Devolution in Wales: The Challenges Ahead

delivered at

The Legal Wales Symposium, September 21st 2007

by

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Cymdeithas y Cyfreithwyr
The Law Society

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Educated at Queen Elizabeth Grammar School, Carmarthen, Sir David went on to read History and Law at Emmanuel College, Cambridge, where he completed his MA and LLB.

Subsequently he was called to the Bar and was a Commonwealth Fund (Harkness) Fellow at Berkeley and Harvard 1956-58. He then taught at the University of Nottingham for five years and at the University of Oxford (Keble College) 1963-67.

In 1967 he returned to Emmanuel College as a Fellow in Law; he became Reader in Public Law in 1976, President of Wolfson College from 1980 to 1992 and was Rouse Ball Professor of English Law 1983-92.

Sir David served as Vice-Chancellor of Cambridge University from 1989 to 1996, and remains an Emeritus Vice-Chancellor of Swansea University.

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Sir David has served over the years on such bodies as the Council on Tribunals, the Royal Commission on the Environment, the Commission on Energy and the Environment, the Animal Procedures Committee (of which he was chairman), and more recently the Senior Salaries Review Body. He was appointed President of Swansea University in 2001.

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Wales has in recent years witnessed an astonishing burst of constitutionalism. After centuries of being in law simply a part of England and then part of an emerging duo described as a matter of courtesy as 'England and Wales', it was finally in 1967 that it was formally provided – almost by a legislative sleight of hand – that Wales was no longer legally part of England[1]. Even so, there was the status of Monmouthshire to be settled, and it was only by virtue of the Local Government Act 1972 that we were able to discard the laborious term 'Wales and Monmouthshire' which had survived for so long.

The new constitutionalism, of course, is a reflection of significant events and campaigns of the past forty years. Yet the special position of Wales within the United Kingdom has been widely asserted or accepted for well over 100 years. In 1892, for instance, James Bryce MP claimed that "there are present in Wales – and no man with open eyes can deny it – conditions and circumstances which make it so unlike England that it ought to be dealt with separately from England"[2] and thirty years later Hugh Edwards MP said in the House of Commons that whatever "may be the determining principle that decides the question of nationality, whether it be race, or territory, or common language, or community of sentiment and tradition, no one would dare to deny the right of Wales to call herself a nation... Wales is not a geographical expression"[3]. Private members' bills, designed to secure changes in Welsh government, include the National Institutions (Wales) Bill 1892; the Government of Wales Bill 1914; the Government of Wales Bill 1922; the Government of Wales Bill 1967; and the Scottish and Welsh Parliaments Bill 1973[4]. These proposals never took off, and they remind one of the painfully slow emergence of Wales viewed as a political entity from the later nineteenth century onwards. When Lord Morgan of Aberdyfi (Kenneth O. Morgan) stated his intention at Oxford University some fifty years ago of writing a doctoral thesis on recent Welsh socio-political history, "this was regarded as an endearing eccentricity"[5].

Times and attitudes have changed, of course, and the new constitutionalism can be marked by the Report of the Royal Commission on the Constitution (the Kilbrandon Report) of 1973, the prolonged and often confusing governmental and parliamentary activity from 1974 to 1979 on devolution proposals for both

Scotland and Wales, a sleepy period thereafter, then the White Paper and the referendum of 1997[6] followed by the Government of Wales Act 1998, the opening of the National Assembly for Wales in 1999, the Report in 2004 of the Richard Commission[7], the White Paper of 2005 on Better Governance for Wales[8], the Government of Wales Act 2006; and finally the agreement of 27 June 2007, One Wales, between the Labour and Plaid Cymru Groups in the National Assembly[9]. Parallel with these developments and publication there has been a rapid increase in the writing on constitutional and legal issues raised by devolution. Richard Rawlings's work on Delineating Wales[10], published in 2003, is an astonishing and impressive marker in the emergence of Legal Wales, and there have been significant contributions by judges, practitioners and academic lawyers[11]. An important recent contribution has been Thomas Glyn Watkin's The Legal History of Wales which takes the reader from pre-Roman Wales up to the legislation of 2006[12].

The new constitutionalism, however, cannot be confined to Wales and, in particular, to the Richard and post-Richard developments. Scottish constitutional devolution is obviously a model in the emergence of Welsh devolution, and only last month the First Minister in Edinburgh introduced a White Paper on the options for the future, including the possibility of a referendum on independence[13]. The Irish dimension has long been relevant, but in preparing a recent lecture on Ireland 1880-2005 – from Charles Stewart Parnell to nearly the third coming of the power-sharing solution of 1998 applying to Northern Ireland[14] – I was struck by the difficulty of finding a coherent constitutional story with any significant lessons for Wales. Then there are the Isle of Man, which came under the English Crown in the fourteenth century[15], and the Channel Islands embracing Jersey and Guernsey with the latter also including Alderney and Sark[16]. The Isle of Man and the Channel Islands are not formally part of the United Kingdom, but they have a constitutional relationship of a kind with Whitehall and Westminster, and they have to be grafted on to the European Union[17].

The European Union itself is highly relevant to devolution and the extent of devolution in the United Kingdom, and the future role of Scotland within Europe was expressly discussed in the Scottish White Paper of last month[18]. The Richard Report considered the role of devolved governments "in the implementation and negotiation of EU and other international obligations"[19], reminding us, for instance, that EU legislation places significant limits on the discretion of the Assembly in fields such as agriculture, fisheries, the environment, and the internal market"[20]. The Commission also noted that Sir David Steel, as Presiding Officer of

the Scottish Parliament, had suggested "that the scrutiny of EU legislation is one of a number of areas in which there is scope for greater sharing of expertise between the various legislative bodies in the UK"[21]. Such a suggestion has doubtless been considered by the British-Irish Council, set up under the Belfast (Good Friday) Agreement of 1998[22], which consists of representatives of the British and Irish governments and of the devolved institutions in Scotland, Wales and Northern Ireland, and of the Channel Islands and the Isle of Man. The work of the Council is referred to in the recent Scottish White Paper[23].

In its broader consideration of the powers and electoral arrangements of the National Assembly for Wales, the Richard Commission took full account of the fact that, in the words of Jane Williams, "Welsh devolution has been in a more or less perpetual state of review, sometimes as part of devolution within the UK, and sometimes limited to Wales, from the very beginning of the Assembly's existence"[24], an observation anticipated in Lord Carlile's article on "The Evolution of Devolution"[25]. The Richard Commission was not happy, however, with the manner of evolution which it saw as having been "an ad hoc, piecemeal development, on a case by case basis, not founded upon any agreed general policy, or informed by any clear set of devolution principles"[26]. Its recommendations centred on a move towards primary legislative powers linked to changes in the structure of the Assembly, increased membership, and changes in the electoral arrangements – all on a suggested timescale allowing for the new-style devolution settlement to be in place by 2011.

The aftermath of Richard has been disappointing, to say the least, and this is to no small extent because party and partisan considerations have militated against sober reflection on the best path for Wales and for the United Kingdom as a whole. David Feldman has written that all constitutions "deal with the business of governing, a dynamic and, to a great extent, political and pragmatic process"[27], but nonetheless there can be a balance between pragmatism and principle. It was Alexander Hamilton who asked in The Federalist, the collection of submissions on the adoption of the US Constitution, "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force". The Kilbrandon Commission produced a sober and considered examination of devolution and related matters, though its treatment of the UK's constitutional relationship with Jersey rested, in the view of one leading academic lawyer, "on uncertainty and ambiguity. It is woefully short on legal authority,

devoid of analytical vigour, packed with speculation and imbued with colonial assumptions which have always been irrelevant to Jersey's status and are out of tune with the present times"[28]. Nevertheless Kilbrandon, in its treatment of Scotland and Wales, provided a dispassionate text ahead of the political manoeuvring which went on for over five years and produced nothing by 1979. This is important, and I still return to Kilbrandon in assessing devolution in the new millennium.

There is little doubt that the Scotland Act 1998 benefited from the work of the Scottish Constitutional Convention for several years ahead of the White Papers of 1997[29]. There was no comparable study with regard to Wales and the result was an unsatisfactory White Paper, an unsatisfactory referendum campaign, and an unsatisfactory piece of legislation in 1998. True enough, as the Richard Commission accepted, there had been subsequent rolling developments in devolution, and the Commission sought valiantly to make sense of these developments and offer a new guidance for the future. Richard reported in the Spring of 2004. Then, in June 2005, came the White Paper Better Governance for Wales[30] issued by the Wales Office. It seemed almost like an echo of what Harold Wilson called "very full consultations"[31] after Kilbrandon, doubtless conducted in smoke-filled rooms when these were still legal, which resulted in a surprising and disappointing rejection of what Kilbrandon had recommended for Wales[32]. It was the scheme of so-called "executive devolution" which was finally thrown out after the referendum held in Wales in 1979. In the Foreword to the White Paper of 2005, the Secretary of State for Wales made no mention of Richard; and this is because the Welsh Labour Party – as demonstrated in its published policy document of August 2004[33] – had re-examined the Commission's proposals, and the National Assembly in October 2004 passed a Motion which moved away from Richard in significant areas.

Better Governance for Wales led to the Government of Wales Act 2006 with its 166 sections and 12 Schedules, enacted just a few months after the opening of the new Assembly buildings on 1 March 2006[34]. There were three major areas of change provided for: a formal separation between the executive and legislative arms of the Assembly, electoral arrangements, and enhanced legislative power for the Assembly. The first of these, which was strongly recommended by Richard, was accepted on all sides and it in effect adopted "the traditional Westminster/ Whitehall model". Under the 1998 Act, the National Assembly had been created as a single corporate body, the practice and preference pointed more and more in the next six years to an abandonment of that awkward concept, and this has been

achieved in Part 2 of the 2006 Act.
The other two areas of emphasis are more controversial. Turning first to the extension of legislative power, Richard envisaged movement towards legislative devolution by 2011. The White Paper and/or the Act are much more limited as to what is on offer. The much-discussed three stages allowed for the conferment of wider powers on the Assembly to make subordinate legislation, something which can be secured without legislation; for a new mechanism whereby Parliament could confer extended legislative powers with regard to specified subject matter, the conferment to be achieved by Order in Council; and for authorisation for the Assembly to legislate within its devolved spheres without further recourse to Parliament, a major change which could only be triggered by a referendum which in its turn could only be triggered by approval of both Houses of Parliament and of two-thirds of all Assembly members. It is difficult to predict the working of any of the stages, and a further factor which may dictate the legislative activity and aspirations of the Assembly is that the Richard proposal that the number of members should be increased from 60 to 80 was rejected.

Considerable uncertainties remain, and we are doubtless faced with several more years of adaptation and evolution with new agreements and conventions emerging. I was from the 1970s an opponent of the various schemes of devolution for Wales, but I also recognised that that referendum of 1997 – dubious as it was in constitutional terms – compelled us to seek a satisfactory outcome in the resulting legislation. In the result the Government of Wales Act offered a scheme which was neither fish nor fowl, and it was inevitable that there would have to be new legislation sooner rather than later. The Government of Wales Act 2006 has many important and workable provisions but its avoidance of a clear-cut move towards what Kilbrandon described as "legislative devolution" is a recipe for continuing irritation and frustration. I can remind this audience that the various entities represented on the British-Irish Council all have primary or quasi-primary legislative powers except Wales. True enough, the agreement of late June of this year between the Labour and Plaid Cymru groups in the National Assembly spoke of a joint commitment to use the stage 2 powers to the full "and to proceed to a successful outcome of a referendum for full law-making powers... as soon as practicable, at or before the end of the Assembly term", but the task facing a proposed all-Wales Convention "based on wide representation from civic society" in paving the way ahead will not be easy[35].

On the electoral issue, Richard devoted chapter 12 to the arrangements. They

noted that the Assembly began with the AMS (Additional Member System) as "a form of proportional representation" which "attempts to combine, in a single voting system, features of the First Past the Post (FPTP) and the Party List systems"[36]. The Commission noted that the STV (Single Transferable Vote) system worked smoothly in Australia, the Republic of Ireland and Northern Ireland, and it saw advantages in the system over AMS, and in large part because AMS could not carry the weight of an increase in Assembly members to 80 it recommended STV as preferable to AMS[37]. The Government in London has, however, rejected the suggested increase in membership, it disliked the impact of simultaneous candidature in constituency elections and elections from party lists (the Clwyd, West question) and the 2006 Act prevents individuals from standing on a constituency or party list basis simultaneously. Once again, the legislation evades the central issues raised by Richard and scores a political rather than a genuine constitutional point. In the White Paper of 2005, the Secretary of State for Wales commented that "voters are confused and concerned" by the then electoral system, but little evidence was presented for this alleged confusion and concern; and, in any event, Richard's proposals were linked to the increase in Assembly membership and were not inconsistent in principle with some modification of AMS. Indeed, the Commission rejected some of the criticisms of simultaneous candidature.

Pausing for a moment to look at the wider constitutional climate in the United Kingdom and the Islands, it is remarkable how much change has occurred over the last 35 years or so. I prefer to speak of constitutional change rather than constitutional reform because "reform" has a connotation of improvement: though I am happy to identify some areas of clear improvement, sometimes achieved by the courts rather than by Parliament (the emergence of a sophisticated and rapidly evolving administrative law in this country), sometimes achieved by statute (an example is the Freedom of Information Act 2000 which followed on an experimental code introduced in the 1990s). Popular pressure or even awareness is not a necessary prelude to constitutional change, and one has to recognise the MEGO element which often arises. MEGO is an acronym for "My Eyes Glaze Over", referring to "something that is both undeniably important and paralyzingly dull"[38], and it was certainly an element when Kilbrandon first reported and was perhaps evident when the new Government introduced a Green Paper on The Governance of Britain just over two months ago[39]. In a Foreword to the Green Paper the Prime Minister and the Secretary of State for Justice (aka the Lord Chancellor) spoke of their desire "to forge a new relationship between government and citizen, and begin the journey towards a new constitutional settlement – a

settlement that entrusts Parliament and the people with more power"[40]. They called for a "national conversation" on limiting the powers of the executive, on making the executive more accountable, on re-invigorating our democracy, and on Britain's future: the citizen and the state. Many important matters would be exposed to the national conversation, including moving several prerogative powers to Parliament, the range and oversight of national security, reform of the House of Lords, the place of Parliament "at the heart of our system of government" with the corollary that devolution "does not cede ultimate sovereignty"[41], and the possible adoption of a Bill of Rights[42] and ultimately a written constitution. The items covered in 63 breathless pages are impressive, but devolution is mentioned only briefly and the special position of Wales not at all, and even raising the question of flying the Union flag is predictably not coupled with whether Wales now merits some representation on that symbol.

It is a sad comment on the desirability of a national conversation on constitutional matters that the Richard Commission allowed a unique opportunity to call for evidence, to hold a number of seminars or meetings, and to produce carefully prepared proposals, only for there to be no opportunity – by referendum or otherwise – for these proposals to be judged by the people rather than another set of compromises forged in 2004-2005. The Commission was set up to take account of the statutory settlement of 1998 and the progress of Welsh devolution through a maze of adjustments worked out on the basis of experience. More important, it was also effectively charged with identifying the way ahead. In the result the Government in Whitehall, shored up by the alleged sanction of manifesto commitments in the General Election of 2005, left us in the Government of Wales Act 2006 with what the Secretary of State for Wales described in the White Paper as "a practical common sense route-map to better governance".

On the basis of the new settlement we will once again face references to the Sewel Convention[43], the Barnett Formula[44], the Rawlings Principles[45], and to the new-fangled constitutional terminology of governance, concordats, and even – with great respect once again to Richard Rawlings – autochthony which Kenneth Wheare once described as having a connotation of being 'home-grown'[46]. I should add that I looked up "autochthon" in the Shorter Oxford English Dictionary for 1933, and found reference to "a son of the soil", the earliest known dwellers in any country (with mention of aborigines (1741)), and original inhabitants or products (1837). I still prefer to describe the home-nurtured aspects of Welsh devolution as "quasi-autochthonous", not least because I find the general

arguments about autochthony in the adoption of new constitutions as somewhat difficult and confusing and scarcely applicable to many aspects of the evolution of devolution in Wales[47]. Given the revived emphasis on constitutional changes in the United Kingdom, raised in July's Green Paper, we should be anxious to avoid too introspective an approach to Welsh devolution, especially as the Green Paper evidently attaches much importance to the nine regional Government Offices in England and the nine Regional Development Agencies[48]. We need to take full account now not only of the relevance of the Green Paper to all parts of the United Kingdom and to the future of the European Union but also of the easily neglected problems associated with separatism, federalism, the 'English' question (aka the West Lothian Question), and the democratic implications of the referendum as a weapon of constitutional change.

It may seem strange to raise the subject of separation when Wales has not even approached as yet the scheme of legislative devolution proposed by Kilbrandon. The Royal Commission, however, devoted an entire chapter to separatism with regard only to Scotland and Wales. The conclusions in the Report were against any move towards political separation, with the final assertion "that the national aspirations of the Scottish and Welsh peoples and their desire for better government are more likely to be satisfied within the United Kingdom than outside it"[49] The general problems of seceding were more recently highlighted in a revealing decision of the Supreme Court of Canada concerning separatist pressures in Quebec[50].

As far as Wales is concerned, we have been reassured by the Secretary of State for Wales in the debate on the 2006 legislation that "devolution has proved a success" and that independence is now seen as "outdated and eccentric"[51], a view echoed by Lord Anderson of Swansea who said that the "separatist tide" has ebbed[52]. Separatism remains on the constitutional agenda because of the situation in Northern Ireland and Scotland. The Northern Ireland Act 1998 provides in section 1 that the province "in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section", and the importance of this availability of choice was stressed at the start of the Belfast Agreement of 1998[53]. Scotland has raised the stakes of independence in the launch of a White Paper in Edinburgh calling for a "national conversation" – it seems as if "conversation" is competing with "autochthony" in the vocabulary of current politics – on plans set out for a referendum on independence[54]. The White Paper begins with the words of Charles Stewart Parnell claiming that no man "has a right

to fix the boundary of the march of a nation..." and it includes a draft bill on a referendum. One suspects that the immediate aim of the SNP-led government would be to extend the boundaries of devolution in the near future; but it would be a mixed blessing if concessions were offered simply to deflect the calls for independence.

Then there is the issue of federalism. Kilbrandon was satisfied that there was "very little demand for federalism in Scotland and Wales[55] and that "no advocate of federalism in the United Kingdom "has succeeded in producing a federal scheme satisfactorily tailored to fit the circumstances of England" with its "overwhelming political importance and wealth"[56]. Chapter 13 on Federalism concludes with the Royal Commission's assertion that "the United Kingdom is not an appropriate place for federalism and now is not an appropriate time"[57]. At the same time the Royal Commission, looking separately at Northern Ireland, which up to 1972 was governed in accordance with the Government of Ireland Act 1920, said that the province "by one of history's choicest ironies" is "the one place where Liberal home rule ideas were ever put into practice"[58], and one Australian scholar suggested that the 1920 Act had created "an odd sort of federal situation"[59]. There is no precise definition of federalism and one writer said that federalism "is what political scientists talk about when they talk about federalism"[60]. Writing in 1941 K. C. Wheare did, however, insist that the essence of federalism is that the relationship between the central legislature and the legislatures of identified parts of the country "is not the relationship of superior to subordinates as is the relationship of the Parliament at Westminster to the Parliament at Stormont, but is the relationship of co-ordinate partners in the governmental process"[61]. There is a long-standing scepticism in this country about federalism, fired especially by Dicey in the context of Home Rule for Ireland[62] and the contexts have also included Home Rule All Round, the advocacy of Imperial Federalism, and the European Union. Constitutionally a federal structure in the United Kingdom would require a written, supreme constitution, the recent Green Paper on The Governance of Britain speaks somewhat uncertainly about the possibility of a written constitution achieved after "extensive and wide consultation"[63], but it may yet be recognised that the adoption of federalism would be preferable by far to separatism and also perhaps help to clarify and rationalise the status of the Channel Islands and the Isle of Man.

The stumbling block, of course, is the question of England. This is so whether one is speaking of devolution or of federalism. Even in 1976, when constitutional

speculation was even fuzzier than it is today, the Government noted that "England contains almost 85 per cent of the population with a correspondingly overwhelming proportion of resources. No existing federation contains a partner of anything like this preponderance"[64]. There is also the West Lothian question relevant especially to devolution, as raised by Tam Dalyell MP: "why it was that, after legislative devolution to Scotland, Scottish MPs would be able to vote on English domestic matters such as education and health in West Bromwich, while English and Welsh MPs would no longer be able to vote on education and health in West Lothian"[65]. This Question had been anticipated in the Memorandum of Dissent filed by two of the Kilbrandon Commissioners, arguing that legislative devolution "would be giving to the people of Scotland and Wales significant additional political rights which would be denied to the people in the different regions of England (all of which have larger populations than Scotland and Wales and a range of problems no less special to themselves)"[66]. The English dimension remains critical to a constitutional solution of the problems of fragmentation within the United Kingdom[67], and it is significant that – notwithstanding reluctance in England to adopt regional assemblies – the Prime Minister has, as noted in the Green Paper, appointed Ministers for the nine English regions with the possibility of nine regional select committees in Parliament to secure proper accountability[68]. It would be premature to envisage such regions developing into units suitable for federation, but there has certainly been a start to combating the problems of the English question. Even in 1974 I argued that "neither federal government nor legislative devolution is likely to work satisfactorily under a selective scheme for which England and the regions of England are excluded... Even if more ambitious schemes are undertaken in Scotland, it might be in the long-term interests of Wales to stand clear of the process of constitutional fragmentation. Such a policy may also be in the long-term interests of England and of the United Kingdom"[69].

My view expressed in 1974 has not changed, though I recognise that it is a view that has been overtaken by events. Hence I applaud the efforts of the Richard Commission to seek major improvements to the settlement of 1998 and I regret the Government's new settlement of 2006 because it perpetuates the weaknesses of 1998 and sets uncertain or unrealistic targets for progress in the future. I also applaud the efforts of the First Minister and his colleagues for their efforts since 1999 to make the unworkable workable and to make the unacceptable acceptable, but there has to be a limit to the process and the distractions which it causes. Perhaps the much-maligned referendum – which Dicey once described as "a foreign expression derived from Switzerland"[70] – will have to be used once again

as a mechanism by which popular rather than party support can be offered in the context of political change.

The referendum is a new device in British constitutional affairs. It has been stated that our "constitution embodies the principle of representative, not direct, democracy, and the referendum has not in the past been a normal feature of the system, although various statutes provided for local referendums" on a variety of matters including a 'local option' for the licensing of public houses[71]. On the latter example, John Davies wrote in A History of Wales that, following a referendum process in 1961, "public houses opened on Sundays in five of the counties and in all the county boroughs of Wales... There were further referenda in 1968, 1975, 1982 and 1989; by 1989, Dwyfor... was the only remaining 'dry' district"[72]. A referendum preceded the establishment of the Greater London Authority, and a mayoral system operates in a small number of places in England by virtue of local referendums.

A national referendum was held in 1975 to determine whether the United Kingdom should stay in the European Community. In moving the second reading of the Referendum Bill 1975, the Lord President of the Council (Edward Short MP) recognised the arguments about direct and representative democracy[73], and the ensuing debate saw vigorous denial of parliamentary sovereignty regarding Scotland[74], the claim by Maurice Macmillan MP that a referendum is "an affront to the sovereignty of Parliament"[75], and remarks by Dafydd Wigley MP, citing Professor Levi's lectures at Aberystwyth on the unwritten constitution[76]. One of the contributors to the debate, Philip Goodhart MP had already published a book on referendums in 1971, and he now stated that "properly used, a referendum could be a buttress and a safeguard for parliamentary democracy rather than its enemy"[77]. There has, of course, been strong pressure recently for a referendum on the new EU Treaty, but the Prime Minister insisted in later August that Parliament would decide[78].

Referendums have been crucial, however, on the question of devolution. Proposals for Scottish and Welsh devolution failed in 1979 but succeeded – in the Welsh case, controversially – in 1997. The Good Friday Agreement of 1998 was also approved by referendum. For all major referendums there is now the Political Parties, Elections and Referendums Act 2000, a reminder of the now-established constitutional use of the device. There has been a call for a referendum on Scottish independence, as we have seen, and the Government of Wales Act 2006

makes a referendum a necessary trigger for the bringing into effect of stage 3 in the legislative process, but there are major obstacles to be overcome before such a poll can be authorised. One Wales, the agreement of June 2007 between the Labour and Plaid Cymru, was remarkably optimistic on the issue of a referendum, however, and it proposed an all-Wales Convention to assess the way forward after which both parties will "then take account of the success of the bedding down of the use of the new legislative powers already available and, by monitoring the state of public opinion, will need to assess the levels of support for full law-making powers necessary to trigger the referendum"[79].

It is inevitable that there will be constitutional changes in Wales beyond the terms of the 2006 legislation. The evolution of devolution will continue. The emergence of Legal Wales will retain its momentum, and the influence of Sir John Thomas and Sir Roderick Evans will be important in setting out the areas of concern and emphasis. The office of Counsel General, now on a statutory footing by virtue of the legislation of 2006, will be central to many developments. The First Minister will continue to take the initiative over legislative powers of the National Assembly. What I fear, however, is that there may be years of shadow-boxing on the issue of primary legislative powers – as we come to terms with, as Richard Rawlings puts it, the "interim constitution" of 2006 which has been piled on the original "interim constitution" of 1998[80] - I hope that, with the stimulus of the new Convention, we may at least and at last reach the powers which were recommended by the Royal Commission on the Constitution in 1973.

Footnotes

1. Welsh Language Act 1967.

2. Parl. Deb., HC, Vol 1, C. 1067, 23 February 1892.

3. Parl. Deb., HC, Vol 150, c. 936, 10 February 1922.

4. See D.G.T. Williams, "Wales and Legislative Devolution" in Harry Calvert (ed.), Devolution (1975) 63, at 64.

5. Kenneth O. Morgan, "Welsh Nationalism" in Wm. Roger Lewis (ed.), Adventures with Britannia. Personalities, Politics and Culture in Britain (1995), 291, at 292. See generally, Rees Davies, The Matter of Britain and the Matter of England, Inaugural Lecture (1996) at the University of Oxford; Keith G. Robbins, "Wales and the 'British Question'" (2002) Transactions of the Hon. Society of Cymmrodorion 152; Kenneth O. Morgan, Wales in British Politics (1963); Wyn Griffith, The Welsh (1950).

6. The White Paper was A Voice for Wales (Llais dros Gymru), Cm 3718. See Williams, "Devolution: the Welsh Perspective" in Constitutional Reform in the United Kingdom: Practice and Principles (1998) (ed. Beatson, Forsyth, Hare).

7. Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, appointed by the First Minister of the National Assembly for Wales in July 2002. The Chairman was Lord Richard of Ammanford.

8. Cm 6582. See Richard Rawlings, "Hastening Slowly: The Next Phase of Welsh Devolution" [2005] Public Law 824.

9. The agreement is sub-titled A Progressive Agenda for the Government of Wales.

10. Delineating Wales. Constitutional, Legal and Administrative Aspects of National Devolution (2003).

11. See Sir John Thomas, "Legal Wales: Its Modern Origins and its Role after Devolution: National Identity, the Welsh Language and Parochialism" (Lord Morris of Borth-y-Gest Lecture, 2000); published in Vol 1 of the Welsh Legal History Society, Legal Wales, the Past and the Future 113; Timothy H. Jones and Jane M. Williams "Wales as a Jurisdiction" [2004] Public Law 78; Richard

Rawlings, "'Say not the struggle naught availeth'. The Richard Commission and After" (The Centre for Welsh Legal Affairs, Fifth Annual Lecture, 2004); Lord Carlile of Berriew QC, "The Evolution of Devolution" (2003), 2 Wales Law Journal 86.

12. The book, which was published in 2007, has an extensive bibliography at 277-303.

13. Choosing Scotland's Future. A National Conversation. Independence and Responsibility in the Modern World. See The Times, 15 August 2007 at 4, 12 (leading article) and 15.

14. This was the Austen Owen Lecture at the University of Richmond, which was published as "Ireland 1880-2005: A Constitutional Perspective" (2007) 41 Univ. of Richmond Law Review 345.

15. See Report of the Joint Working Party on the Constitutional Relationship between the Isle of Man and the United Kingdom, HMSO (1969).

16. See Philip Bailhache (ed.), A Celebration of Autonomy 1204-2004. 800 Years of Channel Islands' Law (Jersey Law Review Ltd., 2005). See also K.R. Simmonds, "The British Islands and the Community": (1968-69) VI Common Market LR 156 (Jersey); (1971) VIII CMLR 475 (Guernsey).

17. The constitutional position of the Isle of Man and the Channel Islands is discussed in the Report of the Royal Commission on the Constitution, Cmnd 5460, at pp. 407-466. See also, K.R. Simmonds, "The British Islands and the Community" (1970) VII Common Market LR 454 (the Isle of Man).

18. Choosing Scotland's Future. A National Conversation. Independence and Responsibility in the Modern World (July 2007).

19. Note 7 above, at ch. 5, para. 112-120.

20. Id., 114.

21. Id., 116.

22. The Belfast Agreement. An Agreement Reached at the Multi-Party Talks on Northern Ireland. Cm 3883 (April 1998), at pp. 14-15.

23. Choosing Scotland's Future, note 13 above, at 4.15-4.16.

24. "Law Making for Wales after the Richard Commission" (2004) 3 Wales Journal of Law and Policy" 251, at 251.

25. Lord Carlile of Berriew QC in (2003) 2 Wales Law Journal 86. The article is an edited version of the David Lloyd George Memorial Lecture delivered at the Criccieth Festival in June 2002.

26. Ch. 14, para. 17.

27. "None, One or Several? Perspectives on the UK's Constitution(s)" (2005) 64 Cambridge L J 329, 333.

28. This comment appeared in Jeffrey Jowell, "The UK's Power over Jersey's Domestic Affairs" in A Celebration of Autonomy, note 16 above, 249, at 268. See also, the Memorandum of Dissent to the Kilbrandon Report, Cmnd 5460-I, at viii-ix.

29. See Anthony Bradley, "Constitutional Reform, The Sovereignty of Parliament and Devolution" in Constitutional Reform in the United Kingdom: Practice and Principles" (Centre for Public Law, University of Cambridge) (1998), at ch. 3, 33 at 35; Scotland's Parliament, Cm 3658 of 1997, at 1.5.

30. Cm 6582 of 2005.

31. Parl. Deb., HC, Vol 903, c. 221, 13 January 1996.

32. Our Changing Democracy, Devolution to Scotland and Wales, Cmnd 6348 of 1975.

33. Better Governance for Wales: A Welsh Labour Party Document.

34. See Alan Trench, Analysis, "The Government of Wales Act 2006: the next step in devolution for Wales" [2006] Public Law 687-696.

35. One Wales. A Progressive Agenda for the government of Wales (27 June 2007), at p. 6.

36. Note 7 above, ch. 12, para. 9.

37. Id., pp. 238-39..

38. MEGO is an American term. See William Safire, New Political Dictionary. The Definitive Guide to the New Language of Politics (1993), at 447.

39. CM 7170 of July 2007.

40. Id., at p. 5.

41. Id., at p. 43.

42. The Joint Committee on Human Rights, chaired by Andrew Dismore MP, called (in May 2007) for the submission of evidence on a Bill of Rights by 31 August 2007.

43. See Rawlings, op. cit., at 527-29.

44. See Richard, op. cit., at p. 199.

45. Id., at 151.

46. K.C. Wheare, The Constitutional Structure of the Commonwealth (1960), ch. 4, at p. 89. See especially the discussion on the emergence of the Irish Free State at 89-94.

47. Sir David Williams, "Devolution: The Past and Future" (2005) 4 Wales Journal of Law and Policy 17, 18.

48. See generally, CM 7170 of 2007, at paras. 115-120.

49. Cmnd 5460, ch. 12, at para. 497.

50. Re. Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada [1998] 16 DLR (4th) 385.

51. Parl. Deb., HC, Vol 441, c. 441, 9 January 2006. But see Partnership for Progress, a Labour Party pamphlet issued in September 2007 – see Western Mail 22 September 2007, at 5.

52. Parl. Deb., HL, Vol 680, c. 309, 22 March 2006. See also Lord Evans of Temple Guiting, id, c. 261, 22 March 2006.

53. Cm 3883, at pp. 2-3.

54. Choosing Scotland's Future. A National Conversation. Independence and Responsibility in the Modern World (2007).

55. Cmnd 5460, para. 498.

56. Id., para. 531.

57. Id., para. 539.

58. Id., at para. 1249.

59. Geoffrey Sawer, Modern Federalism (1969) at 57. See also A.G. Donaldson, "The Constitution of Northern Ireland: its Origins and Development" (1955) II Univ. of Toronto L J 1, 5-6.

60. William S. Livingstone (ed.), Federalism in the Commonwealth: A Bibliographical Commentary (1963), at xvi-xvii.

61. What Federal Government Is (pamphlet issued by Federal Union, 1941), at 9-10.

62. See D.G.T. Williams, "The Constitution of the United Kingdom" [1972B] Cambridge L J 266.

63. CM 7170, at para. 213. On federalism and devolution, see Sandra Day O'Connor, "Altered States: Federalism and Devolution at the 'Real' Turn of the Millennium" [2001] 60 Cambridge L J 493, esp. at 502-05.

64. Devolution, The English Dimension. A Consultative Document (HMSO, 1976), at para. 17.

65. Vernon Bogdanor, Devolution in the United Kingdom (1999), at p. 34.

66. Cmnd 5460-I, at viii.

67. See Brigid Hadfield, "Devolution, Westminster and the English Question" [2005] Public Law 286.

68. CM 7170, paras. 115-120.

69. Note 4 above, at 82.

70. Law of the Constitution, 8th ed. (1915), at xci-c.

71. Colin Turpin and Adam Tomkins, British Government and the Constitution (6th ed., 2007), at 533.

72. A History of Wales (1993), at 642.

73. Parl. Deb., HC, Vol 889, cc. 1418, ff, 10 April 1975.

74. Id., c. 1465 (Douglas Henderson MP), with reference to *MacCormick v Lord Advocate.*

75. Id., c. 1477.

76. Id., cc. 1486-91.

77. Id., c. 1494. The book was Referendum (1971).

78. The Times, 23 August 2007, at 14.

79. Note 35 above, at p. 6.

80. Note 8 above, at 851.