Justifying a (Welsh) Legal Jurisdiction

When should a community have its own legal system? Interest in the question is spurred by a topical debate. Early in 2017, the Wales Act received Royal assent following a stormy and protracted legislative passage.[1] The Act substantially alters the Welsh devolution settlement. Most notably, it shifts Welsh devolution from a conferred powers to a reserved powers model. The Welsh Assembly is no longer told what it *may do*, but what it *may not do*. This permits comparisons between the Assembly and devolved legislatures in Edinburgh and Stormont; there is consistency in the *form* of devolution, if not yet in *scope*.[2] Yet even before the new settlement came fully into force, there have been complaints that important questions are unresolved. Prominent amongst these questions is whether there should be a Welsh legal jurisdiction, separate from England. In September 2017 the Welsh government appointed the outgoing Lord Chief Justice, Lord Thomas of Cwmgiedd, [3] to lead a Commission whose terms of reference include the possibility of establishing a Welsh legal jurisdiction.[4] Whether or not Wales should become a separate legal system intimately connects with principled questions about what makes a legal system legitimate. In the devolution context, principle is too frequently dashed on the rocks of political pragmatism.[5] My argument seeks to avoid that fate.

I shall argue that creating separate bodies of law, separate courts, and a separate judiciary can be justified in light of a proper understanding of the judicial function. Judging sometimes involves exercising discretion in line with community values. It follows that a community with distinctive values ought to have a distinct court system. Although this principled argument applies generally, I shall focus for practical purposes on the debate about Wales. In Section 1, I define legal jurisdiction and outline the parameters of the current debate. In Section 2, I outline the background to the Welsh jurisdiction debate, arguing that formerly

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[1] For a detailed account, see: Richard Rawlings, 'The Strange Reconstitution of Wales' [2018] Public Law 62-83

[2] Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 303

[3] Welsh Government, 'First Minister establishes a Commission on Justice in Wales' (*Welsh Government*, 18 September 2017) <http://gov.wales/newsroom/firstminister/2017/170918-first-minister-establishes-commission-on-justice-in-wales/?lang=en> accessed 26 July 2018

[4] The Commission on Justice in Wales, 'Terms of Reference' (*Welsh Government*, 22 February 2018) <https://beta.gov.wales/commission-justice-wales/terms-reference> accessed 26 July 2018

[5] See, for example: Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) (Silk Commission) <http://webarchive.nationalarchives.gov.uk/20140605075122/http://commissionondevolutioninwales.independent.gov.uk/> accessed 31 July 2018; House of Lords Constitution Committee, *The Union and Devolution* (HL Paper 149 2015-160); Rawlings, 'The Strange Reconstitution of Wales' (n x)

strong arguments against reform are no longer persuasive. In Section 3, I suggest that arguments premised on political devolution are limited in terms of persuasiveness and ramifications. In Section 4, I propose a novel justification for extensive jurisdictional reform. A proper understanding of the judicial function entails that judicial decision-making must be responsive to local community values. If Welsh community values diverges sufficiently from English community values, radical jurisdictional reform is justified.

1 What is a Legal Jurisdiction?

1.1 A Narrow Concept

For Asha Kaushal, '[j]urisdiction is a multivalent concept.'[6] Jurisdiction undoubtedly means 'different things in different circumstances.'[7] Our circumstances are the debate over Welsh legal jurisdiction, in which context meaning of jurisdiction has been considered. For Tim Jones and Jane Williams, a jurisdiction has 'three commonly accepted characteristics [...] a defined territory; a distinct body of law; and a structure of courts and legal institutions.'[8] This conception of jurisdiction has been criticised as over-broad by Richard Percival. For him, this 'orthodox analysis of "jurisdiction-hood" is flawed in ways that have unhelpfully limited the policy debate'.[9] A focus on territory, for example, struggles to account for the extra-territorial yet intra-jurisdictional application of some law, such as the English & Welsh law against murder.[10] Percival also doubts that unique legal institutions are a necessary condition of jurisdictionhood. Some courts, like the Judicial Committee of the Privy Council, decide cases for several jurisdictions.[11] Their shared court does not entail that those jurisdictions are in fact united.

For Percival, jurisdiction has a narrower meaning. A jurisdiction comprises 'three sets of legal rules: rules creating a court; rules providing a court with a judiciary; and finally rules setting out the reach of the court.'[12] 'Reach rules' delineate a body of law that a court has authority to apply. In my view, reach rules are the essence of jurisdiction. Every jurisdiction is

[6] Asha Kaushal, 'The Politics of Jurisdiction' (2015) 78 Modern Law Review 759-92, 791
[7] Ibid 760
[8] Jones and Williams, 'Wales as a Jurisdiction' (n x) 78
[9] Richard Percival, 'How to Do Things with Jurisdictions: Wales and the Jurisdiction Question' [2017] Public Law 249-69, 249
[10] Ibid 252-53
[11] Ibid 251
[12] Ibid 250-51

a defined body of law. That body of law is defined by reach rules. When we are using 'jurisdiction' synonymously with 'legal system', reach rules may appear to have something in common with H.L.A. Hart's rules of recognition.[13] These are standards specifying what is and is not a valid rule of a legal system. But jurisdictional reach rules are a broader category than rules of recognition, since they do not necessarily specify *all* valid legal rules of a system. The jurisdiction of the Criminal Division of the UK Court of Appeal, for example, is constrained to cases concerning a subset of valid laws of the system.[14] It does not have jurisdiction to determine family law disputes, even though family law is equally part of the system.

Critically, Percival defines jurisdiction such that its distinct reach rules need not correspond to a distinct court system or judiciary.[15] One court can adjudicate for multiple bodies of law without imperilling the existence of those bodies of law as distinctive jurisdictions. This conceptual point deserves attention because it indicates the minimum existence conditions for a jurisdiction.[16] Minimally, transforming the unified England & Wales jurisdiction into two jurisdictions requires the replacement of one set of reach rules with two. Wales could be established as a jurisdiction without establishing separate Welsh courts or judiciary.

1.2 A Broad Debate

While the conceptual definition clarifies the separability of several categories of institutional reform, we should not limit discussion by reference to the concept. Debates over Welsh jurisdiction are not just discussions of whether Wales should be a jurisdiction, whatever the concept happens to mean. To be sure, once Welsh reach rules are established a Welsh legal jurisdiction will exist. But this technical exercise is the least radical of various proposed reforms. The debate extends to matters beyond conceptual necessity, including separate Welsh courts, judiciary, legal professions, and political control over the wider justice system.

Since the Welsh jurisdiction debate encompasses a wide range of possible reforms, it is regrettable that options for reform have been widely characterised in binary terms. Commentators frequently present a choice between two models: a 'distinct' or a 'separate' jurisdiction.[17] Establishing a distinct Welsh jurisdiction is the more conservative option. At

[13] H. L. A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 100-10
[14] Criminal Appeal Act 1966, s 1
[15] Percival, 'How to Do Things with Jurisdictions: Wales and the Jurisdiction Question' (n x) 262
[16] Ibid
[17] For example: Wales Governance Centre, *Delivering a Reserved Powers Model of Devolution for Wales* (n x) Wales Governance Centre, *Challenge and Opportunity: The Draft Wales Bill 2015* (February 2016) < http://sites.cardiff.ac.uk/wgc/files/2016/01/Challenge-and-Opportunity-The-Draft-Wales-Bill-2015.pdf>

minimum, it entails establishing only a distinctively Welsh set of reach rules.[18] In other words, it instantiates the conceptual definition of jurisdiction without any further institutional reform. For others, however, even this conservative option entails more extensive reform. The Welsh Government's conception of 'distinct' jurisdiction envisages separate courts, but retains a shared judiciary.[19] The Wales Governance Centre articulates three different models of 'distinct' jurisdiction, with those three models capable of further sub-division.[20]

The alternative model, 'separate' jurisdiction, encompasses various more radical options. Under one expansive formulation, a 'separate' jurisdiction would entail:

> '[A Welsh] Court of Appeal, High Court, Crown, County and Family Courts, and Magistrates Courts. These courts would have exclusive jurisdiction over the law in Wales, with the UK Supreme Court as the final court of appeal. The National Assembly would have the power to reform, restructure or abolish courts. Judges and magistrates would be appointed by or on the advice of the Welsh Ministers, and would sit only in Wales. A separate court service for Wales would be funded from the Welsh government's budget and legal aid would also be devolved. Wales would have a separate prosecution authority. Wider responsibilities in relation to the administration of justice, as regards prisons or offender management for example, might also be included. There would be a separate bar and a separate solicitors' profession and no automatic right to practise in Wales if admitted in England and vice versa.'[21]

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accessed 10 July 2018; Welsh Government, *Government and Law in Wales Draft Bill: Explanatory Summary* (March 2016) < http://www.assembly.wales/ministerial%20statements%20documents/government-laws-wales-draft-bill/explanatory%20summary%20for%20government%20laws%20in%20wales%20bill%20english%20website%20version.pdf> accessed 10 July 2018; Richard Percival, 'How to Do Things with Jurisdictions: Wales and the Jurisdiction Question' (n x); Rawlings, 'The Strange Reconstitution of Wales' (n x),

[18] Percival, 'How to Do Things with Jurisdictions: Wales and the Jurisdiction Question' (n x)

[19] Government and Laws in Wales Bill (March 2016) < https://gov.wales/docs/cabinetstatements/2016/160307governmentlawsinwalesen1.pdf> accessed 10th July 2018; Welsh Government, *Government and Law in Wales Draft Bill: Explanatory Summary* (n x)

[20] Wales Governance Centre, *Challenge and Opportunity: The Draft Wales Bill 2015* (n x) 37-8

[21] ibid 33

The distinct/separate binary is ambiguous and oversimplified. It fails clearly to articulate the sheer range of possible reform. The discussion incorporates several distinguishable institutional reforms.[22] These include the establishment of:

1. Separate Bodies of Law (i.e. Reach Rules)
2. Separate Courts
3. Separate Judiciaries
4. Separate Legal Professions
5. Devolved Political Powers over Court Infrastructure and Funding
6. Devolved Political Powers over the Wider Justice System

We must acknowledge the wide spectrum of possible reforms, encompassing various degrees of separation in relation to various different institutions. I shall focus on the reforms encompassed by points 1-3: the separation of the Law of Wales from the Law of England, the separation of the Courts of Wales from the Courts of England, and the separation of the Judiciary of Wales from the Judiciary of England.

2 Why Now?

Since the sixteenth century, England and Wales have shared a unified legal jurisdiction.[23] Insofar as the law applying in England and the law applying in Wales is identical or near-identical, that arrangement is perfectly sensible. To have separate legal systems applying essentially the same law would be wasteful and risks confusing divergence. These arguments in support of the unified jurisdiction are negative: they endorse the unified jurisdiction based on perceived harms of separation. Negative arguments do not identify anything innately valuable in the unified system. Nor are positive arguments for the unified jurisdiction readily

[22] Even these categories contain elisions. We might separate some but not all courts. Administration of justice includes responsibility for police, prisons, prosecution, probation, legal aid, and more. Power could be devolved over virtually any combination of these subjects.
[23] Laws in Wales Act 1535; Laws in Wales Act 1542

available.[24] Scotland and Northern Ireland exist as separate legal jurisdictions from England & Wales with little discontent about opportunities lost.[25]

The proposal to establish a Welsh legal jurisdiction arises principally because the law applying in England and the law applying in Wales is no longer near-identical. The law of England & Wales incorporates law that applies in both England and Wales, law that applies only in Wales, and law that applies only in England. Law limited in territorial scope pre-exists devolution, but the volume of such law has swelled since the first, tentative devolution under the Government of Wales Act 1998. Devolution to Wales has rapidly expanded from its humble, 'executive' beginnings.[26] Dissatisfaction with that approach led to the spartan conferred legislative powers model of the Government Wales Act 2006. Increasingly broad powers have been conferred since.[27] Most recently, the Wales Act 2017 shifts the model of devolution to a reserved powers model and grants additional legislative powers to the Welsh Assembly. For some, the latest advances are tarnished by diminution of the Assembly's power in other areas.[28] But in any event, a Welsh institution now exercises broad legislative powers. At the same time, the UK Parliament increasingly legislates for England alone.[29] Even if the jurisdiction debate is not new - for Jones and Williams, a Welsh jurisdiction was 'emerging from the unified legal system of England and Wales'[30] as long ago as 2004 - the nature and urgency of the debate has shifted.

As the law applying in Wales and the law applying in England diverge, the negative reasons for sustaining the unified jurisdiction diminish in persuasiveness. First, the unified jurisdiction prevents confusion only insofar as the law applying in England and in Wales is near-identical. But the ship of legal uniformity has sailed with the fleet of devolved political powers. Indeed, if potential divergence and confusion is a good argument against anything, it is a good argument against devolving political power. How many Welsh nationals have been

[24] Wales Governance Centre, *Delivering a Reserved Powers Model of Devolution for Wales* (September 2015) <http://sites.cardiff.ac.uk/wgc/files/2015/09/Devolution-Report-ENG-V4.pdf> accessed 10th July 2018>

[25] Wales is not identical to Scotland or Northern Ireland (Bingham Centre for the Rule of Law, *A Constitutional Crossroads: Ways Forward for the United Kingdom* (The BIICL 2015) 1). If proximity and population flow matter, they are aspects of the negative arguments criticised below.

[26] On frustrations with this terminology, see: Timothy H Jones and Jane M Williams, 'Wales as a Jurisdiction' [2004] Public Law 78-101

[27] The greatest gains followed a referendum in 2011: Richard Wyn Jones and Roger Scully, *Wales Says Yes: Devolution and the 2011 Welsh Referendum* (University of Wales Press 2012)

[28] Rawlings, 'The Strange Reconstitution of Wales' (n x) 74

[29] The advent of EVEL reflects concerns about the legitimacy of all MPs legislating for England alone. See: 'English votes for English laws: House of Commons bill procedure' (*Parliament.uk*, 22 October 2015) <https://www.parliament.uk/about/how/laws/bills/public/english-votes-for-english-laws/> accessed 27 July 2018.

[30] Jones and Williams, 'Wales as a Jurisdiction' (n x) 100

caught without the cash to pay for their prescription in Bristol? How many Londoners (prior to policy alignment in 2015) were visibly shaken at the prospect of paying 5p for a plastic carrier bag at Tesco in Newport? Presumably these and other inconveniences are outweighed by countervailing considerations. A Welsh legal jurisdiction may increase scope for divergence, but it would scarcely be more extensive than that already permitted.

Second, as English law and Welsh law become more different, establishing separate bodies of law and even separate court systems is less frivolous or wasteful. Judicial and professional specialisation will be required to cope with diverging statute books, whether or not the jurisdictions are formally separated. As the reasons to preserve the status quo exert less influence, a Welsh legal jurisdiction becomes an increasingly realistic possibility. Yet significant constitutional reform demands justification, and such justification must do more than point to a lack of good reasons on the other side of the debate. There may no longer be compelling answers to the question 'why not?' But the question 'why?' remains to be answered.

3 Is Jurisdictional Reform Required by Devolution of Political Power?

In debates over devolution of political power, pragmatic justifications based on efficiency and practicality dominate. Unsurprisingly, arguments in favour of a Welsh legal jurisdiction have principally focused on perceived practical advantages. For some, the principal justification is that jurisdictional reform is necessitated by the devolution of political power to Wales. The argument comes in two varieties. First, some have argued that current devolution to Wales *could* create sufficient practical difficulties to justify the establishment of a separate legal jurisdiction.[31] However, such practical difficulties have not materialised widely, if at all.

The second version asserts that the lack of a Welsh jurisdiction precludes otherwise justified devolution of political power. Many political powers are reserved to Westminster institutions specifically in order to preserve the unified jurisdiction. In 2016, the Welsh Government said the following about the Bill that would become the Wales Act 2017:

[31] Wales Governance Centre, *Delivering a Reserved Powers Model of Devolution for Wales* (n x) 26-7

> 'the UK Government sought to justify the imposition of new, significant and impractical constraints on the Assembly's legislative competence by reference to the need to protect this [unified] jurisdiction' [32]

The result, the Welsh Government notes elsewhere, is 'a confusing and very limited system of devolved government.'[33] It concludes that 'the essential requirement not to constrain the Welsh legislature in this way, makes the creation of a distinct Welsh jurisdiction essential.'[34] Although the constraints are less extensive in the Act than the Bill, there are nevertheless substantial restrictions on what the Assembly may do in relation to the justice system. Schedule 1 to the Wales Act 2017, inserting a new Schedule 7A into the Government of Wales Act 2006, lists the 'Single legal jurisdiction of England and Wales' as a 'General Reservation'.[35] Preservation of the unified jurisdiction entails specific reservation of 'courts',[36] 'judges',[37] 'civil or criminal proceedings',[38] 'Tribunals'[39] (except wholly Welsh tribunals), 'private law' including the law of 'contract, agency, bailment, tort, unjust enrichment and restitution, property, trusts and succession',[40] core components of 'criminal law',[41] and 'Prisons and Offender Management'.[42] Asserting preservation of the unified jurisdiction as an absolute constraint on devolution arguably hinders a principled allocation of power.

This argument is limited in two ways. The first limitation results from the contentious political debate over devolving these powers. The appropriate extent of devolution is a matter on which people may adopt different, yet perfectly reasonable views. The argument – that a Welsh legal jurisdiction should be established, because its absence limits devolution – will persuade only those who believe further devolution is justified. An opponent to devolving control of, say, private law, may highlight potential complexity and economic inefficiency, considering frequent cross-border trade. This opponent will not accept the Welsh government's argument, since they deny its premise. If it is not an 'essential requirement' to devolve further political power, this justification for a new legal jurisdiction collapses. We could go further:

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[32] Welsh Government, *Government and Law in Wales Draft Bill: Explanatory Summary* (n x) 19
[33] Welsh Government, 'Coherent, stable and long-lasting devolution for Wales' (2015) < https://gov.wales/docs/caecd/publications/160526-wales-bill-explanatory-en.odp> accessed 10th July 2018
[34] Welsh Government, *Government and Law in Wales Draft Bill: Explanatory Summary* (n x) 19
[35] Wales Act 2017, Schedule 1 Para 8.
[36] ibid Para 8(1)(a)
[37] ibid Para 8(1)(b)
[38] ibid Para 8(1)(c)
[39] ibid Para 9(1)
[40] ibid Schedule 2 Para 3(2)
[41] ibid Para 4
[42] ibid Schedule 1 Para 175

arguably, major constitutional change should be avoided if its sole foundations are deeply controversial.

The second limitation pertains to the argument's ramifications. Some treat this argument a putative justification for far-reaching reform.[43] Assuming *arguendo* that its premise is correct, the argument would justify minimal reform, specifically establishing separate bodies of law for England and Wales. As the law in England and in Wales diverges, complexity increases. When law-making power is devolved, the possibility arises of two different legal standards applying to the same thing, yet co-existing within the unified body of law of England and Wales. It would be for citizens, lawyers, and courts to disentangle each law's application. Separating the two bodies of law reduces this complexity by clearly delineating the law applicable to each territory.

Might it be argued, by extension, that future divergence necessitates separate courts and judiciaries, just as it necessitates separate bodies of law? On this view, separating bodies of law does not eradicate complexity; it merely changes the *type* of complexity. Courts no longer disentangle the law, but would instead struggle with large volumes of radically different substantive law. Divergence thus requires judicial specialisation: it may be prudent for judges to deal with either English or Welsh law, but not both. But specialisation does not require separate courts. Specialisation designed to cope with legal complexity exists within the current system. The High Court, for example, divides into the Queen's Bench, Chancery, and Family divisions, with further specialist subdivisions. Judges are assigned in order to specialise. Judges and courts also specialise by territory. Circuit judges are allocated to one of seven regions, one of which is 'Wales'. Steps have been taken to regionalise parts of the High Court's jurisdiction.[44] There is no reason why further regional specialisation should not be possible if substantive legal divergence demands it.[45] Offsetting complexity is thus a reason for establishing separate bodies of law, but not separate courts or judiciaries. Without supplementary justifications, there is no reason to pursue more radical reform.

What kind of argument might justify the more radical step of separating Welsh and English courts and judiciaries? We must distinguish the probable effects of separating bodies of law, on the one hand, and separating courts and judiciaries, on the other. Separating bodies of law is likely to yield benefits of clarity and certainty, as explained above. As the law of

[43] Welsh Government, *Government and Law in Wales Draft Bill: Explanatory Summary* (n x)
[44] Sarah Nason and Maurice Sunkin, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law' (2013) 76 Modern Law Review 223-53
[45] Jones and Williams, 'Wales as a Jurisdiction' (n x)

England and of Wales become more different, these benefits increase. And while separating bodies of law creates the technical possibility of divergent substantive judicial decision-making, that consequence is improbable. A separate Welsh body of law could be interpreted differently from its English counterpart. In principle, a form of words in Welsh legislation could mean one thing, while the same or similar words in English legislation could be acquire an altogether different interpretation. But if the judges are members of the same courts, with a shared hierarchy and culture, they are unlikely to deviate from uniformity in interpretation.[46] Writing of his experience as a Scottish Law Lord, Lord Hope notes 'a desire among the other [Law Lords] that the law on each side of the border should be the same.'[47] If the realistic possibility of interpretative divergence is an aspiration, then we have a good reason to separate the courts and judiciaries. Doing so would establish separate hierarchies and cultures, and consequently fewer pressures to conformity.

Nothing the above argument makes the case for facilitating interpretative divergence. It will not suffice to assert that the courts and judiciaries should be separated, just so that Welsh political institutions can be devolved power over them. Proponents of more radical reform need additional justifications that identify the value of differently functioning court system or differently constituted judiciary. Such justification has not yet been compellingly advanced,[48] but I shall now outline one possible line of argument.

4 Does the Nature of the Judicial Function Justify Jurisdictional Reform?

In 2015, a group of Welsh lawyers published a pamphlet: 'Justice for Wales: In support of a Welsh Jurisdiction'.[49] The group assert:

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[46] Similarly, on why feminist judges do not always make feminist decisions: Rosemary Hunter, 'More Than Just a Different Face? Judicial Diversity and Decision-Making' (2015) 68 Current Legal Problems 119-41, 126-29

[47] Lord Hope, 'Taking the Case to London - Is It All Over?' [1998] Juridical Review 135-49, 146

[48] Another argument is that Welsh control over the judiciary would facilitate promotion of the Welsh language in the higher courts. There is already good availability of Welsh speaking judges in the lower courts, but not in the High Court and above (Gwynedd Parry, 'Is Breaking up Hard to Do? The Case for a Separate Welsh Jurisdiction' [2017] Irish Jurist 61-93). The argument is unpersuasive for two reasons. First, it is not clear why Welsh speaking judges could not be appointed to the higher courts under the current system, as they are in the lower courts. Second, one might prefer legal expertise not to be subordinated to language in appointments to the higher courts. Especially since the individual citizen typically participates less in these hearings.

[49] Justice for Wales, *In support of a Welsh Jurisdiction* (2015) <http://sites.cardiff.ac.uk/wgc/files/2015/11/Publisher-version-of-Pamphletfinal.pdf> accessed 31 July 2018

> ‘It is important that judges understand the cultural milieu from which cases that they hear, and the laws they interpret, arise. The New Zealand judiciary, for example, is of high repute, but few would think it acceptable that New Zealand judges should routinely decide English cases and interpret English laws.’[50]

The group are concerned that the unified jurisdiction creates the same potential problems: ‘At present, a court sitting in Sheffield or Luton is as competent to determine the meaning of Welsh legislation as one sitting in Swansea or Llangefni.’[51] For the pamphleteers, there is harm in non-Welsh judges adjudicating the law applicable in Wales, and corollary value in establishing separate Welsh courts to adjudicate that law. I shall ask whether their assertion is correct. The answer to this question matters: if the pamphleteers are right, there is a principled reason to separate English and Welsh courts and judiciaries.

4.1 Judicial Discretion and Community Values

The question of whether Wales – or anywhere – ought to have its own courts and judiciary turns on the nature of judging. The precise judicial function varies between jurisdictions. Some judges in some jurisdictions may do things that other judges in other jurisdictions may not. Yet there are universal features of the judicial function. Judges everywhere make legally authoritative decisions in cases that come before them. In doing so they must identify, interpret, and apply the law of their jurisdiction(s).

How might the judicial function compel the establishment of a separate Welsh judicial and court system? On one view, it will not. If we sketch judges as cartoon formalists, then judges just apply established legal rules. On this view, judges take the law of a jurisdiction, apply it to established facts, and spit out decisions like bewigged calculators. Deciding English cases in New Zealand, or Welsh matters in Sheffield is unproblematic. If a legally competent judge understands the relevant rules and procedures, they should be able to competently decide any case. In other words, judging is wholly removed from the cultural milieu in which the dispute and the applicable law arose. Fortunately for proponents of separate Welsh courts, this understanding of judging is unrealistic, existing only (if at all) as an ideal.[52] The formalist judge requires a perfectly clear and comprehensive legal code, something well beyond the capability

[50] ibid 9
[51] ibid
[52] Jeremy Waldron, ‘Normative (or Ethical) Positivism’ in Jules Coleman (ed), *Hart's Postscript* (Oxford University Press 2001)

of any human legislator.[53] As Lord Reid famously observed: 'we must accept the fact that for better or for worse judges do make law, and tackle the question how do they approach their task and how should they approach it.'[54]

A realistic view of the judicial function recognises that judges do more than just apply rules to facts. Prominent theoretical accounts differ on the precise nature of the judicial function, but most recognise that judges have recourse to *something more* than the legal rules in their decision-making. Even the most rule-centric accounts of judging admit that rules are frequently not determinative. For Hart, judges decide according to valid rules of the legal system in most cases, but in 'every legal system a large and important field is left open for the exercise of discretion by courts and other officials'.[55] Where uncertainty arises over the meaning or application of legal rules, judges must exercise discretion to decide the case before them. This discretion is not unlimited, but subject to 'many constraints narrowing [the judge's] choice'.[56] A judge, faced with no clear rule determining the outcome of a case, ought not to decide by coin-toss or based on his or her take on the relative physical attractiveness of the parties, or any other irrelevant consideration. For Hart's positivist successors, judges should exercise their discretion in accordance with techniques of legal reasoning.[57] They proceed by analogy and from abstract principle, having recourse to underlying 'considerations of political morality' in 'cases in which source-based laws are indeterminate or where they conflict.'[58] Even on this positivist view of the judicial function, judicial decisions are sometimes guided by considerations of moral or political principle.

For these purposes it scarcely matters which theoretical account of the judicial function is adopted.[59] What matters is that theorists agree on the narrow point that judges decide cases based on *something more* than clear-cut legal rules. And most take (or should take) this something more to include what I shall call *community values*. What are community values? I mean the moral and political values that are held, by and large, within a specific community. These community values are roughly what Hart labels 'conventional'[60] or 'positive'[61] morality:

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[53] Hart, *The Concept of Law* (n x) 126
[54] Lord Reid, 'The Judge as Law Maker' (1972) 12 Journal of the Society of Public Teachers of Law 22-29, 22
[55] Hart, *The Concept of Law* (n x) 136
[56] Ibid 273 (original emphasis omitted)
[57] Ibid 274-75; John Gardner, *Law as a Leap of Faith* (Oxford University Press 2012) 37-42
[58] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1995) 223
[59] Hartian positivism is as close to formalism as it gets. Others would only argue that values and principles play an even greater role. See, for example: Ronald Dworkin, *Law's Empire* (Hart Publishing 1998)
[60] Hart, *The Concept of Law* (n x) 169
[61] H. L. A. Hart, *Law, Liberty, and Morality* (Stanford University Press 1963) 20

'the morality actually accepted and shared by a given social group'.[62] Such conventional morality is distinguished from critical morality: 'the general moral principles used in the criticism of actual social institutions including positive morality.'[63] By way of illustration, in *Community X* a canon of conventional morality holds that better-off citizens should financially provide for worse-off citizens. Those who criticise this viewpoint on libertarian grounds employ values of critical morality. The former, conventional standards are those prevailing in the community right now. The latter are claimed as general standards against which conventional standards can be assessed. There are, naturally, connections between the two. For Neil MacCormick, 'If the critical moralist does his work well and persuades his fellows of the greater rationality of his view, the effect over time must be a change in [conventional] morality.'[64]

One might feel squeamish about judges relying on standards held conventionally, rather than objectively true moral standards. Faced with an apparent choice between objectively true standards and those which just happen to be held in a given society at a given time, it may indeed seem perverse to prefer the latter. Conventional standards, the critic would argue, are likely to be mistaken whereas objectively true standards cannot be mistaken.

My first response is a reminder that any apparent choice between conventional standards and objectively true standards is illusory. If a universally true, ascertainable, and readily applicable set of values were available, then it would be preferable for judges to exercise their discretion on that basis.[65] But a critical morality meeting these criteria is not available, even to senior judges. For Jeremy Waldron, 'there are many of us, and we disagree about justice.'[66] In circumstances of reasonable disagreement, we cannot be sure which standards are objectively true and which are not. In these circumstances, the fairest and most reliable heuristic is ordinarily a society's conventional standards. A broad community consensus is as good as it gets. It ought to be noted that, for Waldron, such disagreement entails 'normative positivism'.[67] Normative positivism recommends that recourse to moral judgement be expunged from judicial decision-making. It therefore seeks to minimalise judicial discretion. For the purposes of this paper we can remain agnostic about the merits of normative

[62] Ibid
[63] Ibid
[64] Neil MacCormick, *H.L.A. Hart* (Edward Arnold 1981) 54
[65] Unless, of course, even objective, universal moral standards are not appropriate for humans as fundamentally social animals. See: Michael J. Sandel, *Liberalism and the Limits of Justice* (2nd edn, Cambridge University Press 1998)
[66] Jeremy Waldron, *Law and Disagreement* (New edn, Oxford University Press 1999) 1. But disagreement 'does not mean there are no right answers.' (164) It merely reflects that we are not sure what the right answers are.
[67] Ibid 167

positivism.[68] But three considerations reduce the force of any normative positivist objection to my argument. One: irrespective of whether normative positivism is correct, judicial decision-making inevitably entails discretion and that discretion will frequently be exercised according to moral or political principles. Since real cases inevitably require judicial discretion, it is important that this discretion is exercised as well as possible. Two: potentially problematic features of discretionary judicial decision-making are reduced when judicial decisions are subordinate to legislation. Judges are constrained, by both the parameters of existing legislation and the possibility of being overridden by future legislation. Three: even if lingering concerns remain, it is unlikely an attractive alternative to judicial discretion exists. Since legal disputes inevitably arise and at least some of those disputes are incapable of resolution on the basis of positive law alone, *someone* will have to exercise discretion to resolve some legal disputes. It is not at all obvious that there exists a better option than the courts.

A second response to the objection that community values should not be relevant in judicial decision-making is to point out that values held conventionally frequently result from communities' 'peculiar but real needs'.[69] In other words, community values differ from place to place because of differences between those places. Perhaps *Community X*, economically and nutritionally dependent on fishing, abhors the use of plastic drinking straws *because* of their catastrophic impact on the fish-stock in nearby waters. Perhaps *Community Y* strongly favours state-provided healthcare *because* its populace is relatively poor and unhealthy. In these circumstances, objective moral principles cannot reflect the needs of the community in question. Even if objective values are available, they only gain real relevance through a process of specification from abstract norms in conjunction with facts about the place and its people. The result, either way, is a distinctive set of community values. Purportedly objective abstract norms are unlikely to be of great utility to the judge, except insofar as the judge carries out the task of specification. If values must be so manipulated, they end up looking a lot like conventional morality.

A third response is to argue that a community has a democratic interest in being governed according to its own values.[70] Democratic political institutions like legislatures obviously reflect this interest. Less obviously, but nevertheless importantly, judicial institutions are capable of reflecting that interest. There may be limits to the scope of this

[68] Waldron, 'Normative (or Ethical) Positivism' (n x)
[69] Hart, *The Concept of Law* (n x) 171. Hart recognises differences arise equally from 'superstition or ignorance'.
[70] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007)

democratic interest. Perhaps a community holds the collective view that marital rape is fine, or interracial marriage wrong. In such cases, judicial reinforcement of community values through their decisions would be deeply concerning. A question thus arises: at what point might we want judges to disregard conventional values in favour of critical values? The question can sidestepped, for now, since it does not detract from the idea that it is *usually* appropriate for judges to exercise discretion in a way that upholds and reinforces relevant community values.

If I am right that judges do and should decide some cases by reference to community values, then judicial legitimacy is determined, in part, by judges' ability to adequately identify and apply the community values of the relevant legal system. For Joseph Raz, the legitimacy of law's authority derives from its capacity to serve those it purports to govern.[71] All of us are subject to reasons that determine how we should act. In deciding how to act, we weigh these reasons to choose our best available option. Law purports to pre-empt this weighing exercise. Law tells its subjects to ignore the usual reasons and just to follow the legal rule instead. The law establishing speed limits on roads, for example, takes the reasons that ordinarily apply to individuals (e.g. the importance of bodily integrity, the social harm of providing care to those with serious injury, the road's proximity to pavements or schools, the science of human reaction times, and so on) and converts them into an authoritative, pre-emptive rule: don't drive above a particular speed on a particular stretch of road. For Raz, an authority is legitimate if its subjects will more likely comply with the reasons that ordinarily apply to them if they follow the authority's directives, instead of deciding how to act for themselves.[72] In other words, authorities are legitimate if they do a better job of guiding their subjects than the subjects themselves could do. Courts, as one institution within a legal system, make claims to authority. Their judgments purport to pre-empt the reasons that ordinarily would apply to their subjects. That being so, courts are legitimate if their decisions reliably guide subjects to comply with the reasons that would ordinarily apply to them.

How does Raz's theory of authority relate to the jurisdiction debate? Relevant considerations in hard cases include reasons deriving from community values. For example, the unusually high value *Community X* places on the quality of its fishing waters should influence the interpretation of an unclear piece of Environmental legislation passed by that community's legislature. Courts are legitimate (they will ordinarily do a better job of guiding their subjects than the subjects could guide themselves) only if they understand the reasons

[71] Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) Ch. 3
[72] Ibid 53

deriving from community values that apply to their subjects. It is unlikely that a New Zealand court, in a hard English case, would have the requisite understanding to exercise its discretion in a way that guides subjects of English law better than those subjects could guide themselves. If legitimacy is constituted by the ability to reliably convert relevant reasons into directives, then knowledge and understanding of the relevant reasons is preconditional.

This theoretical idea finds support in judicial practice. The European Court of Human Rights (ECtHR) inevitably judges the human rights-compatibility of domestic law with the European Convention on Human Rights (ECHR). Under the analysis above, ECtHR's function risks illegitimacy. In hard cases, where the compatibility of domestic law and ECHR rights is not clear-cut, ECtHR has discretion. It may choose between rival outcomes, based on underlying principle, including community values. In these circumstances, judgment by ECtHR appears less legitimate than judgment by domestic courts. ECtHR is less likely to guide domestic actors to comply with the reasons that apply to them. Of course, ECtHR recognises this danger. When its 'margin of appreciation' doctrine is invoked, ECtHR refrains from concretely deciding. Instead, it defers to domestic authorities, including courts. In the landmark *Handyside*[73] case, ECtHR rationalised the doctrine:

> 'it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements'[74]

For ECtHR, values differ between places and times. It follows that local courts, embedded in a community and its values, are better placed to answer difficult legal questions.[75]

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[73] *Handyside v United Kingdom* (1979-80) 1 EHRR 737
[74] ibid [48]
[75] The doctrine has democratic underpinnings as well. The margin of appreciation is not solely justified by 'the relative disadvantage suffered by an international court in the task of evaluating local needs and conditions. It has a close affinity with a municipal doctrine: the margin of discretion, or deference […] which our courts will pay to the judgment of public decision-makers' (*SRM Global Fund LLP v Commissioners of HM Treasury* [2009] EWCA 788 [59] (Laws LJ)).

4.2 Application to Wales

Judges inevitably decide cases by reference to community values as well as the posited rules of a jurisdiction. It follows that judges' understanding of the relevant community values matters for their legitimacy, just as their legal expertise matters. The intuitive objection to a court based in New Zealand deciding an English case is explained by their lack of understanding of local values. As conventional wisdom would have it, to understand a place one must become embedded within it. This lack of understanding may not preclude the New Zealand judges from identifying and applying English legal rules, but it will prevent them from reliably drawing on relevant community values in deciding how to interpret these rules. The likelihood that hard cases will not be appropriately decided constitutes a compelling reason to demand that judges deciding cases for a place are sufficiently embedded in that place.

It follows that if Welsh community values differ sufficiently from English community values, then Welsh legal disputes should be resolved in Welsh courts by judges cognisant of Welsh community values. The obvious question is: do Welsh community values differ sufficiently from English community values? Divergence in community values is not binary, nor is it obviously quantifiable. It is a matter of judgement, and one that I am ill-equipped to make. I will suggest three relevant considerations.

First, it would be mistaken to summarily dismiss this argument on the basis of a shared recent history. Membership of the United Kingdom does not rule out the existence of differences in community values capable of affecting the legitimacy of legal adjudication. Nor does historic membership of the unified jurisdiction.[76]

Second, in principle it is less harmful to separate the court and judicial systems too hastily than too tardily. Where, within an existing legal system, there is *some* divergence between one territory and another, but not *enough* to justify separation, little harm is caused by premature separation. Judicial decisions may remain similar between the two jurisdictions, and there may be some unnecessary disruption. But if divergence *is* sufficient to justify separation, failure to separate causes substantial harm. In these circumstances, a community is subject to law that does not fully reflect its values. To that extent, the law is illegitimate. All else being

[76] Northern Ireland was part of the unified jurisdiction until 1920. See further: Parry, 'Is Breaking up Hard to Do? The Case for a Separate Welsh Jurisdiction' (n x) 75-82

equal, a mere possibility of difference in community values justifies separate courts and judiciaries.[77]

Third, there is reason to believe the community values of Wales differ from England. The very fact of devolution of political power may reflect differences in community values. Devolution permits a community to be governed in accordance with its own values.[78] Observably, devolution has permitted policy divergence between Wales and England. Welsh institutions have been pro-active on the environment, in respect of children's rights, education, healthcare, and many more public policy areas. Such reforms presumptively reflect distinctive Welsh community values. Increasingly, the Welsh arms of UK-wide political parties exist as distinct entities, promoting an agenda constituted from within the specific culture and politics of Wales. As with Scotland, Wales has a prominent political party that is uniquely Welsh.

Moreover, the view that Welsh community values are distinctive has received high-level judicial endorsement in the *Asbestos Diseases*[79] case. For Lord Thomas, legislation imposing healthcare costs on negligent employers:

> 'can […] be seen as reflecting choices of social and economic policy and of social justice in Wales which may be different to the views of social and economic policy and social justice reasonably held in other parts of the United Kingdom'.[80]

In other words, the policy in the disputed legislation reflected distinctive Welsh community values. The *Asbestos Diseases* case decided the Welsh Assembly's competence to enact the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill. The Bill sought to recover the costs of NHS healthcare for sufferers of asbestos-related diseases from their former employers and the employers' insurers. These employers are liable in tort, but free at point of use healthcare means that cost of healthcare is not a recoverable loss. The UK Supreme Court (UKSC) unanimously held that the Bill exceeded the Assembly's competence, but divided 3-2 between more and less restrictive approaches. For Lord Mance, with whom Lords Neuberger

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[77] Frequently all else is *not* equal. The North East is culturally different from London, but any argument for a separate legal system is outweighed by practical considerations. Such practical considerations are less persuasive in Wales for the reasons outlined in Section 2, above.

[78] Jurisdictional reform is justified on a parallel basis in this paper. Jurisdiction and devolution are both justifiable by divergent community values.

[79] *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3. The illustration is imperfect, since the dispute revolved around the limits of legislative competence as defined by the GWA 2006, an Act of the Westminster Parliament. Nevertheless, the judicial reasoning about the Bill's meaning and effects pertains to the present discussion.

[80] ibid [107] (Lord Thomas)

and Hodge agreed, the recovery mechanism exceeded the powers conferred to the Welsh Assembly under the Government of Wales Act 2006.[81] It was, moreover, in contravention of Article 1 of Protocol 1 of the ECHR (A1P1), both in respect of its effects on employers and their insurers. For Lord Thomas, with whom Lady Hale agreed, the aims and machinery of the Bill were, in principle, within the Assembly's powers. Nor were the A1P1 rights of employers violated. For the minority, the Bill was nevertheless *ultra vires*, for disproportionately interfering with the A1P1 rights of the insurers. Lord Thomas, the then Lord Chief Justice, was empanelled for his understanding of the Welsh context.[82]

Not only does Lord Thomas endorse the notion that Welsh and English community values differ, the differences between the minority and majority judgments are striking. Lord Thomas repeatedly characterises NHS healthcare of sufferers of asbestos-related diseases as a 'state benefit provided by the State to such employers and their insurers which relieves them of some of the consequences of the employers' wrongdoing as tortfeasor.'[83] This construal of the status quo as a state benefit to corporations contrasts with Lord Mance's focus on corporations' private law rights and liabilities. It is tempting to characterise Lord Thomas as the *Welsh socialist* foil to Lord Mance's *English centre-right* approach. Arguably, the differences in rhetoric reflect distinct philosophies of the relationship between the state, its citizens, and commercial interests. If so, the difference in judicial perspective maps onto the broad-brush difference in community values between Wales and England. After all, Wales consistently returns large majorities of Labour MPs and AMs to the Westminster Parliament[84] and Welsh Assembly,[85] contrasting with England's generally Conservative inclination.[86]

This difference in approach influences the contrasting judgments on the issue of whether the Bill is beyond the Welsh Assembly's competence. For Lord Mance, the conferred power the Welsh Assembly purported to act under – 'organisation and funding of national health service' – could not […] have been conceived with a view to covering what would amount in reality to rewriting the law of tort and breach of statutory duty'.[87] Lord Thomas does

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[81] Government of Wales Act 2006, ss 107 and 108, sch 7

[82] Wales Governance Centre, *Justice in Wales: Principles, Progress and Next Steps* (2016) 13 < http://sites.cardiff.ac.uk/wgc/files/2016/09/Justice-in-Wales-Sept-2016.pdf> accessed 31 July 2018

[83] *Asbestos Diseases* (n x) [75] (Lord Thomas). The terminology frequently reappears in his judgment.

[84] 'Results' (*BBC News: Election 2017*) <http://www.bbc.co.uk/news/election/2017/results/wales> accessed 31 July 2018

[85] 'Your Assembly Members by Party' (*National Assembly for Wales*) < http://www.senedd.assembly.wales/mgMemberIndex.aspx?FN=PARTY&VW=LIST&PIC=0> accessed 31 July 2018

[86] 'Results' (*BBC News: Election 2017*) <http://www.bbc.co.uk/news/election/2017/results/england> accessed 31 July 2018

[87] *Asbestos Diseases* (n x) [27] (Lord Mance)

not regard the Bill as rewriting the law of tort, but as removing a subsidy by imposing a charge for NHS services, akin to a prescription charge. It follows that:

> 'In principle […] the Welsh Assembly has competence to enact legislation for charging for services by way of the treatment and long term care of those with asbestos-related diseases provided the moneys so raised are used exclusively for the Welsh NHS.'[88]

The primary legislative aim – charging for services – therefore falls within competence for Lord Thomas. It is a charge for services, moreover, that employers of patients would be liable to pay were it not for the 'state benefit' the NHS confers on them. For that reason, there is no reason to deny the Assembly's competence. Indeed, the legislation implements the most efficient mechanism for securing its primary aim.[89]

Another difference in judicial approach concerns the proportionality of the Bill with A1P1 property rights. The measure amounts to a retrospective imposition of financial liability, and therefore engages the A1P1 rights of employers and their insurers. The UKSC held unanimously that the insurers' rights were violated by the Bill, since the Bill overrode elements of insurance contracts limiting insurers' financial exposure. But the UKSC divided on the proportionality of the interference with the employers' rights. For Lord Mance, the 'special justification' required to establish the proportionality of retrospective liability is not established.[90] Lord Thomas reaches the opposite conclusion. Of critical importance is his emphasis on the importance of 'the social and economic context of Wales'.[91] He refers specifically to the historic prevalence of heavy industry in Wales, the concomitant prevalence of asbestos-related disease, and the resulting financial burden on the NHS in Wales.[92] As a result 'It has long been seen as a matter of social justice that proper compensation and care be provided at the expense of employers […] to those suffering from such diseases'.[93] In other words, as a result of its history and context, Wales has taken a particular view on this issue of social justice. Lord Thomas' understanding of the context and the aims of the Welsh Assembly influence his determination of the proportionality question. Lord Thomas 'would accord great

[88] ibid [95] (Lord Thomas)
[89] ibid [99-100] (Lord Thomas)
[90] ibid [66] (Lord Mance)
[91] ibid [106] (Lord Thomas)
[92] ibid
[93] ibid

weight to the Welsh Assembly's judgement, not simply weight as Lord Mance states'.[94] And for Lord Thomas:

> 'the special justification […] has been established, given the social and economic policy in dealing with the present consequences of past wrongdoing by employers by discontinuing a benefit to the wrongdoer.'[95]

The harm to employers' A1P1 rights is therefore in proportion to the public interest; a fair balance is struck.[96] The difference in approach apparently results from the view of the importance of the public interest at stake. For Lord Thomas, interference with property rights is justified by the social harms that interference avoids. For Lord Mance, the public interest is insufficiently weighty. Critically, the difference appears to result from Lord Thomas' relative sensitivity to the Welsh context and its unique sense of social justice. In other words: its community values.

The judge empanelled for his understanding of the Welsh context thus reaches conclusions more sympathetic to Welsh policy. It is admittedly speculative to explain this difference by reference to understandings of local community values. But it is a speculation in which I am prepared to indulge, for this reason: even if the difference in approach in this case did not in fact reflect different community values, judicial approaches plausibly could differ on that basis. Differences in outlook can lead to differences in legal reasoning. Where the law ought to reflect one outlook and not another, it is problematic when an institution is structured to favour the less appropriate option.

4.3 Is the Legitimacy of the UKSC Undermined?

Even the most radical proposals for reform preserve the UKSC as the apex court of a Welsh jurisdiction. The UKSC presently fulfils this function for all UK jurisdictions, excepting Scots criminal law. Might the argument from the judicial function imperil the legitimacy of this appellate jurisdiction? The judiciary of the UKSC is appointed predominantly from English legal practice, with minority representation from Scotland and Northern Ireland. The UKSC judiciary is not, therefore, fully embedded in the communities of the devolved nations. It may follow that the UKSC is ill-suited to deciding hard cases arising from devolved nations, whose

[94] Ibid [118] (Lord Thomas)
[95] ibid [127] (Lord Thomas)
[96] ibid

community values are distinct from England's. If so, the present argument might undermine the UKSC's authority, not only over a future Welsh jurisdiction, but over the already separate Scottish and Northern Irish jurisdictions.

The UKSC appointments process recognises these risks. The Constitutional Reform Act 2005, s. 27(8) stipulates that commissions for selecting UKSC judges 'must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom.' In practice, commissions ensure that the UKSC judiciary represents Scotland, Northern Ireland, and England & Wales.[97] Although there is no practice of appointing a Welsh judge,[98] for cases concerning Welsh law the UKSC has empanelled non-UKSC judges with an understanding of the Welsh law and context.[99] It is probable that if separate Welsh courts were established, the practice of appointing a representative judge to the UKSC would extend to Wales.

Judges from the devolved nations may offset the potential drawbacks of devolved law being decided in the UKSC. Indeed, my argument may help justify the existing practice. However, while UKSC appointments practice undoubtedly *offsets* this potential blot on the court's authority, it does not *eradicate* it. Judges representing the relevant devolved nation never outnumber those from England. Conceivably, non-local judges, drawing on their own understanding of the relevant community values, can reject the local judge's understanding of local community values. Arguably, the *Asbestos Diseases* case illustrates this danger. Consequently, the authority of the UKSC may still be disputed.

If I am right, must the jurisdiction of the UKSC be drastically narrowed and final courts of appeal established for each UK jurisdiction? Not necessarily. The role of the UKSC is grounded in the expertise of its judges. Such expertise is a valuable resource on which all devolved legal systems may want to draw. Could we retain recourse to this expertise while reducing the risk of overreach? One option would be to drastically increase the size of the UKSC bench to enable greater representation of the devolved nations. Alternatively, the UKSC has doctrinal tools at its disposal to ensure that it does not overstep the bounds of its legitimacy. Just as it might defer to a political institution on political questions, the UKSC could adopt a doctrine of deference to the courts of each of the devolved jurisdictions. Admittedly, deference

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[97] The Supreme Court of the United Kingdom, *Procedure for Appointing a Justice of The Supreme Court of the United Kingdom* (2016) <https://www.supremecourt.uk/docs/appointments-of-justices.pdf> accessed 31 July 2018

[98] Lord Lloyd-Jones became the first Welsh Justice of the UKSC in October 2017.

[99] See, for example: *Agricultural Sector (Wales) Bill - Reference by the Attorney General for England and Wales* [2014] UKSC 43; *Asbestos Diseases* (n x)

of this sort is typically granted to political institutions. But courts do also recognise the limits of their institutional competence *vis a vis* other courts. Appellate courts do not typically re-determine facts, but are limited to resolving points of law. These practices respond to appellate courts' limitations as fact-finders. If the argument from the judicial function is correct, UK-wide appellate courts ought also to recognise their limitations as deciders of hard cases from devolved jurisdictions. The UKSC might therefore adopt a deferential attitude to a hypothetical Welsh Court of Appeal. An obvious drawback is that this suggestion guts the UKSC of its central role. If an appellate court does not have legitimate authority to determine questions of law in hard cases, it is hard to conceive what useful function it serves.

If the authority of the UKSC in the devolved jurisdictions is undermined, that does not necessarily undermine my argument. Political institutions in the devolved nations have changed radically since the mid-1990s. There is no reason to think legal institutions are immune to the same pressures that necessitate political reform. Nor is the notion of limiting the UKSC's jurisdiction over UK jurisdictions without precedent: Scots criminal cases cannot usually be appealed to the UKSC. The continuing jurisdiction of the UKSC ought not, then, be considered a red line.

5 Conclusion

I have sought to understand the force and scope of justifications for jurisdictional reform in Wales. In doing do, I have proposed a general account of the legitimacy of court and judicial systems. Legitimacy frequently depends on judges' ability to exercise their law-making function in line with the values adopted by the community they adjudicate for. Where judges predominantly from one community adjudicate for another community with a distinctive set of values, the law risks failing to reflect the community it purports to govern. Whether legislated or judge-made, law failing to serve those it governs lacks legitimacy. There are differences in community values between Wales and England. The question remains whether there is sufficient difference to imperil the legitimacy of the unified court and judicial system. But there is certainly a question to answer and I have outlined the framework for doing so.