TERRITORIAL JURISDICTION, EXTENT AND APPLICATION

1. This appendix sets out our understanding of the three important, legal concepts that connect law to territory.

2. The three concepts are “jurisdiction”, “extent” and “application”. It is only in the case of “application” that the notion of a territory is an exclusively geographical concept. For “jurisdiction” and “extent” other constitutional factors are relevant. “Jurisdiction”, for us, is about what courts can do. “Extent” and “application” are essentially about what rules can do. All of these concepts interact with each other. This can give rise to confusion.

3. Sometimes, very similar legal outcomes can be analysed in different ways: so that they appear to depend on different concepts; and there can be a degree of arbitrariness about the way in which a particular effect is analysed. This also complicates the process of distinguishing the three concepts from each other.

4. Some of this confusion seems to us to have affected the debate currently taking place about whether there can be, or should be, a separate Welsh “jurisdiction”[1]. That confusion has been aggravated by the fact that the word “jurisdiction” is not always used with the same meaning in different contexts. Aspects of that debate have been put to us in evidence. That is why we are setting out how we understand the matter.

“Jurisdiction”

5. For us, the concept of “jurisdiction” has a narrow sense. It describes the result of applying a separate set of rules for defining the categories of case that a court is willing or required to hear.

6. The rules that determine a court’s jurisdiction will almost invariably operate by reference to the whole <u>or a part</u> of a

1 Reference to the consultation.

territory by reference to which there is a separate legal system (by which we mean a system of legal rules, rather than a system of courts). The jurisdictional rules will require a connection between a case brought before it, and that territory or the relevant part of it. That territory or part may itself be described as the court's jurisdiction.

7. The required connection may take different forms. However, once the jurisdiction of a court is established, the court will decide the matter according to the rules that belong to the legal system for the territory to which, or to part of which, the court's jurisdiction relates.

"Extent"

8. "Extent" is the concept that identifies the legal system (a set of rules) to which a particular legal rule belongs. For this purpose there are only three legal systems within the United Kingdom, Scots law, the law of Northern Ireland and the law of England-and-Wales (here "England-and-Wales" is hyphenated to indicate they are being referred to as a single territory, rather than as two separate ones).

9. What defines a legal system for this purpose is that all the rules that belong to it are identified by the application of identical rules of recognition. This involves the existence of a set of rules of recognition for defining what constitutes a legitimate source of law "for" a particular territory. It is because there is no set of rules of recognition for England alone, or for Wales alone, that produces the effect that there are only three legal systems for the United Kingdom[2], and that the concept of extent to England or extent to Wales are meaningless.

10. The existence of a separate legal system for a territory is sometimes thought to be a consequence of the existence of a single courts system for that territory. It follows that it is also

2 As a matter of analysis, it could be said that the law of the United Kingdom, the law of Great Britain or the law of some other combination of different parts of the United Kingdom each constitutes a separate legal system to the extent that the same rules of recognition apply in the combined territories. It is more straightforward, however, to assume that there are only three systems, but that each has elements that overlap with the others.

thought by some that providing for different parts of a court system to apply different jurisdictional rules would create separate legal systems. That is not the case. Just as it is quite common for eg inferior courts in a single court system to have a jurisdiction defined by reference to only part of a territory for which there is a separate legal system. So courts in two different courts systems could bind themselves to identical rules of recognition and so apply exactly the same law. A single courts system is not a logically necessary requirement for a single legal system; and it is certainly not the case that the division of a courts system will inevitably or immediately lead to the creation of a separate legal system. [3]

"Application"

11. Application is perhaps the easiest of the three concepts to describe; but it may be the most difficult to pin down in practice.

12. The concept of application looks at a particular rule and asks if there is any territorial limitation on the operation of the rule. There is no principle that requires a rule of application to confine itself to a territory with a separate legal system or to a territory which constitutes the jurisdictional area of a particular court or court system. So a particular rule might apply only in London or to fishing on a particular river or to the operation of a particular port or just to a defined area around Parliament. The rule itself determines its territorial application

Discussion

13. So the three concepts operate in this way. "Jurisdiction" uses a territorial connection to define the cases which a court has been set up to hear. "Extent" uses a territorial connection to

3 Separate court systems might in practice lead to separate legal systems, but it is not a logically necessary consequence. Rules of recognition that include rules about precedent and judge-made law generally make the existence of a hierarchy within the courts system relevant to the task of finding binding precedent; and, without a single hierarchy, the rules of recognition would tend to diverge. Another reason is that separate court systems will tend to develop different procedural rules. Substantive law and procedure are often so intertwined that rules of law applied in different court systems would be very likely to diverge if they were applied in the context of different rules of procedure.

identify the set of rules that will be applied by a court to a case within its jurisdiction. “Application” uses a territorial connection to impose a limitation on the effect of a particular rule within a system.

14. The concepts of jurisdiction, application and extent are linked. The concept of extent can import general rules of application. These may be firm rules, as in the case of rules made by a devolved legislature, where the rules defining legislative competence limit it by reference to extent and application. They may also take the form of presumptions. The sovereignty of Parliament entitles Parliament to make criminal offences of conduct with no connection to the United Kingdom - and it has done so in the case of eg war crimes and other international wrong. However, the presumption, where Parliament creates a new criminal offence, is that some connection with the part of the United Kingdom to which the offence extends must be established before the law applies. In a particular case however it may be difficult to analyse whether the required connection is implicit in the extent of the offence, is regarded as implicit as matter of construing what Parliament intended when it created the offence or is imposed by practice by Parliament relying on a jurisdictional rule of the courts applying the law in question.

15. The rules of application, jurisdiction and extent are particularly intertwined in the case of public law and criminal law, because the courts of one country do not normally regard it as within their jurisdiction to enforce the public law or criminal law of another country. However civil law matters give rise to different issues, and there are aspects of the law of the United Kingdom that can give rise to further confusion.

16. In the case of civil matters, things may be more complicated because the required connection may depend on no more than the practicalities of bringing the parties before the court. So jurisdiction may depend, for example, on whether the defendant has been served with process or resides within the court’s jurisdiction (viz within the territory for which the relevant legal system exists, or within an area comprised in that territory).

17. In addition, there may be a discretion for the court to allow other cases to be brought "within its jurisdiction" (eg by service of process abroad). How a discretion of that sort should be exercised may depend on questions about the "extent" or "application" of the law that would be relevant if the case were allowed to come before the court. However, once a court has established jurisdiction and so decided to apply the rules the legal system recognised by that court, that the legal system it applies my still the law of some other legal system to be treated as relevant.

18. All mature legal systems, including Scots law, the law of Northern Ireland and the law of England-and-Wales, contain rules that allow foreign law to be taken into account where it is relevant to a particular case. This happens where the facts of the case have a connection with a particular foreign territory. (A simple example would be if a case were heard in England-and-Wales about damages caused by a road accident in France. Another would be if a court in England-and-Wales needed to decide whether to recognise a couple as married if they had been through a marriage or divorce in a territory where the laws of marriage or divorce were different).

19. The rules that allow this are known as the rules about "conflict of laws" rules (or in so far as they are intended to reflect a degree of international comity, "the rules of private international law"). Where those rules apply the relevant foreign law will proved as a relevant fact, rather than recognised as a legal rule that the court is under a duty to apply as such.

20. For many purposes these "conflict of laws" rules of England-and-Wales, Scotland and Northern Ireland operate between the three legal systems in the United Kingdom in the same way as they do between each of those systems and entirely foreign systems. The existence of three sets of conflicts rules is further evidence of the existence of three legal systems within the United Kingdom. The can be no system of conflict of rules between England and Wales, and there e is none, because there can, by definition, be no conflict within a single system.

21. A related complication is caused by the fact that rules of recognition are shared between the three territories. The UK Parliament can make a rule that extends to England-and-Wales but not to Scotland; and that rule will be treated as relevant in a case heard by a court in Scotland (whose duty is to apply Scots law) only if there is a "conflict of laws" rule of Scots law that requires it to take into account the law of England-and-Wales (e.g. because of some connection between particular facts of the case and some place in England or Wales). In practice, rules for taking account of foreign law are likely to tend towards greater comity between different parts of the same country than between one country and an entirely different one; but essentially the rules still work in the same way.

22. On the other hand, if the UK Parliament makes a rule specifying that particular legal consequences should flow from specified conduct in England or Wales and then extends that law to Great Britain (viz England-and-Wales and Scotland), that will have the effect that the part of that law that relates to conduct in England or Wales has already been made part of Scots law without any need to have a rule of Scots law that requires the law of England-and-Wales to be taken into account.

23. In practice, of course this distinction may be only theoretical. In practical terms, it may make little or no difference in practice whether a court in Scotland recognises a rule of the law operating in England-and-Wales because there is a rule of Scots law that recognises the relevance of a foreign law in the circumstances in question or if it does because the rule is already part of Scots law because it has been "extended" by Parliament to Great Britain, or to the whole United Kingdom. Nevertheless this illustration does help to illustrate the concept of extent. In practice it may be more straightforward to incorporate the rule into Scots law than to rely on what are sometimes complex "conflict of laws" rules. It is for this reason that provisions of Westminster Bills that are primarily relevant to only one part of the United Kingdom are extended to other parts, particularly when there may be issues about the legal status or capacity of a legal person.

24. The concept of “territorial extent” cannot be used to distinguish cases with a connection to Wales from cases with a connection with England, because England and Wales share a single system and rules of extent and rules that derive from the rules of extent do not distinguish between the two. Rules made by the UK Parliament for England necessarily become part of the law of England-and-Wales. And so do rules made by the Welsh Assembly. Limitations to one of the other have to take a different form and to rely primarily on “application”.

Legislative competence

25. It is worth noting that each of the definitions of legislative competence that apply to the devolved legislatures use both concepts: extent and application, together with other factors (primarily the topic to which the legislation relates).[4]

26. However the limitation on the power of the Welsh Assembly to make legislation is primarily a limitation relying on application[5] and the limitations in the other two cases are primarily limitations relating to extent. In the case of Wales this is because the only practicable limitation is one to the law of England-and-Wales, and that is clearly insufficient to distinguish English cases from Welsh cases. It is this that results in the courts in England and in Wales applying identical rules of recognition, rather than the way the courts of England and Wales are organised.

27. As between England and Wales, the only limitations on the legislative competence of the Welsh Assembly are limitations of application. It is noteworthy that the Scottish Parliament and the Northern Ireland Assembly have no power to amend the law of England-and-Wales consequentially on the provisions they make for Scotland or Northern Ireland. By contrast the Welsh Assembly has an inherent power to amend the law of England-and-Wales, and so its power to do so for England has been confined to incidental matters.[6]

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4 See section 29(2)(a) of the Scotland Act 1998, section 6(2)(a) of the Northern Ireland Act 1998 and section 108(4)(b) & (5) and section 108(6)(b) of the Government of Wales Act 2006.
5 See ibid section 108(4)(b) of the Government of Wales Act 2006.
6 Ibid s. 108(5).