

## **Introduction**

Thank you for inviting me to speak today. We are all extremely grateful that the British Academy and the Learned Society of Wales have devoted this day in London to consideration of Welsh constitutional matters.

I am, of course, here because I chair the Commission on Devolution in Wales. I will be telling you something about the Commission's work to date and what it expects to do in the future. What I cannot tell you is what the Commission is going to say in its second report due early next year, not least because I do not yet know what my colleagues and I are likely to agree.

However, if I said nothing other than what I could be sure would be completely uncontroversial, I would be a very dull participant today. So I am going to speak about some constitutional conclusions I have drawn as an individual, as well as speaking on behalf of the Commission. After 35 years as a public official, constrained in what I could say, I enjoy my new freedom. But old habits die hard, and I will try to remain relatively circumspect and not alarm my colleagues or our secretariat.

My allotted subject is the "Constitutional Future of Wales and the UK". I am going to imagine that there are brackets around "Wales and the UK". It is presumptuous enough of me to speak on the constitutional future of Wales, and I have no intention of speaking about constitutional matters that affect the UK but have no special relationship to Wales.

So, for example, I shall say nothing about the UK's relationship with the European Union, or indeed the Council of Europe, profound as the effects any changes in that constitutional relationship would have on Wales, because those changes will impinge on every citizen of the United Kingdom.

## **Genesis of the Commission**

Let me first say something about the background to 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 hurriedly agreed coalition agreement with its promises for a five year programme was, of course, a compromise. The Conservative election manifesto said little on constitutional matters in Wales (they would not stand in the way of the referendum on legislative powers, but their "priority remains getting people back into work and strengthening the Welsh economy") – though there was a reference to the UK's "unbalanced" constitutional settlement – a term, presumably of disapprobation. I am pretty sure therefore that it was the Liberal Democrats with their federalist history who secured a commitment to a Calman-like process for Wales.

Having said that, collective responsibility has been a pretty hardy beast since 2010, and I have no cause to doubt the engagement of Ministers of both coalition parties with our work. Indeed, 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 powers between Edinburgh and London.

My 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 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 much more pressure in Wales for a re-alignment of powers.

Thirdly, tax devolution was part of the referendum deal 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 is **xx** compared to **xx** 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.

Here I want to throw out a small pebble. There is no axiomatic solidarity in the relationship between Wales and the two other small home nations. Of course there is an emotional Celtic link, and a common sense of being the smaller partners in the Union, with the concomitant recognition that what suits the English majority, and what therefore has an appeal for a Westminster Government, might not work equally well in Edinburgh, Belfast and Cardiff.

However, if you talk to officials and politicians in Cardiff, Belfast and Edinburgh, you soon become aware that they will only act in concert when they regard their own particular interests as making that desirable. Wales does not serve its best interests if it merely tries to swim in Scotland’s slipstream.

## **Part 1 recommendations**

Let me return to the Commission. Our 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 immense good fortune to follow in the wake of the Commission appointed by the Welsh Government that Gerry Holtham chaired. That was a Commission of just three most distinguished economists, and it would have been perverse of us entirely to plough on regardless of their work. But I do believe that there was value in exposing their views to a more public and more political scrutiny – to which they stood up very well. 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 I in November last year. I am not going to explain today our views on airport passenger duty or landfill tax, you may be pleased to hear. But I think it is worth mentioning a couple of general principles and conclusions that we drew.

The main thing that struck us in Part I 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 was anomalous and that Wales should have some tax and borrowing powers.

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. 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, 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, as Welsh Governments have used their other powers in ways that they believe serve the interests of the people of Wales.

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 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 I 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, where we have three new Commissioners, having lost two who served on Part 1.

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 (if such a thing is possible) in the sense that we are prepared to refine it in the light of what we learn in evidence.

I emphasised earlier what an advantage it has been to our Commission, as opposed to our Scottish predecessor, that all four parties represented in the National Assembly have nominated members. That does, of course, mean that, unlike Calman, we are not all avowedly unionist. So we would not expect our Plaid Cymru-nominated member to sign up to anything that suggested that the union will last for ever.

Nevertheless, I think we are all 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. If you like, the "how" and the "what" of devolution.

Let me give some examples of the how. 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?

Another example. Uniquely in Wales, the Secretary of State must come before the National Assembly to explain the Queen's Speech. No doubt this was originally designed for an Assembly with no primary legislative powers. But should it be removed now that the Assembly does have these powers, or is it an interesting example of accountability of the government of the United Kingdom to a devolved legislature that Scotland and Northern Ireland ought to consider emulating?

On the what, I am sure that Thomas Watkin will have something to say on the issue of a Welsh jurisdiction, so I shall pass over that. But why is, for example, 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.

## **History of the Welsh Constitution**

Let me turn finally to some speculation about the future constitution. To talk sensibly about the future, it is, of course, essential to understand the past. I embark on history with a great deal of diffidence, given the company.

To say that Wales's constitutional relationship with the rest of the UK has fluctuated is something of an understatement. If one extreme was the Wales and Berwick Act 1746 with its provision that the word "England" in statute meant also Wales, we are coming up to the centenary of the high point of the Welsh Church Act 1914.

But then the campaign for Home Rule all-round of the early 20<sup>th</sup> century ran into the buffers soon after the First World War with the failure of the 1919 Speaker's Conference to come up with agreed proposals. Plaid Cymru was formed in 1925, but did not win a seat at Westminster till 1966. The Home Secretary was given the added title of Minister of Welsh Affairs in 1951; but the then incumbent of the post (none other than Gwilym Lloyd George) was able to assert in 1955 in response to SO Davies's Government of Wales Bill that "as political units, Wales and Great Britain are, in the world in which we live, essentially indivisible". That Bill, incidentally, received the support of only six Welsh MPs.

But if 1955 was almost a return to 1746, things have moved pretty steadily in a single direction, with a few stutters, since. A Minister of State for Wales was appointed in 1957, and the new Labour Government established the office of Secretary of State for Wales in 1964. The Kilbrandon Commission sat from 1968 to 1973, but was hopelessly divided on Wales. But partly because of the exigencies of the need to keep the “odds and sods” on board during the minority Labour Government of 1974 to 1979, first the Scotland and Wales Bill and then the separate Bills were introduced and carried. The rejection of devolution in Wales in 1979 was decisive, but the period of Conservative Government was probably equally decisive in stimulating demand for devolution in Scotland, and by second wind, Wales.

The Government of Wales Act 1998 was drafted in a hurry. The Welsh Office had given little thought to 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. The consensual model of politics disappeared. The amalgam of government and legislature was worn away from within, and became untenable. Of all the constitutional reforms of the early Blair years, the model of the 1998 Government of Wales Act was the least long-lasting.

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 rather than the reserved powers model found in Scotland.

I have run through this history which will be very familiar to almost all of you simply to illustrate how our constitutional path has lurched along, and has hardly followed a carefully planned piece of strategic thinking for what the relationship between Wales and the rest of the United Kingdom ought to be.

For all this, we have not been short of very high class analysis: Kilbrandon, of course, but more recently the Richard Commission of 2004, Emyr Jones Parry’s All Wales Convention of 2009, 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 in 2010, and the McKay Commission report earlier this year. 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 House of Lords.

Now there is our Commission on Devolution to Wales, and one is tempted to say with **Macbeth** “What, will this line stretch out until the crack of doom?” Or, just perhaps, is our Commission really going to do what some commentators

optimistically ask us to do and provide a blueprint to fix things for the foreseeable Welsh constitutional future?

### **Constitutional change**

I am rather an inadequate Welsh learner, but one Welsh proverb has always much appealed to me: *Dyfal donc a dyr y garreg* – persistent tapping breaks the stone. Perhaps the drip, drip theory of constitutional development is the right one.

Earlier, I used the rather loaded word “lurched”, but one could ask 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.

Vernon Bogdanor, in the peroration of 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”.

Since I am not a politician, and since we will be hearing later today from eminent Welsh politicians, I shall not comment on the political will to complete the process of constitutional reform, though I am conscious from my work with the Commission that many citizens find the discussion of constitutional issues an annoying habit of the chattering classes.

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, involve as wide a group as possible – learn from New Zealand’s current constitutional conversation, do not rely on the “usual suspects”. If pre-legislative scrutiny is a good idea in the case of ordinary day-to-day legislation, and I certainly think it is, 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 properly to be tested in Parliament.

But our remit has strict limits.

When the First Minister recently came to see the Commission, he was asked about his proposal for a Constitutional Convention. He told us that his proposal had the support of the Prime Minister, though the two differed on timing. The First Minister had believed that the Convention should be held before the Scottish referendum, though he now accepts that this will not be possible. The Prime Minister believes that the Convention should follow the referendum.

Whatever the result of that referendum, there will surely be a need for a wider reappraisal of our constitution.

### **Reappraising what?**

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 which might perhaps form part (but only part) of that 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 and all such terms? 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?

Another question related to my old parliamentary stamping ground. 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?

Then there is the problem of nomenclature. Other than calling them by name – England, Scotland, Wales and Northern Ireland – we do not really have a comfortable term for these geographical parts of these islands that everyone can sign up to.

Federal states do not have this problem – they have provinces or states (though they have to accommodate peculiarities like Australia's Northern Territory or the three territories of Canada). Even non-federal Spain calls each of its constituent parts, whatever their historical antecedents, "comunidades autonomas".



Perhaps this does not matter in a “quasi-federation”. But 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.

That leads me on to something of which we have become acutely aware as we have conducted our work. It is what one of our Commissioners dubbed “the problem with 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 what I regard as 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”. I hope that there will be a constitutional convention that will indeed soon address those questions.

But if we learn one thing from history, however distinguished that convention is, however well-thought out its recommendations, it will not be the last word. After all, not even the laws of the Medes and Persians remained unaltered. Constitutional change is a process not an event, as **said in 19xx** about the Cuban revolution.

Thank you for listening so patiently.