Introduction

I first describe the work of the Commission on Devolution in Wales to date and what it expects to do in the future. I also speak about some constitutional conclusions I have drawn as an individual. In that I do not speak on behalf of the Commission.

Genesis of the Commission

I think it is unlikely that there would have been a Commission, at least just yet, if the UK General Election of 2010 had not delivered a coalition.

The Conservative election manifesto said little on constitutional matters in Wales though there was a reference to the UK's "unbalanced" constitutional settlement – a term, presumably, of disapprobation. Presumably it was the Liberal Democrats with their federalist history who secured a commitment to a Calman-like process for Wales.

Having said that, the Commission has enjoyed excellent support from both the present and the previous Secretary of State, for which we are very grateful.

Calman was a unionist Commission, eschewed by the SNP. Its principal recommendations were about fiscal powers and inter-institutional co-operation. It made few recommendations for changes in the balance of other powers between Edinburgh and London.

Our Commission is not quite "ap Calman" as it was styled by some when it was first announced. First, and most importantly, its establishment was supported by all four political parties in the National Assembly, who all nominated members to it. That has been an enormous strength.

Secondly, if the non-fiscal powers of a Scottish Parliament that exists within the United Kingdom Union were at the time of Calman regarded as largely satisfactory by the unionist parties, there is pressure in Wales for a re-alignment of powers.

Thirdly, tax devolution was part of the referendum in Scotland in 1998, even if it was never implemented. Tax devolution would be new territory for Wales.

Finally, Wales is not Scotland. Our GVA per head is 75% of the UK average compared to 99% in the case of Scotland. Scotland has been well served by the Barnett formula, or at least, very much better served than Wales has been. Our border is much more porous than Scotland's is. Scotland has retained civic institutions since 1707 and had, of course, emerged as a state in a way Wales never did in the early modern era.

Although there is always an advantage in having a Scottish precedent for change in Wales, there is no axiomatic solidarity in the relationship between Wales and Scotland. That means that Wales does not serve its best interests if it merely tries to swim in Scotland's slipstream.

Part 1 recommendations

Our Commission's work was divided into two Parts. The first part was financial. Our terms of reference here were:

> *To review the case for the devolution of fiscal powers to the National Assembly for Wales and to recommend a package of powers that would improve the financial accountability of the Assembly, which are consistent with the United Kingdom's fiscal objectives and are likely to have a wide degree of support*

We had the good fortune to follow in the wake of the Commission appointed by the Welsh Government that Gerry Holtham chaired. We did depart from Holtham in some important respects, but it would frankly have been surprising if we had not said many of the same things.

We published our report on Part 1 in November last year. The main thing that struck us was that Wales appears to be unique in the world in having legislative and spending powers but no tax and borrowing powers. We felt that this anomaly should end.

While we believed that a suite of smaller taxes should properly be within the Assembly's control, we also believed that it was important that a significant tax should also be within that control in order to achieve real increased financial accountability. For various reasons, we ruled out corporation tax, value added tax, fuel duties and national insurance, but we concluded that the income tax base should be shared between the governments in Cardiff and London, with the Welsh Government free to alter each rate of tax independently, enjoying – or suffering – the consequences of any variation they made.

We called our Report "Empowerment and Responsibility: Financial Powers to strengthen Wales". While we entirely accepted that the Assembly is at present accountable to the people of Wales for the way in which it spends its budget, we felt that having to make fiscal choices would bring a deeper accountability to Welsh political life and would enrich the political process. It would also empower a Welsh Government to use its financial powers to strengthen Wales economically.

But we were also clear that this should be subject to not undermining either the UK Government's macro-economic responsibilities, or the fiscal transfers that underpin the successful UK fiscal and monetary union. And we set two conditions for the transfer of income tax powers: a mutually satisfactory resolution of funding issues between the two governments, and the endorsement by the people of Wales in a referendum.

We still wait optimistically for the UK Government's response to our Part 1 recommendations. But it was important to us and significant politically that all four parties in the Assembly endorsed our recommendations.

Part 2 work

We approached Part 1 by a desire to be consensual; to be evidence based and listen to views across all of Wales and beyond; to base our recommendations on principles, and to take full account of the international evidence. That approach served us well in Part 1, and we will be continuing it in Part 2.

The remit for Part 2 of our work is

> *To review the powers of the National Assembly for Wales in the light of experience and to recommend modifications to the present constitutional arrangements that would enable the United Kingdom Parliament and the National Assembly for Wales to better serve the people of Wales.*

We have expressed our vision for Part 2 in the following terms:

> *We believe that the people of Wales will be best served by:*
> - *a clear, well-founded devolution settlement that allows coherent political decisions to be made in a democratic and accountable manner, and*
> - *political institutions that operate effectively and work together in the interests of the people they serve.*
>
> *Devolution of power to Wales should benefit Wales and the whole of the United Kingdom*

That vision is provisional in the sense that we are prepared to refine it in the light of what we learn in evidence.

We are interested in our Part 2 work in trying to establish an intellectually coherent rationale for what our terms of reference call the "constitutional arrangements" of Wales.

Let me give some examples of the issues we will be considering. Why are powers reserved in Scotland, reserved and excepted in Northern Ireland and conferred in Wales? Is there a principle behind this, or is it an accident? If there is a principle, does it withstand scrutiny? If it is an accident, is it a happy accident? Is it defended because of constitutional inertia? Is it attacked in Wales because of a perception that we are treated as second-class members of the union? How would any change be effected? Would it be worth the candle?

Why is policing not devolved in Wales when it is in Scotland and Northern Ireland? Why on the other hand is health almost entirely devolved? Again, is this pragmatism or principle? Historical accident or strategic design? And any of you who reads the evidence we have received from both Governments and many other witnesses will realise that the issue of where that devolution line is drawn is contested all across the frontier.

I hope that our Part 2 report will address some of these questions of principle, and that it will not shy away from recommending both where the dividing line between Cardiff's powers and those of London should be, and why we believe that it should be placed where we recommend. We remain optimistic – not, I hope, naively - about building a broad consensus.

History of the Welsh Constitution

Let me turn finally to some personal speculation about the future constitution. To talk sensibly about the future, it is, of course, essential to understand the past.

The Government of Wales Act 1998 was drafted in a hurry. The Welsh Office had given little thought to the detail of devolution before the 1997 election. Wales had had no Constitutional Convention. The 1978 Act was dusted down, but even as it made its progress through Parliament was radically re-written. Even so, the model chosen was ill-thought through and could not, and did not, survive long.

We then had the 2006 Act, with its Part 4 that was expected to sit unused on the statute book for some time. But when the Welsh electorate delivered an Assembly where Labour needed to share power with Plaid Cymru, a referendum was proposed, held and won and the paraphernalia of LCOs was replaced by primary legislative powers, albeit ones based on a conferred powers model.

I have run through this simply to illustrate how our constitutional path has lurched along, and has hardly followed a carefully planned piece of strategic thinking.

For all this, we have not been short of very high class analysis: Kilbrandon, of course, but more recently the Richard Commission, Emyr Jones Parry's All Wales Convention, and more specific pieces of analysis with an important bearing on Welsh constitutional matters like Roger Jones's report in 2009, the report of the Holtham Commission, and the McKay Commission report. There have also been a series of extremely valuable reports from parliamentary committees, especially the Welsh Affairs Committee in the Commons and the Constitution Committee in the Lords.

Now there is our Commission on Devolution to Wales, and one is tempted to say with Macbeth "What, will the line stretch out until the crack of doom?"

Constitutional change

Dyfal donc a dyr y garreg. Perhaps the drip, drip theory of constitutional development is the right one. What is wrong with a gradual process of change where each new step is thoroughly tested and, if necessary, modified? You only need to look at the modern consequences of the Second Amendment to the US Constitution to recognize the problem of sanctifying constitutions in a way that means that it is next to impossible to trim the hooves of a constitutional cow.

The almost imperceptible shifts in constitutional practice in the UK allow us a flexibility and adaptability that we perhaps ought to value. Constitutional change perhaps ought to be a process rather than an event, as the American Marxists Huberman and Sweezy wrote in 1960 of the Cuban revolution.

Vernon Bogdanor, in the History of the British Constitution in the Twentieth Century produced by the British Academy in 2003, argued that the historic British constitution based on tacit understandings more than codified rules might be, at the time he wrote ten years ago, in the process of transformation to a quasi-federal codified constitution, but that it also risked remaining in no-man's land because there was "little political will to complete the process, and little consensus on what the final goal should be".

I shall not comment on the political will to complete the process of constitutional reform. But how would one begin to build consensus on the final goal? Here I think that the Commission on Devolution offers a few modest lessons: get all-party buy in, and involve civil society and citizens in what they call in New Zealand "the constitutional conversation". If pre-legislative scrutiny is a good idea in the case of ordinary day-to-day legislation, then thorough testing is even more desirable in the case of proposals for constitutional change. We hope that we as a Commission are doing that in the areas

within our remit, and we expect any proposals we make also in due course properly to be tested in Parliament.

When the First Minister recently came to see the Commission, he was asked about his proposal for a Constitutional Convention. He originally advocated a Convention held before the Scottish referendum. Since this is not going to happen, he now believes a Convention should follow the referendum, whatever the result. He may have support more widely for that view.

On the basis of what I have learned from my work with the Commission, let me suggest a few topics that are beyond the remit of our Commission, but relevant to Wales and which might perhaps form part (but only part) of any wider constitutional reappraisal:

First, there is the fair funding issue. What ought to be the basis of fiscal transfers inside a union? What ought to replace the unsustainable Barnett formula? How does any formula cope with divergent policies within the Union? And what is different as between fiscal transfers to, say, the North East of England and to Northern Ireland?

What is the rationale for asymmetric devolution? Is it justifiable in principle, or is a justified only on the basis of historical accident? Can we expect more of it if London receives greater powers, as Tony Travers's report has recently suggested, and if other city regions in England want to follow?

And do we need more clarity by what we mean by subsidiarity and localism? How many levels of government do we need - from community council to European Union, and do we want to settle their relative powers and interrelationships?

What ought to be the implications of devolved government for the make-up of both Houses of Parliament, and how can Lords reform be considered without this territorial element?

Is a quasi-federation a "proper" constitutional outcome? Do we instead need something where the rights of the federal government (if I can call Whitehall and Westminster that for the moment) are as subject to the rule of constitutional law as the rights of the "states" that make up the federation?

And if that is a step too far, we certainly could look at better mechanisms for the resolution of disputes between the governments within the UK, or, on the positive side, for enhancing their co-operation. As one official said rather strikingly to us in Scotland, there may be a hierarchy of Parliaments in the UK, but there is no hierarchy of governments.

Then there is what one of our Commissioners dubbed "the problem of England".

With the exceptions of Tanzania and Trinidad and Tobago, I am not aware of any federation where 85% of the population is in one unit. If Scotland leaves the Union, the problem becomes even more acute.

English regional government, as proposed by Gladstone in the Midlothian campaign, by Churchill in 1911 and, of course, by Tony Blair, might have been one solution, but there seems no appetite to revive it.

The McKay Commission has produced an elegant solution to the parliamentary aspect of the English question, but I doubt that it will have satisfied those who want a stronger voice for England on laws that affect England alone. Nor does it solve the problems inherent in having the government of England and the government of the United Kingdom institutionally intertwined.

According to Vernon Bogdanor, the establishment of the devolved administrations raised "fundamental questions concerning parliamentary sovereignty and federalism, questions that successive governments sought to avoid answering". Those fundamental questions still need answers, and that is beyond the unpaid pay grade of the Commission on Devolution in Wales.