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# How to Do Things with Jurisdictions: Wales and the Jurisdiction Question

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## **Introduction**

There is a recurring debate amongst lawyers and policy makers about the desirability of Wales becoming a separate, fourth, UK jurisdiction. The question has become one of immediate political and legal importance, as Wales moves towards its fourth distinct devolution settlement since 1999. Indeed, the demand for a separate jurisdiction became a key component of the opposition within Wales to what was widely seen as a botched attempt at introducing a reserved powers model in the Government's draft Wales Bill, and the subsequent retreat by the Government from that draft. Whether the replacement, what will shortly become the Wales Act 2017, is a significant improvement remains an open question.<sup>1</sup>

The policy question relies on an understanding of what we mean when we talk about a "separate jurisdiction" for Wales. This in turn provides an opportunity to consider more generally the concept of "jurisdiction", a fundamental, but little-studied, feature of the structure of the law.

My argument here is that what has become the orthodox analysis of "jurisdiction-hood" is flawed in ways that have unhelpfully limited the policy debate. As a result of the critical reception of the draft Wales Bill, this orthodoxy has started to shift, with talk of a "distinct but not separate" jurisdiction for Wales.<sup>2</sup> This shift is to be welcomed, but it is still far from an adequate recognition of the flexibility of the concept of jurisdiction, and what that flexibility can offer policy makers in the current debate.

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<sup>1</sup> Wales Office, *Draft Wales Bill* (October 20, 2015). This article goes to press shortly before Royal assent, following the grudging consent of the National Assembly for Wales on January 17, 2017, but before third reading and motions reconciling Lords and Commons versions. References to the bill are to the final, post Lords report stage print, 2016/17 HL Bill 89. Reversing its previous position, the Welsh Government now supports a Welsh jurisdiction: Welsh Government, *Draft Wales Bill Inquiry: written Evidence* (November 26, 2015); Welsh Government, *Evidence Submitted by the Welsh Government to the Commission on Devolution in Wales*, (February 18, 2013). The UK Government accepted the need for a "pause" to reconsider its approach: <https://www.gov.uk/government/news/amended-wales-bill-will-deliver-a-stronger-devolution-settlement> [Accessed January 18, 2017]. The Welsh Government subsequently published a draft Government and Laws of Wales Bill, which included its approach to a "distinct not separate" jurisdiction: <http://gov.wales/about/cabinet/cabinetstatements/2016/governmentandlaws/?lang=en> [Accessed January 18, 2017].

<sup>2</sup> See particularly Wales Governance Centre, *Challenge and Opportunity: The Draft Wales Bill 2015* (February 2016).

The orthodox view is determined by the perceived nature of the existing territorial jurisdictions. This has two aspects. First, it sees a monolithic, ubiquitous understanding of the jurisdictions of Scotland, Northern Ireland and England and Wales as being the only model for a jurisdiction for Wales. On this understanding, unlike, for instance, federal structures, the whole of the law is the subject matter of a single territorial jurisdiction expressed in a single and distinct system of courts, whose reach is confined to, but ubiquitous within, the territory. There is no way for the law to express itself except through the lens of the three jurisdictions. Secondly, the point at which such a jurisdiction would arrive is not seen as being fixed in advance. Thus, it is said, a Welsh jurisdiction is capable of (and indeed, is) “emerging,” with the gradual accretion of differences in the substantive law between Wales and England and the development of distinctive legal institutions in Wales. The accretion of institutions, at some unspecified point, becomes a jurisdiction.<sup>3</sup>

Particularly influential in this understanding of jurisdiction is Jones and Williams’ important article *Wales as a Jurisdiction*.<sup>4</sup> Their description of the “three commonly accepted characteristics of a jurisdiction” has been widely adopted in the various reports of Commissions and committees that have considered the question from a policy perspective. Those three characteristics are “a defined territory; a distinct body of law; and a structure of courts and legal institutions.” While it *may* (often but not always) be reasonable to describe these things as “characteristics”, in the sense of oft observed features, of a jurisdiction, they have been used – in both Jones and Williams’ article and in the policy debate – as *definitional*. It is that use that is erroneous, and has been unhelpful in policy terms.

Real life jurisdictions, both in the UK and elsewhere in the common law world, do not match this over-simplified, stereotypical notion of territorial jurisdiction. This qualification applies to each of the three Jones and Williams’ characteristics.

The first, a territory, is not something problematic or controversial in respect of Wales; but nonetheless it is important for the more general project – the understanding of what it is to be a jurisdiction – to consider it. I argue that the territoriality of the three UK territorial jurisdictions is significantly qualified in practice; and, more importantly, there are in addition a number of other jurisdictions by which the law of the UK is delivered.

Secondly, while there may be no point in a separate jurisdiction unless it administers “a separate body of law”, it is not strictly necessary that that should be the case. Further, there are plentiful examples of *shared* law between jurisdictions.

The final characteristic is “courts and other legal institution”. A court (or system of courts) is indeed fundamental to the existence of a jurisdiction. But what of “other legal institutions”? While a judiciary is a necessary implication of a court, jurisdictions can and do share a judiciary. There is no reason to suppose that separate legal professions are necessary, and the same is true for courts administration, or the many other disparate institutions sometimes claimed.

Rather, I argue, a jurisdiction, in the “territorial jurisdiction” sense, requires 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, that is, defining the disputes, questions, issues and authorisations which it is charged to decide.

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<sup>3</sup> For an illustration of this consensus, see National Assembly for Wales Constitutional and Legislative Affairs Committee, *Inquiry into a Separate Welsh Jurisdiction*, (2012), chapter 3.

<sup>4</sup> [2004] P.L. 78.

Having established an alternative view of what a jurisdiction is, I apply this approach to the possible options for a separate Welsh jurisdiction, which involves some consideration of the extent of devolution of responsibility for the law.

### ***The uses of “jurisdiction”***

There was very little discussion in Jones and Williams’s original paper of what a jurisdiction is (as one would expect, as their primary concern was elsewhere). Jones and Williams do say in a footnote that they are concerned with an “empirical” approach, not a legal-philosophical one, referring to the debate about a “system of law” in positivism.<sup>5</sup>

It is clearly right to base the enquiry on the nature of existing jurisdictions. But to characterise the enquiry as empirical only takes us so far. It does not scrutinise the identity of the facts or institutions which are to be the subjects of the empirical enquiry. In the first place, this narrows the enquiry, which proceeds on the unstated basis that the existing territorial jurisdictions, as understood in the UK lawyer’s world view, is an uncontroversial given. Secondly, it inhibits our understanding of the nature of the empirically observed “characteristics”, in particular suggesting that each of the three is of equal significance or status.

“Jurisdiction”, Diplock LJ has said, “is an expression which is used in a variety of senses and takes its colour from its context”.<sup>6</sup> It is common to talk of things like the limited statutory jurisdictions of some courts and tribunals and the “inherent jurisdiction” of the High Court. A court or, particularly, a tribunal may have a number of separate and distinctly identified “jurisdictions”. The English First-tier Tribunal (Property Chamber), for instance, is said to have 118 jurisdictions, meaning that statute has conferred upon it the power to determine disputes in that many categories of case.<sup>7</sup> Such narrow-band jurisdictions are characteristic of tribunals, charged with determining a precise and limited statutory question. But “jurisdiction” in this sense also applies to broad-band courts. There is, for instance, a body of case law on when a court is acting without, or in excess of, jurisdiction, a consequence of which may be that its decision-makers are not acting judicially.<sup>8</sup>

But the semantic core of these various usages is the same. The roots of the word are the Latin words for “law” and “to say” or “to declare”. The notion of “jurisdiction” has to do, in all cases, with the proper reach of a court or other tribunal. A jurisdiction is “a legal space, or sphere of competence ... to have jurisdiction over a matter is to have competence to make a determination with respect to that matter.”<sup>9</sup>

So without more, we can say that the description of a *territory* as a “jurisdiction” is a secondary meaning of the word, referring to the territorial limits of the proper reach of the court or system of courts. Conceptually, it is not the political space that comes first and is then filled up with a system of courts. It is a court which comes first, and the space is defined as the limits of its determinative reach. Indeed, it has been argued that the territoriality of territorial jurisdictions is a relatively new phenomenon.<sup>10</sup> Further, Jones and Williams’ third characteristic, legal institutions, bundles the essential institution – a court (or system of courts) – with other contingent, observed, characteristics of the existing territorial jurisdictions, like a legal profession, a judicial appointments system or a Law Commission.

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<sup>5</sup> T.H. Jones and J.M. Williams, “Wales as a Jurisdiction” [2004] P.L. 78, fn 1.

<sup>6</sup> *Anisminic Ltd v Foreign Compensation Commission* [1968] 2 Q.B. 892 (CA), 889.

<sup>7</sup> List supplied by the First-tier Tribunal (Property Chamber).

<sup>8</sup> See, for instance, *Re McC (A Minor)* [1985] A.C. 528.

<sup>9</sup> Shaunnagh Dorsett, “Since Time Immemorial: A Story of Common Law Jurisdiction, Native Title and Tanistry” (2002) 26 M.U.L.R. 32, 34.

<sup>10</sup> Richard T Ford “Law’s Territory (A History of Jurisdiction) (1999) 97 Mitch.L.Rev. 843.

### ***The requirements of a jurisdiction: The territoriality of the territorial jurisdictions***

The orthodox picture of the monolithic and ubiquitous British territorial jurisdiction is extreme and inaccurate. The UK is not as simple as that.

The reach of English and Welsh civil courts has always extended to rules allowing service of process outside the realm; and now includes the regulation of place of trial by the doctrine of *forum non conveniens* and the enforcement of choice of court clauses in contracts by various procedural means.<sup>11</sup>

The criminal law is said to be more fundamentally territorial.<sup>12</sup> But all three UK territorial criminal jurisdictions assume responsibility to try British citizens for murder (and culpable homicide) committed abroad, and the modern tendency has been to increase extra-territorial reach in contexts such as bribery, money laundering, fraud and genocide and crimes against humanity.<sup>13</sup>

These may not fundamentally question territoriality, but they do begin to qualify it. The point goes further, however, if we look out to sea.

The seaward boundary of the territorial jurisdictions is somewhat complicated, and different lines are drawn for different purposes. But even if the law is complicated, it does not conceptually challenge the notion that the territory of the territorial jurisdictions stops *somewhere*, albeit at different places in different contexts.

But the seaward boundaries *do* present an interesting conceptual challenge if we go further offshore. The “territorial sea” extends for 12 nautical miles from (broadly) the shore,<sup>14</sup> and constitutes part of the UK.

It is clear that the UK stops at the seaward boundary of the territorial sea. Beyond that are international waters. But the UK as a state nevertheless exercises certain limited sovereign rights recognised in international and domestic law beyond that, to a limit of 200 nautical miles. This is now the Exclusive Economic Zone, designated under the Marine and Coastal Access Act 2009.<sup>15</sup> The devolved administrations undertake functions in both the territorial area and this zone.<sup>16</sup>

The Zone is clearly not territorially part of Scotland, Northern Ireland, or England and Wales. But nonetheless, UK statutes place obligations on people to do or not to do things there, disputes in relation to which must form the subject matter of cases in courts.

For instance, there is, in the Marine and Coastal Access Act 2009, a system of licensing of certain activities, including in part of the EEZ.<sup>17</sup> In common with most licensing regimes, it

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<sup>11</sup> For a general account of “the traditional English rules”, see McClean and Beevers *Morris The Conflict of Laws* (7 ed 2009) chapter 5, esp pp. 132-143.

<sup>12</sup> See for instance Richardson (ed) *Archbold 2015*, para 2-35.

<sup>13</sup> Offences Against the Person Act 1861, s. 9; Criminal Procedure (Scotland) Act 1995, s. 11; Bribery Act 2010, ss. 7 and 12; Proceeds of Crime Act 2002; Fraud Act 2006, Criminal Justice Act 1993, part 1; International Criminal Court Act 2001; International Criminal Court (Scotland) Act 2001 asp 13.

<sup>14</sup> All seaward zones are measured from the “baseline”, which is the low water mark, subject to special provision for bays and estuaries and to extension as a result of tidally-exposed land: see Territorial Waters Order in Council 1964 (as amended by the Territorial Sea (Amendment) Order 1998, S.I. 1998/2564).

<sup>15</sup> Marine and Coastal Access Act 2006, s. 41; Exclusive Economic Zone Order 2013.

<sup>16</sup> Territorial Sea Act 1987; Territorial Sea (Limits) Order 1989 (S.I. 1989/482); Scotland Act 1998, s. 126(1); Northern Ireland Act 1998, s. 98; Government of Wales Act 2006, s. 158(1). For the Welsh Zone, see Government of Wales Act 2006, s. 158(1), as amended by the Marine and Coastal Access Act 2009.

<sup>17</sup> Part 4 of the Act.

makes provision for various associated criminal offences.<sup>18</sup> Section 110 of the 2009 Act allows criminal proceedings to be taken in “any part of the United Kingdom”. So the criminal courts of each of the three territorial jurisdictions enjoy coterminous jurisdiction in respect of these offences, wherever in the zone they take place. Such an offence committed 13 miles off Cape Wrath may be tried in a sheriff’s court in Scotland, or a magistrates’ court in any of (and anywhere in) Northern Ireland, Wales or England.

The same Act makes provision for a system of “marine policy statements”, which may relate to both the territorial sea and the EEZ.<sup>19</sup> There is a system of statutory challenges to the validity of the plans, not dissimilar to that in the planning system. Asymmetrically, the Act confers exclusive jurisdiction in relation to such challenges on the High Court of England and Wales if the plan is for an area in the territorial sea of England and Wales; but for everywhere else, jurisdiction is exercised by “any superior court in the United Kingdom”, that is, the High Courts in London or Belfast, or the Court of Session.<sup>20</sup> The courts of all three territorial jurisdictions have the same jurisdiction, over the same part of the surface of the planet.

One *could* claim that these expanses of water in some sense subsist as attenuated parts of Scotland, England and Wales, and Northern Ireland, each simultaneously with the other; or that they are *deemed* to be part of the territory associated with the court before which the case is heard for the duration of the proceedings (or the hearing, or the effects of a conviction). But to do so would be eccentric, even if not wholly incoherent. All one needs to say is that the jurisdictions of the specified *courts* extends to the relevant disputes there.

### ***UK jurisdictions***

Further, the territorial jurisdictions do not exhaust the reach of courts and tribunals in the UK. The UK services jurisdiction, for instance, does not have a fundamentally territorial basis at all. Now codified in the Armed Services Act 2006, the services jurisdiction applies to every member of the regular armed forces and reserve forces when acting as such,<sup>21</sup> and certain civilians.<sup>22</sup>

And in relation to tribunals, there are both UK and already-existing Welsh jurisdictions. The Tribunals, Courts and Enforcement Act 2007 created a First-tier Tribunal and an Upper Tribunal in a section extending to each of the parts of the United Kingdom. Both tribunals sit in a number of distinct “chambers”, which in turn exercise varied statutory jurisdictions. Many, but by no means all, of the jurisdictions relate to challenges to state action.<sup>23</sup>

Some of the Tribunals’ jurisdictions are UK jurisdictions, such as those relating to tax, immigration and nationality. Of the seven chambers of the First-tier Tribunal, two comprise UK only jurisdictions – the Tax Chamber and the Immigration and Asylum Chamber. The General Regulatory Chamber has UK, GB, England and Wales and England only jurisdictions. Outside this structure lie a number of first instance tribunals which have been recognised as devolved in Wales. The right of appeal, however, in respect of most of them remains to the Upper Tribunal.

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<sup>18</sup> Marine and Coastal Access Act 2006, ss. 85 and 89

<sup>19</sup> Part 3 generally.

<sup>20</sup> Marine and Coastal Access Act 2006, s. 62.

<sup>21</sup> Armed Forces Act 2006 s. 367.

<sup>22</sup> Armed Forces Act 2006 s. 370 and sch. 15 and Armed Forces (Civilians Subject to Service Discipline) Order 2009, S.I. 2009/836; Armed Forces (Civilians Subject to Service Discipline) Order 2009, S.I. 2009/836. There is a territorial element to the civilian jurisdiction.

<sup>23</sup> See Tribunals, Courts and Enforcement Act 2007, Part 1, ch. 3, and orders made thereunder.

The relationship between the UK tribunal system and the territorial jurisdictions illustrates the complexity of UK jurisdictions. From the Upper Tribunal, there is a right of appeal to the “relevant appellate court”, which is one of the England and Wales or Northern Ireland Courts of Appeal, or the Court of Sessions. The Tribunals, Courts and Enforcement Act 2007 provides that the identification of the correct court is a matter for the Upper Tribunal, which specifies whichever of the three options is “the most appropriate”. In *Advocate General for Scotland v Murray Group Holdings Ltd*, that court was the Court of Sessions, but the case involved consideration of English and Welsh trust and contract law. The Court of Sessions decided that, in such a case, the Scottish court had judicial knowledge of the law of England and Wales. The First-tier and Upper Tribunals had such knowledge; as would the Supreme Court on appeal. It would be “highly artificial” if the Court of Sessions did not. It would mean that the Scottish appellate court would have to treat that law as foreign, and would be constrained by the tribunals’ findings (as of fact) in respect of it.<sup>24</sup>

We should not dismiss tribunal jurisdictions as of marginal relevance, merely because they are narrow-band tribunal jurisdictions, or because, to the extent they relate to citizen-state disputes, they necessarily follow the outline of the state itself. They show that the law of the UK is perfectly capable of being expressed via a jurisdiction not limited to the territorial jurisdictions.

In any event, there is a more important UK jurisdiction to which these limitations do not apply. The Supreme Court was established by the Constitutional Reform Act 2005, section 41(2) of which states that “a decision of the Supreme Court on appeal from a court of any part of the United Kingdom, other than a decision on a devolution matter, is to be regarded as a decision of a court of that part of the United Kingdom”. The following subsection provides that a Supreme Court decision on a devolution matter is not binding on itself; but “otherwise, is binding in all legal proceedings”. This does two important things: it clearly locates the Supreme Court as being *within* each territorial jurisdiction when deciding ordinary cases from that jurisdiction (thus closing a dispute about the precedential effects of certain non-Scottish House of Lords decisions in Scots law). But it also, equally clearly, locates the Supreme Court *outside* the confines of the territorial jurisdictions when exercising its jurisdiction in relation to “devolution matters”.<sup>25</sup>

The Supreme Court inherited this jurisdiction from the Judicial Committee of the Privy Council, on which it was conferred by the three original devolution statutes.<sup>26</sup> The key function of the “devolution matters” jurisdiction is to police the powers of the devolved legislatures and executives. In the exercise of this jurisdiction, the Court has, for instance, delineated (albeit at times not entirely clearly) the contours of the Welsh settlements based on the Government of Wales Act 2006.<sup>27</sup>

The “devolution matters” jurisdiction has been described by Professor Neil Walker as the “birth of a constitutional jurisdiction”.<sup>28</sup> Lady Hale devoted her address to the Legal Wales

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<sup>24</sup> [2015] S.L.T. 765, [49] – [50].

<sup>25</sup> Constitutional Reform Act s. 41(4).

<sup>26</sup> Government of Wales Acts 1998 and 2006, s. 149 and sch. 9; ss. 99 and 112, Scotland Act 1998, s.98 and sch.6; s. 33 and Northern Ireland Act 1998, sch10; s. 1; transferred to the Supreme Court by Constitutional Reform Act 2005, sch. 9, part 2.

<sup>27</sup> *Local Government Byelaws (Wales) Bill 2012 – Reference by the Attorney General* [2012] UKSC 53; [2013] 1 A.C. 792; *Agricultural Sector (Wales) Bill – Reference by the Attorney-General* [2014] UKSC 43, [2014] 1 W.L.R. 2622; and *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales* [2015] UKSC 3; [2015] 2 W.L.R. 481.

<sup>28</sup> Neil Walker, *Final Appellate Jurisdiction in the Scottish Legal System (2010)*, a report to the Scottish Government (2010).

conference in 2012 to the experience of constitutional adjudication, and went so far as to say “the United Kingdom has indeed become a federal state with a Constitution regulating the relationship between the federal centre and the component parts.”

That may be going too far. But nonetheless, it is clear that the devolution matters jurisdiction it is *not* merely part of Scots, Northern Irish or English and Welsh law. It is not assimilable to the territorial jurisdictions, and thus stands apart from them. It is determinative in all proceedings (section 41(3)), and so stands above them.

### ***The requirements of a jurisdiction: judiciary***

If jurisdiction refers (at least) to the reach of a court, then a court *is* fundamental, and a court requires a judiciary. It is important, however, to note two points. First, the creation of a court or system of courts, and the provision of a judiciary are not the same thing. They involve distinct and separate legal steps. Secondly, the judiciary constitutes the *court*, not – or not only – the *jurisdiction*. The legal rules that provide a court with a judiciary do not exhaust the legal rules necessary to confer jurisdiction status.

But a judiciary can be shared. One common site for such sharing is apex courts – the top court in a system of multiple jurisdictions. But the nature of the law declared in such courts may differ.

The Judicial Committee of the Privy Council provides an extreme case of this sort of judicial sharing. It has long provided an apex court for British territories and in some cases their successor states. It still exercises thirty-six jurisdictions (seven of which are UK jurisdictions). At its likely peak in about 1922, it had very many more.<sup>29</sup>

The position of the Supreme Court as a court of distinct jurisdictions is clear. Section 41(2) of the Constitutional Reform Act provides that when sitting on a case from one of the territorial jurisdictions, the Supreme Court is sitting as a court of that jurisdiction. In the Supreme Court, each of the three territorial jurisdictions (and others – it is possible for UK service cases and UK jurisdiction cases from the Upper Tribunal to reach the Supreme Court) share the same judiciary. The sharing in this context is seamless – the judges do not have to be distinctly appointed to each jurisdiction.

The same may be true where a court has some statutory limit to its jurisdiction. It is, if not common, then far from unknown, for the England and Wales Court of Appeal to conclude that a matter is within the jurisdiction of the Administrative Court, and thereupon to formally constitute itself as the Administrative Court, if necessary waiving technical requirements, and determine the case, or a part of it, as the Administrative Court.<sup>30</sup>

Another example of shared judiciary at appellate but not apex level is provided by the relationship between the Court of Appeal, Criminal Division and the Courts Martial Appeal Court. The Court of Appeal, Criminal Division may, on the same day, consider cases in that jurisdiction, then transform itself into the Courts Martial Appeal Court (applying the same law, largely) without any outward distinction, and decide a case from a court martial. As a matter of practice, only particular judges are used for court martial appeals, but all judges of the (England and Wales) Court of Appeal are automatically appointed to the Court Martial Appeal

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<sup>29</sup> <https://www.jcpc.uk/about/role-of-the-jcpc.html> [Accessed January 18, 2017]; Marshall, *The Judicial Committee of the Privy Council: A Waning Jurisdiction* (1964) 13 ICLQ 697; information from Mark Ormerod, Chief Executive of the Supreme Court and Judicial Committee of the Privy Council.

<sup>30</sup> S Holdham and A Beldam, *Court of Appeal Criminal Division, A Practitioners' Guide* (Sweet and Maxwell, 2012) para. 8–029.

Court. Judges of both High Courts, Scottish courts and others may also be appointed.<sup>31</sup> At first instance, similarly seamless judicial sharing works the other way round: judge advocates of the services jurisdiction may, since 2012, sit as judges of the Crown Court.<sup>32</sup>

Small jurisdictions may also allow for judicial sharing via the qualifications required for judicial appointment – in Jersey, for instance, Court of Appeal judges and Commissioners, who preside over the Royal Court, must either be suitably qualified local lawyers, or from the UK jurisdictions (plus Guernsey or the Isle of Man), or commonwealth judges.<sup>33</sup> The pattern in the Church of England canon law jurisdiction courts is not dissimilar.<sup>34</sup>

In the Canadian system, the appointment of judges is instructive.<sup>35</sup> The starting point is three constitutional provisions: first, section 96 of the Constitution Act 1867 provides that the appointment of judges to “the Superior, District and County Courts in each Province” is a federal function. However, secondly, the provinces are responsible for the administration of justice in the province.<sup>36</sup> Thirdly, the federal Parliament may establish a “general court of appeal for Canada” and “additional courts for the better administration of the laws of Canada”.<sup>37</sup>

The result was that there was a three-tiered hierarchy within each Province, with a superior court, comprising both a court of appeal and trial divisions, local county or district courts, and inferior or provincial courts. The first two were known as “section 96 courts” and had federally appointed judges in provincially constituted, administered and managed courts. The latter were also provincially created and administered, but the judges were provincially appointed. During the course of the 1970s, the local and district courts were amalgamated with the superior courts, which all have trial and appeal chambers or divisions.<sup>38</sup>

The provincial jurisdictions are more similar to UK territorial jurisdictions than those of American states, or Australian states or territories, in that the provincial courts, broadly, administer federal as well as provincial law.<sup>39</sup> There is also a Federal tier, now comprising the Federal Court and the Federal Court of Appeal.<sup>40</sup>

The Supreme Court is not just the apex constitutional court, but also operates as a final court of appeal from Provincial courts – like the UK Supreme Court and the High Court of Australia, and unlike the Supreme Court of the United States.

When the High Court of Australia acts as the final court of appeal, however, it is said that the law that the court declares is a unified “common law of Australia”. It is, thus, not limited as

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<sup>31</sup> Court Martial Appeals Act 1968, s. 2; information on practice provided by Alix Beldam.

<sup>32</sup> Senior Courts Act 1981, s. 8(1)(b); but not in respect of an appeal from a Youth Court: s. 8(1A); as amended by Armed Forces Act 2011, sch 2.

<sup>33</sup> Royal Court (Jersey) Law 1948, s. 10(2); Court of Appeal (Jersey) Law 1961, s. 2.

<sup>34</sup> Ecclesiastical Jurisdiction Measure 1963, ss. 2 and 3.

<sup>35</sup> This account relates to the common law provinces, not Quebec or the territories.

<sup>36</sup> Constitution Act 1867, ss. 92(14) and 91(27). The Constitution Act 1867 is the British North America Act 1867, as renamed by the Constitution Act 1982, s. 53(2).

<sup>37</sup> Constitution Act 1867, s. 101.

<sup>38</sup> Nomenclature varies between provinces. In most, the superior court is termed the Supreme Court. Peter W Hogg, *Constitutional Law of Canada, 5th Edition Supplemented, vol 1* (Thomson Carswell 2007-), p. 7-2.

<sup>39</sup> Peter W Hogg, *Constitutional Law of Canada, 5th Edition Supplemented, vol 1* (Thomson Carswell 2007-), p. 7-3, and cases cited (fn 8).

<sup>40</sup> Peter W Hogg, *Constitutional Law of Canada, 5th Edition Supplemented, vol 1* (Thomson Carswell 2007-), p. 7-26 – 7-27, 8-4.1 – 8-4.2; <http://www.scc-csc.gc.ca/court-cour/sys-eng.aspx> [Accessed January 11, 2016]

binding precedent to the state or territory jurisdiction from whence the case originated.<sup>41</sup> Naturally, a decision on the construction of a state statute will only strictly apply to that statute, and therefore within that jurisdiction. But to the extent that the High Court declared the common law in such a case, that statement of the law would be of binding precedential value in each of the other states or territories.

### ***The requirements of a jurisdiction: legal professions***

In practice, a court or system of courts needs lawyers to bring cases in it, and to provide a pool for the selection of the judiciary. Each of Scotland, Northern Ireland and England and Wales have distinct barristers' and solicitors' professions, with their own professional rules, educational systems and structures for practice. Lawyers may qualify in more than one jurisdiction, but it is not commonplace and will normally involve taking additional examinations and paying substantial fees.

But this is not always the case. The UK services jurisdiction deals with rights of audience by means of the regulation of who people subject to service law may appoint as their legal representative. Rule 39 of the Armed Forces (Court Martial) Rules 2009<sup>42</sup> limits representatives to those with such rights in England and Wales, Scotland, Northern Ireland, and (broadly) lawyers in the Channel Islands, the Isle of Man, a Commonwealth country or a British overseas territory.<sup>43</sup> Thus those practicing law in the majority of common law countries can exercise rights of representation and audience before a court martial without taking any additional formal step.

In both Australia and Canada, barristers and solicitors in each of the states, provinces or territories have automatic rights of audience in each of the others, subject to minor limitations (in Canada, for instance, generally a member of the bar of one Province is limited to 100 days a year practice in another, before he or she must be called in the second Province, which in any event is a minor formal step).

In Australia, this has been accomplished despite the fact that there are more substantial differences in the organisation of the professions between the states and territories in Australia than there are within the UK. In most states and territories, the two professions are fused, although in some an independent bar persists, while two states have fully independent professions, as in the UK.<sup>44</sup>

Further, the Australian states and territories are also currently going through a process to adopt a Uniform Law which would apply a common professional regulatory structure: Legal Profession Uniform Law Application Acts were passed in New South Wales and Victoria (which together comprise more than half the population of the country) in 2014. The Uniform Law, if and when generally adopted, would come close to the creation of Australia-wide legal professions, albeit with the regulatory structure administered locally by State or Territory professional bodies.

### ***The requirements of a jurisdiction: administrative arrangements and other institutions***

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<sup>41</sup> Australian Constitutional Commission, *Report of the Advisory Committee on the Australian Judicial System* (1987), para. 2.4.

<sup>42</sup> S.I. 2009/2041.

<sup>43</sup> There remains a culturally ingrained practice in the Navy of serving officers acting as legal representatives in courts martial: information provided by Andrew Cayley CMG QC, Director of Service Prosecutions. It is not clear how this sits with rule 39.

<sup>44</sup> <http://www.austbar.asn.au/the-profession> [Accessed January 18, 2017].

It will be apparent that, on this account of what it is to be a jurisdiction, the other institutions cited as necessary for a jurisdiction are, at best, merely those which are associated with jurisdiction-status. It is difficult to see how it can be seriously argued that a law commission or a separate police, prison or probation service are *necessary* for jurisdiction-hood,<sup>45</sup> although it may well be that the existence of a separate jurisdiction would facilitate their devolution. The Welsh Government, for instance, argued in its evidence to Silk that policing should be devolved, but that, at least at that time, there should not be a separate jurisdiction.<sup>46</sup>

The administration of the courts themselves is also an executive function, the performance of which does not have to lie with the executive coterminous with the jurisdiction. Differential administration is inevitable in apex courts/appeal courts. In Northern Ireland, justice functions, which included the administration of the courts, were not initially devolved as part of the current settlement. During the period from 1999 until they were devolved in 2010,<sup>47</sup> the UK administered the courts of the Northern Ireland jurisdiction, as indeed they had done throughout the direct rule period from 1972 to 1999. It can hardly be said that the separate existence of the Northern Ireland jurisdiction was thereby compromised during those periods. Similarly, in Canada, the section 96 courts are administered by the Province, and the judiciary appointed by the Federal Government.

### ***The requirements of a jurisdiction: law***

The final “characteristic” advanced by Jones and Williams is a “distinct body of law”. Certainly, a jurisdiction must administer law within the reach of the court to be a jurisdiction, but it is not obvious that it must be, at least always, a *distinct* body of law.

There are existing examples of such only partial distinctiveness. The UK Services jurisdiction does have its own law, in that the Armed Forces Act 2006 provides for a significant suite of armed forces only offences, such as aiding an enemy, mutiny and malingering.<sup>48</sup> However, most of the offences dealt with, at least at the level of the Courts Martial Appeal Court, are criminal offences under the law of England and Wales. Section 42 of the 2006 Act provides that, in addition to the service-only offences, it is a service offence to commit an act which would be an offence under the law of England and Wales. Section 42 is a jurisdiction-conferring provision. Its effect is to confer on the services jurisdiction the criminal law of England and Wales. The rationale for a service jurisdiction lies in the need to provide law to a distinct group of people, who cannot be territorially defined, and the desirability of its own distinctive institutions. There would be no conceptual difficulty were the *whole* of the substance of services law to be identical to the law of England and Wales.

A recent decision of the UK Supreme Court has created a novel form of law sharing between the UK territorial jurisdictions and the other jurisdictions exercised at apex level by the Privy Council. In *Willers v Joyce and Another*,<sup>49</sup> the Court created a new procedure empowering the Privy Council to certify that a finding in a case concerning an overseas jurisdiction is also to be considered the law of England and Wales (or one of the other jurisdictions).

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<sup>45</sup> Although this was the position attributed by the Constitutional and Legislative Affairs Committee of the National Assembly to Winston Roddick QC.

<sup>46</sup> Welsh Government, *Evidence Submitted by the Welsh Government to the Commission on Devolution in Wales*, (February 18, 2013), p 15.

<sup>47</sup> Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, S.I. 976 of 2010.

<sup>48</sup> Armed Forces Act 2006, ss. 1, 6 and 16.

<sup>49</sup> [2016] UKSC 44, [2016] 3 W.L.R. 534.

Australia provides a striking example of jurisdictions *sharing* law, another qualification to the supposed characteristic of distinctiveness of law. It is worth setting out the Australian experience, because in addition to providing an example of the same law lying within the reach of more than one system of courts (ie non-distinctiveness of law), it may be institutionally interesting in the context of Welsh devolution.

Australia has developed a practice by which the courts in one jurisdiction are vested with the power to decide issues that arise in the law of another jurisdiction. From the establishment of the Commonwealth of Australia, the federal Parliament was empowered by the constitution to vest in state courts jurisdiction in federal matters.<sup>50</sup> Most of the matters reserved for the Commonwealth were invested in State courts in the Judiciary Act 1903, section 38. Further, the High Court has the power to remit cases within its jurisdiction, on a case by case basis, to state courts.<sup>51</sup>

The process was taken a step further in 1987 when a system of *cross-vesting* was established by the passage of Jurisdiction of Courts (Cross-Vesting) Acts at both Commonwealth and state level. These provided for the first-instance Federal courts (the Federal Court and Family Court) to also exercise state jurisdictions, as well as cross-vesting between states and territories. The system operated for about eight years until the High Court found it to be in part unconstitutional in *Re Wakim: Ex parte McNally*.<sup>52</sup> Specifically, there was no power in the constitution for state jurisdiction to be vested in federal courts.

In *Re Wakim* the efficiency and effectiveness of cross-vesting was not in doubt. Indeed, Kirby J's dissenting judgment laid considerable stress on the clear advantages of the scheme, as evidenced by the unanimity of the state and Commonwealth governments who appeared as interveners.<sup>53</sup>

There is a similar example, albeit writ very small indeed, in England and Wales. English magistrates, in some circumstances, administer the law of Scotland, when dealing with salmon poaching offences on the river Tweed.<sup>54</sup>

### **What is required for a jurisdiction?**

A court or system of courts is fundamental to the existence of a jurisdiction; and a judiciary is constitutive of a court. But the core of jurisdiction as a concept lies in the *reach* of the court, and that is constituted by a third and distinct set of legal rules. These specify the disputes, claims, questions and authorisations which it is empowered to decide or make. All three sets of rules are necessary.

In England and Wales, the High Court emerged from English courts which themselves proceeded from the monarch: "all lawful jurisdiction is derived from and must be traced to the royal authority. Any exercise ... of jurisdiction not so authorised, is an usurpation of the prerogative, and a resort to force unwarranted by law", as the House of Lords could say in a case as late as 1867.<sup>55</sup> That case concerned the jurisdiction of the Lord Mayor's Court. Since then, the courts have all been put on a statutory footing, as is neatly illustrated by the

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<sup>50</sup> Commonwealth of Australia Constitution Act 1900, ss. 71, 75, 76 and 77.

<sup>51</sup> Judiciary Act 1903, s. 44(1).

<sup>52</sup> *Re Wakim: Ex parte McNally* (1999) 198 CLR 512.

<sup>53</sup> For an example of the difficulties caused by the decision, see Andrew Keay, "Jurisdictional Chaos: The Fall-Out from the Australian High Court's Decision in *Re Wakim*" [1999] ICCLR 269.

<sup>54</sup> Salmon and Freshwater Fisheries (Protection)(Scotland) Act 1951, ss. 22. See *Gibson v Ryan* [1968] 1 Q.B. 250 and *Ryan v Ross and Another* [1963] 2 Q.B. 151 for examples.

<sup>55</sup> *Mayor and Aldermen of the City of London v Cox* (1867) LR 2 HL 239, 254.

subsequent history of that court – following amalgamation by statute with another City court in 1920,<sup>56</sup> it was assimilated to the statutory county court system in 1971.<sup>57</sup>

The consolidating statute which now houses the creation of the higher courts (by way of the Supreme Court of Judicature Acts 1873 and 1925 and the Courts Act 1971) is the Senior Courts Act 1981. That Act provides that “the Senior Courts of England and Wales shall consist of the Court of Appeal, the High Court of Justice and the Crown Court” in section 1, and in sections 2 and 4, provides that the Court of Appeal and the High Court respectively “shall consist of” the relevant judges. But the quotation above from section 1 continues “each having such jurisdiction as is conferred on it by or under this or any other Act.”

Thus, at least in modern times, it is legislation that creates courts, establishes their judiciaries and gives them reach.

These sets of rules – creation, constitution and reach – are not only conceptually separable, but are often actually separated in practice.

In Canada, as we have seen, it is provincial legislation that creates the senior provincial section 96 courts, and provides their reach rules, but the Federal Government that appoints the judiciary.

In Scotland, the Court of Session was established from the first by statute, in 1532,<sup>58</sup> as Scotland emerged from its “Dark Age” of legal history.<sup>59</sup> While much reformed since, the court’s creation rule remains legally contained in the still in-force words of the Act of 1532. Its constitution rules, however, are now contained in the consolidating Court of Session Act 1988.<sup>60</sup> And over time, the Court has absorbed, by statute, other courts, and their jurisdictions,<sup>61</sup> so that its reach rules can be found in numerous statutes, as well as, still, in the common law.<sup>62</sup>

The identification of these three sets of rules helps elucidate the usage of the term “jurisdiction”. In the statutory provisions quoted above, “jurisdiction” refers strictly to what I have termed reach rules. When required to describe what I have been referring to as the “territorial jurisdictions”, the Constitutional Reform Act 2005, section 41 refers (in common with many other statutes) to “the separate legal systems of the parts of the United Kingdom”, and “jurisdiction” is reserved for the reach rules in section 40. However, even Parliamentary counsel are not wholly consistent – in the Wales Bill, the list of reserved matters include a paragraph headed “single legal jurisdiction of England and Wales”, which reserves courts and

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<sup>56</sup> Mayor’s and City of London Court Act 1920.

<sup>57</sup> Courts Act 1971, s. 42. The City became a county court district, and what was really a new county court retained the old name; and is now a part of the single County Court created by Crime and Courts Act 2013, s. 17(1), inserting County Courts Act 1984, s. A1).

<sup>58</sup> College of Justice Act 1532.

<sup>59</sup> Campbell H. Paton, “The Dark Age, 1329-1532” in *An Introduction to Scottish Legal History* (Stair Society 1958).

<sup>60</sup> Court of Session Act 1988, s. 1-2, as subsequently amended, most recently by Judiciary and Courts (Scotland) Act 2008, and orders made thereunder.

<sup>61</sup> Lord Cooper of Culross, “The Central Courts after 1532” pp 346-349, in *An Introduction to Scottish Legal History* (Stair Society 1958) and Stair Memorial Encyclopaedia Vol. 6, Courts and Competency, paras. 915-919.

<sup>62</sup> Stair Memorial Encyclopaedia, vol. 6, Courts and Competency, paras 923 to 925.

tribunals and judges, and indeed “civil or criminal proceedings”, judicial review and private international law.<sup>63</sup>

We find, then, both narrow and wider usages of the “jurisdiction”. The strict, narrow usage confines it to reach rules. But a broader usage is also linguistically acceptable. That usage includes creation and constitution rules, and it is the three together that constitute the “territorial jurisdictions”.

### ***Reach rules of the courts of England and Wales***

The reach rules of the courts of England and Wales are numerous and protean. The generalist civil courts of first instance have a broad jurisdiction conferred on them – thus the County Court Act 1984 confers a general jurisdiction in relation to contract and tort, land law and various equitable jurisdictions<sup>64</sup> (among others). The general jurisdiction of the High Court is inherited. The Supreme Court of Judicature Act 1873 created the High Court out of a series of predecessors, and section 16 “transferred to and vested in” the new court the jurisdictions of the old; a formulation repeated in the first consolidation, in 1925.<sup>65</sup> Now, the Senior Courts Act 1981 confers, in a section headed “general jurisdiction of the High Court,” “all such ... jurisdictions ... as were exercisable by it immediately before the commencement of this Act”.<sup>66</sup>

But, in addition, innumerable Acts dealing with any number of subjects confer narrower and more specific jurisdictions. There is no list. By way of illustration, between the start of 2015 and the time of writing, 11 Acts have conferred new jurisdictions on the High Court, some numerous.<sup>67</sup>

The position with newer courts is not much simpler. Thus the primary appellate jurisdiction of the Civil Division of the Court of Appeal is set out in the 1981 Act. But all previous jurisdictions are saved in a manner similar to the High Court; and the core jurisdiction of the Criminal Division remains in the Criminal Appeal Act 1966. The (troublesome) distinction between the jurisdiction of the Criminal Division and the High Court is also set out in the 1981 Act,<sup>68</sup> and there are various other jurisdictions provided for elsewhere.<sup>69</sup>

The Crown Court was created in 1971, and its creation and constitution rules are now in the Senior Courts Act 1981.<sup>70</sup> Its core jurisdiction – exclusively to try proceedings on indictment –

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<sup>63</sup> Wales Bill, 2016-2017, HL Bill 89, Sch. 1, para. 1, inserting sch. 7A to the Government of Wales Act 2006, para. 6. Parliamentary counsel’s embarrassment with the usage may be mitigated by the fact it is only used in a cross-heading, not the Bill proper.

<sup>64</sup> County Court Act 1984, ss. 15, 21 and 23.

<sup>65</sup> Supreme Court of Judicature (Consolidation) Act 1925, s. 18.

<sup>66</sup> Senior Courts Act 1981, s. 19(2).

<sup>67</sup> Historic Environment (Wales) Act 2016, s. 14; Renting Homes (Wales) Act 2016, numerous; Planning (Wales) Act 2015, s. 48; Armed Forces (Services Complaints and Financial Assistance) Act 2015, s. 2; Consumer Rights Act 2015, numerous; Modern Slavery Act 2015, s. 54; Recall of MPs Act 2015, sch 3, part 3, para 11; Small Business, Enterprise and Employment Act 2015, numerous; Serious Crime Act 2015, s. 49; Counter Terrorism and Security Act 2015, numerous; and Criminal Justice and Courts Act 2015, sch 16.

<sup>68</sup> Senior Courts Act 1981, ss. 15-18 and 28; eg Criminal Justice Act 1988

<sup>69</sup> Appeals by the prosecution in Criminal Justice Act 2003, part 9; other minor jurisdictions in eg Criminal Justice Act 1988, s. 159, Football and Spectators Act 1989, s. 14A(5A), Serious Crime Act 2007, s. 24.

<sup>70</sup> Senior Courts Act 1981, ss. 1 and 8.

is also found there.<sup>71</sup> But, while the procedure for proceedings on indictment are now statutory,<sup>72</sup> the indictment remains a creature of ancient common law.<sup>73</sup>

The reach rules I have referred to above are those which relate to the definition of the disputes and other matters to be decided by the court, but reach rules include those that limit the geographic reach of the court. Traditionally, these were purely a matter of domestic law; and they remain so in respect of criminal liability, and non-European jurisdictions in respect of civil law.<sup>74</sup> The conflict of law rules in relation to civil law in European jurisdictions are now the subject matter of EU legislation, transposed into domestic law.<sup>75</sup>

### ***Pointers towards a Welsh jurisdiction***

I turn now to some of the implications of this account of jurisdiction for the debate about a Welsh jurisdiction. Exploiting the potential flexibilities of jurisdictions arising out of the discussion above, the aim is to indicate, necessarily at a very general level, how a Welsh jurisdiction could be created without the entire panoply of institutions and structures which have generally been thought necessary for jurisdiction status. In doing so, I draw on the distinction between the rules relating to creation, constitution by a judiciary, and reach.

Before doing so, it is necessary, however, to give a little detail about the current developments in devolution to Wales. At present, the legislative competence of the National Assembly for Wales set out in Part 4 of the Government of Wales Act 2006 works on a conferred powers model – the Act sets out the broad policy areas legislative competence for which is devolved. As part of post Scottish Independence referendum devolution developments, the Government promised a “reserved powers” model for Wales: a statement of devolution that proceeds by saying what is *not* devolved rather than what is, and this is the form taken in the current Wales Bill, shortly to receive Royal assent (and the preceding draft Bill).

Under the current, conferred powers model, provided Assembly legislation related to the specified subject-matter, it could change the law. The move to the greater specificity of a reserved model, however, created difficulties in defining the relationship between devolved matters and the general law. The original draft bill adopted a blanket reservation of criminal law (including civil penalties) and “private law” (“the law of contract, agency, bailment, tort, unjustified enrichment and restitution, property, trusts and succession”),<sup>76</sup> mitigated by provisions allowing amendments where *necessary* for legislation in devolved areas.<sup>77</sup> The bill as introduced to Parliament swept away this much-criticised “necessity test”, and substituted a more nuanced approach. The Wales Bill adopts broadly the same structure in relation to private law, which remains wholly reserved, but subject to a provision allowing modification to the law where the *purpose* of the modification relates to a devolved matter, a broader test than

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<sup>71</sup> Senior Courts Act 2015, s. 46; and s. 48 for appeals from magistrates’ courts.

<sup>72</sup> Indictment Act 1915, and Criminal Procedure Rules 2015, part 10 made thereunder.

<sup>73</sup> J H Baker, *An Introduction to English Legal History* (4 th ed, 2002), p 505-506.

<sup>74</sup> See McClean and Beevers *Morris The Conflict of Laws* (7 ed 2009) chapter 5 for the traditional rules.

<sup>75</sup> Civil Jurisdiction and Judgments Act 1982.

<sup>76</sup> The reservation appears as a “general restriction” on legislative competence in Wales Office, *Draft Wales Bill* October 20, 2015, sch. 2, para. 1, inserting sch. 7B to the Government of Wales Act 2006, paras. 3 and 4. Para 1 similarly restricts Assembly legislation on the law on reserved matters.

<sup>77</sup> The test appears in Wales Office, *Draft Wales Bill* October 20, 2015, sch. 2, para. 1, inserting sch. 7B to the Government of Wales Act 2006, para 2 (the law on reserved matters), para 3 (private law) and para 4 (criminal law and civil penalties) and clause 3 substituting s. 108A for s. 108 of the 2006 Act, subsection (3) (effect beyond Wales).

necessity. In relation to criminal law, however, the bill reserves not the whole field, but four specific categories of offences (broadly, treason, homicide and serious offences against the person, sexual offences and perjury) and certain of the “general parts” of the criminal law, like criminal responsibility and the meaning of *mens rea* terms.<sup>78</sup>

A possible more general answer would have been to have removed the general restrictions on private law and criminal law/civil penalties altogether. This would have amounted to a significant extension of substantive devolution of legislative competence – the non-reservation of some categories of substantive criminal law goes some way, but perhaps not very far, in that direction. The Parliamentary process has failed to amend these provisions. Nonetheless, the option of a general policy of not reserving criminal and private law will remain on the table for the future.

While the distribution of legislative responsibility between state and sub-state units has no *necessary* relationship with the structure of state and sub-state jurisdictions, it can clearly have an effect on what is desirable in policy terms. There may be practical reasons for in general aligning legislative competence and jurisdiction; and it is, at least, a better conceptual fit to do so, even if only for reasons of transparency. In some circumstances, however, the relationship may be more complicated. In particular, it may be that drawing the right jurisdictional line assists the delineation of legislative competence; or, contrariwise, the delineation of competence may make coincidence of jurisdiction pointless. I return to this in relation to reach rules below

My purpose is not to engage in principle with the level of substantive devolution. Nonetheless, in the particular circumstances of the options for the Welsh devolution settlement at the moment, it is necessary to consider jurisdictional design on the basis of both possibilities – non-reservation of criminal and private law, and continued (at least, largely) reservation.

### ***A Welsh Jurisdiction: Creation rules***

General devolution of private and criminal law would argue for a more expansive form of Welsh jurisdiction. As it happens, the Welsh Government’s draft Government and Laws in Wales bill adopts just such an approach, although its approach to devolved powers is different.<sup>79</sup> The draft bill abolishes the existing senior courts (Court of Appeal, High Court and Crown Court) and county and family courts and in their stead creates (similar) senior courts, county and family courts for England and for Wales. There is no express provision for magistrates’ courts, on the basis that they already operate on a territorial basis, and would apply the law of the new Welsh jurisdiction (no doubt after the issue of separate commissions of the peace).<sup>80</sup> A broadly similar approach, of *de jure* abolition and creation, was adopted in the Government of Ireland Act 1920.<sup>81</sup>

But even with this maximalist approach, as we have seen, the new Welsh jurisdiction need be no more monolithic and ubiquitous than the existing territorial jurisdictions. And a merits-based consideration of some courts and tribunals might still result in persisting England and Wales jurisdictions. Just as there are GB and UK tribunal jurisdictions, it may well be sensible for,

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<sup>78</sup> Wales Bill 2016-2017, HL Bill 89, Sch. 2, para 1, inserting sch. 7B to the Government of Wales Act 2006, para 2 (the law on reserved matters), para 3 (private law) and para 4 (criminal law and civil penalties).

<sup>79</sup> Welsh Government, *Government and Laws in Wales Draft bill* March 2016, clauses 77 – 84 (jurisdiction); Sch 7 Part 2 (criminal law, private law and family law as deferred matters).

<sup>80</sup> Information supplied by Huw Davies, principal drafter of the bill, Welsh Government Legislative Counsel’s Office.

<sup>81</sup> Government of Ireland Act 1920, ss. 38 – 41; laws, and other institutions, were to continue with such modifications as were necessary: s. 61.

say, the First-tier Tribunal land registration jurisdiction, or the War Pensions chamber, to remain on an England and Wales basis. Even with general devolution of civil and criminal law, some parts of the High Court might retain an England and Wales jurisdiction. For instance, the subject matter of the Mental Capacity Act 2005 would remain reserved under current plans,<sup>82</sup> and that subject matter provides the jurisdictions of the Court of Protection. If there are sufficiently compelling practical reasons, based on expertise and administrative ease, there would be no reason of principle for it not to retain an England and Wales jurisdiction. One might also question the necessity for a Welsh Admiralty jurisdictions, for example.

However, if there is no further devolution, there are alternatives to the (comparatively) wholesale jurisdiction proposed by the Welsh Government's draft bill. In particular, there might be advantages in a system comprising both an England and Wales jurisdiction, and a Welsh only jurisdiction, differentiating the two by subject-matter reach rules. I discuss how this might work below. The implication of such an approach for creation rules is that the necessary courts for a Welsh jurisdiction would be created *de novo*, without the concomitant abolition of the England and Wales courts. And, on this model, it would not be necessary to replicate all courts. In the absence of general devolution of criminal law, for instance, there may be no need to create a Welsh Crown Court or magistrates' courts, on the assumption that such devolution as there is of criminal law in the Wales Bill will only be used for regulatory purposes.

Where new courts are created alongside existing courts, there would, of course, be no need to house them in distinct buildings. The Welsh jurisdiction could operate in the same buildings (and, as we will see, using the same judiciary), in much the same way that the Courts Marital Appeal Courts functions at present.

### ***A Welsh Jurisdiction: Constitution rules – the judiciary***

The obvious solution to the creation of a judiciary for a Welsh jurisdiction – and that adopted by the Welsh Government's draft bill – is that the two new jurisdictions should share a judiciary. Unlike creation and reach rules, the considerations in relation to the judiciary appear the same, regardless of the extent of a Welsh jurisdiction.

I set out above examples of judiciary-sharing – at apex and appeal level, by cross-vesting in Australia, *de facto* in Jersey – that show that judiciary sharing is not conceptually incompatible with jurisdiction-hood. I know of no example of a *wholly* shared judiciary at all levels, but there is no reason in principle why it should not be possible.

I suggest three options for such sharing. The first two would be seamless sharing – that is, sharing a judiciary capable of sitting in both jurisdictions without separate appointment. There would be a single judicial structure spanning the two new jurisdictions, but with different governance arrangements. The third would be *de facto* sharing, in which the judiciary were common because both systems independently appointed the same people.

The least-radical approach would be for the current England and Wales judicial system, as currently constituted, to serve both jurisdictions. Considered in terms of devolved competences, the governmental function of providing a judiciary for both the England and the Wales jurisdictions would be non-devolved. The UK Government would continue to be responsible in policy terms for the judiciary and to pay for it. This is the approach adopted in the Welsh Government's bill for the immediate creation of a Welsh jurisdiction.

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<sup>82</sup> See Wales Bill, 2016-2017, HL Bill 89, sch. 1, inserting sch. 7A to the Government of Wales Act 2006, section L5.

This would share some of the characteristics of the Canadian system of federal appointment to provincial, as well as federal, jurisdictions, although the federally-appointed provincial judiciary are not shared.

The second seamless option would be to turn the judiciary of England and Wales into a trans-jurisdictional body, serving both new jurisdictions. All judges of what would be formally a new institution would be capable of sitting in both jurisdictions. Judicial leadership would be unchanged, and there would be no need to consider the institution of a cross-vesting scheme on the Australian model, because all judges sitting in either jurisdiction would be empowered to make a judgement in the other, should the necessity arise.

The trans-jurisdictional organisation model, however, would present sponsorship/governance problems. It would be unrealistic to expect the UK Government, acting for the English jurisdiction with 94.6% of the joint population, to have no greater voice in the governance of the new institution than Wales. Setting up governance arrangements to reflect such circumstances would be a novel undertaking; but not an impossible one. At the very least, the Welsh Government would have *de jure* joint responsibility, and a formal involvement in policy decisions, even if, in the end, the English voice would be determinative in the event of disagreement.

Under the third, *de facto* joint model, the Welsh judiciary would come from the joint appointment of judges of the English judiciary, and possibly other judges from other jurisdictions.

On the ground, such a system might not look very different from the seamless models. There are, however, some significant differences. There would be separate provision for judicial leadership, and it might be desirable to make provision for cross-vesting with the English jurisdiction. Even if it would not be necessary to replicate the existing judicial appointments system, there would be some additional administrative costs to the Welsh Government of appointing judges.

More fundamentally, such a system would be parasitic on the English (and other) system (or systems). That is its advantage – it means that the Welsh Government does not have to replicate all the features already in place for the existing England and Wales jurisdiction, which would transfer to the English jurisdiction. For the system to reap the advantages of this parasitism, however, the statute would have to limit the qualifications necessary to become a Welsh judge to judicial appointment elsewhere. That need not be limited to the English jurisdiction, but in practice it would be largely reliant on that new big neighbour. Of the nine appointed members of the Jersey Court of Appeal, for instance, eight are members of the England and Wales bar.<sup>83</sup>

This clearly has some disadvantages. It would be reasonable for someone wishing for a judicial career in Wales to join a seamless joint judicial structure to do so; less so for a prospective Welsh judge to first have to become an English (or Scottish, or Northern Irish etc) judge. One could object that this is a matter of perception rather than substance. But perception and symbolism are not unimportant.

The idea of a “distinct, not separate” jurisdiction for Wales is founded on the idea of sharing a judiciary.

It is worth considering at this point the effect of a shared judiciary on that other issue, the structure of the legal professions. If a judiciary can be shared, so too can the legal professions

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<sup>83</sup> <https://www.jerseylaw.je/courts/Pages/Judiciary.aspx> [Accessed January 18, 2017]

– indeed, with a shared judiciary, any other structure would seem inapt. If we strip away the *assumption* that a separate jurisdiction necessarily requires separate legal professionals, the only argument for separate professions rests on the extent of distinct law. But distinct law is a product of devolved legislative power, not the separation of the two jurisdictions. If it were really the case that distinct law required separate professions, the necessity would arise regardless of the separation of jurisdictions. And it is very unlikely to be necessary. If Australia can bring together eight professions with over a hundred years of distinct law, why should the English and Welsh professions need to part?

### **A Welsh Jurisdiction: Reach rules**

In common with creation rules, it is necessary to consider reach rules in the context of both general legal devolution, that is devolution of the competence to make law amending private and criminal law generally, and without.

If we assume general legal devolution, the Welsh Government’s (maximalist) draft bill provides a model. It recreates the existing reach rules of the superseded courts for the courts it creates and assigns to the Welsh jurisdiction. Those courts are, it provides, to “apply the law extending to Wales”, where the draft bill constitutes the substantive law of Wales as the pre-existing law of the England and Wales jurisdiction, excluding the law that *applies* only in England. Clause 83 is headed “division of business between courts of Wales and courts of England”, and provides that the Welsh courts “are to apply the law extending to Wales”.

The existing set of reach rules that distributes civil cases between the courts of “each part of the United Kingdom” are contained in schedule 4 to the Civil Jurisdiction and Judgments Act 1982. The schedule adapts (with minor changes) the rules contained in what is known as the Judgments Regulation,<sup>84</sup> the now-current European conflict of laws instrument. The primary rule is that a person should be sued in the courts of the part of the UK in which they are domiciled, but a person may sue in the place where the subject matter of the contract lies – where a contract was to be performed, where a tort or delict occurred, where a trust is located and so on.<sup>85</sup> There are special rules for non-natural persons. There are numerous exceptions and qualifications, set out in schedule 4 and schedule 5. The creation of a Welsh jurisdiction would require the amendment of these rules to incorporate the Welsh jurisdiction (while the Welsh Government’s draft does not do it, it provides a power to do so; were the draft a real bill rather than an incomplete and indicative one, it might well include these amendments<sup>86</sup>).

In respect of criminal law, what is now the current case law in England and Wales would obtain – the Crown Court has jurisdiction to try proceedings on indictment where a substantial measure of the activities constituting the crime charged took place in England and Wales, except where the activities should, on the basis of international comity, be dealt with elsewhere.<sup>87</sup> Scotland, similarly, requires a “territorial connection”.<sup>88</sup> The leading case of *Laird*

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<sup>84</sup> Council Regulation 44/2001. It was brought into effect by the Civil Jurisdiction Order 2001, which amended the Civil Jurisdiction and Judgments Act 1982. The Regulation is the current version of the EEC/EU rules first established in the Brussels Convention of 1968 (“Brussels I”), and that Convention is an interpretative aid in respect of Civil Jurisdiction and Judgments Act 1982, sch 4 (s. 16(3)). For the differences between sch 4 and the Judgment Regulation, see McClean and Beevers *Morris The Conflict of Laws* (7 ed 2009) para 4-065.

<sup>85</sup> Civil Jurisdiction and Judgments Act 1982, sch 4, paras 1 – 3.

<sup>86</sup> Information supplied by Huw Davies, principal drafter of the bill, Welsh Government Legislative Counsel’s Office.

<sup>87</sup> *R v Smith (Wallace Duncan) (No 4)* [2004] QB1418. For the liability or otherwise of aliens, particularly for treason, see the cases cited in Richardson (ed) *Archbold 2016* para 1-146.

<sup>88</sup> MGA Christie *Gordon The Criminal Law of Scotland* (3 d ed 2000-2001), para 3.44.

*v HM Advocate*<sup>89</sup> involved a fraudulent scheme, elements of which took place in Scotland and England.

But in the absence of general legal devolution, something closer to a fit between jurisdiction and the distribution of legislative competence might be desirable. This is a common feature of federal jurisdictions. Thus, matters relating to areas of activity where legislative competence is devolved, such as housing, could fall within a Welsh jurisdiction. Conversely, a failure to devolve private law in general would argue for the retention of such matters as part of the England and Wales jurisdiction.

But distributing jurisdiction in this way is problematic. The core difficulty is the incommensurability of policy categories and legal categories. It therefore applies equally to the specification of the law necessary for the exercise of legislative competence as it does to the specification of the law in a reach rule. The descriptions used for policy areas, for what the Supreme Court called “objects of legislative activity”,<sup>90</sup> do not necessarily map accurately onto the legal categories by which jurisdiction, or a *fully autonomous* definition of the law for the purpose of legislative competence, may most effectively be defined.

To take one example, “housing” is a policy area. As a tradition description of a policy area, it includes, among other things, the regulation of rented accommodation. Legally, the respective rights of landlords and tenants and the law relating to tenancy terms, is part of the law of landlord and tenant. But landlord and tenant law also includes commercial renting; and long residential tenancies. Neither commercial property nor matters such as leasehold enfranchisement or service charge disputes in long leases are traditionally seen as included within “housing policy” – thus, they are within the departmental responsibility of the Ministry of Justice, as part of civil law, not the “housing” subject owned by the Department for Local Government and Communities.

Contrariwise, the public law system for controlling overcrowding, or regulating the physical standard of short-term rented property, is part of the “housing” policy subject, but not landlord and tenant as a legal category.

It is by no means impossible to describe, and chop up, the legal categories relevant to devolved subject matters in this way, even if it is a substantial task (and one more appropriate to a conferred power model than a reserved powers one). It is highly unlikely that the fit would be exact in all circumstances. And it would also be necessary in some areas for the two jurisdictions – England and Wales and Wales – to share jurisdiction. So it is one possible way of defining a Welsh jurisdiction that is close-to-coincident with legislative competence.

But there would also be another possible approach to such a partial Wales jurisdiction. The optimal reach rules for a Welsh jurisdiction co-existing with a continuing England and Wales jurisdiction may not the same as the optimal limits on the competence of the National Assembly. In other words, it might be possible to differentiate a smaller number of legal categories to be *judicially* reserved than need be *legislatively* reserved.

In Canada, the federal first instance jurisdiction is much more confined than the legislative competence of the Parliament. Most federal legislation is adjudicated by provincial courts. It would be possible to develop a similar, narrow list of matters judicially reserved (in Canada, judicial review of federal officialdom, copyright, trademarks, patents, admiralty, tax and citizenship), without regard to legislative competence (although here the position of the courts would be reversed – the reserved matters would lie with the England and Wales jurisdiction,

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<sup>89</sup> 1985 JC 37.

<sup>90</sup> Re Agricultural Sector (Wales) Bill [2014] 1 WLR 2622, [49].

in Wales). One attraction of this approach is that it is likely to be much easier to draft and administer. Another is that it would enable – or require – the UK Government to identify the legal areas in which it considered a persisting England and Wales really necessary, while relinquishing the rest.

The options set out above for co-existing jurisdictions within Wales, differentiated by reach rules, could be described as retaining an England and Wales *territorial* jurisdiction and creating a Welsh *territorial* jurisdiction. Better, though, to simply describe which disputes different courts are empowered to adjudicate, as a Canadian lawyer will.

### **Conclusion**

There may be any number of positive reasons for the introduction of a Welsh jurisdiction. A jurisdiction may solve problems with the formulation of devolved legislative and executive powers. It may bring the delivery of justice nearer to the people in Wales, and better reflect Welsh social, economic and cultural conditions. It may be apposite to reflect the growth and maturity of Wales as a polity. It may be symbolically important. Equally, there may be disadvantages to a Welsh jurisdiction, whether in terms of cost, or consistency, or even quality of adjudication.

But it is only by adopting a better analysis of jurisdiction, and by understanding the flexibility of the concept, that we can open up the policy discussion beyond the inaccurate, one-size-fits-all monolithic model of territorial jurisdictions.