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**RT. HON SIR MALCOLM PILL**

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Like many sermons I have heard in Chapel, I propose to divide my address into three parts, first, a consideration of Welsh identity, second, reference to the present unitary legal system of England and Wales and, third, the impact of current constitutional changes on those two concepts. The third part is sub-divided and contains substantive views. Ministers of religion used to call it the “message” though not my Minister and today not me. (My colleague Hywel ap Robert, son of a manse of Yr Annibynwyr, would comment, on hearing an argument put zealously that messages were for Western Union). I set out the first two parts in some detail in order to set the scene, for the third, though much of the detail will be familiar to most of you.

### **National Identity**

Wales has a population of just under 3 million. Its capital is Cardiff, in the extreme south of the country with a population of just over 300,000. Between 20% and 25% of the population speak Welsh; the percentage is much higher than that in some parts of the west and north, it is much lower in the south-east.

Wales has been united formally with England since 1536. The framework for governing Wales for 4½ centuries was provided by the Laws in Wales Acts of 1536 and 1543.

For centuries, the economy of Wales was mainly rural, though seafaring was never negligible. There was a rapid growth of population in the 19<sup>th</sup> century with the Industrial Revolution. Substantial immigration occurred into the south-east of Wales from the rest of Wales and from English counties, particularly those around the Bristol Channel. Cardiff grew as a major port and, in the 20<sup>th</sup> century, as an administrative centre, formally being made capital in 1953.

Since the abolition of the Courts of Great Session in 1836 the administration of justice in Wales has been as a part of a unitary legal system comprising England and Wales. Following a referendum, the Government of Wales Act 1998 was enacted and was followed by the Government of Wales Act 2006 which is, in the opinion of the House of Lords Constitution Committee “in effect, a written constitution for the governance of Wales”.

What is there about Wales which merits a separate identity within the United Kingdom? The concept of Welsh identity is a difficult one. As someone based in Wales for almost all my life, though with opportunities in my working life, especially in recent years, to assess the situation from outside, I am still trying to define it. I read the recent biography of RS Thomas by Byron Rogers in the hope of finding an answer. He lived and worked in different parts of Wales in the course of his life and was fanatical about the Welsh language, though his highly esteemed poetry was written in English. Having read the book, I was even more confused.

I feel a strong sense of Welsh identity, whether I am in Wales or beyond. I am fifth generation, Cardiff the Pill and Davies branches of the family having arrived in Cardiff from Cornwall and Pembrokeshire respectively in the 1860s when the population of Cardiff was only just over 30,000. No member of the family has been fluent in Welsh since my great grandmother.

The Welsh language of course is an important feature of the Welsh identity but far from the only one. During the 20<sup>th</sup> century, Welsh broadcasting, in English and in Welsh, has promoted and reflected the existence of a Welsh identity as has the work of educational institutions, cultural institutions such as the Welsh National Opera, and sporting loyalties.

I am unable to offer a definition but am satisfied that there is a sense of identity felt by the great majority of the 2.8 million people in Wales, whether Welsh speaking or not. All I conclude is that, when considering constitutional change, the concept must be inclusive. Important though the promotion and use of the Welsh language is, a promotion that is encouraged by many in the monoglot English majority, it cannot be a requirement for enjoying a sense of Welsh identity. Such exclusiveness would, in my view, be inimical to the future development of Wales. Nor can the sense of identity be sensibly based on residence in a particular part of the country.

What can be said with confidence is, first, that a sense of Welsh national identity exists in a majority of the population and, secondly, that the sense of identity is recognised and acknowledged not only in the cultural, educational and sporting contexts I have mentioned but in current arrangements for the governance of Wales.

### **Unitary Legal System**

What the constitution in the 2006 Act does not provide are arrangements for the administration of justice in Wales. As Professor Thomas put it in his essay in the Halsbury Centenary Essays (2007), the unity of the legal system of England and Wales is not “overtly disrupted” by the 2006 Act. As legal systems go, that of England and Wales is conspicuous for its unitary character and the domination of London. The Court of Appeal, where I sit, illustrates those characteristics. London based, we are the sole Court of Appeal for over 40 million people, busy people in terms of their commerce and industry, activities of public bodies, and family life and, regrettably, the volume of crime. The Court covers the whole range of work, there is no separate constitutional court for example, for the entire population.

That contrasts with most other jurisdictions, common law and otherwise. Denmark, with a population of 4.8 million, has 2 geographically based Courts of Appeal, Finland has 5. In Switzerland, each of 21 Cantons has its own Court of Appeal. The federal jurisdiction in the United States has 11 circuits each with its own Court of Appeal, and the work of the circuit which includes California is such that there are

serious moves to sub-divide it. The larger continental jurisdictions are federal, some of them being of comparatively recent creation as compared with that of England and Wales. The size of the Court has its disadvantages in terms of the diminution of a collegiate approach with a very large court and the creation of additional work and a risk of uncertainty in the law as a result of the many different constitutions in which the court sits.

It is not my task today to address that problem. The unitary system is well entrenched by history and practice and has its advantages. The problems perceived to arise from the size of the jurisdiction are not susceptible to an easy answer. A separate system for Wales would do little to reduce that problem, the Welsh work being only a small proportion, in the region of 5%, of the work of the Court of Appeal, and the system as a whole.

What can, however, be said is that devolution in the administration of justice would not run counter to the healthy administration of justice in the present jurisdiction to or international norms. As to international norms, I mention the recent decision of the European Court of Justice in *Horvath v Secretary of State for Environment, Food and Rural Affairs* (Case C-428/07) 16 July 2009, which is the subject of a workshop later this morning. *Magee v UK* in the ECtHR [2000] ECHR 216 is to a similar effect.

There are advantages in being part of a large jurisdiction and having the comfort and prestige that is likely to go with it but, in terms of manageability, there are advantages in a smaller and less cumbersome system. I had the opportunity last year to spend several days in Denmark studying the legal system. I was struck by its manageability, in particular the easy and apparently harmonious relationship between the judges and the administrators, and a recognition of the role and needs of the judiciary that goes with it. There are many jurisdictions in Europe with populations much smaller than that of Wales, including, within the United Kingdom itself, the jurisdiction of Northern Ireland.

The Beeching Reforms, given effect by the Courts Act 1971, encouraged the growth of a Welsh legal identity. The introduction of presiding judges for the circuits and a strong circuit office, now HMCS Wales, and its chief officers, have made both the judiciary and practitioners conscious of a separate Welsh identity. The development of civil justice centres, pioneered in Cardiff by His Honour Graham Jones, has had a devolutionary effect. While there was some diminution in local control with the abolition of Quarter Sessions, the administration formerly done by the Sessions became the function of the Circuit Office thus enhancing a Welsh, or at that time a Wales and Chester, approach to problems and needs. Most of the presiding judges who have held office on the Circuit since 1971 have encouraged the sense of Welsh identity in the judiciary and the profession and have had opportunities to do so. As an analysis of the situation in Wales, and in particular mid-Wales, I commend the lecture delivered by Judge Milwyn Jarman QC, the Chancery Judge in Wales, at Welshpool on 24 September, the Islwyn Davies Memorial Lecture.

Divergences in the law and practice between England and Wales did not begin with the 1998 Act. The Welsh Office had been, at least since 1964, empowered in areas within its competence to lay down policies which were, in public law terms, enforceable. Planning and highways policies, for example, diverged between England and Wales and application of the Welsh policies could not be challenged on public law grounds. When appearing for the Welsh Office at road enquiries in the 1970's, I enjoyed, professionally that is, the discomfort of opposing counsel who, in cross-

examination, tried unsuccessfully to challenge the Welsh Office policy that the capacity of a road with given qualities was lower in Wales, in terms of the number of vehicles it could carry, than a road with similar qualities in England.

There has of course been a great acceleration in the divergence since 1998. In the planning field, for example, substantial divergence has occurred, by way of subordinate legislation as well as policy. There are significant differences in education and health, though the approaches in the two areas have been different. The divergences and differences were explained in papers delivered by Huw Williams and Emyr Lewis at a Law Society Seminar in Cardiff earlier this year.

The process is also demonstrated in a study of local government made by Professor Bailey and Dr Elliott (2009 Cambridge Law Journal 437). They studied and analysed the position of local government in England and Wales and found a “concentration of factors” which, “positively incentivises,” to adopt their terminology, intervention by central government in local government, activism by central government being the norm in this jurisdiction. They found local democracy to be in a weak state, with little democratic nexus between individuals and their councils.

I refer to the issue not to enter into controversy between local and London government but to the difference the authors found between that situation and the situation between central government and the devolved governments of Scotland and Wales. Central government’s approach to the devolved administrations in Scotland and Wales has been different, they conclude. In both countries, they find a reluctance in central government to intervene, because of the “perceived legitimacy” of the devolved administrations, and a need to negotiate with them. The factors which formerly provided incentives for interventions by central government now work in the opposite direction. As central government recognises the legitimacy of the Assembly and the devolved administration, it is important, in my view, that the unitary legal system gives equivalent recognition in the judicial structure suitable for Wales.

### **Consequences for the administration of justice**

How will devolution in the administration of justice develop? I refer to options and first give an example of how, in my view, it should not, be done. The Constitutional Reform Act 2005 set up a Judicial Appointments Commission for England and Wales, and we have the privilege of the presence of its first Chairman at this conference this afternoon. In the statute, section 61 and schedule 12, paragraph 10(4), it is provided:

“The panel must select persons for appointment as lay members (including the Chairman) with a view to securing, as far as practicable, that the persons so appointed include at any time at least one who appears to the panel to have special knowledge of Wales”.

That is recognition indeed of the Welsh identity but is it the right way to give effect to it? I emphasise that I am making no criticism of the Commission whose members are obliged to operate under the Statute. Its members are conscientious in their work.

No part of England, notwithstanding distance from London and other regional and local characteristics, has been considered fit for such a provision. I have spoken of the Welsh identity. The difficulty of identifying the single person contemplated by

the language of the schedule is obvious. But, more important, what is the function of that person when decisions are taken on judicial appointments in Wales? Should the other members of the panel defer to that member? Surely not because it would give that lay person a power no less than that formerly possessed by the Lord Chancellor in making judicial appointments. If they do not defer, what enquiries should they make about the “special knowledge” and its relevance to the particular appointment in question and what weight should they give to his or her views? However conscientious and able that person is (and the present incumbent undoubtedly is both) the statutory scheme is less than satisfactory.

Once the identity of Wales and the need to have regard to the particular qualities and needs of Wales when making judicial appointments is recognised, effect to it should be given, I suggest, either by way of a separate commission, or a separate panel of the existing commission, in which both professional and lay members are familiar with the qualities of Wales and its distinctive needs. It would not be an innovation; there has for a long time been a Parliamentary Boundary Commission for Wales, a Local Government Boundary Commission for Wales and, when Wales for this purpose divided into separate constituencies, a European Parliamentary Boundary Commission for Wales. The judiciary of Wales and distinguished Welsh lay people have been prominent in the work of those Commissions.

Moreover, the route taken in the Tribunals, Courts and Enforcement Act 2007 is different from that in the 2005 Act. The 2007 Act created the Administration Justice Tribunals Council (AJTC) as successor to the Council for Tribunals. It made provision for a Welsh Committee, which has subsequently been created, to keep the administrative justice system in Wales under review. This is a broad brief. The Committee reports to the Welsh Assembly.

Once the special identity and the particular needs of Wales are recognised, it is important that judicial appointments are made by professional and lay members familiar with the administration of justice in Wales. That gives rise to the further question whether High Court judges, who sit both in Wales and England, should be appointed in the same way. That in turn gives rise to the larger question whether devolution of the administration of justice should extend to Wales having its own legal system with separate High Court and Court of Appeal. Whether the approach to the devolution of the administration of justice should adopt a step by step approach or take a large step at one time is obviously a major question. I first refer to forces which may work in favour of unity or at least a merely gradual approach to devolution.

First, the advantages which Wales has enjoyed and continues to enjoy from the link with England in the administration of justice cannot be ignored. It provides access to broad fields and powerful resources.

Secondly, the English experience which many current members of the judiciary, and of course many members of both professions, have undergone has probably enlarged horizons and may well have made them better able to serve the public and the interests of justice in Wales. My experience in England as Queen’s Counsel and as a judge possibly fitted me better for the privilege of spending five years as a presiding judge on the Wales and Chester Circuit. There are others who take the same view.

Thirdly, you will know from my background and the time I have spent in Cardiff as a legal practitioner, a judge and a resident that I strongly support the City’s

development and status. I have to recognise its limitations, however. It is a City that has developed comparatively recently and has neither the population nor prestige, nor the legal traditions of Edinburgh or Belfast. Meeting with Scots and Northern Ireland lawyers makes one aware of our comparative lack of pedigree and experience in this field. Moreover, Cardiff is still in the process of earning the capital status conferred upon it in 1953 and not only in the perceptions of the world beyond Wales but in the perceptions of the people of Wales. Of course I am not saying that Welsh judges and practitioners are any less able. Experience refutes that possibility. A tradition of judicial separateness, and of dealing with a devolved administration, requires skills which cannot, however, be acquired in a moment. The Association of Judges of Wales, is seeking to make good the deficiency, including by forging links with judges in other jurisdictions.

Fourthly, the legal profession in Wales also needs to grow in strength and be mindful of public needs. It is in the interests of the administration of justice in Wales if more of the quality legal work which arises from the activities of public bodies in Wales and from commerce, is done by lawyers, both solicitors and counsel, based in Wales. At the bar at any rate, I regret that the trend in the last generation appears to have been in the opposite direction.

I have referred to potential weaknesses and drawbacks in legal Wales. Notwithstanding those factors, I have come to regard greater devolution in the administration of justice in Wales as inevitable. The law in Wales is becoming different in important areas having an impact on the lives of the people, particularly in the field of public law. In his essay, Professor Thomas referred to the “depth of legislative divergence” between England and Wales. Separate laws are a pointer to a separate system. The divergence is compounded by the bilingual form of, for example, statutory instruments. Given the test which is to be applied to the construction of statutory documents in Wales, English words may acquire a different meaning in Wales from the one they have in England.

Before considering further what steps may be taken, I refer to a difficulty highlighted when a delegation of Welsh judges, during its visit to Switzerland earlier this year, had discussions with Professor Nicholas Schmitt at the highly regarded Institute of Federalism in the University of Fribourg. As one would expect, he addressed us on the merits of federalism. The great federations have in the main been “bottom up” administrations where, as with the Cantons in Switzerland, smaller units have come together into a Federation. In the United States, following the War of Independence, the thirteen former colonies came together and, following a torrid summer in Philadelphia in 1787, agreed upon a federal form of government, including a Supreme Court. The Commonwealth of Australia is another example.

Professor Schmitt urged caution when considering, in terms of the administration of justice, a “top-down” federation. Steps should be taken slowly and gradually, he urged. While no situation will be identical with Wales, it would be helpful to know of and learn from successful “top-down” devolution of the administration of justice. I regret I am not aware of relevant comparative studies, for example, with Spain where similar forces are present. The factors considered appear in the main to support a phased approach to the devolution of the administration of justice.

At this stage, I mention, though will need to do so only briefly, changes that have occurred and are under consideration. I have referred to the role of presiding judges, as did Lord Elis-Thomas when delivering his recent address at the Annual Law

Society Lecture at the National Eisteddfod. I will refer again to that important address. It is difficult now to envisage the appointment of a presiding judge for Wales who is not prepared to accept that the administration of justice here must not merely be as just another part of a unitary system, and no different from regions in England.

The Administrative Court now has an office in Cardiff. The Court of Appeal Civil Division now sits twice a year in Wales, provided work is available, and the new Master of the Rolls has already told me of his intention to make an early visit. Apart from this year's proposed sittings, substantial lists have been available with the ready co-operation of the present listing officer at the RCJ. Compiling a list for Wales is not easy, cases on occasion having an unhappy knack of being ready at the wrong time but I believe we now have a system in place whereby Welsh cases are identified and, wherever possible, listed in Wales. We can work towards greater flexibility in timing of sittings but it is not easy to organise.

The principle that cases arising in Wales should be heard in Wales is now more readily accepted. When Court of Appeal sittings in Cardiff began, I heard applications, on varied grounds, why Welsh cases could not be heard by the Court of Appeal in Cardiff, including one that the weather was insufficiently good to make the journey. Such applications are now less frequent.

An obvious area for possible devolution is in the management in Wales of the court and tribunal building programme. If a Welsh public body decides where hospitals are built in Wales, should not a Welsh public body decide where courts are built? In his address Lord Elis-Thomas stated that "there is no practical or technical reason why Welsh Ministers should not fund Her Majesty's court service in Wales. . . That would help to ensure that the pattern of court provision, both civil and criminal, reflects the needs of Wales". I agree that the subject requires consideration.

To that I would add consideration of the needs of that very important component of the structure for the administration of justice, the tribunal service. Some tribunals, such as the Mental Health Appeals Tribunal, are already administered from and in Wales. At present Tribunals in Wales present a less than satisfactory patchwork. Their relationship with the Assembly Government also requires early attention, a subject to which I cannot refer in any more detail. However, speaking more generally, the scale of activities and institutions in Wales, provide opportunities for a better integrated system for courts and tribunals, and the resources they require, than is possible in the current unitary system. In other spheres already mentioned, the advantages of operations in a Welsh framework have been demonstrated.

The Presiding Officer did also suggest the transfer of legislative competence for the field of criminal law to the Assembly. I say no more than that such a change would be a very large step and one which would require most careful consideration, given the complexities of criminal law and sentencing policy in recent years. The status and role of police authorities in the administration of justice would need to be considered along with it.

### **The place of the judiciary in the constitution of Wales**

It is not my wish to go through possible devolution of function subject by subject. The question of legislative competence is rightly being debated intensively. What I should like to address is the question of the relationship of the Welsh Assembly, the

Welsh judiciary and HMCS Wales. That is fundamental and must not be forgotten as devolution proceeds. Lord Elis-Thomas referred to “the third type of governmental power, which is just as important as the legislative and governing powers, namely judicial power”. Recognition of its importance from that high source is most welcome though one may question whether “judicial power” is correctly described as a type of “governmental power”. Judicial power is an important part of the constitution and must be separate, as Montesquieu proposed in *L’Esprit de Lois* and is universally recognised in the Western tradition.

I have mentioned the Philadelphia Convention. The Federalist Papers which followed it, written mainly by Alexander Hamilton and James Madison, are among the great constitutional statements. In paper LXXVIII, Hamilton, who was the father of government in the United States, as Madison was the father of the constitution stated:

“the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree that ‘there is no liberty if the power of judging be not separated from the legislative and executive powers’ [Montesquieu]. And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independent as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure as the citadel of the public justice and the public security.”

Those forces must be recognised as the devolutionary settlement proceeds. The unitary system had a severe shock when the role of the Lord Chancellor was fundamentally changed. He had been the head of the judiciary and, with a position close to the centre of government, could protect and enhance the judiciary and its role. New arrangements have painfully and arduously been worked out and a Concordat achieved between Lord Judge’s predecessor as Lord Chief Justice and the Minister of Justice and Lord Chancellor, whose role is now political. The implications of this are still being worked out. We must not proceed on the basis, to which the understandable unfamiliarity of politicians in Wales with the judicial arm of the constitution could contribute, that the judiciary, when performing its functions, is managed by the Assembly Government or answerable to it.

I have no doubt that the independence of individual judges making individual decisions would not be challenged but there is more to it than that. If the independence of the judiciary is in the long term to be maintained, it must have an important role in judicial administration, in judicial discipline and standards, the allocation of funds, judicial deployment, judicial training and the organisation of both courts and tribunals, including bilingual aspects of that organisation. These are only examples. I do not think Lord Elis-Thomas meant to challenge that need but the

statement that Welsh Ministers should “fund Her Majesty’s court service in Wales” has a simplicity which, with respect, may deflect from the complexity involved.

Lord Elis-Thomas suggests that the term of presiding judges in Wales should be extended from 4 to 6 years and the senior of them should be designated “Lord President of the courts of Wales”. I agree with the thinking behind the suggestions, though not necessarily with the suggestions themselves. They are a recognition, as it appears to me, of the need for high level judicial input into the devolutionary settlement. The role which has been performed by presiding judges needs to be amended and expanded to meet current needs in Cardiff and London, though the office should continue. There needs to be a judicial body in Wales which can speak on equal terms with the Assembly government and HMCS, as points of contact increase.

In the Republic of Ireland, the judiciary manages the sum budgeted for the administration of justice. In Norway and Denmark, countries with which Wales has much in common, and following intensive studies, judicial administrations have been set up, independent of the Ministry of Justice, and with a strong judicial component and influence. The judicial administrators, while remaining part of the civil service, must be answerable, at any rate in part, to the judiciary and not merely to the Assembly. They are at present answerable to the administration in London, which is itself subject to the Concordat, to which I have referred, between Lord Chief Justice, now head of the judiciary, and the Minister of Justice. In London, there is a Judicial Executive Board which may provide an example.

A similar arrangement needs to be worked out in Wales. The body needs to have continuity, prestige and power, its authority deriving from that of the Lord Chief Justice of England and Wales in the unitary system. That is the route by which, as Lord Elis-Thomas put it, “the development of the judiciary and the courts in Wales keeps step with other constitutional developments”. Whether in the longer term, a statutory framework is required can be debated but action should not in my view be delayed. Circumstances have changed substantially and events may now move swiftly with a referendum due in 2011. The judicial arm of the constitution of Wales must be integral to the settlement and not left merely to follow along and comply with it, whatever form it takes. An important input should come from the judiciary sitting in and familiar with Wales, those with a close and, if possible, long experience of life and judicial administration here.

I underline, out of caution, that arrangements for judicial administration need not, and in my view should not, detract from the sovereignty of the legislative body in law making, whatever settlement, by way of legislative competence, is settled between Westminster and Cardiff. The extent to which, if at all, the judiciary should be able to challenge the lawfulness of legislative acts is an issue separate from the one I have been considering.

The strength or lack of strength of the political will for change is of course fundamental and a subject on which I have no wish or right to speak. A political will to confront fundamental constitutional problems has perhaps been lacking in British public life when compared with that of other European states. The UK/Welsh agenda may be very different from the issues faced in Europe but it must be recognised that, at bottom, it is the political will, or lack of it, which will determine the shape of devolution. What form devolution and particularly devolution of legislative competence should take, is now the subject of earnest consideration. My theme is that such consideration must include awareness of the role and standing of the

judiciary in Wales and the consequent need for appropriate judicial status as the settlement emerges.

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