CLA WJ 7

Inquiry into the establishment of a separate Welsh jurisdiction
Personal Response (David Hughes)

Memorandum of evidence to the Constitutional and Legislative Affairs Committee of the National Assembly of Wales

Re a Separate Welsh Jurisdiction

Introduction

1 I am a barrister practising at the Bar in Cardiff since June 2007. From 1997 until that date[1], I practised at the Gibraltar Bar. My practice in Cardiff encompasses public and administrative law, and in Gibraltar I appeared in a number of cases regarding the interpretation of the Gibraltar Constitution. The practice of appearing before Anglo-Welsh judges in the Gibraltar Court of Appeal has played a significant part in forming my views on the desirability of creating a separate Welsh jurisdiction.

2 In this memorandum, I will seek to address the questions posed in the Committee's call for evidence. Although I believe that the creation of a Welsh jurisdiction would be a good thing, I preparing this memorandum I have sought to put before the Committee observations rather than to make points.

The meaning of the term "separate Welsh jurisdiction"

3 This term is most readily understood by comparing Wales with Scotland and Northern Ireland. Each of the latter has its own law (whether or not made (in the case of statute law) in Edinburgh/Belfast or Westminster); each has its own courts (although UK-wide tribunals may sit in those countries, the courts of England & Wales have no jurisdiction there). Each has its own legal professions.

[1] Save for a period of pupillage in London.

4 Wales has none of these. Although the National Assembly has primary legislative competence in a number of areas, and although the law it makes applies only in Wales, it is still part of the law of England and Wales. Anglo-Welsh courts determine cases involving such law, and therefore legislation made by the National Assembly can be interpreted by courts sitting in England, whose judges may have little or no professional or personal experience of Wales. Welsh lawyers are admitted to practice and regulated by organisations based in England. By way of comparison, Gibraltarian lawyers, although educated in the UK and admitted firstly in one of its component jurisdictions, are admitted and regulated by the Supreme Court of Gibraltar. Gibraltar has its own judicial appointments system. Although its appellate judges are retired Anglo-Welsh appellate judges[2] (sitting part-time), their appointment in Gibraltar is made under Gibraltarian law and has no necessary legal connection to their judicial service elsewhere[3].

5 A Welsh jurisdiction should be understand as involving the recognition of Welsh law as being distinct from English law (although it may well mirror it to a large extent), administered by Welsh courts (as opposed to Anglo-Welsh courts located in Wales), with lawyers admitted to practice in Wales appearing.

Potential benefits, barriers and costs of introducing a separate Welsh jurisdiction

6 What the benefits of a separate jurisdiction would be depends, to an extent, on individuals' political views, but it would allow the justice system in Wales to better reflect the needs and priorities of the people of Wales and their elected representatives. It is hard to see how the creation of our own

[2] Which itself can be less than ideal, but the use of judges from other jurisdictions is perhaps inevitable in so small a jurisdiction. The same could not be said of Wales.
[3] Gibraltar Constitution, s62.

jurisdiction could not bring with it control of the funding of access to justice. Some might want to use this to introduce, for example, a Conditional Legal Aid Fund as used in Hong Kong and some Australian states. Others might want to reform personal injury law by introducing a New Zealand style no-fault compensation scheme and thereby abolishing personal injury litigation. However, some benefits are easily identifiable.

7 The most obvious benefit to my mind is that it avoids the risks inherent in having the same courts applying distinct primary legislation from two different sources within the same jurisdiction. I do not believe that the comparison with courts in the United States having to deal with state and federal legislation is apt; the United States is a federal country, its lawyers and judges educated within a legal culture in which different federal and state competences are well understood. Anglo-Welsh lawyers, by contrast, are educated in a unitary tradition, and the Anglo-Welsh jurisdiction is not a federal one.

8 My experience in Gibraltar was that it was sometimes difficult for retired Anglo-Welsh judges sitting in the Court of Appeal to adjust their thinking from one appropriate to applying Anglo-Welsh law to one appropriate to applying the Law of Gibraltar. Although this most often manifested itself in the course of argument before the court, an example can be seen in the case of *Rojas -v- Berllaque [2001-02] Gib LR 252*, when the majority of the court struggled with provisions of the Gibraltar Constitution that provided for remedies in the event of violations of constitutional rights, preferring instead an Anglo-Welsh approach. That this happened in a jurisdiction physically separate from England & Wales leads me to believe that, if a separate Welsh jurisdiction is not established, at some point in the future Welsh legislation drafted to be

different from that applying in England will be interpreted to mean the same as that applying in England. Although the creation of a separate jurisdiction would not totally eliminate this risk, it would do much to reduce it. This risk would, if it materialised, be a significant detriment to the public. Avoiding it is a considerable benefit.

9 Another benefit would be what might be termed the civic culture of Wales. At present, the centre of our jurisdiction is in London. Although the administrative court sits in Wales, there are still some matters which must be heard in London[4]. What the call for evidence describes as "regular sittings" of the court of appeal in Cardiff are, in fact, short visits by a London-based court.

10 Amongst the consequences of this is a perception in some quarters that "London is best". Although there are some very distinguished barristers practising in Wales, other able Welsh practitioners have chosen to live and to make their careers in London. Users of legal services too often instruct solicitors based outside Wales, and even when Welsh solicitors are used, English-based counsel are often instructed. Although its centrality means that, on occasion, people may need to instruct London-based lawyers on very specific issues, at present English-based lawyers[5] are used in cases that could perfectly well be done by Welsh-based lawyers. The negative effects of this are manifold; not only are the legal fees exported to England, but the idea of Wales as a backwater is perpetuated. This in turn poses a dilemma to those starting out on a legal career – do they base themselves in Wales, or do they practice in London? Every able lawyer who makes the latter choice is a loss to Wales. The same is all the more true for every socially committed lawyer, who could make a

[4] CPR 54PD 3.1.

[5] And I suggest that where lawyers choose to live and based their practices is a better indication of their commitment to Wales than where they may happen to have been born or raised.

contribution not only to legal and business life in Wales, but through community involvement to the cultural and political life of our country. By way of comparison, relatively few Gibraltarians who qualify as lawyers choose to practice elsewhere (although I recognise that physical distance and cultural differences may also influence this).

The practical implications of a separate jurisdiction for the legal profession and the public

11 Although it is likely that there would continue, for at least some years, to be significant cross-border practice, one would expect to see less use of London-based layers in Wales. There would be costs benefits to this. There would also be the obvious reduction in costs that would come from not having to travel to hearings in London (other than in the UK Supreme Court).

12 Leaving aside the obvious desirability of having a trustworthy and efficient legal system[6], much is said about the importance of the Anglo-Welsh legal system as a source of business to the UK[7]. But the benefits of this are largely, if not exclusively, confined to the south east of England. If Wales were a separate jurisdiction, we would be free to run a court service at least as trustworthy as that in England and more efficient, and therefore compete against London as a venue for dispute resolution.

13 One might well see the cost of regulating the legal profession reduce. Although the need for proper regulation cannot be disputed, there is a good argument to make that lawyers in a Welsh jurisdiction could safely be subject to a more economic regulatory regime. For example, it is questionable whether the introduction of Alternative Business Structures serves to answer a need in Wales. From a barrister's point of view,

[6] And our current system is certainly trustworthy and largely efficient.
[7] For example, see http://www.economist.com/node/21543557?fsrc=scn/fb/wl/ar/unsungheroes

there seems to be a good argument for the regulation of lawyers to be done by function, rather than by title. This is probably not the place to go into the regulation of lawyers at length. I would be happy to supply the committee with further evidence on this, but the long and the short of it is that, if Welsh lawyers are regulated by Welsh bodies, those Welsh bodies can tailor the regulation of Welsh lawyers to meet Welsh needs.

14 Thought would have to be given to legal education. In Gibraltar, there is no local legal education, lawyers are admitted in one of the UK's jurisdictions and then apply to the Supreme Court for admission, for which there is no exam. Lawyers are not permitted to establish their own practices immediately, but instead have to practice together with more experienced lawyers for a time.

15 There would be no reason why England & Wales should not continue to have joint legal education. The legal systems would be likely to continue to have great similarity, certainly more than exists between the Anglo-Welsh jurisdiction and Gibraltar. One practical advantage to retaining common legal education would be that it would be easier for those intending to become Barristers to continue to have access to the Inns of Court Scholarship funds. The Inns distribute a significant amount of money each year, and they can make a real difference to students from non-wealthy backgrounds looking to come to the Bar (as was my own case). Although physically located in London, the Inns have accumulated their funds as the Inns for the whole of England & Wales. Justice requires that Welsh students continue to be able to access them, and the practical need for scholarships is likely to be greater in Wales than in England.

16 There is the question of precedent. Pre-separation caselaw would remain binding precedent. Precedent from post-

separation English courts could not be binding precedent, although it would be of persuasive authority. Statutory provision enabling a Welsh Court of Appeal to depart from pre-separation precedent where appropriate should be considered. Wales could be expected to produce a lower volume of caselaw than England, which means that pre-separation precedent could be overruled in England but remain in force in Wales. There may be no compelling reason for statutory change in the law, and the point may not arise for a number of years in Wales. A Welsh Court of Appeal ought to be free to depart from pre-separation precedent in these or similar circumstances.

17 In Gibraltar, the lack of local precedent causes little practical difficulty. Although Anglo-Welsh caselaw is not thought to be binding[8], this has not led to great uncertainty in the law. In practice, Anglo-Welsh caselaw is treated as the starting point, both for common-law matters and when interpreting a similar statute.

18 A separate Welsh jurisdiction should include provision for Welsh QCs. Not to appoint silks, when they are appointed in the other UK jurisdictions and in Ireland, would be to deny Welsh lawyers a distinction available in comparable jurisdictions. There is a view that the current system works against able Welsh lawyers. Although this is not the occasion for a detailed critique of the current system, the ideal would be that a Welsh system should command the confidence of the legal profession and the public.

19 At present, it appears that Anglo-Welsh silks called to the Northern Ireland Bar appear there as silks. They are permitted as a courtesy to appear as if they were local silks in Gibraltar, although their exact status is not clear. The contrary is not

[8] The relevant statutory provision (the English Law Application Act 1962, s2) is ambiguous, and the interpretation given in Almeda –v- AG for Gibraltar [2003] UKPC 81, [2003] All ER (D) 335 (Nov) (@ para 13) is open to criticism.

true – Northern Irish or Gibraltar Silks appearing before an Anglo-Welsh Court do not appear as silks. This is an unjustifiable discrimination, and should not happen in Wales. Wales should seek an understanding with the other common law jurisdictions within the UK[9] that either silks be mutually recognised, or they be required to appear as juniors when appearing outside the jurisdiction in which they take silk. Thought will also have to be given to whom is to be eligible to take silk in Wales. It would not be desirable for those whose practice is predominantly based in English to seek to take silk in what one hopes would be a more economical Welsh regime for the sake of cost or convenience.

20 An issue that has the potential to cause difficulty is the use of the term "English Law" in contracts. Many contracts, particularly standard form contracts, use this term instead of the preferable "Anglo-Welsh law", and the related term "English Courts", in controlling law and jurisdiction clauses. At present, the latter means the Courts of England & Wales. The former is probably intended to mean that the contract is controlled by the law of England & Wales[10]. Statutory provision should be considered to make clear the position of both pre-separation contracts and post-separation contracts. It would be highly undesirable, to say the least, for people in Wales who have entered into contracts to find that those contracts are controlled by English, rather than Welsh law, and that the Welsh Courts have no jurisdiction to adjudicate any disputes about them. It should not be presumed that this problem will be confined to pre-separation contracts. Standard forms pre-dating separation are likely to continue to be in use for some time thereafter, and it may be that those who draft standard form contracts will be unaware of

[9] I recognise that this may not be appropriate with Scotland.
[10] What the position is where the law is different in the two countries is unclear.

separation or fail to take account of it. A recent visit to London revealed almost complete unawareness of the possibility of Wales becoming a separate jurisdiction.

The operation of other small jurisdictions in the UK, particularly those, such as Northern Ireland, that use a common law system.

21 I believe that I have dealt with this question above. Although not technically within the UK, and although a far smaller jurisdiction than Wales would be, I believe that Gibraltar has some lessons for Wales.

22 In addition to comparison with Northern Ireland, it may be that the Australian jurisdictions have lessons to offer. I have in mind particularly Western Australia and Northern Territory, in which a de facto independent Bar is a relatively recent phenomenon, and the lessons that they may have for Wales regarding legal education and the regulation of the Bar in particular.

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