

WALES AND THE JURISDICTION QUESTION: A SUBMISSION TO THE COMMISSION FOR JUSTICE IN WALES

This submission seeks to explore the nature of the UK territorial jurisdictions, with a view to suggesting pointers towards the choices that would be open policy makers in establishing a Welsh jurisdiction, in particular in ways that depart from the standard model of the UK jurisdictions. The point is not to advance the case for a Welsh jurisdiction, but rather to consider what policy choices are available in any decision to establish one. It is largely based on my paper “How to do things with jurisdictions: Wales and the jurisdiction question” [2017] PL 249.

The nature of the territorial jurisdictions

The orthodox account of a territorial jurisdiction in connection with the debate on jurisdiction in Wales is that the defining characteristics of such a jurisdiction are an ascertained territory, a distinct body of law, and a structure of courts and legal institutions. So understood, it is said, it is possible for a Welsh jurisdiction to emerge, as those characteristics develop through the operation of devolution.

Further, the prevailing orthodoxy tends towards a monolithic, ubiquitous understanding of the jurisdictions of Scotland, Northern Ireland and England and Wales as being the only model for a jurisdiction for Wales. On this understanding, unlike, for instance, federal structures, the whole of the law is the subject matter of a single territorial jurisdiction expressed in a single and distinct system of courts, whose reach is confined to, but ubiquitous within, the territory. The law in the UK expresses itself except through the lens of the three jurisdictions.

My view is that this is an erroneous account of territorial jurisdiction-hood, and has been unhelpful in the policy debate about the desirability of a jurisdiction. I suggest that, a court apart, none of the supposed characteristics is in fact definitional (even if they may commonly be empirically observed as features of territorial jurisdictions). Rather, a jurisdiction, in this senses, requires and is defined by three sets of rules. Those are the rules creating a court; the rules providing the court with its judiciary, and what I call reach rules – the rules setting out the disputes, questions, issues and authorisations it is charged with deciding. There is, broadly, a broad and a narrow use of the word “jurisdiction”. The former is what I have referred to as a territorial jurisdiction, and what in legislation is usually referred to as a “part of the United Kingdom”. In legislation, the word “jurisdiction” is usually (the Wales Act 2017 is an exception) used to refer to reach rules.

The understanding of the British territorial jurisdictions referred to above is extreme and inaccurate. Counter examples of how the law may be delivered other than through the territorial jurisdictions include the largely non-territorial UK services jurisdiction, the territorial/jurisdictional mix within HM Tribunal Service (and other tribunals), and the constitutional “devolution matters” jurisdiction of the Supreme Court (which is legislatively not exercised as a court of a “part of the UK”, but binds all). An interesting example of a territorial jurisdiction accommodating itself to these jurisdictions is *Advocate General for Scotland v Murray Group Holdings Ltd* [2015] CSIH 77, 2015 SLT 765, in which the Court of Session decided that it was seised of the law of England and Wales on an appeal from the Upper Tribunal (on the nomination of the Tribunal under the Tribunals, Courts and Enforcement Act 2007).

Consideration of both UK and other jurisdictions shows that territorial jurisdictions can share law, and share judiciaries. A straightforward example of both is apex courts, such as the UK and Canadian Supreme Courts, the High Court of Australia and the Privy Council.

Cross-jurisdictional sharing of law is fundamental to international and EU law. But sharing of law between jurisdictions at a domestic level also occurs in, for instance, the UK service jurisdiction, which administers both a suite of armed-forces only offences, and the criminal law of England and Wales. A recent novel form of such sharing is provided by the introduction of a system empowering the Privy Council to certify that a finding in a case concerning an overseas jurisdiction is also to be considered the law of England and Wales (or one of the other jurisdictions) in *Willers v Joyce* [2016] UKSC 44, [2016] 3 W.L.R. 534.

In Australia, the constitution allows the Federal Parliament to vest in state courts jurisdiction in federal matters, and it did so from an early date. More recently, provision was made for cross-vesting between state/territory and federal jurisdictions, and between states and territories. This element was short lived, as it was found to be unconstitutional, but its efficiency was undoubted.

Closer to home, and writ very small, in some circumstances English magistrates must administer the law of Scotland in relation to salmon poaching offences on the River Tweed.

Sharing of judiciary takes place in an obvious way at apex court level. An example at non-apex appellate level is the way that the Court of Appeal, Criminal Division becomes the Courts Martial Appeal Court to hear appeals within the service jurisdiction.

Small jurisdictions may share judicial resources by means of the qualifying rules for judicial appointment. In Jersey, for instance, Court of Appeal judges and commissioners may either be drawn from local practitioners or from commonwealth judges. Most belong to the latter category.

Some implications for a Welsh jurisdiction

From the point of view of advocates of a Welsh jurisdiction, the down side to this approach is that a Welsh jurisdiction will not “emerge”. Each of the categories of rules constituting a jurisdiction, under modern conditions, requires to be legislated. A Welsh jurisdiction will only come about as a result of an Act of Parliament.

The upside is that a more nuanced understanding of the concept of jurisdiction provides opportunities for flexibilities in how a Welsh jurisdiction might be set up in order to reflect the unique history and context of Welsh devolution.

The fundamental point is that, the courts and judiciary apart, no *institution* is required by definition for a jurisdiction to exist. There is no formal necessity for a Welsh jurisdiction to require separate professions, its own law commission, or even to administer its own courts. In each case, a policy decision is there to be made about how a Welsh jurisdiction should be configured. It may be, for instance, that devolution of courts administration is a good idea, and one that would fit better with a separate jurisdiction, but that is a policy decision.

Contrariwise, it may be that the sundering of the legal professions between England and Wales, with its implications for professional advancement and legal education, is seen as a disadvantage of jurisdiction-hood. The answer would then lie in a policy decision to either retain a single professional structure, the regulatory and representative bodies operating on a cross-jurisdictional basis; or to ensure that separate professions are highly permeable, as is the case in Canada and Australia.

And even in respect of the definitional institutions – the courts and the judiciary – flexibility is possible. There would necessarily be a great deal of shared law at the inception of a Welsh jurisdiction. It might be considered that the common law of the two new jurisdictions should remain in step. If that is felt to be an important consideration, provision could be made to allow the apex Supreme Court's decisions on the common law of each jurisdiction to remain binding in the other, much as, in Australia, the High Court declares a single common law of Australia, binding in each state, regardless of the jurisdiction from which the case came. England and Wales could, in other words, share a different relationship at apex court level compared with that which pertains in relation to Northern Ireland and Scotland.

Similarly, while the establishment of a purely Welsh judiciary is one policy option, there are others. The two new jurisdictions could effectively share judges in a number of ways. At one extreme, the appointment of judges could, administratively, remain a UK Government function, and the establishing legislation could require that to be exercised so as to retain a single judiciary for both jurisdictions. This is similar in some respects to the situation in Canada, where the appointment of the higher judiciary in provincial courts is a Federal function (although the judges so appointed only act in the provincial jurisdiction). Alternatively, some form of joint governance of a new, cross-jurisdictional judiciary could be contemplated. In these scenarios, cross-border issues would be easier to manage, in that all Welsh judges would also be English judges and vice versa. They could accordingly constitute themselves as judges of a court in the other jurisdiction when needed, in much the same way as the Court of Appeal occasionally reconstitutes itself as an Administrative Court when deciding a case makes it convenient to do so.

At the other end of the spectrum, Wales could appoint its own judges, but only from the ranks of the existing judges of the UK jurisdictions or those plus other commonwealth jurisdictions. On this approach, as with the wholly separate Welsh judiciary option, consideration could be given to the cross-vesting of jurisdiction, as in Australia.

It is often said that, in relation to the rest of the devolution settlement, Welsh devolution is exceptional, and inferior. Conceiving a Welsh jurisdiction in the ways suggested in this submission may be thought to increase, rather than move away from, this undesirable Welsh exceptionalism. This may be so. But it may be that creating a Welsh jurisdiction on a different model is better than no Welsh jurisdiction, for its advocates. And more fundamentally, the original Welsh anomaly is, precisely, that it is jurisdictionally tied to England. It may be that more flexibility and creativity is needed to undo that knot than the standard model of UK territorial jurisdictions allows.

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Personal Note:

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2015 I was the Team Manager of the Public Law Team at the Law Commission, with overall responsibility at the Commission for devolution issues.