

THE WELSH POLITICAL ARCHIVE ANNUAL LECTURE 2013
National Library of Wales
 The Welsh Nation and the United Kingdom

The Rt Hon the Lord Morris of Aberavon, KG, QC

Approximately two years ago, to my surprise, I was invited to deliver this lecture.¹ I agreed, *D.V.*, requesting indulgence to reconsider the request from time to time. I have little experience in lecturing. I earned my living as a politician and as a lawyer, taking part in debates at Westminster and in the courts in the south-east of England. Trying to ride two horses at the same time!

Soon after I was elected a Member of Parliament in 1959, I went to address the Swansea University Students Labour Club. There listening to me was a schoolboy from the sixth form. I had such an influence on him that, after the meeting, that lad went off like a shot and joined the Conservative party. His name was Brian Griffiths, who rose to become one of Margaret Thatcher's chief advisors, and in the fullness of time he was elevated to become Lord Griffiths of Fforest-fach. Perhaps it's just as well I haven't done much lecturing. Keeping quiet is perhaps better!

I gave a lecture in 2006 in Criccieth to commemorate David Lloyd George, the Welshman who contributed most to the politics of the Kingdom, on the subject 'The Contribution of Lawyers from Wales'.² From the age of the Stuarts onwards they have made a major contribution to the life of the United Kingdom. In my time, forgetting the present, a huge contribution was made by the judge Lord Morris of Borthygest, a devolutionist who adorned the devolution campaign stage in Bangor in 1978 – his words on self-defence are quoted every week in our courts, and we remember also the contribution of the judge Lord Edmund-Davies of Mountain Ash. In a lecture to the Cymmrodorion in Cardiff, Edmund-Davies ranked two lawyers from Wales as outstanding.³ One was the notable Lord Atkin of Aberdovey who had such an influence on 'Tort' law, placing the responsibility on a Biblical footing: *Who is my neighbour?* It was the case of the snail in the bottle that was in question and who was legally responsible for the outcomes. His voice during the turmoil of war was so strong, though unpopular, in another case involving the freedom and rights of the individual. It is interesting that it was a grandson of Atkin, Mr Youard, who was patron of the annual lecture to the Welsh Legal History Society in Swansea (2 December 2011) which I delivered on the war in Kosovo – 'The development by attorney generals of the doctrine of armed intervention by states, without Security Council Authorisation, to avert an overwhelming Humanitarian Catastrophe'.

The second of Edmund-Davies's favourites was Judge David Jenkins of

1 This article is the text of the Welsh Political Archive Annual Lecture given by Lord Morris at the National Library of Wales on 1 November 2013. The Cymmrodorion Society is grateful to Lord Morris and the National Library of Wales for the opportunity to publish the lecture in the *Transactions*, in both Welsh and English. [Ed.]

2 *Transactions of the Honourable Society of Cymmrodorion*, 13 (2007), 26 June 2006.

3 'Judicial Quality', *Transactions of the Honourable Society of Cymmrodorion*, (1983) pp. 22-27.

Hensol during the time of Cromwell. When Jenkins appeared before the House of Commons charged with treason, he refused to kneel, and uttered the unforgettable words: 'I go to my death with the Bible under one arm and Magna Carta under the other.' He left the courts of Westminster to organise *eisteddfodau* in Glamorgan.

Many believe that administration of the law was my only work as the Attorney General – but sometimes there is the demand for the creation of law, and believe me, that's quite a lonely job, without many guidelines to lean on and to take some of the strain. Some say that is when my hair turned white!

According to one report, a summary of the advice of the present Attorney General Dominic Greive, QC to the cabinet on military intervention in Syria in 2013 follows verbatim the advice I gave then, and apart from my address to the international court at The Hague, my book is the only public document on the new doctrine.⁴

Talking of this period in my life, I drew on my experiences in a post I held concurrently, namely Attorney General for Northern Ireland when I gave evidence to one of the Assembly's Select Committees on the proposal to create an independent legal system for Wales – but we will come back to this later on.

With both of us by then on the backbenches in the House of Lords, new principle was enunciated again on 22 March 2006, by one of my predecessors, Lord (Patrick) Mayhew, QC and myself as we gave evidence to the House of Lords Constitution Committee on the question of whether we should go to war without an express resolution of Parliament. It is quite surprising that, until then, a Government's right to use the Royal Prerogative to go to war without any other basis, and especially without a parliamentary resolution, was accepted without question.

But that it how it was over the centuries. From now on, apart from particular circumstances, I hope and believe that the recommendations of the Select Committee will be followed,⁵ and that the precedent created before the Iraq war will be further adopted, and that there will be a parliamentary resolution before any swords are sharpened and used. I was very gratified that the House of Commons was afforded the opportunity to debate and vote on the case of Syria in August 2013.

Forgive me for emphasizing the contribution of lawyers in the United Kingdom. I'm sure a similar story could be told about many other occupations.

It is surprising, and always a pleasure to me, considering our population is so small, how often the names of Welsh people rise to the top, and not only as British and Irish Lions. There is no need to go back to the death warrant of Charles I to note those of Welsh descent who were signatories to it, or to the United States Declaration of Independence.

Let us turn to the future in Wales. The first point I want to make is that it will be vitally important in the post-devolution period for educational and professional qualifications in Wales to be acceptable across the UK and wider. There is so much border crossing, and I speak not only as a former University Chancellor, but as a member of the House of Commons for over forty years who gave priority to

4 Lord Morris of Aberavon, *Fifty Years in Politics and the Law* (Cardiff: University of Wales Press, 2011), pp. 205–6.

5 Report of the Constitution Select Committee, 2005–6.

employment, jobs and industry. When I first went to Parliament, Welsh institutions were few and far between. There was, of course, one politically important movement – but with little influence in practical terms then – arguing for Welsh independence, although it was not always clear what that meant.

I note this, in order to make it completely clear that it was on a completely different tack that Gwilym Prys Davies, with the encouragement of one of the most highly respected leaders of the Labour Party and more widely, namely Jim Griffiths, started to put meat on the bones of the idea of some sort of national democratic system for Wales. Together with another Welshman, Aneurin Bevan, the two who developed the welfare state, if not established it, Jim had the vision and the authority, but there was a need to work on the vision. The first step was to persuade the Labour Party to establish a Secretary of State for Wales. This battle was won during his period (1964) after some strenuous work, not for the last time in the Labour Party, and the administrative steps he took from the first day he filled the post were key to the route taken in the future. Not enough emphasis has been placed on these steps. It was an honour to be a Junior Minister in a Labour government that took this important step of acknowledging Wales as a nation, and turning back the clock after centuries of injustice since the days of the Tudors and earlier.

Fourteen years elapsed before detailed proposals could be made for a democratic body for the nation. When I received a call, much to my surprise – and the surprise of the nation – around lunchtime on the Tuesday after the election in 1974 to Downing Street to be appointed Secretary of State for Wales, Prime Minister Harold Wilson's words are as clear in my mind today as they were then: 'Bring us your ideas for devolution – I will be greatly interested in them.' He gave me freedom. It was a challenge.

The proposals agreed in due course by the cabinet were, in my opinion, the most far-reaching we could possibly offer at that time. Wilson's leadership turned the opinion of the minority into a cabinet decision. To my great disappointment, our proposals were rejected across Wales from Anglesey to Newport, and as I said on the nine o'clock news on that fateful night – 'When you see an elephant on your doorstep, you know it's there.' John Roberts Williams's description of our nation's behaviour at that momentous moment in our history was much more colourful! We were before our time.

My second point: where are we going now? Can I first of all mention funding? This is a subject to which every 'Cardi' gives priority! There is discontent in Scotland and in Wales regarding the Barnett formula, as it is not regarded as a fair formula. As I was there as Secretary of State for Wales on the first day to argue with Joel Barnett, the Chief Secretary, about my share of new funding from the Treasury, I can assure you that no-one thought this would continue over the years because every government was too stubborn to change it. And nobody talked about it as a formula!

In the spring (March 2013) following on from the Coalition Programme, a Commission chaired by McKay, former Clerk to the House of Commons, and parliamentary expert, published its report on 'The Consequences of Devolution for the House of Commons'. Depending perhaps too much on 'vox pops', it was stated

that there was discontent in England too regarding the fairness of the expenditure on the devolved states, especially in Scotland. They were trying to provide an answer for the West Lothian question, asked time after time by my old friend and adversary in debates from our Cambridge days, Tam Dalyell, later MP for West Lothian. I represented the Voice of the Labour Club in debates at the Union there, and Tam represented the Conservatives! He had not seen the light in those days.

What is our answer to the fact that sometimes the votes of House of Commons members from Scotland and Wales can drown the majority of parliamentary members from England, on matters such as health in England, that are not relevant to the duties of Scottish and Welsh MPs at Westminster? Not very often, it must be said.

When I started thinking, almost two years ago, about the material for this lecture, I felt quite warm towards the establishment of a federal system for the United Kingdom. But we must face the fact that only 17% of the total population of the kingdom live in Scotland, Wales and Northern Ireland together. The strength and influence of an English parliament could undermine the British parliament. But more importantly than this, the majority of people in any part of England have no desire at all for regional parliaments. The McKay Commission has tried to devise a system of voting in the House of Commons that is limited to members from England only, with the last word to all members, on matters such as health when they are relevant to England only. The intention is to try to avoid creating two types of MPs, some sort of 'in, out and in again' system. I was certain when I first wrote this lecture that there would be a great deal of deliberation before any new system was found to be satisfactory.

In the summer, it was disclosed that Oliver Letwin, the Cabinet Minister, was working on an answer that would include a proposal to create an additional stage in the House of Commons, the 'fourth reading' to discuss measures, when voting would be restricted to English members only on these matters. It is likely that such a proposal would go beyond McKay as, contrary to McKay, a veto would be given to members from England. Vernon Bogdanor, the authority on the constitution, states that this would destroy the principle of cabinet responsibility, and allow for the possibility on the one hand of a Labour administration on foreign affairs, defence and economic policy, but a Tory administration in England for health, education and home matters. The truth is, although Enoch Powell dubbed the problem the 'West Lothian Question', in essence it is an 'English Question'. I foresee considerably more than deliberation, if a similar measure to the above is brought before Parliament.

McKay's other important message is their opinion that the parliamentary process in Westminster has changed very little since the advent of devolution. They make one very interesting proposal, namely the establishment of a new committee in the House of Commons (the House of Lords was forgotten) to consider the legal effect and cross-border policies of the various states of the kingdom, to be called the 'Devolution Committee'. This would be a good step to take. Following devolution, there have been considerable differences in the development of policies in the various countries. This was to be expected, and I look forward very much to this.

A considerable number of studies have been carried out to interpret the

differences so far, for example by Birrell, Keating, Trench, Paul Greer and higher education studies in the kingdom's universities. This is one of the strengths of devolution, to be more accountable to the desires of the various countries, without being restricted by the shackles of Whitehall, and the possibility of experimenting on new policies, sometimes giving the chance for one to learn from the other – from plastic bags upwards! 'Democracy Laboratories' is one description of the federal system of the United States, and it is a good description, and I hope the experimenting will be on wider territory than the whims of one or two with the ability to persuade their fellow members.

When I was Secretary of State for Wales and wanted to follow a route that was different from that of Whitehall, it was necessary to fight two battles, one within the Welsh Office, such as the argument for the fourth channel, and after settling this, a debate or battle in Whitehall. In the areas of health, education, schools, student grants, care for the elderly, paying for prescriptions, for example, the countries have followed different courses. In Birrell's opinion, this is the weakest part of the developments. I am much more hopeful. Is there a limit to differences, perhaps? The problem of jealousy, possibly, regarding some particular expenditure? Should wise parliamentarians consider this in the future? I'm just asking the question.

My third point: if they are going to make a difference, strong units must be developed to create policies within the devolved Governments, and within the parties, and indeed much wider than this. I cannot over-emphasize the need for every public body to work on policies and respond to the policies of the Government and the parties. The Silk Commission has made important proposals on tax-raising and borrowing by the Assembly.⁶ Unfortunately, the Barnett formula was not within their remit. The Treasury's instinct is to decide on any expenditure based on what happened in the past, and far too often, not on the need. We must come back to this, hopefully in a period of comparative prosperity.

I have no objections in principle to transferring the right to raise some taxes, but I doubt how practical or acceptable this will be, especially if all that happens is to change the Westminster tax into a Welsh tax. No-one likes new taxation. I don't think Scotland has used its powers. I am warming considerably towards devolving powers to borrow money and to use it to make expenditure on investment smoother. But as the financial status of the United Kingdom has international effects, Silk accepted the need for the totality of loans to be determined by the Treasury.

I now come to Silk's second task and the Welsh Government has made a fair effort in its evidence to the Commission on this section. Coming from the stable from which I come – step-by-step development – I accept and embrace, and this is important to me, what I believe to be the Government's main proposal. This is the fourth point, namely the need for another Government of Wales Act which would break completely new ground for Wales, namely to move from the present statutory system of a list of rights, which the Welsh Government may legislate according to the 2006 act, to a system of noting the right to legislate on all topics apart from those reserved by Westminster – the 'reserved system'.

This would correspond, more or less, to what exists in Scotland, in general

6 'Empowerment and Responsibility – Financial Powers to Strengthen Wales' (November, 2012).

following the matters listed in the fifth Schedule in the Scotland Act 1998 – foreign affairs and defence, the main Home Office matters such as security and immigration, social security, energy, employment rights, health and safety, social safety and health, charities and land legislation. To my great surprise broadcasting is rejected. The Government makes one other important point, namely that it should be possible to change the boundaries of responsibility in the future without primary legislation and especially that any decision on the transfer of responsibilities goes hand in hand with funding.

The Government proceeds to detail the powers it seeks. In my opinion, ‘managing’ Wales is a full-time job, and fighting for subject after subject, as I had to do when I was Secretary of State, would be a misuse of the time and function of ministers and the Government. However, I believe that there is a considerable amount of further work to be done on this part of the evidence on devolution. Some proposals are without basis and others unreasonable – for example, responsibility for legislating nationally on the speed of motorcars after crossing the Severn, and the drink-drive regime specifically. I was shocked by the naivety of some of the proposals.

A great disappointment to me, since I gave the Chancellor’s lecture when I was invested as Chancellor of Glamorgan University in 2001,⁷ is that Wales and the Welsh people have turned their backs on taking responsibility for broadcasting in Wales. There was complete silence when I mentioned the subject then. Some support came from many people later on. There are biblical precedents for late conversions.

Over the years, the broadcasters in Cardiff have preferred to be overseen from faraway London rather than nearby Cardiff, and the Government in Cardiff has feared getting to grips with the problem of securing compensation for the cost that would follow transfer. Had courage been demonstrated during a time of plenty, Westminster would not have been able to make such savage cuts as they did to the funding of S4C – totally contrary to the law at the time. In my opinion, the Assembly cannot fully carry out its duties in respect of the Welsh language (under the Government of Wales Act 2006, section 108, Schedule 7 [20]) without being responsible for one of the key instruments that sponsors and supports the language, namely broadcasting in Wales. Instead of this, the Government’s offer of a voice in the appointments to the BBC and S4C are of little consequence, and are cosmetic only, little more than the informal powers I had as Secretary of State for Wales.

I greatly welcome the proposal for powers over the police, as there is so much collaboration between them and the social services and local authorities, and at present the police receive some of their funding from the Assembly, and also parliamentary responsibility for energy production.

A red herring followed by the First Minister of Wales was to start an investigation into the question of whether there was a case for establishing a separate or independent legal authority for Wales. I gave evidence to the Assembly select committee on 25 June 2012 and I enclosed a memorandum from the Chief

7 ‘The Development of Welsh Political Institutions over Fifty Years’, The Lord Merlyn Rees Lecture (University of Glamorgan, 6 December 2001).

Justice of Northern Ireland when I was Attorney General there (Lord Carswell). He listed the essential institutions that would have to be established as part of the 'Independence'.⁸

Important steps have already been taken by the senior judges to secure sittings of the higher courts and the special courts in Wales. And I especially welcome the appointment of the Welshman from Cwmgiedd, Sir John Thomas, as Lord Chief Justice, who has already done so much in this respect. My opinion was that it was better at present to consolidate and develop this process, which is not without its problems. As legislation from Cardiff grew, the case for new institutions would be stronger, and an open mind should be kept about this. There were more practical steps to be taken to increase the case for sittings by the profession itself. The committee more or less agreed with me. I doubted whether this was an example of devolution at all, and in my document I laid out my priorities for further devolution. In his later statements, the First Minister has cooled towards this idea at present.

The big difference between the Act I proposed for Wales in 1979 and the Act in 1998 is the system of electing a proportion of the members in a different way. There was no difference in the number of members between the two Acts. The Richard Committee in 2004 reached the conclusion that the Assembly's membership should be increased from sixty to eighty. Detailed work was carried out in its consideration of the workload of Assembly members in scrutinizing and keeping an eye on the Government – the core of every democratic system.

My fifth point is that I am now persuaded, following the granting of the right to legislate to the Assembly, that the case for increasing the number of members has strengthened, and I accept it. The public will take quite a bit of persuading about this. Unfortunately, parliamentary representatives are not too popular! To increase their number is another story. Democracy is not without its cost. The more members, the more will be the cost. The public will expect some sacrifice to meet the costs.

I have three proposals in this respect – none of them very popular!

A reduction in the number of Assembly ministers. At the time of the Richard Report there were nine members of the cabinet and three deputies – twelve ministers in all.⁹ Now there are eleven ministers in the cabinet and three deputies – a total of fourteen ministers. The Counsel General is now a member of the cabinet. Of course, the work is different to my period as Secretary of State for Wales. There is a 'Senedd' to face every week and so forth.

But it is fair to remind you that I only had two Junior Ministers to assist me as Secretary of State. As part of my post I had general responsibilities to the Cabinet and its problems. I remember five or six meetings within two or three days during the IMF [International Monetary Fund] crisis in 1977–8. Time after time, I or my junior ministers were called to ministerial meetings in Brussels, and on one occasion, at the request of the Prime Minister, I had to take the chair there until the early hours of the morning, taking the place of our appointed minister who was busy with other duties. My responsibilities in Wales for employment and industry

8 Report, Constitutional and Legislative Affairs Committee.

9 Report of the Richard Commission (Spring, 2004).

justified my presence. There was also occasionally the task of representing the kingdom at other international discussions, and when the Council of Ministers in Brussels was discussing agriculture, I or one of my junior ministers tried to be there most times, as agriculture was so important to Wales and Brussels had so much authority.

It is not the cost of the Minister only that we have to consider, but his staff and his office too, and everything, like ‘Parkinson’s Law’, continuing to grow. I have some idea that the nation would welcome a reduction in the number of ministers, and that after this they would be released to increase the number of members to oversee the Government. With the increase in legislating, how much room is there to increase the hours of sittings in Cardiff? There has been criticism recently about the reduction in Parliamentary sittings in Westminster, and there are murmurings in Cardiff too.

According to Richard, and some time has elapsed since then, the Assembly, contrary to the wishes of the opposition parties, decided to reduce its committee sittings. The function of the committees has changed since Richard and this must be considered. Richard argued that the Scottish Parliament was sitting for 156 days per year at that time, and Cardiff was only sitting for 135. Last year the Assembly sat for 127 days. There will be an increase in the assembly’s sittings from 2012–13 to 2013–14 from thirty-three weeks to thirty-four weeks, and so also the number of days, due to the increase in their legislative and policy programme. If we are seriously going to persuade the public regarding an increase in the number of members, it would be wise for Westminster and Cardiff to pay attention to the expectations of the electorate. What is the *quid pro quo*?

It is fair to recognise our first ministers and governments have made devolution acceptable so that there is no question of turning the clock back. The fifth wheel on the parliamentary coach is the existence of the Secretary of State in Scotland and Wales. There are two junior ministers in the Wales Office, one in the House of Commons and one brand new one for the first time ever in the House of Lords. What on earth they do on a day-to-day basis, goodness only knows! They have few duties following the advent of devolution, and even fewer after transfer of legislative powers to the Assembly. From my experience as the holder of the office for over five years, it is impossible to justify these posts today.

The McKay Commission received evidence that a parliamentary mechanism was needed between the Parliaments of Scotland, Wales, and Westminster at the time of discussing consent to legislation. It was stated: ‘They should be communicated one Parliament to another [...] and not something transmitted by the Minister from the Front Bench’ (para. 266). I have already referred to the proposal to establish a new Devolution Committee in the House of Commons. Constitutional change is needed in this respect too.

My sixth point is my belief that this is the route for the future – namely, direct discussions between Cardiff and Westminster. The First Minister of Wales should be discussing what is relevant to his responsibilities directly with ministers and departments in Westminster rather than the Secretary of State trying to use what influence he has with the Treasury and others – the same pattern as the Parliament to Parliament suggested by McKay. Our biggest problem today is to ensure that

Wales has the greatest influence on whatever develops in the relationship between the United Kingdom and 'Europe' and our members of parliament have a part to play and also the Government and the members in Cardiff.

The great blessing in my life, since I was Defence Minister when the army was sent to Northern Ireland in August 1969, has been the administrative closeness which has developed between the various factions in Northern Ireland and also, in a different way, the close collaboration between the Republic of Ireland and the United Kingdom. When I was Attorney General, I developed close and personal collaboration with the Attorney General in Dublin, and the relationship was seen to strengthen week by week during my tenure of the post. In my book¹⁰ in Appendix 9 (19 June 1968) can be seen my memorandum to Harold Wilson on the constitutional problems in Wales, where there is reference towards the end to the hope that when the old wounds have lost some of their scars, Ireland should be encouraged to draw closer to us. In Northern Ireland, and later during the banking crisis in Ireland, the fruits of the relationship were seen in practice.

Looking back, I am pleased that so much has happened to us constitutionally during the last fifty years. Many claim to have fathered success, but failure is always an orphan. How much of a vision did I have – that is a matter for others to judge. Unless a politician has a vision when starting out and developing his career, that career is not worth following. I had the opportunity to try to create, and the health and stamina to carry on doing so, and all I can do is give thanks for that.

10 *Fifty Years in Politics and the Law.*