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DEVOLUTION AND THE ADMINISTRATION OF JUSTICE

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I regard it as a great honour to have been asked to deliver this year's Lord Callaghan Memorial Lecture and I am grateful to the University for inviting me to do so. I am also grateful to the University for allowing me to choose the subject of the lecture – the only limitation placed upon me being that the topic should be of current interest. My subject – "Devolution and the Administration of Justice" – I am confident meets that criterion.

I also feel that it is an appropriate subject for The Lord Callaghan Memorial Lecture. We are now some thirty years after the Callaghan government tried to bring devolution to Scotland and Wales and we are shortly to have another referendum on the next stage of devolution to Wales.

Another factor which encouraged me to choose this topic for this evening is that in the closing months of last year a number of events occurred which touch on this subject. In October at the Legal Wales Conference at Cardiff important papers were delivered by Lord Judge, the Lord Chief Justice of England and Wales, by Lord Justice Pill, a former distinguished practitioner at the bar at Cardiff and now the senior Lord Justice in the Court of Appeal of England and Wales and by Mr Justice Hickinbottom, until recently the Designated Civil Judge for Wales.

In November the report of the All Wales Convention chaired by Sir Emyr Jones Parry was delivered and in December Jack Straw MP, the Lord Chancellor and Secretary of State for Justice delivered a lecture at Cardiff under the auspices of the Law Society in Wales on the administration of justice in Wales.

I hope it is, therefore, opportune to spend the next few minutes drawing the various threads together and to consider how the administration of justice in Wales has been affected by devolution and how it might be in the future.

During the coming months the referendum will, no doubt, provoke intense public debate. So it should but that is a political debate which I can not and do not wish to enter. It is, however, necessary for our purposes this evening to identify the issue to be resolved by the referendum. What is at stake is not a constitutional issue of fundamental importance; it is

rather a narrowly defined issue already provided for in the Government of Wales Act 2006, namely, whether the National Assembly should have the powers set out in Part 3 of the Act or those in Part 4. It is not whether the Assembly should have the ability to pass primary legislation in relation to devolved matters, for it can already obtain the ability to do so under the existing Legislative Competence Order procedure. The issue is whether the Assembly should acquire the ability to legislate in relation to devolved matters without on every occasion having to seek the permission of Westminster.

In many respects the matter in issue is a procedural one, but having said that, there can be no doubt that if the Assembly were to acquire the increased powers available under Part 4 of the act there would be an increase in Welsh legislation and an increase in the potential for the law in Wales in relation to devolved matters to differ from the law in England – a phenomenon which has, of course, already commenced.

What is important to note is that what ever be the result of the referendum the administration of justice in Wales will not be a devolved matter and, save for some exceptions to which I shall turn in a moment, the administration of justice will continue to be the responsibility of Westminster, and Wales will continue to be part of the jurisdiction of England and Wales.

Nevertheless, the Welsh Assembly Government has declared an interest in seeking devolution of responsibility for aspects of the justice system. It already has an input into some aspects of the justice system (for example, through its funding of certain aspects of policing and its participation with NOMS Cymru in a strategy for reducing re-offending) and the One Wales agenda states:

> ".....We will also consider the potential for devolution of some or all of the criminal justice system."
> ".....We will consider the evidence for the devolution of the criminal justice system within the contexts of (a) devolution of funding and (b) moves towards the establishment of a single administration of justice in Wales."

How far these considerations have progressed and precisely what aspects of the justice system are referred to are not clear. In any event, whether responsibility for any aspect of the administration of justice in Wales should be transferred to the Assembly and, if such a transfer took place, responsibility for which aspects should be devolved are political questions upon which I can not trespass.

However, the question I should like to consider this evening is what kind of justice system should Wales be seeking to develop in the coming few years and I should like to concentrate on the courts and tribunals which operate in and for Wales.

Although Wales appears in the name of the jurisdiction of England and Wales, the jurisdiction is centred in and dominated by London. It is a unitary jurisdiction and, except for necessary provisions relating to the use of the Welsh language in proceedings in Wales, Wales has been treated over the years as though it is part of England and no institution of the law exists in Wales which does not also exist in the regions of England.

For the purposes of administering the courts, England and Wales is divided into six areas; five correspond to the regions of England – the Northern, Northern Eastern, Midland, South Eastern and Western Regions. The sixth area is Wales which has been a unit for these purposes only since 2007 when the Wales and Chester Circuit ended and the administrative boundaries of Her Majesty's Court Service (HMCS) were brought in to alignment with the geographic borders of Wales.

Wales is by far the smallest of the six areas but devolution has undoubtedly raised the profile of Wales in legal circles. Those involved in the law in Wales are increasingly aware of the need to look at the practice and institutions of the law from a Welsh perspective and it is becoming increasingly accepted that cases, at all levels, which arise in Wales should be litigated in Wales. This provides a challenge for the legal professions in Wales to develop the necessary skills to meet the demands of a changing constitutional and professional environment.

The need to look at Wales as distinct from England was made clear both by the Lord Chief Justice and the Lord Chancellor in their recent speeches in Cardiff. Lord Judge said:

> "It is important for me to emphasise that when I am standing in Cardiff.....or for that matter Caernarfon, I am here as the Lord Chief Justice of Wales. In Wales, Wales comes first and England second. That priority is not in doubt."

The Lord Chancellor said:

> "Our aim now must be to.....support[ing] the further development of a distinctly Welsh legal identity, within the frame work of a non-devolved system."

The decision almost three years ago to treat Wales as a unit for the purpose of administering the courts in Wales was a very significant event. There can be no doubt that it was influenced in part, at least, by the devolutionary process and Lord Judge in his Legal Wales address described it as "perhaps the most important and symbolic" response to devolution that has occurred in the administration of justice. On previous occasions when such a move was mooted it had always been argued that Wales was too small to form its own administrative unit within the England and Wales system. Treating Wales as an entity for these purposes has provided for the first time for many hundreds of years the opportunity not only to administer the courts in Wales on an all-Wales basis but also to plan for and develop a justice system in Wales suitable for our needs.

What should we be aiming for as we plan for the future? Firstly we need a justice system which serves the whole of Wales – a system which provides a service which is reasonably accessible wherever you live in Wales and which is available to you in either Welsh or English. The system should be tailored to meet the needs of Wales and should be capable of providing work and good career structures in Wales for those who work in it.

Wales is very different from England – demographically, geographically and linguistically – and due regard should be paid to these factors when we consider how we plan our justice system. The kind of court centre which might be suitable for England may not meet the requirements of Wales. Wales, unlike England, is not a country of large cities. London, which is part of the South Eastern Circuit, has a population at least twice that of Wales. Our largest city, Cardiff, is considerably smaller than English cities such as Birmingham, Manchester, Liverpool, Leeds, Sheffield, Bradford and Bristol.

Our most populous areas are in the extreme south and north of the country; in the south from Newport to Llanelli extending into the valleys of South Wales and in the north from Wrexham to Caernarfon. By and large these are the areas in which our courts are situated. The area in between is not heavily populated but there are, nevertheless, significant centres of population which are focal points for the surrounding communities: e.g. Carmarthen, Haverfordwest, Cardigan, Aberystwyth, Newtown, Welshpool and Dolgellau. In many of these areas courts have either been closed completely or partially withdrawn yet it is in these

areas that public transport services are often not satisfactory and gaining access to a court can be difficult. Requiring a resident of, for example, Aberystwyth to attend the Crown Court in Swansea can present a considerable challenge to the individual concerned.

Our linguistic make up is fundamentally different from that of England. We have two official languages and court proceedings in Wales are conducted in Welsh and English on a daily basis – often with both languages being used in the same case. Traditionally, it is in the more rural areas of Wales that the Welsh language has been at its strongest and unfortunately it is often in these areas that the local courts have been closed either because they are regarded as too small or the cost of maintaining them regarded as too high.

Desirable though it may be to have a court in every community in Wales we have to be realistic. It is not possible, nor indeed necessary, to have a Magistrates' Court in every town where Magistrates sat twenty years ago nor can we expect a Crown Court in every county town where the Assize Court or Quarter Sessions sat in the 1960s before Dr Beeching took his axe to the Court system. However, spending criteria and administrative templates set in London for England and Wales may be suitable for England but not necessarily suitable for Wales. Lord Justice Pill, in his Legal Wales address, posed the question why, if a Welsh public body decides where hospitals are built, should not a Welsh public body decide where courts are built. It is difficult to think of a reason why that should not be the case and last summer in his Law Society lecture Lord Elis-Thomas suggested that it would help ensure a court system which reflected the needs of Wales if Her Majesty's Court Service Wales were funded by Ministers of the Welsh Assembly Government. These are important matters and need urgent consideration.

Is Wales too small to develop the infra-structure of a justice system? Examples both in Europe and in the United Kingdom confirm that it is not. Many European countries, some with a unitary political structure others with a decentralised structure have developed justice systems to meet the needs of a population not dissimilar to Wales and within the United Kingdom we have to look no further than Northern Ireland which has a population much smaller than Wales.

Although courts and tribunals are complementary parts of the system which delivers justice to the citizen I should like first to consider each in turn and before suggesting how the two should be brought together.

The Court System

Although centred in London many important aspects of the court system are already decentralised. Lay magistrates and all District Judges and Circuit Judges who sit in the Magistrates', County and Crown Courts of Wales are based in Wales and their sitting patterns and itineraries and the courts in which they sit are the responsibility of HMCS Wales which is based in Cardiff. All work which arises in Wales for those courts is administered in Wales and heard in courts within or as near as possible to the community from which the case comes.

The High Court and the Court of Appeal are different; these courts and the judges who sit in them are all based in London. The new Supreme Court is also based in London but that court serves not only England and Wales but also Scotland and Northern Ireland and can be conveniently left out of this evening's considerations.

Following the referendum of 1997 and the setting up of the Assembly the judiciary reacted positively to the changing constitutional position of Wales. In 1998 the Administrative Court of Wales was established by the then Lord Chancellor, Lord Irvine. It was established administratively without the need for legislation. The purpose of establishing this court was

to hear challenges to decisions of the Assembly in a court in Cardiff as it was considered politically inappropriate that such challenges should be heard in the Administrative Court in London. However, although the court was established no office was set up in Cardiff to support it. There was, therefore, no office to ensure that the cases which the rules permitted to be heard in this court could be commenced, administered and listed from an office in Cardiff. The absence of such an office resulted in the Administrative Court of Wales never flourishing as it could and should have. Any papers lodged in Cardiff were merely sent to London to be processed, administered and listed – and too often that listing was in a court in London. The absence of a proper office for this court was a major disincentive to commencing Judicial Review proceedings in Cardiff and to lawyers in Cardiff developing the expertise necessary to undertake the kind of cases which could be heard in the Administrative Court of Wales. The office was finally set up in April 2009 – eleven years after the court – and in the few months that have passed since last April the indications are that the court is flourishing. The opening of the office was part of a process called "The Regionalisation of the Administrative Court" which was prompted by demands from English cities for such an office. One of the lessons to be learned from this experience is that the decentralisation of a court can not succeed unless it is accompanied by the necessary infrastructure to ensure its proper functioning.

In 1998 both divisions of the Court of Appeal undertook to sit in Cardiff regularly – the Civil Division for two weeks a year and the Criminal Division for three weeks a year. In broad terms this arrangement continues and both divisions also sit in the major cities of England. Sittings of the Court of Appeal – especially the Criminal Division – have rarely been successful. Each division decides many months in advance when it will sit in Cardiff. Neither division has an office in Cardiff and all appeals from Wales must be lodged, administered and listed in London. Frequently there is an insufficiency of cases from Wales to fill the court's list during the week the court has predetermined to sit in Cardiff although numerous Welsh cases may have been heard in London during the weeks immediately before the Cardiff sitting. Sittings of the Court of Appeal in Cardiff are rarely manpower/case disposal efficient and only a small proportion of the appeals from Wales are actually heard in Wales. In the absence of an office of the Court of Appeal in Wales this is hardly surprising.

There should be further decentralisation of the institutions of the law to Wales in recognition of Wales' constitutional position and its position in the present jurisdiction.

In his Legal Wales address, Lord Judge, having referred to the establishing of HMCS Wales and the office of the Administrative Court in Wales and having listed other changes made in response to the developing constitutional position of Wales said:

> "This list is not closed; there is plenty of space left on the paper. I make it clear that I am willing to consider any proposals for change or development which can be shown to fall within or are consistent with the current constitutional position"

May I suggest two proposals for change which come within the criteria set by the Lord Chief Justice – one in relation to the High Court and the other in relation to the Court of Appeal?

(a) High Court

High Court Judges are deployed from London and sent out on Circuit to try the more difficult and high profile cases. Itineraries are fixed months in advance and sometimes a High Court Judge is available when suitable work is not and *vice versa*. However, the demands of the Administrative Court and the Court of Appeal in London mean that less and less High Court judicial time is available for the circuits and fewer High Court Judges are

seen outside London than was the case, say, ten or fifteen years ago. Whatever be the view on the circuits of England about the acceptability of that situation, I suggest that it is not consistent with Wales' constitutional position. Wales should be allocated High Court Judge sitting time commensurate with its position as a partner, albeit the junior partner, in the jurisdiction of England and Wales and not treated merely as part of England. The amount of High Court judge work in Wales is identifiable and it would require only a small change in deployment practices firstly, to identify at the beginning of each year a number of High Court Judges who, in addition to other duties, would be available to sit in Wales and, secondly, to allocate to Wales a fixed number of days sufficient to do at least the bulk of that work and those days should then be used by HMCS Wales to ensure that High Court work is heard in Wales by High Court Judges.

(b) The Court of Appeal

The principle that justice should be administered locally applies no less to appeals to the Court of Appeal than it does to cases in the Crown Court, the Administrative Court or any other court. Is it acceptable that only a small proportion of Wales' appellate work is heard in Wales and that all the administration of those cases together with the jobs, career structures and economic benefits arising from it are centred in London? Should there not be an expectation, similar to that which exists in relation to Welsh Administrative Court work, that all appeals from Wales should be heard in Wales and that there be an office of the Court of Appeal in Wales in which all appeals from Wales are lodged and administered? The social, economic and professional advantages to Wales are obvious.

Where should the Court of Appeal sit in Wales and where should its office be sited? The obvious answer to both questions is, of course, Cardiff. However, while that may be an acceptable short term solution it may not be the correct long term answer for Wales. We have to guard against becoming Cardiff-centric and there may be a lesson for Wales to learn in this context not only from the over London-centricity of the present jurisdiction but also from Switzerland, a country of a little over seven million people, with four national languages and which is divided into 26 cantons each with its own Court of Appeal. One arm of the state, the legislature, is based in Bern in the north of the country in a German speaking area and for that reason it was decided that the other arm of the state, the Supreme Court, should be based in the south of the country in a French speaking area. Thus the Supreme Court is located in Lausanne. As the seat of government is in Cardiff should the Court of Appeal be located in Caernarfon, Llandudno, Mold or Wrexham?

These are merely my own ideas. Others will have ideas of their own. There should be wide consideration of what proposals for change should be made to the Lord Chief Justice. Who in Wales should consider these matters? In addition to the Welsh judiciary and the Assembly, I would suggest that the Standing Committee on Legal Wales consider these issues. That committee brings together representatives of all constituencies of the law in Wales and its terms of reference include the fostering of the institutions of the law in Wales. The views of this committee would be of great value.

The Tribunal System

Over the years there has developed alongside the court system a system of tribunals. In large measure the tribunals were created in response to deficiencies in the court system and their purpose was to provide a quick hearing in an inexpensive, easily accessible and uncomplicated forum in which the citizen could challenge a decision of a government department. They were set up as the need arose and there was no consistency of approach to their creation or administration.

Unfortunately, as time has passed the law administered in tribunals has become as complex as the law administered in the courts and when lawyers are engaged to represent litigants

there is no real difference between the cost of litigation before a tribunal and litigation before a court. On the positive side reforms in court procedures have ensured that the expedition which characterised tribunal proceedings is now also to be expected before the courts. The consequence of these developments is that there is no difference between the way justice is administered in the tribunals and the way it is administered in the courts and tribunals have become an integral and important part of the justice system.

Two characteristics of tribunals were and, to an extent to which I shall return in a moment, remain of importance.

Firstly, tribunals were sponsored by government departments. In practical terms this means that a government department would establish the tribunal, administer the tribunal, appoint tribunal members and pay them. The result was that a citizen wishing to challenge a government decision would have to appear before a tribunal paid for and run by the very department whose decision he wished to challenge. A citizen's concerns about the independence of the forum in which he was required to appear were understandable. At best the arrangements lacked objective fairness and independence and may well have run counter to Article 6 of the European Convention on Human Rights.

Secondly, the geographic area in which a tribunal operated depended upon the geographic area for which the relevant department had responsibility. Thus, some tribunals cover the whole of the United Kingdom, i.e. England, Wales, Scotland and Northern Ireland; others cover Britain i.e. England, Wales and Scotland while others operate only in England and Wales. Some tribunals operate only in England or only in Scotland or only in Wales. The tribunal system, therefore, presents a complex patchwork of jurisdictions and when the Assembly was established responsibility for those tribunals which operated only in Wales and which had been the responsibility of the Welsh Office passed to the Assembly and then to the relevant Minister in the Welsh Assembly Government.

Responsibility for more than a dozen tribunals now lies in Cardiff and the Assembly has power to create further tribunals. To this extent the administration of justice is devolved. In addition to these Welsh or devolved tribunals we also have operating in Wales " cross-border" tribunals responsibility for which is not devolved and remains with the United Kingdom government.

In the last few years the non-devolved tribunals have been the subject of substantial reform. In order to address the apparent lack of independence of the tribunals, responsibility for them has been removed from the sponsoring government departments and vested in the Ministry of Justice in London. The tribunal judiciary is headed by the Senior President who is a Lord Justice of Appeal and an appointment to a tribunal is undertaken by an independent body – The Judicial Appointments Commission - and is based on merit. The independence of the tribunals in this new structure is, therefore, guaranteed and visible to all.

Administration of these tribunals has been placed in the hands of a newly created Tribunal Service which is to tribunals what Her Majesty's Court Service is to courts. However, unlike HMCS the Tribunal Service does not treat Wales as a unit for the administration of tribunals as it concluded that for these purposes Wales is too small. This is disappointing and somewhat surprising in the light of the recent decision of HMCS to treat Wales as a unit for the administration of the courts in Wales and is an example of a template based on the size and needs of England being applied inappropriately to Wales and of an apparent unwillingness to make special provision for Wales within the present jurisdiction. The consequence of this is that for the purposes of non-devolved tribunals Wales is part of an administrative unit which includes a large part of the South West of England.

What of devolved tribunals? Anyone interested in the future of tribunals in Wales can do no better than read the thorough analysis of the situation set out in the recent report of the Welsh Committee of the Administrative Justice and Tribunals Council which is chaired by Sir Adrian Webb. Unfortunately, I have time this evening to touch on only a few aspects of tribunals in Wales.

The reforms which I have just summarised do not apply to devolved tribunals. A citizen appearing before a tribunal for which the Assembly has responsibility might still wonder whether it is truly independent of the decision maker whose decision he wishes to challenge and whether the process he is required to be part of is compliant with the European Convention on Human Rights. He might also wonder why his fellow citizen appearing before a cross-border tribunal in Wales does not need to have such concerns. Is such a situation acceptable? Clearly it is not. There is a need for reform but the challenges presented by this need also present the Welsh Assembly Government with an opportunity to be innovative and creative and to show that it is capable of dealing appropriately with those aspects of the justice system which are devolved.

What should be done? Again, may I make some personal suggestions?

Firstly, responsibility for every devolved tribunal should be taken from the sponsoring department and vested in an office independent of any department whose decision might be the subject of challenge. Initially, I thought that the Office of the Counsel General might be an appropriate recipient of this responsibility but it may be that the statutory limitations on that office make it unsuitable. Sir Adrian Webb's committee suggests that the Welsh Assembly Government create a focal point for administrative justice in the Department for the First Minister and Cabinet. I would have no difficulty with ultimate responsibility for tribunals resting there in the same way that responsibility for non-devolved tribunals rests with the Ministry of Justice in London. An alternative might be to create an office wholly independent of all government departments.

Who should administer the day to day running of the tribunals? Again there should be one body administering all devolved tribunals so that efficiencies and economies of scale can be maximised. It is possible that they could be administered by the department which has overall responsibility for tribunals but we already have a body in Wales which administers on a day to day basis part of the justice system. HMCS Wales runs the courts in Wales and some judges who sit in the courts also sit on tribunals. There is, therefore, already a degree of common interest and the knowledge and depth of experience of HMCS Wales would be valuable to the devolved tribunals. Would it not make sense to consider delegating the administration of the devolved tribunals to HMCS Wales so that an integrated system can be developed and maximum use made of courts as tribunal hearing centres? This approach could be taken further. There is an obvious need for whoever administers the devolved tribunals to engage with the Tribunal Service which runs the cross-border tribunals to identify ways in which duplication of expenditure can be avoided, efficiencies achieved and to facilitate the shared use of hearing centres. A town in rural Wales, for example, for which neither a court centre nor a tribunal hearing centre could independently be justified might justify a Justice Centre which could be used as a court house and as a tribunal hearing centre.

Wales is too small a nation to have a multiplicity of bodies all running different aspects of what should be an integrated justice system and in due course consideration should be given to merging HMCS Wales and the Tribunal Service in Wales so that one body administers the courts and the devolved and non-devolved tribunals.

What of appointments to the devolved tribunals? At present there is a variety of appointment procedures. These need to be rationalised and appointments made after open

competition based on merit. Should there not be an appointments body – a Board or Commission – established to make such appointments or to identify suitable appointees and to recommend them to the person who has ultimate responsibility for making the appointment? In his Legal Wales address Lord Justice Pill suggested the need for a separate Judicial Appointments Commission for Wales or alternatively a separate panel of the present London based Judicial Appointments Commission to make judicial appointments in Wales? Perhaps the body which I propose should be established to make appointments to devolved tribunals could be an embryonic response to his suggestion.

A Welsh Jurisdiction?

Finally, I should like to mention briefly the question of a Welsh jurisdiction as recently there has been some debate about the possibility of Wales developing a jurisdiction of its own.

The Report of the All Wales Convention succinctly describes a jurisdiction as being indicated by a defined territory, a distinct body of law, or a separate structure of courts and legal institutions. In the United Kingdom there are a number of jurisdictions which have developed for political and/or historical reasons; Scotland and Northern Ireland have their own jurisdictions and England and Wales form a further jurisdiction. None of those jurisdictions is entirely self contained or watertight and there are significant cross-overs between them one of which I have just referred to in the context of tribunals. An important feature of the Scottish and Northern Irish jurisdictions is that each has its own judicial structures.

Since the creation of the Welsh Office in the 1960s there has been the potential for the law in Wales to differ from that in England in devolved fields and that potential has increased with the creation of the Assembly. Areas of difference will further increase as the powers and confidence of the Assembly grow. In so far as a court or tribunal in Wales administers or enforces a law passed by the Assembly it can be said to be functioning in the context of a Welsh jurisdiction or at least in the context of a changing English and Welsh jurisdiction. Examples exist in Europe of legal institutions in devolved or decentralised states which operate both in the jurisdiction of the devolved or decentralised government and that of the central government. Perhaps one of our universities would be interested in looking further into these examples to see whether there are lessons for Wales to learn from such structures.

What is beyond doubt is that there is no need for a Welsh jurisdiction to implement the changes which would follow if, after a referendum, Part 4 of the Government of Wales Act 2006 were to be implemented and the various suggestions I have made about the future are all consistent with Wales being part of the present jurisdiction. Whether Wales ultimately proceeds to its own jurisdiction with its own judicial structure is for the future to decide although whether such an issue is apt for decision by a referendum, as Jack Straw seemed to suggest in his Cardiff speech, might be open to debate.

A Welsh jurisdiction or part of an amended England and Wales jurisdiction? It is a topic which will be of interest to politicians and legal academics as well as lawyers. The ultimate decision may be heavily influenced by how responsive the present jurisdiction proves to be to the legitimate expectations of Wales.
