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Paper:

Parry, R. (2017). Is Breaking up Hard to do? The Case for a Separate Welsh Jurisdiction. *The Irish Jurist*, 57, 61-93.

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IS BREAKING UP HARD TO DO? THE CASE FOR A SEPARATE WELSH JURISDICTION

“The distress of the people is incredible, especially the Welsh, from whom by act of parliament the king has just taken away their native laws, customs and privileges, which is the very thing they can endure least patiently”¹

Perhaps the climatic moment in Robert Bolt’s play, *A Man for All Seasons*, is that parting shot delivered by Thomas More to Richard Rich at the former’s trial for treason. Having committed perjury in order to implicate More and thus curry favour with the King and his men, Rich is about to leave Westminster Hall. Before he leaves, he is stopped and questioned by More about a chain of office bearing a red dragon around his neck. To Thomas Cromwell’s intervention that Rich has been appointed Attorney-General of Wales, More delivers the rejoinder, “For Wales? Why Richard, it profit a man nothing to give his soul for the whole world, . . . but for Wales!”²

More’s pithy reply³ would become renowned thanks to Fred Zinnemann’s Oscar winning cinematic production of 1966 (Zinnemann’s other productions included the 1952 western, *High Noon*, which also involved some highly charged confrontations but without the same thespian qualities). Setting aside anxieties about historical accuracy and giving full allowance for dramatic licence, it is a brief but penetrating insight into the pathos that underpins unprincipled and blind ambition. The fact that the salvo is fired at Wales’s expense does not detract from its impact and validity, even though, for a Welshman, it does leave something of a bitter taste in the mouth.

In addition to its moral content, the scene also provides a reminder of Wales’s constitutional past and a time in history when Wales had its own institutions and officers of law and government. In 1534, the year of the Act of Supremacy that led to More’s trial and execution, that constitutional anachronism, the Council of Wales and the Marches, with its headquarters in the marcher town of Ludlow, would have exercised extensive control over law and governance in Wales, something that a Welsh attorney-general would have known.⁴ It was also a year that marked the beginning of the Tudor assimilationist reforms, known later as the “acts of union”, which put the native Welsh laws to the sword.⁵ Although Wales would henceforth be annexed into the English realm, it would continue as a somewhat semi-detached entity until the early nineteenth century, when it was integrated fully into the English legal system.⁶

¹ Eustace Chapuys to Emperor Charles V, 1534, quoted in Meic Stephens (ed.) *A Most Peculiar People* (Cardiff: University of Wales Press, 1992), p. 13.

² Robert Bolt, *A Man for All Seasons* (London: Heinemann, 1960), Act II, Scene VIII.

³ Inspired, of course, by the Gospel of Mark, Chapter 8, verse 36.

⁴ See Mark A. Thomson, *A Constitutional History of England 1642 to 1801* (London: Methuen, 1938), p. 141; also Thomas Glyn Watkin, *The Legal History of Wales* (2nd edn.) (Cardiff: University of Wales Press, 2012), p. 153.

⁵ A period in Welsh history recounted in Glanmor Williams, *Recovery, Reorientation and Reformation: Wales c.1415-1642* (Oxford: Clarendon Press, 1987).

⁶ See Theodore F. T. Plucknett, *Taswell-Langmead’s English Constitutional History* (London: Sweet & Maxwell, 1960), t. 236.

In recent times, the future of that integrated status has been the subject of much deliberation.⁷ The Welsh Government, the National Assembly for Wales and the UK Government have visited the issue of Wales's future within the constitution and pondered over its current status as a part of the unified jurisdiction of England and Wales.⁸ Driving the debate has been the fact that primary legislation is made for Wales by a nascent Welsh legislature, and the question is whether such laws can continue to be recognised as part of "the law of England and Wales" or whether these laws should be, in fact, "the laws of Wales", separate from English law. Furthermore, and as a corollary, should Wales also have its own judiciary and institutions of law, such that would establish it as a separate legal system or jurisdiction?⁹

Judging by the responses to the various consultation exercises held in recent years, there is great anxiety within the legal profession in Wales about the implications of separation.¹⁰ Such anxiety should not be determinative of the issue, of course. After all, the medical profession fought tooth and nail in an attempt to prevent the founding of the National Health Service, the jewel in the crown of the Attlee government of 1945-51, in 1948.¹¹ The UK Government's position is reflected in the Wales Act 2017.¹² Although the act increases the Assembly's law-making powers within a reserved-powers model of devolution, thus bringing Wales into closer constitutional alignment with Scotland and Northern Ireland, the UK Government set its face against any suggestion of partitioning the unitary jurisdiction of England and Wales.¹³

Yet, despite this conservative ambivalence, if not resistance, there is increasing acknowledgement within the political and legal community that the constitutional direction of travel is towards greater legal autonomy and the strengthening of the architecture of legal devolution in Wales.¹⁴ Indeed, with the future of the United Kingdom itself under close scrutiny as calls for federation to stave off Scottish independence in the post-Brexit era gather momentum, the restoration of Welsh legal autonomy may occur sooner than later.¹⁵ This article argues that it should. Wales is a nation whose constitutional house is in disorder, and the constitutional gradualism which has hitherto stifled the growth and maturing of Welsh democracy does not provide the expeditious reforms that the times require.¹⁶ The article, therefore, sets out the principal arguments for a separate Welsh jurisdiction or legal system. It

⁷ See, for example, Carwyn Jones, "The Future of the Union: Wales", Lecture at the London School of Economics, 8 November 2012. See:

http://www.lse.ac.uk/assets/richmedia/channels/publicLecturesAndEvents/transcripts/20121108_1830_theFutureOfTheUnionWales_tr.pdf (last visited 1 February 2017).

⁸ For the consultation carried out by the National Assembly for Wales, see

<http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?IID=2594&Opt=0> (last visited 1 February 2017).

⁹ For thoughts on this issue, see Theodore Huckle QC (Counsel General, Welsh Government), *Wales, a Jurisdiction?* Speech to the Society of Legal Scholars, Cardiff Law School, 15 November 2012. See:

<http://www.iwa.wales/click/2012/11/wales-a-jurisdiction/> (last visited 1 February 2017).

¹⁰ See responses in: <http://gov.wales/consultations/finance/seplegaljurisdiction/?lang=en> (last visited 1 February 2017).

¹¹ Clare Beckett and Francis Beckett, *Bevan* (London: Haus Publishing, 2004), pp. 81-87.

¹² Wales Act 2017.

¹³ See the House of Commons debate on the Wales Bill on 5 July 2016:

<https://hansard.parliament.uk/commons/2016-07-05/debates/1607054300001/WalesBill> (last visited 1 February 2017).

¹⁴ See Theodore Huckle QC, "Why Wales needs its own legal jurisdiction":

see <http://www.clickonwales.org/2016/04/why-wales-needs-its-own-legal-jurisdiction/> (last visited 1 February 2017).

¹⁵ See *The Guardian*, 10 July 2016.

¹⁶ A call for a more coherent unionist vision of a devolved yet unitary British state can be found in Richard Rawlings, "Riders on the Storm: Wales, the Union, and Territorial Constitutional Crisis" (2015) 42 (4) *Journal of Law And Society*, pp. 471-98.

also considers how Northern Ireland may offer a viable template in terms of the essential elements of a Welsh legal system.

THE LEGAL SYSTEM OF WALES IN HISTORICAL CONTEXT

To understand properly the purpose of this debate and appreciate what is at stake, one must have a grasp of history. Wales has often been hailed as England's first or oldest colony.¹⁷ Whereas Wales may indeed have a strong claim to that ignominious title,¹⁸ the process by which native Welsh legal tradition and legal structures were displaced by English law, and Welsh courts incorporated fully into the English legal system, took centuries to complete.¹⁹ The influence of native laws declined following the Edwardian military conquest of 1282 and the ancillary constitutional reforms of the Statute of Rhuddlan of 1284.²⁰ Although subject to the authority of the crown, Wales became a patchwork of jurisdictions operating different legal codes, some native Welsh, some English and often a hybrid of both.²¹ The principalities of Wales, territories which had been under native rule in 1282, would henceforth be under direct crown control, while the marcher lordships continued to enjoy a large degree of feudal autonomy as had been the case before the conquest.²²

The Tudor reforms of the sixteenth century marked another step in the process of assimilation by eradicating the surviving remnants of native Welsh laws, abolishing the principalities/marcher lordships constitutional anomaly, and basing local government and the administration of justice in Wales almost uniformly on the English model.²³ There were to be only a few remaining points of departure from the English legal system, with the Council of Wales and the Marches, which had a sporadic existence until its ultimate abolition in 1689, exercising varying levels of legal jurisdiction, and the Great Sessions, royal courts that were peculiar to Wales and which exercised a broad jurisdiction until they were replaced with the English assizes in 1830.²⁴

With the abolition of the Great Sessions in 1830, Wales lost the remaining vestige of a distinctive legal identity.²⁵ This completed the incorporation of Wales into England so that governance and justice in Wales was consistent with that of England.²⁶ Two legal circuits, the North Wales and Chester circuit and the South Wales circuit, were established to administer

¹⁷ See, for example, Niall Griffiths "Wales: England's Oldest Colony" *New Statesman*, 23 April 2007; Martyn Ford, *For Wales, See England: Language, Nationhood and Identity* (Stroud: Amberley Publishing Limited, 2016) p. 42.

¹⁸ Setting aside any better claims which Cornwall may have: see Glanville Price, "The Other Celtic Languages in the Twentieth Century" in Geraint Jenkins, (ed.), *The Welsh Language in the Twentieth Century*, (University of Wales Press, Cardiff, 2000), at p. 601.

¹⁹ See O. Hood Phillips & Jackson, *Constitutional and Administrative Law*, 8th ed., (London: Sweet & Maxwell, 2001), at p. 16.

²⁰ See Llinos Beverley Smith, "The Statute of Wales, 1284" (1980) 10 (2) *Welsh History Review*, pp. 127-154.

²¹ W. H. Waters, *The Edwardian Settlement of North Wales in its Administrative and Legal Aspects (1284-1343)* (Cardiff: University of Wales Press, 1935), pp. 150-53.

²² See R.R. Davies, "The law of the March" (1970) 5 (1) *Welsh History Review*, pp. 1-30.

²³ The significance of this period is reflected upon in Geraint H. Jenkins, "'Taphy-land historians' and the Union of England and Wales 1536 – 2007" (2008) 1 (2) *Journal of Irish Scottish Studies*, pp. 1-27.

²⁴ See Thomas G. Watkin, *The Legal History of Wales*, (Cardiff, University of Wales Press, 2007), chapters 6-8.

²⁵ The abolition of the Court of Great Sessions also undermined the Welshness 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', (1998) 19 (2) *Welsh History Review*, , pp. 226-264.

²⁶ See John Davies, *History of Wales*, (London: Penguin, 2007) (Revised Edition) at p. 332.

the Assizes (with Monmouthshire being part of the Oxford circuit). By the middle of the nineteenth century, Wales appeared to be both administratively fragmented and culturally assimilated into the English legal system.

But this assimilationist agenda would experience a gradual reversal. The democratisation of the British state in the late nineteenth century and into the twentieth century laid the grounds for the emergence of a new political class who would champion Welsh causes and who would inspire a national reawakening.²⁷ National bodies were established, such as the National Museum and the National Library, and a sense of Welsh nationhood reasserted itself. This, in turn, would have implications for the administration of justice in Wales.

By 1945, the north and south circuits had become united as the Wales and Chester Circuit (Monmouthshire remained part of the Oxford circuit until 1971), thus reintroducing a unified Welsh legal administration.²⁸ The unification of the circuit came about partly due to the growth of the legal profession in Wales. The reforms to the justice system at the beginning of the 1970's²⁹ enabled something of that distinctively Welsh dimension to the administration of justice that was lost in 1830 to be recaptured.³⁰ Political pressure ensured that the new system would be managed as an administrative unit with headquarters in Cardiff.³¹ This was a modest but symbolic development which recognised Wales as a distinctive region in the administration of justice, and circuit committees and meetings could discuss courts policy from a Welsh perspective.

The idea of Wales as a distinctive legal entity could now evolve gradually. Other developments would also, inadvertently, support the development of Welsh legal identity. The Administration of Justice Act 1970 enabled the High Court to sit outside London and Cardiff became a venue for such sittings. The Court of Appeal also started to sit outside London, and Cardiff became one of its regional destinations. A Mercantile Court for Wales was established in Cardiff. This was a form of legal devolution before its political counterpart had begun.

It was following the creation of the National Assembly for Wales in 1999, and especially with the implementation of the Government of Wales Act 2006, which confirmed the National Assembly for Wales's role as a legislature, that the repatriation of Welsh legal identity became a credible issue. The need to adapt the legal system to the transformed constitutional landscape became universally acknowledged.³² A new concept emerged, "Legal Wales", an expression which captured the notion of Wales as a distinctive legal region with the potential to shape its own future.³³

In the years following devolution, Wales's status as an administrative legal unit within the jurisdiction of England and Wales was strengthened when Her Majesty's Court Service in

²⁷ A comprehensive account of this period is to be found in Kenneth O. Morgan, *Rebirth of a Nation, A History of Modern Wales*, (Oxford: Oxford University Press) (1981).

²⁸ The way in which a Welsh identity was re-established within the courts system in the 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 Glyn Watkin (ed.), *Legal Wales: Its Past, Its Future* (Cardiff: The Welsh Legal History Society, 2001) pp. 113-165.

²⁹ Courts Act 1971: the three-tier system of criminal courts, i.e. the petty sessions, Quarter Sessions and Assizes, was abolished and the two-tier system of magistrates' courts and Crown Courts was established.

³⁰ See the Beeching Report, *Report of the Royal Commission on Assize and Quarter Sessions*, (London: HMSO, 1969) (Cmnd 4153), p. 36. Beeching's recommendations became law in the Courts Act 1971.

³¹ See Sir William Mars-Jones, "Beeching- Before and After on the Wales and Chester Circuit", (1973) 4 *Cambrian Law Review*, pp. 81-93.

³² "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.

³³ See Sir Roderick Evans, "Legal Wales- The Way Ahead", Law Society Lecture, National Eisteddfod of Wales, Swansea, 2006, at pp. 3-4.

Wales was established 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 its administration jointly with Wales ceased.

Legal unity had now been achieved insofar as the administration of the courts in Wales was concerned. The post of Presiding Judge for Wales was created, and other Welsh legal institutions developed, including the Association of Judges in Wales and the Wales Bench Chairs Forum.³⁴ Other specific judicial posts were established, such as the Chancery Judge and the Mercantile Judge, to preside in courts in specialist legal fields. The legal profession responded by creating national specialist associations such as the Wales Public Law and Human Rights Association, and the Wales Commercial Law Association. In the meantime, laws at Westminster had also created legal and quasi-legal posts specifically for Wales.³⁵

The establishment of the Administrative Court in Cardiff in 1998 was highly significant and more than a mere administrative innovation. It promoted a key principle that judicial reviews of the actions of the Welsh Government or the National Assembly should be resolved in Wales so that the people of Wales can hold their Government to account in a tribunal of law in their own country.³⁶ In April 2009, a permanent administrative office was established in Cardiff for the Administrative Court in Wales to ensure that Welsh judicial review cases are heard in Wales. As one prominent judge concluded: “the decentralisation of a court cannot succeed unless it is accompanied by the necessary infrastructure to ensure its proper functioning”.³⁷ The administration of the business of the Administrative Court contrasts with that of the High Court and Court of Appeal. With the latter, appeals are sent to London for processing, and there is no mechanism to ensure that the Court of Appeal, when sitting in Wales, hears appeals from Wales. Administration for both the High Court and Court of Appeal is still centred in London.³⁸

Specifically Welsh tribunals have been established by the Welsh Government, such as the Special Educational Needs Tribunal for Wales, the Mental Health Review Tribunal for Wales and the Welsh Language Tribunal, developments which derive 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 Welsh Government and its departments is often emphasised.³⁹ The creation of the unified Courts and Tribunals Service in 2011, which has a Welsh regional administration, was a further step in consolidating the administrative infrastructure of Welsh courts and tribunals.

The developments of recent years serve to highlight the fact that the justice system in Wales has adapted to the development of devolution. The result has been the partial restoration of legal identity and legal autonomy. But the issue remains: to what extent can the present unified jurisdiction of England and Wales continue and at what point, if at all, must the creation

³⁴ “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.

³⁵ See, for example, Children’s Commissioner for Wales Act 2001; Public Services Ombudsman (Wales) Act 2005; Commissioner for Older People (Wales) Act 2006.

³⁶ See *National Assembly for Wales v Condron* (2006) EWCA Civ 1573; also, *R (Deepdock Limited & others) v Welsh Ministers* (2007) EWHC 3347 (Admin).

³⁷ Sir Roderick Evans, “Devolution and the Administration of Justice”, above, fn. 33.

³⁸ “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 centered in London?”, Sir Roderick Evans, “Devolution and the Administration of Justice”, above, fn.33.

³⁹ See Sir David Lloyd Jones, *The Machinery of Justice in a Changing Wales* (Law Society Lecture, National Eisteddfod of Wales, Blaenau Gwent, 2010), at pp. 18-19.

of a distinctive legal system for Wales be reached? It has sometimes been said that Wales is an “emerging jurisdiction”.⁴⁰ What exactly is a jurisdiction? Some have attempted to offer a definition of the principal characteristics of a jurisdiction when considering the Welsh position.⁴¹ But the term, ‘jurisdiction’, is not a term of art, and the word and its meaning varies depending on specific circumstances. It might mean judicial power or authority to act, the territorial extent of judicial power or a courts system.⁴² However, what is meant by the term jurisdiction in the context of this debate is a separate legal system, legal institutions and a courts system. Although Wales now has its own government and legislature creating primary laws within its defined territory, it does not have its own legal system and judiciary. Even in Britain, which upholds the principle of parliamentary sovereignty and where there is no official separation of powers, the judiciary has a constitutional role in maintaining individual freedom against abuse of executive power.⁴³ Scotland and Northern Ireland have their own legal jurisdictions, their own laws, judiciary and legal infrastructure. The Government of Wales Act 2006 contained no provisions for the creation of a Welsh justice system, despite conferring additional legislative powers on the National Assembly.

Why was this the case? Objections to a separate legal jurisdiction for Wales amount to a varied cocktail of concerns and anxieties. Jack Straw, when Lord Chancellor, was candid in setting out some of the principal objections in a lecture to the Law Society in Cardiff.⁴⁴ Some relate to the future relationship between Wales and England regarding, for example, the status of court judgements in England on Welsh courts if Wales was a separate jurisdiction, and vice-versa. How would such a change affect the way the principle of precedent operated? As it was put, “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?”⁴⁵

An obvious but important point to note is that the Supreme Court of the United Kingdom is the highest Court of Appeal for all the state’s jurisdictions, and it is here, normally, that complex legal questions which give rise to new and important legal precedents are determined. Even if decisions of the English court of appeal were to become merely persuasive in Wales, that should not cause significant difficulties. Welsh judges could give due and proper consideration to English judgments, and follow them where they served the interests of justice. That is the current practice within the jurisdictions of the UK, namely, giving due and proper consideration to cross-jurisdictional judgements that offer a suitable precedent. The short response to many of these concerns is that such technical matters, including cross-jurisdictional enforcement of judgments, could be resolved in the same way as between the jurisdictions of England (and Wales), Scotland and Northern Ireland.

Supporters of the present unified jurisdiction also stress the benefits of constitutional gradualism, of encouraging the “organic development of greater autonomy of the Welsh

⁴⁰ Timothy H. Jones and Jane M. Williams, “Wales as a Jurisdiction”, [2004] *Public Law*, pp. 78-101, on p. 101. The phrase, “emerging jurisdiction” is used.

⁴¹ See T. H. Jones and Jane M. Williams, above, fn. 40; 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).

⁴² For reflections on the meaning of the term jurisdiction, see Thomas Glyn Watkin, “Jurisdiction and Judicial Authority: The view from Wales” in Thomas Glyn Watkin (ed.), *The Welsh Legal Triads and other Essays* (Bangor: Welsh Legal History Society, 2012), pp. 67-80.

⁴³ See, O. Hood Phillips & Jackson, *Constitutional and Administrative Law*, pp. 26-28.

⁴⁴ The Lord Chancellor and Justice Secretary, the Right Honourable Jack Straw MP, “Administration of Justice in Wales”, Cardiff Law Society Lecture, 3 December 2009.

⁴⁵ Fn. 44.

system...but within a common jurisdiction”.⁴⁶ Such an attitude can be criticised for being essentially reactive and responding to change rather than offering a progressive vision for the future. Other arguments are based on geographical and demographic factors. The geographical proximity of Wales to England, and the nature of the Welsh landscape and demography are felt to stand against the development of a Welsh legal system. Whereas, because of geographical reasons, people from north Wales do not have as much daily contact with the cities and people of south Wales, the border between Wales and England is long and porous and there is constant travel across the border. This differentiates, it is said, Wales from Scotland, where there is an extensive, sparsely-populated area either side of the border with England, and over a hundred miles separating the main population centres of the North of England and the central belt of Scotland.⁴⁷ Equally, the water that divides Northern Ireland from Britain provides a clear boundary, and so different arrangements must apply. But this, disingenuous point, is in fact an argument against Welsh devolution in general rather than an argument against the creation of a Welsh legal system specifically. If Welsh geography is an obstacle, then it is a mystery how Welsh devolution ever came about in the first place.

Nevertheless, Wales remains part of the unified jurisdiction of England and Wales and is thus, in UK terms, a constitutional anomaly. The most recent comprehensive review of devolution in Wales recommended the adoption of a reserved powers model of legislative devolution akin to that which exists in Scotland and Northern Ireland. This would mark a significant change from the current conferred powers model whereby there is a constitutional presumption of no power devolved unless explicitly conferred in statute, to a constitutional presumption of devolution unless power is explicitly reserved to the Westminster parliament. The same report was more timid on the question of the separate jurisdiction and kicked the issue into the long grass by recommending that there should be further review of devolution of the justice system within ten years.⁴⁸

The argument advanced in this article is that Wales cannot afford to wait a decade to determine this issue. Events gather pace following the referendum of 23rd June 2016 on the UK’s membership of the EU, and the future of the UK and its constituent parts continues to exercise political minds.⁴⁹ The constitutional future of Wales must be considered with haste and urgency in light of rapidly changing circumstances. For example, the UK’s departure from the European Union will require amendments to the Government of Wales Act 2006, which currently requires laws made in Cardiff to be compatible with EU law,⁵⁰ and for Welsh Ministers not to exercise their functions in such a way that is incompatible with EU law.⁵¹ With the repatriation of law making powers from the EU to the UK being an inevitable consequence of Brexit (although the detail is yet to be determined), the impact of this on the legislative competence of the National Assembly for Wales *vis-à-vis* that of the Westminster parliament will be the subject of further deliberation in the coming months.

⁴⁶ Fn. 44.

⁴⁷ Fn. 44.

⁴⁸ *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (Cardiff: Commission on Devolution in Wales, March 2014), pp. 124-25.

⁴⁹ See the article, “Nicola Sturgeon seeks guarantee on rights of EU nationals in Scotland post-Brexit vote” *The Independent*, 2 July 2016.

⁵⁰ Government of Wales Act 2006, s. 108 (5).

⁵¹ Government of Wales Act 2006, s. 80 (8).

LEGISLATIVE DEVOLUTION

On the 3rd March 2011 the people of Wales voted in a referendum to affirm the role of the National Assembly for Wales as a primary law maker, or legislature, for Wales.⁵² A democratic mandate for legislative devolution, as required under the Government of Wales Act 2006, was thus achieved, and the National Assembly now operates as a legislature with primary law making powers within devolved subjects. This was a landmark in the history of the National Assembly, and an important step towards achieving greater constitutional concordance with the other devolved nations of the United Kingdom.⁵³ The 1998 Act had established a limited form of executive devolution, with powers to make secondary or subordinate legislation and exercise executive powers.⁵⁴ The Government of Wales Act 2006 ensured the constitutional separation of the Welsh Government and the National Assembly and set in place a parliamentary model of government.⁵⁵

Since legislative devolution came into full effect, twenty eight Acts of the National Assembly for Wales have received Royal Assent.⁵⁶ In the period between 2007 and 2011, when the interim constitution allowed the National Assembly to make primary legislation, then known as Assembly Measures, subject to the obtaining of legislative competence orders from the Westminster parliament, twenty two Assembly Measures were passed. Add to this a substantial volume of secondary legislation in the form of statutory instruments created in Wales since the advent of devolution, there is a body of law emerging which applies in Wales only. Already, divergence in key areas of policy is creating legal divergence between England and Wales, especially in the fields of planning, housing and education law. The Wales Act 2014 conferred tax-raising powers on the National Assembly, powers that increase under the provisions of the Wales Act 2017. Wales can also claim to have pioneered, with the Rights of Children and Young Persons (Wales) Measure 2011, a groundbreaking and unprecedented piece of legislation creating a legal duty on Welsh Ministers to have due regard to the rights and obligations in the United Nations Convention on the Rights of the Child.⁵⁷

The divergence between laws in Wales and laws in England is also driven by legislative provisions made for England in Westminster that do not apply in Wales.⁵⁸ Moreover, Westminster statutes may be amended both by the Westminster parliament and the National Assembly and legislation that relates to a devolved area may be a combination of legislation passed by the National Assembly and the Westminster parliament and/or subordinate legislation made by Ministers in both. The Wales Act 2017 will facilitate even greater divergence, with greater legislative powers for the National Assembly in new areas, including energy, transport and elements of private and criminal law.⁵⁹ Welsh Ministers, who also have law-making functions, are already exercising those functions in some areas of the criminal

⁵² Thus implementing the recommendations in the *All Wales Convention Report* (Crown Copyright, 2009).132 pp.

⁵³ For an overview of the first devolution settlement in Wales, see Richard Rawlings, *Delineating Wales: Constitutional, Legal and Administrative Aspects of National Devolution* (Cardiff: University of Wales Press, 2003). Also Noreen Burrows, *Devolution* (London: Sweet & Maxwell, 2000), generally, and especially pp. 9-27.

⁵⁴ See Vernon Bogdanor, *Devolution in the United Kingdom* (Oxford: Oxford University Press, 1999), p. 254.

⁵⁵ See Dafydd Elis-Thomas, "From Body Corporate to Parliamentary Service" (2005) 4 *Wales Journal of Law and Policy*, 12.

⁵⁶ See <http://www.legislation.gov.uk/anaw?page=1> (last visited 1 February 2017).

⁵⁷ For commentary on this initiative, see Jane Williams (ed.), *The United Nations Convention on the Rights of the Child in Wales* (Cardiff: University of Wales Press, 2013).

⁵⁸ The Law Commission, *Form and Accessibility of the law applicable in Wales* (Law Commission Report No 366) (London: Parliamentary Printers, HC 469-I, 29 June 2016), pp. 7-8.

⁵⁹ See Wales Act 2017, s. 3 and schedule 2.

justice system. This includes the police, young offenders, drugs-related crime, and health and education services for prisoners.

The Wales Act 2017 also implements the recommendation of the Commission on Devolution in Wales's report that there should be a shift from a conferred powers model to that of a reserved powers model, which brings Wales into greater constitutional alignment with Scotland and Northern Ireland.⁶⁰ In terms of its legislative powers, Wales can be said to be gradually catching up with the other devolved nations. This is something to be welcomed. The conferred powers model has been the source of uncertainty and instability. Regular referrals by both the National Assembly⁶¹ and the UK Government⁶² to the Supreme Court for rulings on the legislative powers of the National Assembly has been a regular feature of the devolved legislative process, something unheard of in either Scotland or Northern Ireland.⁶³

Yet, enthusiasm for the proposed shift to a reserved powers model has been dampened by a long list of reserved matters in a new Schedule 7A to the 2006 Act.⁶⁴ The list of reserved matters decreased during the Bill's passage through parliament, with concessions on matters such as water, and teachers' pay and conditions. But those matters which the UK Government feels that are better kept back from the National Assembly include subjects as profound as Sunday trading, alcohol licensing, charities and fund-raising. Indeed, the Act has the potential to reduce the legislative powers of the National Assembly rather than increase those powers, when both the list of reserved matters and other restraints on the National Assembly's powers to make laws, especially with regard to non-devolved matters, are taken into account.⁶⁵ This lengthy and arbitrary list of matters reserved to Westminster indicates two things.

First of all, there is no underlying principle which determines in a rational or logical way what matters could be legislated for by the National Assembly in Cardiff, and what should be reserved for the Westminster parliament. For example, one cannot detect in the Wales Act 2017 a presumption in favour of devolution unless a matter is more appropriately legislated for by the parliament of the state. The subsidiarity principle would have offered a sound and principled basis for the devolution of legislative powers, a principle which implicitly appears to operate in the context of Scotland and Northern Ireland. It is a principle that maintains that a central authority should have a subsidiary function, performing only those tasks which cannot be performed at a more local level.⁶⁶ In this regard it is well established in EU law the EU does not take action unless it is more effective than action taken at national, regional or local level.⁶⁷ Alas, this has not been adopted as a principled basis for the lengthy reservations in the Wales Act 2017.

Secondly, it demonstrates that the only overarching principle within the Wales Act 2017 in reality is that there is a single jurisdiction of England and Wales, and this state of affairs must continue at all costs. The Act is thus better understood as the product of an inhibition about the prospect of a separate Welsh jurisdiction coming into existence. It is this which explains the long list of reserved matters and other restraints on the legislative powers of the

⁶⁰ Wales Act 2017, s. 3 and schedules 1 and 2.

⁶¹ See *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill 2015: Reference by the Counsel General for Wales (Applicant) and The Association of British Insurers (Intervener)* [2015] UKSC 3.

⁶² See *Agricultural Sector (Wales) Bill 2014 - Reference by the Attorney General for England and Wales* [2014] UKSC 43; also *Local Government Byelaws (Wales) Bill 2012 - Reference by the Attorney General for England and Wales* [2012] UKSC 53.

⁶³ For commentary see Ann Sherlock, "Supreme Court ruling on Welsh legislation", U. K. Const. L. Blog (30th July 2014) (available at: <http://ukconstitutionallaw.org/>) (last visited 1 February 2017).

⁶⁴ See Wales Act 2017, schedule 1.

⁶⁵ See <http://www.bbc.co.uk/news/uk-wales-politics-37789638> (last visited 1 February 2017).

⁶⁶ <https://en.oxforddictionaries.com/definition/subsidiarity> (last visited 1 February 2017).

⁶⁷ See *Treaty on the Functioning of the European Union*, Art. 5.2.

National Assembly for Wales compared with its counterparts in Scotland and Northern Ireland. And that is why the issue of a separate Welsh jurisdiction is central to the future of devolution in Wales. It is an unresolved issue which means that the Wales Act 2017 can only be yet another interim development in the long and arduous journey of Welsh devolution.

The Wales Act 2017 maintains the current position whereby the laws made for Wales are part and parcel of “the laws of England and Wales”, and denies “Welsh Law” as a distinct and separate body of law.⁶⁸ Lawyers often speak, with apparent technical insight, of laws applying in Wales but extending to England and Wales, a phrase which for a non-expert smacks of lawyerly obfuscation. Some succour to the notion of “Welsh Law” can be found in the first section of the Wales Act 2017. As originally drafted, the Bill proposed an amendment to the Government of Wales Act 2006 to insert a section stating, “there is a body of Welsh law made by the Assembly and the Welsh Ministers”.⁶⁹ Clearly, this phrasing was thought to be ambiguous, and might have inadvertently unleashed a new creature called “Welsh law”. It was subsequently refined somewhat so that the section in the Act now reads: “The law that applies in Wales includes a body of Welsh law made by the Assembly and the Welsh Ministers”. In the following proposed subsection, there is clarification that “Welsh Law” is simply a shorthand term for laws made by the Assembly and Welsh Ministers which form part of the law of England and Wales.⁷⁰

This is hardly a step in the direction of clarity. The phrase, “Welsh law”, must surely mean more than laws made in a particular place, and must also include laws made for Wales in Westminster, that is, the law that applies in Wales in entirety. The current position is reminiscent of the jurisdictional chaos of the Wales of the middle ages, when English law and Welsh law was applied in tandem but to different degrees, and depending largely on ethnicity, in the principalities and marcher lordships of Wales.⁷¹ Rather than moving matters forward, the Act appears to be resurrecting constitutional medievalism.

The crux of the matter is that there currently exists an ideological refusal on the part of the UK Government to allow the full implications of legislative devolution to mature into the recognition of the existence of Welsh Law as a distinct body of law, and that a Welsh legal system must develop as a consequence. It is a mindset which threatens to impede the normalisation of Welsh democracy within the context of devolution in the UK constitution. In a public lecture in 2006, the First Minister recognised that the case for a separate jurisdiction would intensify following a plebiscite in favour of the National Assembly as a legislature. The development of a separate jurisdiction for Wales was recognised as being 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

⁶⁸ The constitutional status of laws made in Wales were considered by 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), pp. 135–45.

⁶⁹ See Wales Bill 2016, clause 1. (Bill 5 (56/2)). It had its first reading in the House of Commons on 7 June 2016, and this was the version which appeared then.

⁷⁰ Wales Act 2017, s. 1.

⁷¹ For further reading, see Diane M. Korngiebel, “English Colonial Ethnic Discrimination in the Lordship of Dyffryn Clwyd: Segregation and Integration, 1282-c.1340” (2007) 23 (2) *Welsh History Review*, pp. 1-24; A.D.M. Barrell and M.H. Brown, “A settler community in post-conquest rural Wales” (1995) 17 (3) *Welsh History Review*, pp. 332-355.

anywhere else in the world which has a legislature with law making powers but no corresponding territorial jurisdiction.”⁷²

The model of a concurrent legal jurisdiction and regional legislature is that which exists in other devolved and federal constitutions such as Australia and Canada. In considering the argument for a Welsh jurisdiction, a former Counsel-General also asked the same question: “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?”⁷³ Referring to the legal implications of legislative devolution, the First Minister also noted that this created a need for justice institutions that are managed locally which can respond to the needs of Wales and are familiar with the law as it applies to Wales.⁷⁴

Conversely, the Report of the All Wales Convention had 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.⁷⁵ In other words, the creation of a separate jurisdiction was not a condition of conferring additional legislative powers to the National Assembly. But it is also equally arguable that a legal jurisdiction is not necessarily dependent upon the existence of a legislature - after all, Scotland was a separate jurisdiction for centuries before the restoration of its parliament in 1999. Northern Ireland remained a separate jurisdiction during the period 1972-1999 after the parliament had been suspended. But this only serves to remind us of the need to distinguish what is possible from that which is the normal constitutional paradigm. The call for a separate jurisdiction is a call for constitutional normalisation.

Diverging laws also raise other challenges to the sustainability of the single jurisdiction. Although having two legislatures making laws for the same territory is not of itself unusual, it does pose challenges in terms of clarity and accessibility. The people need to know the law that applies to them. A unified body of Welsh law, the law that applies in Wales, regardless of where it is made, must be clear and accessible to the public.⁷⁶ The Law Commission has recognised the challenges to accessibility and clarity which the current position poses, and made proposals based on the fundamental tenet, in the context of legislation, that accessibility is central to the rule of law.⁷⁷ It made proposals for the codification in new National Assembly legislation of legislation whose subject matter is within the legislative competence of the National Assembly for Wales and which is currently dispersed in pieces of legislation of the United Kingdom Parliament and/or the National Assembly.⁷⁸

The growth in legislative divergence means that the Welsh judiciary and legal profession will be required to specialise in Welsh law.⁷⁹ As a former Lord Chief Justice said, as the need for a legally qualified and independent judiciary is paramount to the rule of law, the fundamental question to be asked of a legal jurisdiction or system is:

⁷² Carwyn Jones, *Law in Wales – The Next Ten Years*, (Law Society Lecture, Cardiff and District National Eisteddfod of Wales 2008), pp. 14-15.

⁷³ Winston Roddick, *The Development of Devolution and Legal Wales* (Annual Lecture of the Welsh Legal Affairs Centre, Aberystwyth University, 28 November 2008), at p. 16.

⁷⁴ Carwyn Jones, *Law in Wales – The Next Ten Years*, p. 12.

⁷⁵ See *Report of the All Wales Convention (Crown Copyright, 2009)*.

⁷⁶ As the Chief Justice of Canada stated: “The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical.” See The Right Honourable Beverley McLachlin, Chief Justice of Canada, *Access to Justice: Meeting the Challenge* (Ottawa: Canadian Judicial Council, 2007).

⁷⁷ See *Form and Accessibility of the Law applicable in Wales* (Law Commission Consultation Paper No. 223, 2015).

⁷⁸ The Law Commission, *Form and Accessibility of the law applicable in Wales* (Law Commission Report No 366) (London: Parliamentary Printers, HC 469–I, 29 June 2016).

⁷⁹ Timothy H. Jones and Jane M. Williams, “Wales as a Jurisdiction”, p. 101.

“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?”⁸⁰

One of the constitutional roles of the judiciary is to provide means of challenging the actions of the legislature and government.⁸¹ If there is a separate body of Welsh law, there must be a legal system and a judiciary which can fulfil their constitutional responsibility within a specifically Welsh context. We shall be returning to the role of the Welsh judiciary shortly. But devolution is generating a culture change within the legal community in Wales with an expectation that justice policy should be drawn up on a Wales-only basis.⁸² This should be seen as an opportunity. The establishment of a Welsh jurisdiction could allow the legal profession in Wales to develop a distinctive professional identity by acquiring new legal skills to meet the needs of the changed constitution and developing expertise in new areas based on Welsh legislation. In addition, legal education and training in the universities in Wales should respond to the opportunity offered by the emergence of a distinct body of law. Only recently, the author of this paper proposed the creation of a Council for Legal Education in Wales to provide a national strategy for legal education and training in Wales and to promote research and scholarship on Welsh law and the legal implications of devolution.⁸³ It is an idea whose time has surely come.

CONSTITUTIONAL PARITY: NORTHERN IRELAND AS A BENCHMARK

Devolution in the United Kingdom is asymmetrical, which means that the constitutional arrangements in Scotland, Northern Ireland and Wales are different. This is in part a reflection of the different circumstances existing in the three nations when the devolution project began.⁸⁴ It hardly represents a coherent constitutional model of governance, and its piecemeal pragmatism has created “a constitutional process of considerable complexity”.⁸⁵ However, it is not suggested here that there should be a uniform or identical settlement as some of the differences in detail, such as the provisions dealing with the power-sharing executive in Northern Ireland for example, exist to deal with specific circumstances and should not be replicated in the others. Tolerance towards a degree of constitutional diversity is likely to remain. However, as already stated, Wales’s initial constitutional settlement was considerably

⁸⁰ An Address by Lord Judge, Legal Wales Conference, Cardiff, 9 October 2009.

⁸¹ 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’.” See Vernon Bogdanor, *Devolution in the United Kingdom* (Oxford: Oxford University Press, 1999). p. 294.

⁸² “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”, fn. 81.

⁸³ R. Gwynedd Parry, “The Three Ages of Legal Scholarship in Wales” in T. G. Watkin (ed.) *The Carno Poisonings and Other Essays*, (Welsh Legal History Society, 2013), pp. 49-71.

⁸⁴ The implications of asymmetrical devolution are considered by Rosanne Palmer, *Devolution, Asymmetry and Europe: Multi-level Governance in the United Kingdom* (Brussels: P. I. E. Peter Lang, 2008).

⁸⁵ Peter Leyland, “The Multifaceted Constitutional Dynamics of U.K. Devolution” *Int. J. Constitutional Law* (2011) 9 (1): pp. 251-273 at p. 271.

less ambitious than in the other two devolved jurisdictions, and there has been an ongoing process of catching up and achieving greater parity.

On the issue of a separate Welsh jurisdiction, if the case also rests on the constitutional symmetry argument, then it is reasonable to enquire, what are the institutions of law in the other devolved jurisdictions? How should we benchmark the shape and form of a potential Welsh jurisdiction? Whereas Scotland's distinctive legal tradition may not offer the best model for Wales, Northern Ireland shares the same common law legal culture as England and Wales, and operates, effectively, as a parallel jurisdiction.⁸⁶ A Welsh jurisdiction adopting the Northern Ireland model would at least require the following key features: High Court in Wales; Court of Appeal in Wales; a Welsh judiciary under the leadership of a Lord Chief Justice for Wales (indicating a distinctive role in Wales but within the context of the British constitution); a Welsh legal profession (either separate Bar and Solicitors, or a fused profession); National Assembly for Wales; control over the police and prisons in Wales.

Of all the arguments for treating Wales differently from Scotland and Northern Ireland, historical arguments have enjoyed the greatest currency. Scotland's distinctive legal tradition, uninterrupted by the Act of Union of 1707, stands in contrast to the assimilationist tradition in Wales. Wales was conquered, Scotland was not, and that, so it is claimed, has made all the difference. The potential sustainability of a Welsh jurisdiction, due to Wales's smallness, is also a related source of anxiety. Pill L.J. made some interesting observations about Cardiff's capacity to serve as a 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.”⁸⁷

While it is recognised that the historical argument has some validity when comparing Wales and Scotland, is that really the case when comparing Wales and Northern Ireland? Northern Ireland provides an interesting comparison on a number of levels. Firstly, its size: Northern Ireland has a population of approximately 1.7 million, whereas Wales has a population of a little more than three million. More people live within the boundaries of old Glamorganshire and Monmouthshire than in the whole of Northern Ireland.

The lack of historical pedigree argument is also undermined when compared with Northern Ireland. Northern Ireland was not a jurisdiction with indigenous legal institutions before 1920.⁸⁸ The campaign by a unionist minority for separation of a part of Ulster was in response to the majority support in Ireland for self government.⁸⁹ It was possibly in 1916 that it was first suggested that the six counties of Ulster might be exempt from the arrangements for the rest of Ireland.⁹⁰ In the aftermath of the First World War, a scheme was proposed

⁸⁶ Regarding Scotland, it was said that, “Labour governments in the 1970s and 1990s...were impressed, and perhaps over impressed...by the case for special treatment for Scotland on the grounds of her separate legal system”: see Vernon Bogdanor, *Devolution in the United Kingdom*, (Oxford: Oxford University Press, 1999) at p. 255.

⁸⁷ See the address by Sir Malcolm Pill, Legal Wales Conference, Cardiff, 9 October 2009: <http://legalwales.org/downloads/legal-wales-conference-cardiff.pdf> (last visited 1 February 2017).

⁸⁸ 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.

⁸⁹ See D. George Boyce, “Northern Ireland: The Origins of the State”, in Peter Catterall and Sean McDougall (eds.), *Northern Ireland Question in British Politics* (London: MacMillan, 1996), pp. 11-28.

⁹⁰ Fn. 89 at p. 14.

whereby the whole of Ireland would have some form of self-rule, but split into two areas with two separate legislatures. This key period between 1918 and 1920 led to the Government of Ireland Act 1920, when the essential elements of the new constitution of Northern Ireland were created.⁹¹

The authors of the Government of Ireland Act 1920 had anticipated two jurisdictions with considerable self-government within the unitary British state - Southern Ireland in the south (in 1922, this entity was of course superseded by the Irish Free State), and Northern Ireland in the north-east. Northern Ireland was to be given a bicameral legislature (with a house of commons and a senate, similar to Britain) and its own government. In February 1920, unionists insisted that they should have a separate jurisdiction with their own judiciary.⁹² What was established was the first incarnation 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.”⁹³

The development of the jurisdiction of Northern Ireland continued with control over the police in the province being placed in the hands of the Northern Irish government in 1921. Control of the police 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 resistance against the 1920 constitution. In March 1922, when the Royal Irish Constabulary was abolished,⁹⁴ the Royal Ulster Constabulary was created.⁹⁵

In 1922, a new treaty between Britain and Ireland created the Irish Free State, but ensured that the six counties in the north-east could be excluded from the provisions of the new state and remain a part of the United Kingdom if they so chose. Northern Ireland thus remained a part of the United Kingdom, with its parliament subordinate to the Westminster parliament. The post of Lord Lieutenant of Ireland was abolished and a new post of Governor General for Northern Ireland was created. The terms of this treaty had far-reaching implications for the future of Ireland. According to one historian, “The Government of Ireland Act envisaged an eventual united 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”.⁹⁶

What legal institutions did Belfast, an important industrial city and provincial centre, have prior to 1920? Belfast had grown quickly as a major industrial city during the nineteenth century. The population doubled from 87,000 to 175,000 between 1851 and 1871.⁹⁷ By the turn of the twentieth century, it had customary public institutions in keeping with its status.⁹⁸ 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 thus comparable in size to the Cardiff of today. However, at the turn of the twenty first century, Cardiff has more national and legal institutions and structures to sustain a jurisdiction than Belfast did in 1920.

On 1 October 1921, the Supreme Court of Judicature of Northern Ireland came into existence. The Supreme Court would consist of a Court of Appeal and a High Court of Justice

⁹¹ An analysis of the 1920 constitution can be found in A. G. Donaldson's “The Constitution of Northern Ireland: its Origins and Development”, (1955)11(1) *University of Toronto Law Journal*, pp. 1-42.

⁹² See, D. George Boyce, “Northern Ireland: The Origins of the State”, fn. 89, p. 19.

⁹³ See Lord MacDermott, “The Supreme Court of Northern Ireland- two Unusual Jurisdictions”, (1952) 2 *Journal of the Society of Public Teachers of Law*, pp. 201-213, on p. 202.

⁹⁴ See Constabulary (Ireland) Act 1922.

⁹⁵ See Constabulary (Northern Ireland) Act 1922.

⁹⁶ See Thomas Hennessey, *A History of Northern Ireland 1920-1996* (Basingstoke: Macmillan, 1997), p. 22.

⁹⁷ Bardon, *A History of Ulster*, fn 88, p. 326.

⁹⁸ Bardon, *A History of Ulster*, fn.88, pp.386-400.

and, in July 1921, the head of the Supreme Court, the Lord Chief Justice of Northern Ireland was appointed.⁹⁹ Following the establishment of the courts machinery, other institutions normally associated with a self-contained jurisdiction gradually developed. Since the sixteenth century, Irish barristers had been based in Dublin, at the King's Inns. The King's Inns were 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 without having to join the Inns of Court in London.

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. 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 so that a committee of the Bar's leaders in Belfast would be responsible for the education and discipline of the profession there. Prospective Northern Irish barristers could henceforth receive their training in Belfast, and following the opening of the new courts in Belfast in October 1921, they could be called to the bar in Belfast rather than Dublin. Barristers trained in either Dublin or Belfast had the right to appear in courts throughout Ireland.¹⁰⁰

This agreement between the barristers of Belfast and Dublin continued up until 1926. when it was decided that a centre for barristers in Northern Ireland, the Inn of Court of Northern Ireland, would be established. Rooms were obtained in Belfast for the new inn of court, and a legal library was bought by Sir Denis Henry, the first Lord Chief Justice, who died in 1925.¹⁰¹ Similarly, the Law Society of Northern Ireland was established in 1922 for the governance of the solicitors' profession. The Law Society set up its own law school for training students who wished to join the profession.

In addition, there was an academic response to the new constitution. There had been a law department at Queen's University, Belfast since its establishment in 1848. It was an academic faculty and, "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".¹⁰² The academic department also 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 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.¹⁰³

A joint 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 within the legal profession in Northern Ireland, together with limited resources, meant that a joint vocational course was the most sensible way

⁹⁹ See David Harkness, *Northern Ireland since 1920* (Dublin: Helicon, 1983), p. 18.

¹⁰⁰ The account is given by J. Ritchie, "The Inn of Court of Northern Ireland: Its Foundation, Development and Functioning", (1964) 15 *Northern Ireland Legal Quarterly*, pp. 463-469; also, J. A. L. MacLean, "The Honourable Society of the Inn of Court of Northern Ireland", (1972) 23(1) *Northern Ireland Legal Quarterly*, pp. 90-94.

¹⁰¹ Ritchie, fn. 100, p. 466.

¹⁰² J. L. Montrose, "Legal Education in Northern Ireland", (1952) 5 *Journal of Legal Education*, pp. 18-25, on p. 22.

¹⁰³ See J. H. S. Elliott, "The Queen's University of Belfast: The New Institute of Professional Legal Studies", (1978) 9 *International Bar Journal*, pp. 63-67.

of providing vocational legal education. 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.

In 1936 the *Northern Ireland Legal Quarterly* was established 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 help its readers to keep in touch with legal developments peculiar to Northern Ireland.”¹⁰⁴

The provision of commentary on Northern Ireland’s laws was thus critically important. But there was also 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.”¹⁰⁵

The Government of Ireland Act 1920, which had defined the constitutional position of Northern Ireland for over seventy years, was repealed by the Northern Ireland Act 1998 (which implemented the terms of the Good Friday Agreement). The 1998 Act established the Northern Ireland Assembly, thus restoring the legislature abolished in 1972 when direct rule from London was imposed. Subsequent reforms, such as the Justice (Northern Ireland) Act 2002 and the Northern Ireland Act 2006, have developed these constitutional arrangements. Authority for the administration of justice in Northern Ireland now lies with the Assembly. However, the model established in 1920, in terms of its structure and personnel, remains the principal basis for the jurisdiction of Northern Ireland in terms of the administration of justice.

The courts of Northern Ireland are administered by the Northern Ireland Court Service established by the Justice (Northern Ireland) Act 1978. The Constitutional Reform Act (United Kingdom) of 2005 created the Supreme Court of the United Kingdom as the highest appeal tribunal for the courts of Northern Ireland. The Supreme Court took over the former function of the Appellate Committee of the House of Lords, which, since the 1920 Act, had been the highest court of appeal for the province. In October 2009, the Supreme Court of Judicature of Northern Ireland became known as the Court of Judicature of Northern Ireland.

Northern Ireland is represented on the Supreme Court of the United Kingdom by virtue of its status as a separate jurisdiction. The current representative is Lord Kerr, the former Lord Chief Justice of Northern Ireland. Scotland is also amply represented on the Supreme Court. Wales, of course, has no representation on the Supreme Court, and in that respect, as in so many others, it is the odd man out.

¹⁰⁴ See editorial, (1936) 1 *Northern Ireland Legal Quarterly*, at p. 4.

¹⁰⁵ Fn. 104.

The present composition, institutions and personnel of the jurisdiction of Northern Ireland offer a guide to the potential composition of a future Welsh jurisdiction. The Court of Judicature of Northern Ireland consists of the Court of Appeal, which 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, magistrates courts and some tribunals. The High Court is composed 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.

Of the other courts, the Crown Court, which sits throughout Northern Ireland, has complete authority over indictable 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 County Courts hear civil cases, cases dealing with matrimonial 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.

Northern Ireland'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.¹⁰⁶ 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.

This, therefore, is the historical development and current position of the jurisdiction of Northern Ireland. How is the history and experience of Northern Ireland of any use to Wales? First of all, the example of Northern Ireland suggests that a jurisdiction is sustainable in circumstances where the population is comparatively small. Northern Ireland also provides a useful comparison as another common law jurisdiction, and its institutions and structures can offer a valuable template that can form the basis for a Welsh jurisdiction. For the historical reasons which have been outlined, it does not possess the same degree of separateness in terms of legal tradition as that of Scotland. There is also evidence that Wales produces enough legal work compared with Northern Ireland to justify the need for a separate Welsh courts structure, and in particular a high court and a court of appeal.¹⁰⁷

The Northern Ireland experience, when looked at in detail, also rebuts claims for the need for an ancient legal pedigree to qualify for a separate jurisdiction, and demonstrates how history is often manipulated to deny Wales its own legal structures. Belfast and Northern Ireland did not have legal centres of any significance prior to the 1920 constitutional settlement. A new jurisdiction was created virtually overnight. The creation of the Northern Ireland jurisdiction in 1920 was essentially an act of political will in response to a political crisis. The circumstances in Wales may not be the same, but the motivations are not relevant. One can but

¹⁰⁶ See: <http://www.psni.police.uk/>

¹⁰⁷ 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).

hope that no reasonable person would suggest that only in response to the threat of civil war and violent conflict can a case for a separate jurisdiction be sustained.

The history of the development of the jurisdiction of Northern Ireland also demonstrates that any jurisdiction is a living organism which must evolve and change, and that not all the essential elements must be in place from the outset. It was only a few years after the establishment of the jurisdiction that, for example, an Inn of Court was established, or that a law journal was founded at a university law school. The creation of the jurisdiction stimulated responses and initiatives over subsequent years as momentum gathered pace and as the entity took root. This is a further lesson for Wales. Building the structure need not be an overnight affair, and that all elements do not necessarily need to be in place from the start. But once established, it has the potential to be a catalyst for enriching and nurturing the legal culture and providing the necessary legal infrastructure for Welsh democracy.

The Northern Ireland model also shows that creating a new jurisdiction does not lead to a complete divorce from the former jurisdiction or splendid isolation in terms of the administration of justice. Free movement is a key feature in the relationship between the lawyers of Northern Ireland and those of England and Wales, and any member of the profession in Northern Ireland can, for example, apply to practise in England and Wales with only a few hurdles to cross.¹⁰⁸ The creation of a Welsh jurisdiction should, therefore, not deprive members of the legal profession in Wales of opportunities to work in England, or vice-versa, provided there is professional competence on both sides.

LANGUAGE AND NATIONAL IDENTITY

What was initially a very modest constitutional settlement which gave very limited secondary law-making powers has grown and matured into legislative devolution.¹⁰⁹ With that has been a growing sense of national identity within the legal community, a process that has led to the inauguration of the concept of Legal Wales.¹¹⁰ If legislative devolution is the principal driver of Welsh legal identity, other drivers also play a part in creating a divergence between the legal system in Wales and that in England. Although the case for a Welsh jurisdiction can draw much from the experiences of Northern Ireland and Scotland, there is a distinctive dimension to the Welsh situation which is not as prevalent in the other devolved jurisdictions, and that is the national language policy and its associated legislative framework.¹¹¹

The Welsh language is used daily by a significant minority of the population of Wales.¹¹² The language has acted as the main and often only catalyst for the development of

¹⁰⁸ See Carwyn Jones, *Law in Wales: The Next Ten Years* (Law Society Lecture, Cardiff and District National Eisteddfod of Wales 2008), at p. 15.

¹⁰⁹ For commentary on the Welsh devolution settlement in its initial phase, see Richard Rawlings, *Delineating Wales* (Cardiff: University of Wales Press, 2003).

¹¹⁰ See Sir John Thomas, "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: Welsh Legal History Society, 2001), pp. 113-165.

¹¹¹ The history of the Irish language in Northern Ireland is considered in Aodán Mac Póilin (ed.), *The Irish Language in Northern Ireland* (Belfast: Ultach Trust, 1997). There is limited legislative support for Gaelic in Scotland by virtue of the Gaelic Language (Scotland) Act 2005, but the Act does not create any rights for speakers of the language. For some historical insights on Scots law and languages, see Hector MacQueen, "Laws and Languages: Some Historical Notes from Scotland" (2002) 6 (2) *Electronic Journal of Comparative Law* (<http://www.ejcl.org/62/art62-2.html>).

¹¹² The Census 2011 figures show that 562,000 or 19% of those over 3 years old can speak Welsh and 14.6% over three years old can speak, read and write in Welsh. See <https://statswales.gov.wales/Catalogue/Welsh-Language>. Welsh as a minority language in Wales is a phenomena of the twentieth and present centuries. The

distinct practices within the legal system in Wales during the twentieth century.¹¹³ It is even possible to argue that the struggle to save the language has been at the heart of the struggle to save the very idea of Wales as a nation.¹¹⁴ The statutory right to use the language in court and tribunal proceedings dates back to 1967.¹¹⁵ The subsequent Welsh Language Act of 1993 confirmed the principle that the Welsh language should be equal with English in the conduct of legal proceedings in Wales.¹¹⁶ This means that in any legal proceedings in Wales any party defendant or witness or other person who desires to use it may speak the Welsh language. In short, the courts operate on a principle of equality rather than a principle of necessity (that is, a defendant or witness may use the Welsh language regardless of any question of their competence in the English language).¹¹⁷

Language rights in Wales took a further step forward when the National Assembly enacted the Welsh Language (Wales) Measure 2011, which confirmed the Welsh language as an official language in Wales.¹¹⁸ It also replaced the former language scheme mechanism with language standards, and extended rights to use the language with a broader range of public and private organisations than in the past. The office of Welsh Language Commissioner¹¹⁹ was established to implement and supervise language standards within a new regulatory regime in which the Commissioner is empowered with legal sanctions in the event of non-compliance.¹²⁰ The Commissioner has already shown an appetite for litigation, when required, to ensure that the Welsh language's official status is respected. This is even in the case of Crown bodies which are not under a legal duty to comply with the statutory regime, but which must engage in proper and lawful consultation with the Commissioner if, having voluntarily introduced and maintained a Welsh language scheme for a number of years, and having previously undertaken to consult with the Commissioner with regard to any changes to it, they suddenly and without

Census of 1891 showed that 54.5% of the population spoke Welsh, with 30% speaking Welsh only; see Gwenfair Parry a Mari A. Williams, *Miliwn o Gymry Cymraeg! Yr Iaith Gymraeg a Chyfrifiad 1891* (Cardiff: University of Wales Press, 1991) at p. 443.

¹¹³ For an account of the development of the legal status of the language during the last century, see Gwilym Prys Davies, "The Legal Status of the Welsh Language in the Twentieth Century", in Geraint Jenkins, (ed.), *The Welsh Language in the Twentieth Century*, (Cardiff: University of Wales Press, 2000), pp. 217-248.

¹¹⁴ A view expounded most eloquently by Saunders Lewis who delivered the BBC Annual Lecture Broadcast on 13 February 1962 entitled *Tynged yr Iaith*, (The Fate of the Language). It can be found in the collection of his political speeches and writings, Marged Dafydd, (ed.), *Ati Wŷr Ifanc*, (Cardiff: University of Wales Press, 1986), 88- 98. See also Saunders Lewis, *Canlyn Arthur, Ysgrifau Gwleidyddol*, (Llandysul: Gomer, 1985), at pp. 61-65

¹¹⁵ Welsh Language Act 1967, s. 1. This provided that, "In any legal proceeding in Wales or Monmouthshire the Welsh language may be spoken by any party, witness or other person who desires to use it, subject in the case of proceedings in a court other than a magistrates' court to such prior notice as may be required by rules of court; and any necessary provision for interpretation shall be made accordingly".

¹¹⁶ Welsh Language Act 1993, s.22. The phrasing is virtually identical to that in the 1967 Act: "In any legal proceedings in Wales the Welsh language may be spoken by any party, witness or other person who desires to use it, subject in the case of proceedings in a court other than a magistrates' court to such prior notice as may be required by rules of court; and any necessary provision for interpretation shall be made accordingly".

¹¹⁷ This principle of equality is a relatively recent innovation in Wales. See *R. v Merthyr Tydfil Justices, ex p Jenkins*, [1967] 2 Q.B. 21. For an excellent account of the development of the legal status of the language during the last century, see Gwilym Prys Davies, "The Legal Status of the Welsh Language in the Twentieth Century", in Geraint Jenkins, (ed.), *The Welsh Language in the Twentieth Century*, (University of Wales Press, Cardiff, 2000), at pp. 217-248. The right to use the Welsh language does not extend to any right to demand that the tribunal itself be fluent in that language, and there is currently no provision enabling the courts to summon Welsh-speaking or bilingual juries in cases when the Welsh language may be used. For a consideration of this particular issue, see R. Gwynedd Parry, "Random Selection, Linguistic Rights and the Jury Trial in Wales" [2002] Crim. L.R. 805.

¹¹⁸ Welsh Language (Wales) Measure 2011, s. 1(1).

¹¹⁹ The role of the Welsh Language Commissioner is given careful and critical scrutiny by Diarmait Mac Giolla Chríost, *The Welsh Language Commissioner in Context: Roles, Methods and Relationships* (Cardiff: University of Wales Press, 2016).

¹²⁰ Welsh Language (Wales) Measure 2011, ss. 71-94.

consultation purport to withdraw the scheme.¹²¹ A judicial innovation in the Measure is the creation of a Welsh Language Tribunal, which will hear and determine appeals by those disputing the language standards imposed upon them or any failure alleged by the Welsh Language Commissioner to implement them.¹²²

“A Wales of vibrant culture and thriving Welsh language” is one of the seven well-being goals in the Well-being of Future Generations (Wales) Act 2015, a piece of legislation whose primary objective is to promote sustainable development in Wales. In theory, this legislation imposes a duty on a number of public bodies listed in the Act¹²³ to make a “thriving Welsh language” a policy objective, and to further the goal of creating “a society that promotes and protects culture, heritage and the Welsh language”.¹²⁴ On how to actually achieve this and other “well-being goals”, the Act provides little guidance, and it is difficult not to regard phrases such as “a vision for the long-term” as being nothing other than aspirational.¹²⁵ Certainly, there are no legally enforceable language rights stemming from this particular legislation.¹²⁶ Somewhat less nebulous is The Planning (Wales) Act 2015, which requires that the Welsh language be taken into consideration in the planning process in Wales and when a planning application is determined. It establishes that impact on Welsh language is a material planning consideration in preparing and determining a planning application.¹²⁷ It also requires that the Welsh language be taken into account in the sustainability appraisal for all development plans.¹²⁸

These legislative initiatives do show that civil society in Wales acknowledges the significance of the Welsh language in the administration of justice and in the public life of Wales in general.¹²⁹ The Welsh language is used extensively in courts in Wales, with over six hundred cases heard wholly or partly in Welsh in courts and tribunals every year.¹³⁰ The right to use the Welsh language in legal proceedings is subject to a territoriality principle established by the Welsh Language Act 1993, which declares that the right to use the Welsh language in courts of justice is confined to Wales only. The legal system in Wales thus operates according to a language policy which does not apply throughout the jurisdiction. As the right to use Welsh in legal proceedings is confined to Wales, as upheld in judicial rulings,¹³¹ this linguistic dimension adds to the argument in favour of a Welsh jurisdiction. For a right to use the Welsh language in the high court or the court of appeal to be recognised, those tribunals must be physically located in Wales. As one senior judge put it:

“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

¹²¹ R. (On the Application of The Welsh Language Commissioner) v National Savings and Investments [2014] EWHC 488 (Admin) (06 March 2014).

¹²² Fn. 120, ss. 120-133.

¹²³ Wellbeing of Future Generations (Wales) Act 2015, s. 6.

¹²⁴ Fn. 123, s. 4.

¹²⁵ Fn. 123, s. 19.

¹²⁶ See the explanatory notes: <http://www.legislation.gov.uk/anaw/2015/2/notes/division/3/3>.

¹²⁷ Planning (Wales) Act 2015, s. 31.

¹²⁸ Fn. 127, s. 11.

¹²⁹ See Lord Judge, *The Safest Shield: Lectures, Speeches and Essays* (Oxford: Hart, 2015), pp.166-80.

¹³⁰ Most are heard in magistrates' courts and County Courts: see The Law Commission, *Form and Accessibility of the law applicable in Wales* (Law Commission Report No 366) (London: Parliamentary Printers, HC 469-I, 29 June 2016), p. 113.

¹³¹ See *Williams v Cowell* [2000]1 W.L.R. 187.

legal proceedings take place and in which a Welsh speaker may want to exercise his statutory right to use the Welsh language.”¹³²

After devolution, Welsh also became a language of law-making and government. The Government of Wales Act 1998 established a principle that the National Assembly would function on the basis of the equal status of Welsh and English.¹³³ Other provisions guaranteed the equal validity of English and Welsh versions of statutory instruments.¹³⁴ These principles were confirmed in the provisions of s. 35 of the Government of Wales Act 2006 which stated that the Assembly must give effect, “so far as is both appropriate in the circumstances and reasonably practicable, to the principle that the English and Welsh languages should be treated on a basis of equality”.¹³⁵

These provisions were subsequently amended by the National Assembly for Wales (Official Languages) Act 2012, so that they now confirm Welsh and English as being official languages of the National Assembly and must be treated on a basis of equality.¹³⁶ Section 78(1) of the Government of Wales Act 2006 requires Welsh Ministers to adopt a strategy stating how they propose to promote and facilitate the use of the Welsh language. Section 78(4) requires Welsh Ministers to keep the strategy under review and enables them from time to time to adopt a new strategy.

The 2006 Act also states that English and Welsh language versions of legislation have equal standing.¹³⁷ It is in the creation of Welsh versions of legislation that the National Assembly is pioneering a new legal culture that is bilingual and that is different from that pertaining in England. The drafting of legislation in the Welsh language took the draughtsmen into uncharted territory.¹³⁸ A language which for centuries had been deprived of legal status and had not developed as a language of law would need to rise to the challenge.¹³⁹ Ensuring the quality of the Welsh version and thus guaranteeing its equal standing with the English version was not going to be an easy task.¹⁴⁰ Indeed, the use and standardisation of Welsh legal terminology in the drafting of legislation remains work in progress.¹⁴¹

There is no doubt that bilingual legislative drafting in Wales is a craft that is still in infancy, but there are lessons that can be learnt, where appropriate, from practices in other bilingual jurisdictions.¹⁴² Conversely, Wales may itself become a paragon of good practice in the art of bilingual legislative drafting in years to come.¹⁴³ Making bilingual laws clear and

¹³² Sir Roderick Evans, “Legal Wales- The Way Ahead”, at p. 7.

¹³³ Government of Wales Act 1998, s. 47 (1). This was subsequently repealed and superseded by provisions in the Government of Wales Act 2006.

¹³⁴ Government of Wales Act 1998, s. 122 (1).

¹³⁵ Government of Wales Act 2006, s. 35(1).

¹³⁶ See National Assembly for Wales (Official Languages) Act 2012.

¹³⁷ Government of Wales Act 2006, s. 156.

¹³⁸ See Gwyn Griffiths, “Her Deddfu’n Ddwyieithog” (2007) 38 *Cambrian Law Review*, pp. 103-116.

¹³⁹ See Keith Bush, “Deddfu yn y Gymraeg: Ail-gydio mewn Hen Ymgom” (2007) 38 *Cambrian Law Review*, pp. 83-102.

¹⁴⁰ Keith Bush, “Deddfu yn y Gymraeg” (2006) 4 *Wales Journal of Law and Policy*, pp. 374-381.

¹⁴¹ The Law Commission, *Form and Accessibility of the law applicable in Wales* (Law Commission Report No 366) (London: Parliamentary Printers, HC 469-I, 29 June 2016), at pp. 113-126.

¹⁴² For Canadian experiences and perspectives, see Robert Bergeron, “Co-Drafting: Canadian Experience of the Creation of bilingual Legislation in a Bijural System”, *The Law Making Powers of the National Assembly for Wales*, (Cardiff: Elfennau'r Gyfraith, 2001), pp. 54-58; also Paul Godin, “The New Brunswick Experience: the Practice of the English Common Law in the French Language”, (2001) 1 *Wales Law Journal*, pp. 41-52. For a critical discussion of the relative merits of co-drafting and translation in the Canadian context, see André Labelle, “What Ever Happened to Legislative Translation in Canada” (2016) 37(2) *Statute Law Review*, pp. 133-43.

¹⁴³ See Thomas Glyn Watkin, “Bilingual Legislation: Awareness, Ambiguity, and Attitudes” (2016) 37(2) *Statute Law Review*, pp. 116-132.

accessible adds another dimension to the case for a separate jurisdiction.¹⁴⁴ The plain fact is that the majority of laws that apply in Wales are not bilingual. The laws created by the UK parliament which apply in Wales are not published in the Welsh language, and so bilingual law and justice is only partial in Wales. This will not change overnight, but a separate jurisdiction within a reserved powers model of legislative devolution is the surest vehicle for remedying this deficiency in the future. If a formal mechanism for adopting Westminster legislation into “Welsh Law” within a separate jurisdiction becomes necessary, then the need for that adoption process to simultaneously ensure that bilingual versions are created must surely be the case.

Creating bilingual laws is one thing, but the implementation, application and interpretation of those laws is another. With regard to the judiciary in Wales, a significant number do speak Welsh and possess sound understanding of the social and legal distinctiveness of Wales.¹⁴⁵ Historically this was certainly not the case, and of those 217 men appointed as judges of the Great Sessions between 1542 and 1830, only thirty were born in Wales, and probably only about ten were able to speak Welsh.¹⁴⁶ In a nutshell, 95% of the judiciary could not speak the language of 90% of the people. This was no doubt a deliberate and conscious policy to enforce clause 20 of the Act of Union of 1535-36, which made English the sole language of justice in Wales.¹⁴⁷ The nineteenth century saw political efforts to ensure that there were judges able to understand evidence in Welsh, in the interests of justice if not due to great commitment to linguistic equality.¹⁴⁸

Today, however, the position is quite different. A brief survey of the Welsh language skills of the judiciary assigned to the Welsh circuit carried out in May 2016 would suggest that there are a fair number of judges in criminal and civil courts with the necessary skills to conduct legal proceedings in the Welsh language.¹⁴⁹

¹⁴⁴ See D. Hughes and H. G. Davies, “Accessible Bilingual Legislation for Wales / Deddfwriaeth Hygyrch a Dwyieithog i Gymru” (2012) 33(2) *Statute Law Review*, pp. 103-121.

¹⁴⁵ See Sir David Lloyd Jones, “The Machinery of Justice in a Changing Wales” (2010) 14 *Transactions of the Honourable Society of the Cymmrodorion*, p. 123.

¹⁴⁶ See W. R. Williams, *The History of the Great Sessions, 1542-1830* (Brecknock: privately published, 1899), at p. 19.

¹⁴⁷ *The Act for Law and Justice to be Ministered in Wales in Like Form as it is in this Realm 1535-36*, cl. 20: “Also be it enacted of the Authority aforesaid, that all Justices, Commissioners, Sherrifs, Coroners, Escheators, Stewards and their Lieutenants, and all other Officers and Ministers of the Law, shall proclaim and keep the sessions Courts, Hundreds, Leets, Sherrifs Courts, and all other Courts in the English Tongue; and all Oaths of Officers, Juries and Inquests, and all other Affidavits, Verdicts and Wagers of Law, to be given and done in the English Tongue: and also that from henceforth no Person or Persons that use the Welsh Speech or Language shall have or enjoy any manner, office or Fees within this Realm of England, Wales or other the King’s Dominion, upon Pain of forfeiting the same offices or Fees, unless he or they use and exercise the English Speech or Language.” For interesting observations on this see Sir Goronwy Edwards, “The Language of the Law Courts in Wales: some Historical Queries” (1975) 6 *Cambrian Law Review*, pp. 5-9.

¹⁴⁸ See HC Deb 11 March 1872 vol 209 c.1844 : “Resolved, That, in the opinion of this House, it is desirable, in the interests of the due administration of justice, that the Judge of a County Court District in which the Welsh language is generally spoken should, as far as the limits of selection will allow, be able to speak and understand that language.” (Mr. Osborne Morgan, M.P.).

¹⁴⁹ Data provided by HM Courts and Tribunals Service, Wales, 16 May 2016, and information on Courts and Tribunals on Judiciary website: <https://www.judiciary.gov.uk/>

Judicial Post/Grade	Total Assigned to Wales	Numbers able to conduct legal proceedings in Welsh	Percentage able to conduct legal proceedings in Welsh
Circuit Judge	34	11	32%
District Judge	22	7	32%
District Judge (Magistrates Courts)	5	2	40%
Deputy Circuit Judge	8	3	38%
Recorder	48	4	8%
Deputy District Judge	49	11	23%
Justices of the Peace ¹⁵⁰	1295	204	16%

Although the general picture is encouraging, the devil is in the detail. A cause for concern is the low number of recorders - practitioners who sit on a part-time basis and from whose ranks the full-time circuit bench is normally drawn - who are capable of conducting proceedings in Welsh. It should also be noted that only six of the circuit judges assigned to Wales are female (of whom three can conduct proceedings in the Welsh language), and there is not one circuit judge from a minority ethnic background. As far as the senior judiciary is concerned, the position is even less promising. At present there is not a single high court judge who can conduct trials in Welsh. High court judges sit as trial judges in courts in Wales, and usually try the more serious cases. In the day to day business of the courts in Wales, it is essential that there exists a sufficient corps of competent and independent judges, of diverse backgrounds, who can conduct proceedings and interpret legislation bilingually. As the Law Commission acknowledged:

“Given the equality of legal standing between the English and Welsh versions of legislation, the long term aspiration must be to ensure that there are sufficient numbers of judges, able to work in the Welsh language, to sit on any case involving comparison of language versions.”¹⁵¹

A “long term aspiration”? With almost half a century since the right to use the Welsh language in legal proceedings was placed on the statute book, this is a matter which surely requires immediate action to keep up with the pace of change. The progress of legislative devolution and the development of a separate Welsh jurisdiction would intensify the need for judges at all levels of seniority who can conduct proceedings through the medium of Welsh. Urgent action would be a more appropriate phrase in this context.

¹⁵⁰ Serving Magistrates Statistics: 1 April 2015. See <https://www.judiciary.gov.uk/publications/judicial-statistics-2015/>

¹⁵¹ The Law Commission, *Form and Accessibility of the law applicable in Wales* (Law Commission Report No 366) (London: Parliamentary Printers, HC 469–I, 29 June 2016), p. 149.

However, it is also reassuring to note some progress, and that the Judicial College has established a Welsh Training Committee to consider the Welsh language training needs of the judiciary. A high court judge, who cannot conduct proceedings in Welsh, is chairing the Lord Chancellor's Standing Committee on the Welsh Language in order to develop and strengthen the use of Welsh in the courts.¹⁵² The Courts and Tribunals Service has a Welsh language scheme which sets out its commitment to providing bilingual services to the public.¹⁵³ It also has a protocol whereby it will inform the Judicial Appointments Commission of any Welsh language requirements when judicial vacancies in Wales arise.¹⁵⁴ The Lord Chancellor approved a non-statutory eligibility criterion for judicial vacancies in Wales whereby candidates will need to have an "understanding or the ability to acquire the understanding of the administration of justice in Wales, including legislation applicable to Wales and Welsh devolution arrangements".¹⁵⁵ For certain posts, the ability to conduct hearings in Welsh will be an essential criterion.¹⁵⁶ Similar arrangements exist with regard to the appointment of magistrates fluent in the Welsh language.¹⁵⁷

Despite these encouraging initiatives, they only serve to reflect the growing schism between the role and expectations of a judge in Wales and a judge in England. The administration of justice in a bilingual country has its own particular needs which can be successfully met by a comprehensive and holistic jurisdictional structure with complete oversight, from undergraduate legal education to judicial training, of those distinctive needs.¹⁵⁸ Wales is, after all, a different country to England, and its bilingualism is one of the key drivers of jurisdictional autonomy.¹⁵⁹

How would the management of justice institutions in Wales be different if Wales was a separate jurisdiction and if justice policy for Wales was made in Cardiff? One would hope that greater understanding of the geography, the demography and the bilingual dimension of Welsh society would have prevented the recent cull of court centres in Wales, a cull which poses real threats to access to justice in Wales. There is not a Crown Court centre between Caernarfon and Swansea, a distance of 150 miles along the predominantly Welsh-speaking western flank of the country. It is also an area of Wales with poor infrastructure, with no motorways and disconnected railways such that it is impossible to travel by train from Swansea to Caernarfon, and vice versa, without first having to travel eastwards to England before making one's way back. Recent court closures in Dolgellau and Carmarthen, where magistrates' courts and the Crown Court had hitherto convened, and where the majority of the

¹⁵² See The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, *The Law of Wales: Looking Forwards*, Speech at the Legal Wales Conference, Cardiff, 9th. October 2015.

¹⁵³ HM Courts and Tribunals Service, Welsh Language Scheme 2013-16.

¹⁵⁴ See HM Courts and Tribunals Service, Welsh Language Impact Assessment 2015.

¹⁵⁵ Fn. 154.

¹⁵⁶ See, for example, the recruitment process initiated by the Judicial Appointments Commission in 2015.

¹⁵⁷ "When advisory committees in Wales forecast the number of magistrates to recruit for a given period, they should consider how many, if any, of the vacancies should be advertised as 'Welsh language-essential'. This will depend on factors such as the existing number of bilingual magistrates, projected retirements and so on. The overarching aim should be to ensure that there will be sufficient numbers of bilingual magistrates in order for the magistrates' courts in the area covered by the advisory committee to fulfil their obligations under Section 22 of the Welsh Language Act." See *Guidance for the recruitment of Welsh language essential magistrates* (Lord Chancellor's Directions, Appendix 3A).

¹⁵⁸ Although credit must be given to the judiciary in showing awareness of the impact of the official status of Welsh on proper law and government in Wales. See *R (Aron Wyn Jones) v Denbighshire County Council* [2016] EWHC 2074 (Admin), when the Administrative Court quashed a decision by a local education authority to close a small Welsh-language primary school, principally on the grounds that it failed to assess the impact on the Welsh language properly.

¹⁵⁹ Carwyn Jones, *Law in Wales – The Next Ten Years* (Law Society Lecture, Cardiff and District National Eisteddfod of Wales 2008), p. 12.

population speak Welsh almost daily, has only exacerbated what was already a challenging context for public access to bilingual justice.¹⁶⁰

CONCLUSIONS

In Henry IV, part I, The Earl of Worcester, conspiring with Welsh leader Owen Glendower and others against the King, entreats Hotspur, “I by letters shall direct your course. When time is ripe, which will be suddenly, I'll steal to Glendower and Lord Mortimer.”¹⁶¹ To borrow Worcester’s phrase, this article’s argument is that the time is indeed ripe for a wholesale review of the constitutional settlement in Wales, and to determine the case for a separate legal jurisdiction for Wales.

The arguments for a separate Welsh jurisdiction are based in part on the need for structural adaptation of the legal system in Wales in response to the democratic endorsement of legislative devolution. Legislative devolution in Wales is now a fact, and it is leading to an ever increasing divergence in the laws in Wales from the laws in England. Adding to that is the case for greater constitutional parity for the devolved nations, and the distinctive needs of Wales as a bilingual country. It is these factors combined that provide the case for Wales to have its own legal system.¹⁶²

Of course, legal bonds that have existed for centuries cannot not be severed lightly. Rawlings said, “a centuries-long process of legal, political and administrative assimilation with a powerful neighbour cannot be wished away”.¹⁶³ Possibly not, although the history of the development of Northern Ireland’s jurisdiction would suggest that the historical bonds argument can be overstated in order to render Welsh democracy a hostage to the past. Moreover, with goodwill on all sides and suitable arrangements on freedom of legal trade, arrangements for the free movement (a phrase which ought to still have meaning within the internal British context) of lawyers across jurisdictions and protocols on mutual recognition of judgements can ease most anxieties about the traumatic effect of dissimilation. More importantly, such a development offers both democratic and legal opportunities for Welsh society and the legal profession in Wales.

There is need to normalise the constitutional position of Wales by ensuring that there are Welsh legal institutions and structures that can operate within the rapidly changing constitutional context. The creation of a separate Welsh jurisdiction would require UK legislation, or at least amendment to current legislation, but would another referendum be required? The UK is tired of referenda. 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 whereby a referendum was held purely to establish a legal jurisdiction. The creation of a separate jurisdiction should be regarded as a corollary to the decision to create a legislature, and as a necessary step towards greater concordance and parity within the UK constitution.

¹⁶⁰ See <http://www.bbc.co.uk/news/uk-wales-35552935> (last visited 1 February 2017).

¹⁶¹ Henry IV, Part 1, (1:3).

¹⁶² Before legislative devolution in Wales, it could be said that “Westminster is no longer a Parliament for the domestic and non-domestic affairs of the whole of the United Kingdom. It has been transformed into a parliament for England, a federal parliament for Scotland and Northern Ireland, and a parliament for primary legislation for Wales”: see Vernon Bogdanor, *The New British Constitution* (Oxford: Hart, 2009), at p. 114. Since 2011, Wales has achieved a legislature, which makes Westminster an even greater “federal parliament”.

¹⁶³ 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, at p. 23.

Parliamentary democracy must surely be the appropriate vehicle for further reform, with parliamentary endorsement in both Cardiff and London, reflecting the shared sovereignty of the legislatures.

Wales has lagged behind the pace in its constitutional journey towards home rule, but it has come far since the insipid settlement of 1998 which led one commentator to conclude that “the model of devolution proposed for Wales is indeed more suitable for a region than a nation”.¹⁶⁴ It is by no means posing the same hard constitutional questions that Scotland is posing for the future of the United Kingdom, at least for the moment. But that assimilationist trajectory which seemed destined to politically and legally subsume Wales into England has been gradually reversed. Of course, there are those voices who say, thus far shalt thou go and no further, and this is no truer than regarding the subject of this article. But devolution opened the possibility of a new future for the Welsh nation, and the future direction is now largely in its own hands. As Bogdanor commented at the outset of devolution:

“Constitutionally, devolution is a mere delegation of power from a superior political body to an inferior one. Politically, however, devolution places a powerful weapon in the hands of the Scots and the Welsh; and, just as one cannot be sure that a weapon will always be used only for the specified purposes for which it may have been intended, so also one cannot predict the use which the Scots and the Welsh will make of devolution.”¹⁶⁵

Perhaps it is a sign of how far devolution has travelled since these comments were published that the Wales Act 2017 places two important principles on a statutory footing, principles which negate any idea that the National Assembly is merely a subsidiary of the Westminster parliament. The first relates to the permanence of the Assembly and the Welsh Government, and ensures that the Assembly and the Welsh Government will not be abolished without the people of Wales voting for it in a referendum.¹⁶⁶ The second is that the Westminster parliament will not normally legislate with regard to devolved matters without the consent of the National Assembly for Wales.¹⁶⁷ These principles effectively render the doctrine of parliamentary sovereignty redundant on devolved powers, and create a new constitutional model based on popular sovereignty.¹⁶⁸

Even so, the development of devolution in Wales has often appeared whimsical, ad-hoc and unprincipled. Often, it has been the principle of minimum concession that has been the guiding star. This article has set out in detail the case for Wales to have its own legal system, a development that is essential for the normalisation and maturing of legislative devolution and justice in Wales. It argues that two principles should guide the process as it develops in the future. The principles derive from an overarching goal of greater constitutional consistency between the devolved nations, or, as Joseph Chamberlain might have put it more than a century ago, “home rule all round”.

They are, firstly, a principle of constitutional parity, which means that there should be a presumption that Wales will have the same or similar legal structures and institutions as Scotland and Northern Ireland unless there is a compelling case for it to be otherwise. The

¹⁶⁴ Vernon Bogdanor, *Devolution in the United Kingdom* (Oxford: Oxford University Press, 1999) at p. 255.

¹⁶⁵ Vernon Bogdanor, *Devolution in the United Kingdom*, fn. 164, at p. 287.

¹⁶⁶ Wales Act 2017, s. 1.

¹⁶⁷ Wales Act 2017, s. 2.

¹⁶⁸ Also reflecting the belief that, “Westminster is in practice no longer sovereign over the domestic affairs of Scotland and Wales”: see Vernon Bogdanor, *The New British Constitution* (Oxford: Hart, 2009), p. 113. See also Anthony Bradley, “The Sovereignty of Parliament: Form or Substance?” in Jeffrey Jowell and Dawn Oliver (eds.) *The Changing Constitution* (Oxford: Oxford University Press, 2007), at pp. 25-58.

burden of proof should be on those objecting to parity. The second principle is that of subsidiarity, which means that legislative powers over all subjects should be devolved to the National Assembly for Wales, unless there is a compelling case for reserving specific legislative powers to the parliament of the United Kingdom.

This article began by recalling the dramatic portrayal of Thomas More's trial and that rather disparaging reference to Wales attributed to him. Thomas More, in his book *Utopia*, published two decades before his trial and execution, prophetically said that "when public judicatories are swayed by avarice or partiality, justice, the grand sinew of society, is lost".¹⁶⁹ This, of course, would find manifestation in More's own subsequent tribulations with biased judicatories. It is, however, hoped that this article, advocating with some conviction a particular course of action as it does, will persuade the impartial and fair minded reader of the rationality and justness of the case for a separate Welsh jurisdiction.

R. Gwynedd Parry

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¹⁶⁹ *Utopia*, Book 2 (1516).

¹⁷⁰ I must thank the editor, the editorial board and the anonymous referees for their very helpful advice and comments on this article. Responsibility for any remaining errors is mine.