

“...a separate Welsh legal jurisdiction already exists.....A distinct body of law applying to a defined territory implies the existence of a separate jurisdiction.”¹

The extent of political and legal devolution in Wales may well imply that the development of a separate jurisdiction is inevitable, or indeed, that it already exists. Of the 814,512 people who participated in the Referendum on the law-making powers of the National Assembly for Wales on 3 March 2011, 63.5 per cent voted in favour of the Assembly assuming primary law making powers in twenty devolved areas.² The results of the Referendum must also be seen within the wider context of political and legal devolution in Wales. Greater emphasis has been placed on the creation of Welsh legal structures since the establishment of the Welsh National Assembly in 1998 and The Government of Wales Act 2006.³ These include the creation of Her Majesty’s Court Service in Wales in 2005 and the concurrent establishment of the post of Presidency Judge for Wales with a Welsh judiciary and magistracy.⁴ Since 1998, an Administrative Court has sat in Wales and there is a separate Welsh jurisdiction for the Public Service Ombudsman.⁵ A Mercantile Court for Wales was established in 2000 and a number of devolved tribunals have been set up, including the Special Educational Needs Tribunal for Wales and the Mental Health Review Tribunal for Wales. Coupled with the right that individuals have to use the Welsh language in legal matters,⁶ the administration of justice in Wales would indeed suggest that a separate jurisdiction is emerging.

¹ S Nason, A Mawhinney, H Pritchard and O Rees, ‘Submission to the Constitutional and Legal Affairs Committee of the National Assembly for Wales: Bangor Law School, Bangor University’, in *National Assembly for Wales Constitutional and Legislative Affairs Committee Inquiry into the establishment of a separate Welsh jurisdiction: Consultation responses March 2012*, paragraph 1, viewed on April 27 2012,

< <http://www.senedd.assemblywales.org/documents/s5904/Consultation%20responses.pdf>>.

² The Electoral Commission, ‘Report on the referendum on the law-making powers of the National Assembly for Wales’, viewed on April 24 2012,

<<http://www.electoralcommission.org.uk/elections/upcoming-elections-and-referendums/wales/?a=118601>>.

³ R G Parry ‘Evidence to the National Assembly for Wales Constitutional and Legislative Affairs Committee’, in *Consultation responses March 2012*, paragraphs 19 – 25, viewed on April 27 2012.

⁴ *ibid.*

⁵ P Tyndall, ‘Response of the Public Services Ombudsman for Wales to the invitation to submit written evidence to the Inquiry by the Constitutional and Legislative Affairs Committee into the establishment of a separate Welsh jurisdiction’, in *Consultation responses March 2012*, paragraph 7, viewed on April 26 2012.

⁶ As a result of the Welsh Language Act 1993.

However, despite these developments, it is submitted that Wales does not yet have a wholly separate jurisdiction. Furthermore, although the political landscape of Wales provides important context for answering the questions raised by this essay, public interest and access to justice must be the driving forces that determine how the jurisdiction of Wales continues to develop. This essay will offer a definition of “a separate Welsh jurisdiction” and conclude that the development of such a jurisdiction is in the public interest and therefore can and should be considered inevitable.

The Welsh jurisdiction has been described as an ‘emerging jurisdiction,’⁷ a ‘distinct’⁸ jurisdiction and an ‘embryonic jurisdiction’.⁹ These terms reflect the rapid pace at which constitutional change in Wales has taken place, leading some to view devolution as a piece-meal and reactive process.¹⁰ This gradual and reactive change has resulted in a constitutional arrangement in Wales dissimilar to that of the other devolved countries of the United Kingdom. Like Scotland and Northern Ireland, Wales has a devolved government and legislature. However, Scotland and Northern Ireland also possess separate legal jurisdictions with separate bodies of law, separate legal professions and separate court systems that have almost exclusive jurisdiction over the cases arising in their territories.¹¹ These jurisdictions have evolved to address particular historical and political contexts in Scotland and Northern Ireland and each possess distinctive features.¹² By contrast, Wales has remained part of the unified jurisdiction of England and Wales, despite possessing a number of features of a devolved legal jurisdiction. It is submitted that the current jurisdictional arrangement in Wales is unsatisfactory, in terms of both constitutional principle and the practicalities of administering justice.

⁷ T H Jones and J M Williams, ‘Wales as a Jurisdiction’, *Public Law*, Spring 2004, pp. 78 – 101 at 101.

⁸ D Wincott and E Lewis, ‘Memorandum to the Constitutional and Legislative Affairs Committee of the National Assembly’s Inquiry into the Establishment of a Separate Welsh Jurisdiction’, in *Consultation responses March 2012*, paragraph 3.7, viewed on April 26 2012.

⁹ The Hon Mr Justice Roderick Evans, ‘Response to the Inquiry into the Establishment of a Separate Welsh Jurisdiction’, in *Consultation responses March 2012*, paragraph 2.5, viewed on April 24 2012.

¹⁰ G Parry, ‘Evidence to the National Assembly for Wales’, in *Consultation responses March 2012*, paragraph 45, viewed on April 24 2012.

¹¹ Ultimate jurisdiction lies with the Supreme Court of the United Kingdom

¹² The Hon Mr Justice Roderick Evans, ‘Response to the Inquiry’, in *Consultation responses March 2012*, paragraph 2.1, viewed on April 24 2012.

This essay suggests that instead, a separate Welsh jurisdiction should be established, consisting of a body of Welsh law that is distinct from English law. Within this separate jurisdiction, the law should be administered by Welsh courts, a Welsh legal profession and a Welsh judiciary. This would require the establishment of a Welsh High Court and Court of Appeal and a Chief Justice as head of the judiciary. As with the Scottish and Northern Irish jurisdictional models, the Supreme Court of the United Kingdom would bind the lower Welsh appeal courts, requiring a Welsh judge to sit in this highest appellate court. In addition, the creation of institutions such as a prison service, a police service, a Welsh Legal Commission and a Judicial Appointments Commission will ensure that the Welsh legal system is administered by independent and self-financing institutions.¹³ It is submitted that the costs incurred in establishing a separate Welsh jurisdiction will be off set by the long-term constitutional, practical and economic advantages, all of which will ultimately improve access to justice in Wales.

The constitutional arrangement that would emerge from a separate Welsh jurisdiction is clearly in the public interest. The current jurisdictional arrangement in Wales is inconsistent with the rest of the United Kingdom and indeed, with the very purpose of devolution itself. Devolution is concerned with democratic accountability and the formulation of policies that more accurately reflect Welsh interests. Maintaining a unified jurisdiction when the government and legislature are devolved undermines the spirit and even the credibility of devolution. In addition, as the policies and laws of Wales increasingly diverge from those of England, an independent court system and judiciary possessing the expertise to deal with specifically Welsh laws will be required. An example of this divergence between England and Wales can be seen in housing policy. In 2009, the Welsh National Assembly commissioned a report on migration and homelessness in Wales.¹⁴ One of the recommendations made in the report was that the minimum residency period required for establishing a local connection (and thus engaging the local authority's duty to provide accommodation) be increased from six to twelve months.¹⁵ In making this recommendation, the report sought to address the public perception in Wales that migrants prevent local people from accessing social housing and have an

¹³ S Nason and others, 'Submission to the Constitutional and Legal Affairs Committee', in *Consultation responses March 2012*, viewed on April 27 2012.

¹⁴ S Hoffman, 'Legislative competence in housing for Wales: an assessment of likely impacts', *Journal of Housing Law* 2010, pp 41 – 46.

¹⁵ Inkson, Delaney and Stirling, 'The effects of recent migration on local authorities' allocation of housing and actions under homelessness legislation: A study in six local authorities (Executive Summary)', 2010 at paragraph 7.1.

adverse impact on community cohesion and Welsh culture.¹⁶ If adopted, this recommendation would create significant differences in the provision of homeless services by local authorities in England and Wales. The differences in health policy in England and Wales may also affect legal developments between the two countries. A BBC ICM poll recently demonstrated that 77 per cent of Welsh people are opposed to the coalition government's proposals to encourage privatisation in the NHS in England.¹⁷ Distinctly Welsh NHS policies such as universally free prescriptions exist in stark contrast to the moves towards privatisation that are being promoted in England. As a result of the 3 March 2011 referendum, housing and health services are both devolved fields in which the Welsh Assembly can enact primary legislation. The policy trends in both areas indicate that Wales will depart substantially from the present law of England and Wales. A separate Welsh jurisdiction that is sensitive to such policy developments will provide a degree of legal certainty as the law in Wales continues to evolve, which is crucial for access to justice.

As well as providing legal certainty in the substance of the law, a separate Welsh jurisdiction will ensure clarity in the administration of justice in Wales. The need for coherence and clarity is particularly apparent in the administration of tribunals in Wales, which have developed in an "ad hoc" and unplanned manner.¹⁸ This has resulted in a "patchwork" of devolved and non-devolved tribunals administered variously by local authorities in England and in Wales, the Welsh Assembly and the UK Tribunals Service.¹⁹ Within this fragmented system, there are inconsistencies in the administration of budgets, training and appointment processes, making it expensive and confusing for tribunal users.²⁰ Moreover, the constitutional arrangements of the tribunals are problematic, with some tribunals being administered by the very departments whose decisions they are reconsidering.²¹ The current tribunal arrangements in Wales thus raise serious questions about the

¹⁶ S Hoffman, 'Legislative competence in housing for Wales', *Journal of Housing Law* 2010, pp 41 – 46.

¹⁷ BBC News website, 'BBC Wales poll: Voters back tax power, but not independence', 1 March 2012, viewed on 30 April 2012, <<http://www.bbc.co.uk/news/uk-wales-politics-17212309>>.

¹⁸ Administrative Justice and Tribunals Council Welsh Committee, 'Inquiry into the establishment of a separate Welsh jurisdiction', in *Consultation responses March 2012*, viewed on April 23 2012.

¹⁹ G Parry, 'Evidence to the National Assembly for Wales', in *Consultation responses March 2012*, paragraph 30, viewed on April 24 2012.

²⁰ Tribunals Council, 'Inquiry into the establishment of a separate Welsh jurisdiction', in *Consultation responses March 2012*, viewed on April 27 2012.

²¹ *ibid.*

separation of the judiciary from the executive. These problems are compounded by the fact that Welsh priorities are not given sufficient recognition within the present jurisdiction, which overwhelmingly focuses on London. Indeed, there are only limited sittings of the Court of Appeal and High Court in Wales and Welsh cases continue to be administered in London.²² In addition, a Judicial College has been established in Wales, but no budget set aside for Welsh language training.²³ The development of a separate jurisdiction would address these problems of poor organisational structure by establishing a comprehensive and coherent court system. Increased emphasis on the promotion of the Welsh language within legal institutions and the provision of Welsh language training to practitioners in Wales would ensure access to justice for Welsh speakers.

Those opposing the establishment of separate Welsh jurisdiction have argued that the current unified jurisdiction can adequately deal with differences in the laws between England and Wales and should be maintained in order to prevent break up of the UK. These arguments do not satisfactorily address how the Welsh legal system will ensure access to justice on a long-term basis. Although the unified jurisdiction may currently have the resources and expertise to deal with divergences in law between England and Wales, that in itself is not a good enough reason to oppose the development of a separate Welsh jurisdiction. Furthermore, as Wales continues to follow a distinct and independent approach to policy making, litigation is likely to be generated that raises important questions of law in Wales. Such litigation should be dealt with by a separate Welsh jurisdiction. This would allow the Welsh judiciary to scrutinise the decisions of the executive more robustly and would safeguard legal certainty as the laws of England and Wales continue to diverge. Concerns that a separate Welsh jurisdiction will lead to irreparable separation with the former jurisdiction are unfounded. As the Northern Irish model demonstrates, England and Wales would remain united by their shared common law tradition, allowing lawyers from one country to continue practicing in the jurisdiction of the other. A separate jurisdiction would only formalise and institutionalise the overwhelming trend of separation between England and Wales.

It has also been argued that the Welsh legal infrastructure does not possess the capacity or resources to sustain a devolved jurisdiction. In particular, doubts

²² The Association of Judges' of Wales, 'Inquiry into the establishment of a separate Welsh jurisdiction: Response from The Association of Judges' of Wales', in *Consultation responses March 2012*, viewed on April 23 2012.

²³ *ibid.*

have been raised as to whether enough work would be generated to justify a separate High Court and Court of Appeal in Wales and whether there is sufficient capacity to establish an independent Welsh legal profession and judiciary.²⁴ Moreover, it has been argued that the costs of achieving a separate jurisdiction would be too great, thereby jeopardising access to justice. However, consideration of the Northern Irish jurisdictional model demonstrates that such concerns can be allayed. Although the population of Northern Ireland is considerably smaller than that of Wales, Northern Ireland possesses the full machinery and infrastructure of a separate jurisdiction. As well as a court system and legal structures to sustain the jurisdiction, this includes provisions for training future lawyers and an academic tradition that enriches the practice of law in Northern Ireland.²⁵ Many of these provisions already exist in Wales. In addition, although the economic consequences of establishing a separate jurisdiction should not be overlooked, the benefits are considerable. A separate jurisdiction would challenge the implicit assumption of the superiority of London that has stemmed from a unified jurisdiction. A shift away from the London-centred focus on administration of justice and provision of legal services would provide Welsh practitioners with greater incentive to practice in Wales, particularly in more complicated cases and more specialised areas of law. Legal fees would then be re-invested in Wales and legal expertise would develop in areas that are currently dominated by English practitioners. Furthermore, the increased legal competence that will follow a separation of the Welsh jurisdiction will encourage Welsh service providers to respond to the needs and demands of a specifically Welsh legal system. Jobs will most likely be created that are not currently available in Wales and an increasing use of courts amongst the local populations is likely to encourage perceptions that the courts are symbols of the community.²⁶ It can be seen therefore that in addition to encouraging access to justice, a separate jurisdiction would benefit the Welsh economy and encourage the development of a skilled labour force.

The establishment of a separate jurisdiction in Wales requires careful planning and consideration of the constitutional, practical and economic

²⁴ Welsh Committee of Judges' Council, Judiciary of England and Wales, 'Inquiry into the establishment of a separate Welsh jurisdiction: Response from the Welsh Committee of Judges' Council, Judiciary of England and Wales', in *Consultation responses March 2012*, viewed on April 23 2012.

²⁵ G Parry, 'Evidence to the National Assembly for Wales', in *Consultation responses March 2012*, paragraphs 62 - 68, viewed on April 24 2012.

²⁶ S Nason and others, 'Submission to the Constitutional and Legal Affairs Committee', in *Consultation responses March 2012*, paragraph 7, viewed on April 27 2012.

consequences. What is clear is that the current mode of gradual improvement and responsive change is not a satisfactory way for a legal identity in Wales to develop. If jurisdictional devolution in Wales were to continue in this vein, it would adversely affect the administration of justice and waste precious public resources as legal institutions are established without any overall vision or strategy. It is important that a legal infrastructure is now developed in Wales that can respond not only to the current constitutional arrangements but also to future divergences in law and policy between England and Wales. A separate Welsh jurisdiction would address the current challenges that exist in the administration of justice in Wales and would also provide a strong foundation for further developments in the Welsh legal system. It cannot be denied that a number of challenges exist in establishing a separate jurisdiction in Wales, but these should not be viewed as obstacles to what, it is submitted, is a crucial next step in the devolutionary process. To the extent that it will improve access to justice and safeguard public interests, a separate Welsh jurisdiction is therefore inevitable.