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**ELISABETH JONES BA, LL.M, DIRECTOR OF LEGAL SERVICES, NATIONAL
ASSEMBLY FOR WALES.**

WHO CARES ABOUT CLARITY? THE PRESENT AND FUTURE LEGISLATIVE COMPETENCE OF THE NATIONAL ASSEMBLY FOR WALES

I wish to thank the Law Society in Wales for the great honour they have done me in inviting me to deliver this lecture; an honour that I feel especially as I am a Welsh learner.

I originally studied languages – French and German. Becoming a lawyer felt like a natural development from that. Like the study of languages, the study of law is all about working with words and analysing their meaning; and communication is also key to being a lawyer. To be honest, it was only later that I realised how much more the law was, and could be. But I am still struck by how the law is a language, and by how much the language we use affects the way that we think.

An individual's body language and even personality are different, depending on the language he or she is using. I would contend that it makes you think differently too. The same may apply to the language of the law. So, if, one day, we have a separate jurisdiction for Wales – as seems likely – we will be able to develop a new way of thinking about legal concepts, about rights and obligations. Being a bilingual nation may free our minds to do so.

I think of the saying, *Cenedl heb iaith, cenedl heb galon*¹. And I think that the heart of a nation expresses itself through the nature of its laws, too; and that the nature of those laws is, in a sense, part of its language.

I will turn, now, to the topic of this lecture. I should emphasise that my remarks are personal and do not represent the position of the National Assembly for Wales or of the Presiding Officer.

Why do I say “Who cares about clarity?” I admit that the title of this speech was deliberately provocative. Surely it is obvious that clarity is important, particularly in a legal and indeed constitutional context. If citizens are not clear about what powers their national parliament has, then that is a problem for democracy. And when not even legal experts are clear about those powers, then that is a very big – and very expensive – problem for democracy.

So, a little provocative. But I did want to make a serious point, too – or perhaps two serious points – through the title of the lecture. The first one is that, in my view, the clarity deficit in our devolution settlement was very significantly reduced on 9th July, by a single event – the Supreme Court ruling in the Agricultural Sector (Wales) Bill case.

The second serious point underlying my title is a pretty obvious one. But nevertheless I think it is worth making. It is that clarity is not the same as width. If we want the Assembly to be able to legislate truly holistically in Wales, what we need is wider powers. It would be possible to have a very clear devolution settlement that was very narrow. Clarity is, in itself, extremely important, for the reasons I have given. But, speaking personally, I am saying that clarity is not enough. We need the Welsh devolution settlement to be clear, and we also need it to be appropriately wide.

I will come back to these points when dealing with the future of the Welsh devolution settlement. But, first, let us look at the Welsh devolution settlement as it stands at present. And for that, we need to remember what

¹ A nation without a language is a nation without a heart.

it looked like until 8th July this year, and then examine how that picture changed radically overnight, with the judgment of the Supreme Court.

So let us begin at the beginning. The National Assembly for Wales acquired the power to pass Acts on 5th March 2011. (I am ignoring, for the purposes of this lecture, its earlier power to pass Measures, which began in 2007 and was more restricted). The current Welsh model of devolved legislative competence is a conferred powers model. That is, the United Kingdom Parliament has conferred a list of subjects of competence on the National Assembly for Wales; and the Assembly can make laws only in relation to those subjects.

That sounds fairly clear.

But in fact , from 5th March 2011 to 8th July this year, the Assembly's competence was very far from clear – which of course meant that it was not clear how narrow or wide it was.

Why was it not clear? The Government of Wales Act 2006 sets down 10 tests for competence, by my preferred method of counting. (There are other methods that could come up with a larger or smaller number, but I think everyone would agree that the tests are numerous). And, of course, they apply to every single provision of every single Bill, not simply to each Bill as a whole. The only thing that is clear from that is that the scope of the settlement was very unclear.

So how has the settlement been clarified by the Supreme Court judgment of 9th July? Very greatly, because the case deals with the first (and arguably the most important) of my 10 tests for competence: the requirement that a Bill provision must “relate to” a subject listed in Part 1 of Schedule 7 to the Government of Wales Act 2006². It is also essential to bear in mind the

² See section 108(4) Government of Wales Act 2006.

second test for competence: the Bill provision must not “fall within” one of the exceptions, which are also listed in Part 1 of Schedule 7 to the 2006 Act³.

References to “Schedule 7” sound very dry. But I am obliged to make them frequently, because Schedule 7 – along with Part 4 of the Government of Wales Act 2006 – is *de facto* the constitution of Wales.

Schedule 7 lists subjects of competence, and it lists exceptions from competence. But those two lists do not cover every area of activity. And the \$64,000 question was: what about the other areas – the ones that are not mentioned at all? Are they outside competence? Remember, the principle underlying the Government of Wales Act is that the Assembly only has competence over the subjects expressly listed in it. What if a Bill provision relates to a subject in Schedule 7, but also relates to something that is not mentioned in Schedule 7 at all? Does that second relationship negate competence?

This issue arose in the Agricultural Sector Bill case. Schedule 7 includes “agriculture” as a subject of competence. Schedule 7 does not mention “employment”. The Agricultural Sector (Wales) Bill gives the Welsh Ministers the power to set minimum wage levels, and certain other terms and conditions of employment, for agricultural workers in Wales. The Welsh Ministers argued that the Bill was within competence, because it related to “agriculture”, which is a subject within Schedule 7. The United Kingdom Government argued that, in reality, the Bill relates to employment⁴ – which is not a subject within Schedule 7, but is not an exception there either.

Lawyers working in the Government and the Assembly often referred to these topics, such as employment, as “phantom exceptions”. They were phantoms because they had no existence in the 2006 Act. But, like phantoms, they nevertheless had an effect: a chilling effect. It was

³ The second test was not in issue in the Agricultural Sector Bill case. It was a central issue in the other Supreme Court case of 2014 on the Assembly’s legislative competence, the case on the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill. That judgment is still awaited.

⁴ See paragraph 4 of the judgment.

⁴ See paragraph 67 of the judgment.

frightening to go into the room where the phantom was; it was frightening to propose legislation on an issue that could relate to employment as well as agriculture, to the English language as well as the Welsh language, to the criminal law as well as to the protection of children. The Supreme Court has now well and truly laid those phantoms to rest.

In its judgment of 9th July, the Court held that a Bill will be within competence provided that it “fairly and realistically”⁵ relates to a subject mentioned in Schedule 7, and does not fall within an exception. The Court said in terms that it does not matter whether the Bill could also be classified as relating to a subject which has not been devolved (i.e. a subject which is not mentioned in Schedule 7).⁶

This is a huge increase in the clarity of the settlement. It is not just of benefit to lawyers and Assembly Members. It is now much easier to state with certainty which policy proposals will be within competence and which will not. Certainty in the law is of benefit to all citizens, whether individuals, businesses or public bodies. As the Supreme Court said, the judgment makes the settlement more stable, coherent and workable⁷.

But, to return to my theme, this is not just an increase in clarity. It is also relevant to the width of the settlement. The Court cannot, of course, widen the Assembly’s competence: it tells us what the law is; it does not make the law. But the judgment of 9th July clarifies the settlement in a way that gives it the maximum width possible given the wording of the Government of Wales Act.

To illustrate what I mean, let us think of alternative judgments that the Supreme Court could have given. If the Justices had so wished, they could have confined their judgment to this particular Bill, without establishing the general principle that topics not mentioned in the 2006 Act can be ignored.

⁵ See paragraph 67 of the judgment

⁶ Ibid.

⁷⁷ See paragraph 68 of the judgment.

Or the Court could have established a different principle. It could, for instance, have held that the true test was where the “centre of gravity” of a Bill lies – in agriculture or in employment law. Or it could have constructed a test built around dominant purpose and secondary purpose.

Any of these alternative solutions would have left the Welsh settlement unclear. And none of them would have shown the Assembly’s existing competence to be as wide as we now know it to be.

Despite the judgment, there is still unnecessary complexity in the settlement. Remember, there are still eight other tests for competence. And those tests also of course restrict the width of existing competence.

The most important of these, and also the least appropriate, in my view, come from the way in which competence can be barred by the mere existence of rump UK Ministerial functions in largely devolved areas. Here, again, we see the link between clarity and width. Even now, post 9th July, it is dangerous to pronounce that a policy proposal will be within the Assembly’s competence until a full check of the effect on UK Ministerial powers has been carried out.

This causes a lack of clarity for the citizen, and that is a very important issue. But I would submit that, for lawyers, the situation post 9th July is radically clearer. Up to 9th July, the devolution settlement was a maze, in which there were no signposts, in which almost every path bifurcated, and where you could not tell whether you were going to come to a dead end until you got there. Since the Supreme Court judgment, it is more like a forest, but one with signposts and paths. It may take some time to get through it, but if you are patient and persistent, you will come out into the light.

So why did the Court go so far? Has it judicially rewritten the Welsh devolution settlement? I would say absolutely not. On the contrary, this is a judgment which bases itself 100% on the wording of the Government of Wales Act 2006. To repeat: the first test for competence in the Act is “does the Bill provision relate to a subject in Schedule 7?” The second test is, “does

the Bill provision fall within an exception in Schedule 7?" The Act says nothing about topics that are neither subjects nor exceptions.

So the Supreme Court has simply given effect to what it calls "the clear test" in the 2006 Act. That means, broadly speaking, looking first at the ordinary meaning of the words used in the Act. In this case, the Court found the words used in the Act to define competence⁸ clear and easy to interpret using their ordinary meaning. The Court also reiterated its ruling in earlier cases that, if help is needed as to what the words mean, then it is proper to have regard to the purpose of the 2006 Act, which was to achieve a constitutional settlement. But this does not mean that the Court considers that there is a presumption in favour of devolution. That possibility was firmly ruled out by the Supreme Court in the Scottish case of *Imperial Tobacco Ltd v The Lord Advocate*⁹.

So what are the implications, now that we know that the boundary of competence can be drawn at maximum width? What topics can the Assembly now deal with in a Bill, where there was doubt before?

I have touched on some of these already: employment law, the English language, the criminal law. And, providing that a Bill provision "fairly and realistically" relates to a subject in Schedule 7, it could also relate to matters like the Armed Forces, the police, prisons, probation law, company law, or common-law fields like contract law, tort law or land law. So the implications are very significant.

To be clear: I am not claiming that, as of 9th July, the Assembly can create a new system of employment law, or tort law or company law for Wales. A Bill provision must still relate to a subject in Schedule 7 to be within competence. This means that there can be no systematic, holistic rewriting of the law on other topics – the topics not mentioned in the 2006 Act.

⁸ i.e. in section 108 of and Schedule 7 to the 2006 Act.

⁹ [2012] UKSC 61 at paragraph 15.

But, for instance, a Bill provision relating to devolved subjects – such as housing or the protection of the environment – might create or modify a tort applicable in Wales. A Bill provision relating to the protection of children or the care of vulnerable people might also change the law on civil or criminal liability. This is of course all subject to the other tests for competence, including the restrictions linked to existing functions of Ministers of the Crown, human rights and European law.

The judgment changes the comparative width of the Scottish and Welsh settlement. The Scottish settlement is generally considered to be wider than the Welsh one. However, even before 9th July, the Welsh settlement was in fact wider, in some limited respects. For instance, the Assembly has some competence in relation to equality law, whereas the Scottish Parliament has none.

The judgment of 9th July has revealed other areas in which the Assembly has greater competence than the Scottish legislature. This is because the case-law of the Supreme Court on the Scottish settlement¹⁰ has firmly established that if a provision of a Bill of the Scottish Parliament relates to a reserved matter, then that provision is outside competence, even if the provision could also be said to relate to a devolved matter. But, as we have just seen, if an Assembly Bill relates both to a subject of competence, and to some other topic that is not expressly referred to in Schedule 7, then the Assembly Bill is within competence.

It is fascinating to compare the list of reserved matters in Schedule 5 to the Scotland Act 1998 with the list of exceptions in Schedule 7 to the 2006 Act. For instance, in the Scottish settlement, the armed forces are a reserved matter. They are not the subject of an exception in the Government of Wales Act. There could conceivably be health, education or social welfare issues concerning the armed forces which could be within the Assembly's powers – subject, as always, to the other tests for competence. Firearms is another

¹⁰ Imperial Tobacco Ltd v Lord Advocate [2012] UKSC 61, paragraph 43.

Scottish reserved matter that is not mentioned in the Government of Wales Act.

Tax, however, is both a reservation in the Scotland Act and an exception in the 2006 Act. So the 9th July judgment has not altered that position, and we await the specific tax-raising powers that the current Wales Bill, going through the Westminster Parliament, will confer on the Assembly.

That completes what I want to say about the present competence of the National Assembly for Wales. Let us now look to the future. The Commission on Devolution in Wales – commonly known as the Silk Commission – has recommended that the Welsh devolution settlement should be recast as a reserved powers model, along the lines of the Scottish settlement¹¹. Both the Presiding Officer and the First Minister called for that conclusion in their evidence to the Commission. All this happened, of course, before the landmark judgment of 9th July this year.

So the question arises: can we still say that a reserved powers model of competence would be clearer for the public to understand? Is it still necessary to avoid frequent references of Assembly Bills to the Supreme Court? And would it allow the Assembly to pass more holistic laws for Wales?

I think there is no doubt that, as the Presiding Officer said in her evidence to the Silk Commission, a reserved powers settlement would be easier to explain to the public. It is much easier to understand “The Assembly can make laws about anything unless the Government of Wales Act says it can't”, rather than having to list the subjects of competence and then list all the exceptions. So a reserved powers model would be clearer in that sense. And – as I have said before – that is a very important sense for democracy.

However, would a reserved-powers settlement be clearer in a technical, legal way? That is, would it help to avoid the frequent referrals of Bills to the Supreme Court that we have experienced so far in Wales?

¹¹ Empowerment and Responsibility: Legislative Powers to Strengthen Wales (Report of the Commission on Devolution in Wales, March 2014), Recommendation R.1, p. 185.

The first thing to say is that the judgment of 9th July should in itself radically reduce the numbers of future referrals of Assembly Bills to the Supreme Court, because it has introduced so much greater clarity and certainty into the Welsh settlement.

The second thing to say is that a reserved-powers settlement is not guaranteed to be clearer from a legal point of view. It all depends on how the reserved powers are drafted. Moreover, we already have some warnings about the clarity of the current Scottish settlement.

For one thing, Lord Hope himself has said, in the Supreme Court, that the Scottish settlement “[might] not strike one as a model of clarity”¹².

Also, Scottish legislative competence has not been immune from challenge. There appears to be an urban myth to the contrary. There have been about 20 challenges to Acts of the Scottish Parliament (“ASPs”) since 1999. At an average of just over one per year, that is slightly higher than the rate we have had in Wales since the equivalent point in devolution here, which is 2011.

The difference is, of course, that the challenges to ASPs have all come from individuals, companies or bodies and not from the UK Government. It is worth noting, however, that not all three challenges to Welsh Bills have come from the UK Government, either. It was the Counsel General to the Welsh Government who referred the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill to the Supreme Court. And the UK Government has not even joined in this case. Instead, the challenge to competence in this case comes from the Association of British Insurers, a private association.

Another difference between the challenges to date to ASPs and those to Assembly legislation is that the challenges to ASPs have been made after Royal Assent, i.e. they really were challenges to Acts, not to Bills. However, the consequence of a successful challenge is the same in both cases; any

¹² *Martin and Miller v Her Majesty’s Advocate (Scotland)* [2010] UKSC 10, *per* Lord Hope, at paragraph 3.

provision which the courts find to be outside competence is not law. Indeed, the consequences of a successful challenge after Royal Assent are more nuclear. The only way to fill the gap left by the void provision is to pass a second Act, amending the challenged one. In contrast, if a Bill is successfully challenged, the Government of Wales Act and the Scotland Act both provide for the Bill to come back to the legislature that passed it, for correction. It is then the corrected Bill that goes forward for Royal Assent.

So: the Scottish reserved powers model has been stated by the Supreme Court not to be a model of clarity, and Acts made under it have been challenged some 20 times. I should add that one of these challenges has been successful – the *Salvesen v Riddell* case¹³, in which the Supreme Court declared that section 72(10) of the Agricultural Holdings (Scotland) Act 2003 was outside competence and therefore not law.

In another case, *Martin & Miller v Lord Advocate*¹⁴, the Supreme Court was split; three Justices (the majority) found in favour of competence, while two dissented.

And in a third case, *Imperial Tobacco Limited v Lord Advocate*¹⁵, the Justices of the Supreme Court clearly found it a challenging task to decide whether a ban on the display of tobacco products in retail outlets related to public health – which would be within competence, or consumer protection, which would be reserved. A very similar issue, you might think, to the one that arose in the case of the Agricultural Sector (Wales) Bill.

I must admit that I am being a little disingenuous. Although there have been about 20 challenges to ASPs, the vast majority have related to human rights. This is an aspect of competence, but it is not unique to the law of devolution. On the other hand, “two and a half” of the three Welsh challenges

¹³ [2013]UKSC 22.

¹⁴ See earlier footnote for citation.

¹⁵ See earlier footnote for citation.

have involved an aspect of competence that is unique to devolution law. So, looked at in that way, the number of challenges under devolution law in Wales – three in three years, versus two in Scotland in 15 years – does appear high. But looking to the future, the Scottish Parliament has just passed a very controversial Bill allowing what we would call common land to be built on, and is considering another very controversial one about Assisted Suicide. It may be, therefore, that the legal focus will shortly move from Wales to Scotland, at least for a while – whatever happens in the referendum on 18th September.

So the Scotland Act does not provide a “model of clarity” (not my words, remember – Lord Hope’s). Although, lessons can be learned from it for any future new Government of Wales Bill. I hope that the Assembly will be able to influence the design of the new settlement in that Bill, when it comes to be prepared.

Such a Bill would, of course, be United Kingdom legislation, which is, traditionally, prepared in a process of discussion between the two Governments – the Welsh Government and the UK Government in the shape of the Wales Office. However, the future Bill is likely to be preceded by a consultation, possibly one on the policy and one on the draft Bill itself. And the Assembly will of course be able to respond to these.

The kinds of lessons from the Scotland Act that I am thinking of are: first, consistency in the way in which reserved topics are described – particularly as to how broad or narrow they are.

A second lesson would be to avoid defining reserved topics as the “subject matter of” this or that UK Parliament statute or part of a statute.

The third lesson would be to find a better way of dealing with cross-cutting legal topics like contract, tort, land law and employment law.

To quote Lord Hope again:

*“it [is] not possible, if a workable system [of devolution is] to be created, for reserved and devolved areas to be divided into precisely defined, watertight compartments. Some degree of overlap [is] inevitable ...”*¹⁶

So, we should not expect a reserved-powers model to deliver complete clarity as to the boundaries of legislative competence. It would, to my mind, be over-optimistic to expect any system of devolution – or federalism – to put in place completely "watertight" compartments between the responsibilities of the different levels of legislature and government. Canada has had a federal system for 150 years; Australia for over 100 and the United States for over 200. Yet their courts continue to hear cases about the division of legislative responsibility there.

However, our aim should always be to achieve the maximum clarity possible – for the sake of democracy and to avoid the waste of public resources on matters such as lawyers' fees!

Let me now try to draw the present and future together into a conclusion.

I have said that the 9th July ruling is hugely significant. It means that the Assembly can legislate on topics that are not referred to in the Government of Wales Act 2006, and on cross-cutting areas of law like contract, tort and land law, provided that the true purpose of the legislation relates to a subject in Schedule 7. However, it does not mean that the Assembly can systematically overhaul the law on those other topics or cross-cutting areas. A reserved-powers model could give the Assembly that power – unless, of course, those areas were reserved. But a reserved-powers model is not the only way to achieve this result. Conferral of new areas of competence on the

¹⁶ Martin and Miller v HM Advocate (Scotland), [2010] UKSC 10, paragraph 11.

Assembly could do so, especially in light of the ruling of 9th July. However, a reserved-powers model would still be clearer for the public to understand.

I talked, at the beginning of this lecture, about the possibility of a new language of law in Wales, that could also be a new language of legal – and therefore social – concepts and relationships. It was that kind of root and branch review of whole areas of law that I was thinking of. We could create a better world of clearer rights and duties, that would be easier for citizens to enforce without incurring huge expense for themselves or the state. There are people in Wales – lawyers, politicians and people of ideas – who are capable of that challenge.

So, at the end of this lecture, I have come back to the concept of clarity. The clarity, and the transformation, that we may be capable of producing, as a nation, when we have the width of competence to do so.
