

Lecture – Law School – 9th April 2008
A CONVENTION FOR THE FUTURE?
THE ROAD AHEAD FOR WELSH DEMOCRACY

I would like to begin by reminding you of the context in which I'm delivering this address tonight.

On this very day eleven years ago, Wales was, in effect, governed by a Secretary of State and two Ministers appointed by the Prime Minister of the UK. They did not have to, and in many cases did not represent a Welsh constituency, much less majority Welsh public opinion. The notion of a democratically elected assembly and government for the nation had been on and off the political agenda since the days of Tom Ellis and the young Lloyd George in the last decade of the nineteenth century.

In 1979 the offer of an assembly with strictly limited powers by the Callaghan government had been comprehensively rejected by the people of Wales in a referendum. There followed 18 years of Conservative government, during which Wales changed massively, in both economic and social terms. Devolution was no part of Thatcher and Major's agenda – far from it - but that experience reinforced the case for devolved government for Wales, for many

who had not supported it in 1979, or were too young to vote, as well as those who did support it then.

And come it did. In May 1997 – almost eleven years ago, it is incredible to think is it not? Tony Blair’s ‘new’ Labour government was elected by a massive landslide with promises to hold referenda on devolution in Wales, Scotland and Northern Ireland, a core part of their manifesto. Within a matter of months the 1979 verdict had been dramatically reversed in the September referendum of 1997 and within just over a year the Government of Wales Act 1998 establishing a National (yes a ‘National’) Assembly for Wales was on the statute book.

The National Assembly had hardly got going in July 1999 before the inherent deficiencies of Welsh executive devolution and the ‘corporate body’ model were becoming apparent and the calls for a clearer constitutional settlement including real legislative powers were being heard – from politicians and constitutional experts alike.

And so, a fundamental condition of the Labour-Liberal Democrat coalition deal in September 2000 was the establishment of a commission to consider the powers and electoral arrangements of the National Assembly, to be chaired by Lord Richard of Ammanford, which duly recommended that the Assembly become,

to coin a phrase, 'a proper parliament'. I shall return to Richard on several occasions tonight.

Then, when the second coalition, the One Wales Government, came along in 2007, a fundamental condition of that deal was that the Assembly be granted primary legislative powers by 2011, based on the provisions of Part 4 of the Government of Wales Act 2006, to which I shall, of course, also return.

In parallel with these events, there has been a remarkable sea-change in Welsh public opinion. The 1997 referendum was won by a whisker – the celebrated 6,721 majority, on a 50.1% turnout. Looking back today, it is incredible to think that had a mere 3,361 people voted differently, Wales would still be directly ruled from London by a Secretary of State? On such a small margin did the destiny of Wales hinge.

By today, just eleven years later - a mere blink of an eye in the history of Wales, public opinion has changed remarkably. Recent research by the Institute of Welsh Politics in Aberystwyth shows that now only a small minority of 17% reject the principle that Wales needs a democratic national government: that is less than one in five, whereas a decade ago, it was one in two. The most favoured option by some margin is a legislative parliament - with tax-raising powers, and it is important to note I think – for it has the support of 44% of

the Welsh people. Add to those the minority 12% who support independence and we have a total of 56% who would like to see more devolved government for Wales than we currently have.

I have given this quick résumé of events so that we should remind ourselves of the transformation there has been in Wales' political life – a transformation few of us could have foreseen eleven years, much less twenty years ago. In the constitutional sense, at least, we can safely claim, literally as much as rhetorically, that Wales is a nation on the move. One sometimes has to pinch oneself to confirm that it is not a dream, but current reality, and it is surely a cause for celebration.

Now, to develop my argument this evening for a clearer devolved legislative system for Wales, I want to refer to the report of the Richard Commission. When its report was published, it immediately struck me – and many other observers – as the most detailed and thoughtful analysis of Wales's governmental arrangements that there had ever been. It gave careful and detailed examination to a range of problems that had developed with the limited measure of devolved government that the 1998 Government of Wales Act had put in place. More significantly still, it had the unanimous agreement of all members of the Commission and for the first time ever it provided a blueprint for the government of Wales which had the support of representatives of all four political parties. That is why it was felt

that an organisation was needed to lead a campaign in support of the main thrust of the Richard recommendations, and I agreed to join with others who were similarly convinced that we should seek to seize the unique opportunity the Richard Commission Report represented and established Tomorrow's Wales/Cymru Yfory.

While we are a small organisation, we have succeeded in being non-partisan, in having members and supporters from all political parties and from none, and in drawing support from across Wales and from supporters of Welsh democracy from further afield. And that is why I have come here tonight, to speak to you about what is now needed for the development of Wales's democracy and why.

Over the last few years – and greatly helped by funding from the Joseph Rowntree Charitable Trust and the Joseph Rowntree Reform Trust, for which we are very grateful – Tomorrow's Wales has sought to draw attention to some of the questions that have arisen with the way devolved government in Wales works, and to help involve civil society in this process. Our organisation includes people involved in a wide range of sectors, and we know only too well how limited is the understanding of civil society and the public at large about how devolution in Wales works, how it has changed, and what they can do about it. We organised the first large-scale conference on the 2006 Act when the ink was still drying on it in November 2006, to help civil society become involved in formulating

arrangements for and contribute to the proceedings of the new Assembly. We have lobbied about a range of matters that concern us, whether it be how legislation is made within the Assembly or the powers conferred on it at Westminster, as well. When the Government of Wales Bill was before Parliament in 2005-6, we drafted amendments which were tabled and debated and we briefed members of both Houses. In 2007 we published a layman's guide to the National Assembly's new powers and procedures – still the only publication of its kind available. We have tried to be the conscience of Wales as its constitution has been developing over the last few years, and we look forward to playing this role over the coming years as well.

The Richard Commission blueprint was for a legislative assembly, with a generous grant of legislative powers on what is called 'the Scottish model', along with increasing the number of Assembly members to 80 and a separation of the executive and legislative functions that were combined in the single body corporate in 1998. That report seems to me – and many observers and commentators – to have been the best attempt to map Wales's constitutional future we had ever had. It is still the clearest and most coherent vision of that future we have, and the one that offers the greatest clarity about how Wales should be governed. In my view it remains the benchmark for that – the standard by which we must judge our

present arrangements and the further steps that will be needed over the next few years

The 2006 Act, to be sure, split the executive from the legislature. And it may produce a legislative assembly with wide ranging powers by 2011, as the Richard report recommended. That depends, though, on whether that is approved by a referendum, the holding of which, itself, needs to be endorsed by five separate political bodies – the Assembly Government, the Assembly itself by a two-thirds majority, the Secretary of State for Wales, and then both Houses of Parliament. All that complexity adds hugely to the political balancing and involvement in what is a very important, but still rather simple, constitutional decision: does Wales want ‘primary legislative powers’ or not?

There are, of course, two main parts to the Government of Wales Act 2006 which relate to the Assembly’s legislative powers, known as Part 3 and Part 4. Part 3 is the provision of the Act currently in force. Of itself, Part 3 does not set out what is the full complement of the Assembly’s legislative powers. Part 4 does set out what legislative powers the Assembly would have, following a successful referendum. Let me start then by looking at the arrangements that are in place under Part 3.

Tomorrow's Wales sees three problems in particular with the current arrangements for governing Wales under the terms of Part 3 of the 2006 Act. First, as you will see from the latest copy of Schedule 5, valuable though they are in enhancing devolution for Wales, as they presently exist, they do not go far enough, falling well short of the Richard recommendations. This may always be a continuing problem with Part 3. Secondly, Part 3 creates a complex and confusing system in that the current and potential legislative powers of the Assembly change almost on a monthly basis. Third, it leaves devolved and non-devolved government so entangled that it simply may not work. Part 3 may be progress, but only as a transitional arrangement, not an end point. Part 3 was not designed to, nor can it ever, provide a stable devolution settlement. The inherent shortcomings of Part 3, I believe, make it necessary that we move to Part 4 and the 'primary legislative powers' that it sets out for the Assembly as soon as possible, as indeed the One Wales agreement acknowledges.

The confusing nature of the present arrangements derives mainly from the way legislative powers are conferred on the National Assembly during this interim phase. I admit to being confused about this; but I'm sure this is something I have in common with at least ninety-eight per cent of the people of Wales.

It is a brave non-lawyer who comes to a University's law school – especially one that has played such an important role in making sense of the legal aspects of Welsh devolution as Cardiff's has - to explain the law. But fools rush in where angels fear to tread, so let me get a little bit technical. Under Part 3 of the Government of Wales Act 2006, the potential legislative powers of the Assembly are set out in Schedule 5 of that Act. The Schedule includes 20 'Fields', such as education, health, the environment within which it is possible for the Assembly to gain legislative power. The specific powers, or 'Matters', enabling the Assembly to make laws (entitled measures), are then listed within these Fields. Powers to make these laws can be acquired either by legislative competence orders, made at Westminster on application by the National Assembly, or they can be acquired directly by Acts of Parliament at Westminster. In each case, the powers to be conferred are negotiated behind the scenes, and result in complex and highly variable powers which are hard for non-specialists to understand or follow. The situation, although better than it was under the 1998 Act, enables the Assembly to pass what amounts to primary legislation which can amend or repeal Acts of Parliament or make entirely new provisions, is nevertheless seriously flawed. Schedule 5 is being constantly updated as new powers or 'Matters' bid for by the Assembly or devolved to the Assembly by LCOs and Acts of Parliament. This means that it is impossible to know exactly what the Assembly's powers are at any

specific time without trawling through this long and complicated list of Fields and Matters.

The system is complicated and the process of obtaining agreement to and passing an LCO is also time-consuming and does not allow for swift legislative action by the Assembly on matters of great importance. Coincidentally, the first LCO – giving the Assembly new powers over education for those with additional learning needs – officially passed into law today, having secured the formal stamp of approval from the Privy Council. Its approval took 10 months and involved the National Assembly, the Secretary of State, the House of Commons (as a whole and through the Welsh Affairs Committee) and the House of Lords. Yes, that is how many stages there are before the National Assembly can gain legislative powers through an LCO. And that is still only the beginning. The issue under consideration is then drafted and brought to the Assembly as a measure and the debate then begins and the Assembly either passes it or not.

Little wonder then that it took so long for the Additional Learning Needs LCO to complete its process. And it was one of the lucky ones. Another LCO – this time on environmental protection - was laid at the same time last June and was approved by an Assembly committee as far back as November. But it hasn't even been considered by the Welsh Affairs Select Committee in London

because it has disappeared into some black hole in Whitehall and is yet to emerge with the Secretary of State's approval. By the time that LCO completes its process goodness knows valuable time will have been lost during which the Assembly could have been taking action to improve the environment in Wales. Disappearing into a black hole is also the current fate of the other 4 LCO's for which the Assembly has so far bid.

As you will see, Schedule 5 appears already to be becoming a confusing statement of powers which is hard to follow or explain particularly as the powers are expressed in different ways. For example, what exactly are the legislative powers relating to Education in Field 5? It is getting more confusing every time new legislative powers accrue to the Assembly. It is, quite frankly, already a mess – and that is after only ten months of operation. What it will be like after five years is not attractive. What would it be like if it were to last longer than that, and become a semi-permanent settlement? To me, that doesn't bear thinking about. I dread to think what price the people of Wales would pay, and democracy in Wales would pay, if this interim arrangement were by some horrible mischance to become long-lasting.

This way of enabling the Assembly to acquire legislative powers incrementally, step by step, causes another problem. It leads to real confusion about who is legislatively responsible for what. I do not

know with confidence which minister or government is responsible now for making legislation in Wales about health or education. Is it for the Assembly through its legislation to give executive powers to the Assembly Government, in relation to the NHS and to organise education with the local education authorities? Or is it still only for the UK Parliament – always remembering that the UK Parliament can also continue to legislate in relation to matters for which the Assembly is given legislative powers. If we ask the experts, they go and look at the detailed provisions of Schedule 5 and give us a technical answer – but voters need to know who is responsible in fact, not technically, so, when they go to the ballot box they can decide whether the Assembly or Parliament or both have done a good job or not, and for whom to vote. We need to ensure that there is clarity as to who is responsible for what when people come to vote. That is something that we haven't got at the moment.

As you will see from the summary of Part 4 of the 2006 Act, one of the clearest benefits of Part 4 coming into force would be that the powers of the Assembly to make laws are generally clearly and fully set out. While Schedule 5, which is currently in operation, is constantly changing, Part 4 comprehensively sets out the powers of the Assembly in a manner that is by and large understandable. Part 4 and its accompanying Schedule 7 would not have to be added to by further orders or Acts of Parliament, and it would be much clearer to everyone what is the legislative responsibility of the Assembly and

what remains the legislative responsibility of Westminster.

Furthermore, those powers would be there ready for the Assembly to use whenever the need arises, without having to go through the time-consuming process of bidding for powers.

Much of what I have said tonight may sound like a lament which does not have much immediate practical point, but that is not the case. In the next few months, perhaps the next few weeks, the All Wales Convention will start work.

Tomorrow's Wales warmly welcomes the establishment of the Convention and the appointment of Sir Emyr Jones Parry, who is proved to be Welsh and a distinguished diplomat, as its Chair. It provides the opportunity for the national debate on devolution that we, unlike Scotland have never properly had.

The Convention's remit is expected to be explicitly linked to the provisions of Part 4 the Government of Wales Act 2006, which would give the National Assembly those much-vaunted 'primary legislative powers'. However, given the apparent lack of understanding of the current devolution settlement, it is clear to me that the 'widespread, thorough and participative consultation at all levels of Welsh society' is required to 'facilitate and stimulate

discussion on the issue of primary law making powers'. This can then enable a wider discussion on Welsh governance to take place.

There are three things that the Convention should seek to achieve. First, it needs to set out clear reasons why Wales's National Assembly should obtain a comprehensive set of primary legislative powers. To me this seems pretty obvious, but I am conscious that agreement about this is not universal and the questions need to be argued through.

Second, it needs to help the public understand this. The very nature of the current devolution arrangements means that they are not very amenable to clear explanation. The language and the procedures are hard to follow, often confusing, arcane and cumbersome. The process, so far, has been very much one, understood and commented upon only by experts, particularly over the last few years. I'm particularly pleased at the recommendation of the Establishing Committee that the Convention's 'Ways of Working' should 'reach out to individuals, groups and communities that have not been involved before in such debates' as well as formal organisations and the usual suspects. A referendum means that the public needs to understand the issues, and be involved and engaged in them. People need to think not only that what is proposed is best for Wales, but that it is worth their while to turn out and vote in the referendum.

The One Wales agreement makes it clear that the Convention has a key role in ‘the preparations for a successful outcome’ to the referendum which it is intended to hold ‘at or before the end of the [current] Assembly term’, for which both coalition parties are clearly committed to campaign. It is vital that it fulfils that role. And to do that, it needs to reach out beyond the coalition parties to all those who want to see devolution in Wales go forward, whatever political party that they belong to – and to those who belong to no party, who may not think of politics and constitutional matters as things that matter to them. Our constitution – Wales’s constitution, and Wales’s place in the broader United Kingdom – matters to everyone, and everyone must be involved in the next stage of making it. This is not just something for a few people in the ‘club’ any more, or for politicians in the safe environs of Cardiff Bay.

And we need a clear outcome from this referendum because it cannot be right for Wales to continue having referenda about every change to the way it is governed. As Ron Davies so famously said, devolution is ‘a process not an event’ – and the mandate for devolution is for the process, not a specific manifestation of it. Referenda should be used sparingly, for major decisions and changes, not as an attempt to throw up an obstacle to a development that follows from what has already been agreed.

Whether there should be an Assembly with a comprehensive set of legislative powers is indeed a major decision, and although the Richard Commission did not think a referendum was necessary for this step, that is enshrined in the 2006 Act and accepted in the One Wales agreement. That is the political reality. And a successful referendum result would give an elected Assembly with primary law-making powers a clear popular mandate, one that will establish the Assembly firmly in the constitutional landscape as a law making body, the first in Wales since the time of the laws of Hywel Dda.

At this point, I'd like to ask whether a further question ought to be posed at this referendum. This – and here I am looking into a crystal ball – relates to financial powers. Although the Assembly Government committed itself in June last year to set up a commission to consider financial matters – the Barnett formula, taxing and borrowing powers – that commission has not yet been set up. We hope very much that it starts its work soon because the task it has to hand is a very important one indeed. We do not know when it will report, let alone what it might recommend or how the UK Government might respond to that. With the launch of the Scottish Constitutional Commission chaired by Sir Kenneth Calman, with a remit that includes looking at Scotland's devolved financing powers, it is clear that Westminster is willing to contemplate this for Scotland. I would add that my view is that Assembly taxing powers need to be anchored in a general financial settlement that gives

Wales a fair deal, recognising its needs now and the contribution it has made over many, many years to the UK's prosperity as a whole. Again, I accept that taxing powers need the authority and approval of the people of Wales. If Wales's Barnett commission were to recommend a degree of tax-raising powers, I accept that that would need approval in a referendum. If that were to happen, I can think of many good reasons why the two referenda should happen together, at the same time – as happened in Scotland in 1997. That means that the key questions for Wales's constitutional future – should we have a proper legislative assembly, and should that assembly have taxing powers – would be considered and answered at the same time. That at least will give us clarity about what the coming years will hold for Wales.

But there is a third job for Sir Emyr and his colleagues, and that may not be popular with some. That is to point out not just the importance of moving to a comprehensive set of primary legislative powers, vital though those are, but also to consider the other issues which still need to be addressed. There can be no doubt that the primary powers set out in Part 4 of the 2006 Act are the next step in developing devolution for Wales, but they are only the next, and certainly not the final step. Part 4 of the 2006 Act – the Part that would come into effect after a successful referendum – while a vast improvement on Part 3, may not be sustainable in the long term as it

still leaves many issues addressed by the Richard Commission unresolved.

First there is the question of the size of the Assembly. The Richard recommendation of an 80-member Assembly was not accepted, and the 2006 Act makes no provision for that. Even 80 members would have been a modest number, compared with other legislatures elsewhere. If we look abroad, we see that in Spain the Basque region, which has 2/3 the population of Wales has a legislative assembly of 75 members. In Germany too, Brandenburg with a population of 2.6million, has a legislature of 88 members. Nowhere do we see legislative parliaments representing a population the size of Wales's so under-resourced in terms of the number of members as is the National Assembly for Wales. The best comparison though is of course with the other devolved parliaments of Britain. The Northern Ireland Assembly has 108 elected members, though the population of the province is only half that of Wales. That means that there is one Member of the Legislative Assembly for about 13 900 people there. In the Scottish Parliament, there is one MSP for about every 38 800 people. In Wales, there is an Assembly Member for every 50 000 people.

So proportionally we have many fewer AMs than these other devolved legislatures – but we are on the way to having similar powers to them. Academic observers, as well as a number of AMs

themselves, have questioned whether the Assembly can carry out the job of legislative scrutiny properly with just 60 members. In fact, even this number of 60 is misleading to an extent. When you take out the Government Ministers and the Presiding Officer and his Deputy, there remain barely 45 AMs to carry out the full range of the Assembly's scrutiny functions. Consequently committees cannot meet often enough to develop the sort of grasp of problems that they need to if they are to make a serious impact and carry out proper scrutiny of proposed legislation and the exercise of the Assembly Government's executive powers which is, of course, central to their role as representatives of the people. At present, members have to attend so many different committees that they find it hard to focus on broader strategic issues, on top of the routine of committees, plenary and casework. It is simply not enough to claim, as some MPs have, that members must work harder. They should, of course, work hard, but more hours of work cannot make up for shortage of numbers.

Proper scrutiny of legislation, budgets and ministerial actions is vital to a democracy where the government is properly accountable to the people and a Welsh legislature needs to be adequately equipped to do the job. If we are to have a functioning Welsh democracy we need an Assembly that has enough members to do the job.

A consequence of increasing the number of AMs of course would be that the current electoral system would become obsolete and an alternative would have to be found. There are many different suggestions as to how this could be done, and the Richard Commission suggested the Single Transferable Vote as the way forward. That may or may not be right, but the electoral system will certainly have to be looked at again.

Secondly, the 'primary legislative powers' on offer are not as generous as the 'Scottish model' of powers recommended by the Richard Commission. Such a model would mean that the Assembly had power to legislate on all matters except ones specifically reserved in the Devolution or other acts for Westminster. As matters stand under both the current and future legislative settlement, the Assembly will only have the powers to legislate that are expressly conferred on it. Even the post referendum Part 4 powers may not be adequate or appropriate when we get to the point of actually using them. They may even be narrower in some respects than the powers exercised by the National Assembly under Part 3, depending on how the transfer of powers under Part 3 progresses over the coming years. Sorting this out will not be easy, but will have to be tackled at some point to create a durable and workable scheme of devolution.

A third problem is the powers of the Secretary of State for Wales who has powers of veto of legislative bills by the Assembly under the current interim system and can in defined circumstances prevent Assembly laws, both under this current system and the post referendum system from receiving the Royal Assent. Such powers could be used to exercise a considerable influence over the nature and extent of the Assembly's laws. Why should this be necessary? - particularly when it is possible to question the legality of the Assembly's laws in a court of law.

Part 4 of the 2006 Act is superior to Part 3. However, the other questions I have posed need to be resolved if we are to secure a stable, effective and democratic system of government for Wales. They are not radical or earth-shattering, but simply aimed at correcting deficiencies of the 2006 Act, based on the sound and well-researched recommendations of the Richard Commission. The All Wales Convention, in order to do its job thoroughly, certainly needs to consider such issues. While accepting that the Convention's central role is to prepare for a successful outcome to a referendum on Part 4, it should not confine its deliberations to this. It is also a unique opportunity to enable us to think about what the next Government of Wales bill needs to contain. When Part 4 has come into effect, I am in no doubt that there will have to be a Government of Wales Act 2012 or 2013, to remedy the omissions of the current Act. The 1998 & 2006 Acts have been conceived

largely in London, not Wales, and I think that has been the reason for their flaws. The next one needs genuinely to be formulated in Wales, in accordance with Wales's needs and priorities, even if it is Westminster that needs to legislate for it.

In conclusion, may I emphasise that, although I have spoken about the deficiencies in the 2006 Act, particularly its Part 3 but also its Part 4, my attitude to the process which is now afoot – truly historic both for Wales and Britain as a whole – is overwhelmingly positive. After centuries of marginalisation and following several false starts and tentative steps forward, Wales is now well and truly on the path to taking its place as an effectively functioning democratic nation. We are all privileged to be observers to and to participate in this. It is very much in that spirit that Tomorrow's Wales will make its contribution.

Dr Barry Morgan
Archbishop of Wales and Chairman of Cymru Yfory