Canolfan Llywodraethiant Cymru
Wales Governance Centre

Workshop: A Reserved Powers Model for Wales

22 May 2015 Pierhead Building

From Wales 3 to Wales 4

From the outset it was acknowledged that implementing a fourth devolutionary settlement for Wales (Wales 4) would be difficult. It was recognised that these difficulties extended beyond the debate over what should or should not be devolved, to a debate over how devolution should be structured. It was the opinion of one participant that the debate over what should, or should not be devolved, was political. The participant believed that, rather than examining this question, lawyers should focus on the debate surrounding the construction of Wales 4.

Most participants supported the move to implement Wales 4. The participants supported in principle the move towards a reserved powers model of devolution in Wales. Many expressed a hope that Wales 4 could prove to be a permanent and final devolution settlement for Wales, not a stepping stone to Wales 5. However participants expressed a number of concerns with the reserved powers framework as currently proposed. The main concerns of the participants were as follows:

- That the proposed list of reservations was too long. There was concern that this could undermine many of the stated objectives of the settlement, such as clarity and sustainability.
- That Wales 4 could lead to a significant loss of powers for the National Assembly.
- That Wales 4 could not be a lasting devolution settlement without an establishment of separate Welsh legal jurisdiction.

The participants examined the various forms that reserved powers models had taken worldwide, in both devolved and federal countries. Attention was drawn to three models in particular:

- A system where powers are reserved to the centre (Australia)
- A system where powers are reserved to the regions (The United States)
- A system where powers are noted on three lists; devolved powers, central powers, shared powers (Germany)

The Scottish Experience

The history of the development of the reserved powers model in Scotland was discussed. It was highlighted that the Scottish Constitutional Convention had merely set out the powers that a new Scottish Parliament should have, and had not considered the system that it should operate under upon its establishment. It was suggested that this was due to a

presumption that the then new act would follow the conferred powers model contained within the old Scotland and Wales Acts 1978. It was noted how it was only subsequently that the reserved powers model that underpinned the Government of Ireland Act 1920 became the preferred model of devolution for those engaged with the debate around the formation of the Scottish Parliament. A participant recalled one expert seminar during this period when there was absolute unanimity in favour of adopting the reserved powers model contained within the Government of Ireland Act rather then the conferred powers model set out by the Scotland Act 1978. The participant also recounted that there had been a preference for joint powers to be regulated by convention as opposed to formulating a list of powers where legislative competence was shared between Holyrood and Westminster.

The right model for Wales?

One participant argued that the complex nature of Wales's devolutionary settlement was a legacy of the history of executive devolution. It was suggested that the mind-set in Westminster had been "what can we let Wales have?" as opposed to a more holistic and principled view of devolution. Reference was made to the Constitution Unit report *An Assembly For Wales*, published in 1996, that had argued for a reserved powers model of legislative devolution for Wales. The contributor recalled that this had been viewed at the time as a purely hypothetical case given that the intention was to devolve executive powers only.

Participants suggested that there were a number of principles that should underpin any move towards a reserved powers model.

One principle that all contributors agreed should be central to any devolutionary settlement was clarity. The complexity of the current devolutionary settlement in Wales was compared to that of a Norwegian fiord, and there was agreement among most participants that a move to a reserved powers model was more likely to achieve clarity than the current conferred powers system.

The reason why clarity was viewed as an important principle was articulated by one participant in the following terms: different groups need to know where power lies for different.

- Politicians – to decide on what they want to do.
- Draftsmen – when they are asked to implement the decision of politicians.
- Lawyers – when a conflict arises.
- Everyone – to know who they should lobby about their concerns or in order to know what they can ask for from the Assembly.

The belief that a reserved powers model would provide more clarity than the conferred model was cited as one of the key reasons why the reserved powers model had been favoured in Scotland. The contributors agreed with this view. It was questioned by some, however, whether the Scotland Act had actually achieved this goal. It was suggested that we should not delude ourselves over the amount of clarity achieved by Scotland Act 1998, and realise instead that significant amount of lawyerly time has subsequently been spent trying to decide what is within the Act.

A participant described how the line between what is devolved and what is reserved in Scotland picks its way carefully between various topics that overlap. An example used was

the field of animal welfare, which is devolved, whereas animal testing is reserved. Indeed, one participant questioned whether the move to a reserved powers model would have any impact on drafters. The participant argued that a drafter's role is to follow the line between devolved and non-devolved however it is established. It was suggested that in reality, there was not much difference between doing this under a reserved powers model or under a conferred powers model. It was further suggested by another participant that the Scotland Act 1998 should be viewed, not in the context of an attempt to achieve clarity, but as a Borders Reivers cattle raid, with Scotland raiding Westminster and grabbing as many powers as possible!

Is reserved powers the right move?

Some participants made clear their view that Wales should not follow the reserved powers model as set out by the Scotland Act. It was argued that the Scotland Act lacks clarity, and that the reservations to Westminster lack any organising principle. Concerns were mainly focused on the length of the reservations in the Scotland Act. Comparisons were made between the short form reserved powers system in use in the United States and the long form system in place in Scotland. Participants overwhelmingly favoured the former. They argued that, given the impossibility of any list – no matter how lengthy – covering the full range of the competences invested at the devolved level, a long list does not offer any more clarity than a short one. They also highlighted the fact that it is impossible to divide powers into neat, watertight compartments. Oone participant suggested that a short, broad list of reservations would lead to less conflict, and as such, should also appeal to Unionists in Wales.

Contributors were concerned about the proposed framework contained within Annex C of the Saint David's Day Agreement. Participants agreed that any reserved powers model based on Annex C would be too long, with one contributor stating that any piece of legislation based on the Annex would be *"extraordinary*". It was noted that under the current proposal that there would be "*page after page*" of things that the Assembly could not do. By contrast, it would be able to do very little. The net result would be to add to the complexity of the devolved settlement whilst reducing clarity. One participant believed that the Saint David's Day agreement had accepted this too easily.

Despite this criticism, however, one participant argued that notwithstanding the complexities of the Scotland Act 1998, they were as nothing in comparison to the Government of Wales Act 2006.

One contributor argued that if Wales 4 could not achieve clarity then another principle closely associated with it gained in importance, namely workability. Workability was considered by the contributor to be a principle that was similar to clarity, but they regarded it as having a broader meaning that included factors such as coherence. Whilst the participant felt that workability could be achieved without clarity, it was argued that it would also be best achieved by having a limited number of reservations.

Concerns surrounding the St David's Day Agreement

It was noted by a participant that the list of reserved powers that appears in Annex B of the Saint David's Day Agreement appears not to be have been put together on the basis of what was agreed in that document, but rather on the basis of the conferred powers that the Assembly already has. It also noted that whilst the list was already extensive, the document

stated that the list was not exhaustive.

Another general principle that contributors regarded as being of central important was subsidiarity. It was argued that a reserved powers model better protects the principle of subsidiarity than a conferred powers model. Under a reserved powers model, devolution becomes the default position, with the onus on the centre to show why an issue should not be devolved.

It was argued that clarity could not be achieved without an emphasis on subsidiarity. Many contributors went so far as to suggest that Wales 4 could not be a lasting settlement without it. One participant suggested that it was already time to start thinking about Wales 5 unless subsidiarity was guaranteed. Annex D of the St David's Day Agreement, in particular, gave rise to some concern on this point.

Annex D was described as being overly London centric: where, it was asked, is the balancing consideration of ensuring that is an adequate policy space for Wales? During discussions it the growing political salience of devolution in England, was highlighted. English Votes for English Laws is a policy set to become more prominent. It was argued that a line would not only have to be drawn between England and Wales, but also between the United Kingdom, and England and Wales. It was suggested that a test of subsidiarity would be harder to use in the context of England and Wales, and this led one participant to ask if what was being proposed was an unscrambling of what we could consider to be the "Welsh bits" from the "English bits".

The absence of the word "citizenship" from Annex D was also the cause of some concern in this regard. It was proposed that the rights of citizens across the UK needed to be limited in order to allow the devolved governments to act in the best interests of their citizens.

Subsidiarity is closely linked to another principle considered vital by one participant, namely, respect for Wales as a polity. The key question, it was suggested, is "what should the Union do" rather than "what should Wales have?" In certain circumstances it might also be necessary to ask what should England and Wales do? The participant suggested that the "what should Wales have?" approach was still prevalent in some quarter, and suspected that the view underlying the majority judgement on the Asbestos Case in the Supreme Court decision had been;

"We can't allow them to get away this…"

Concern about the danger of the powers of the Assembly being undermined were most pronounced in the context of the wording of Annexes B, C and D of the Saint David's Day Agreement. One participant argued that there had been too much focus on the powers transferred under the legislation and not enough attention given to how the legislation would be structured. A particularly pressing concern for many participants was the retention of the term "relate to" under the draft list of reserved powers contained within the Annexes. One contributor, in particular, warned of the threat of 'mirror imaging' when establishing a reserved powers system in Wales.

The Supreme Court judgement in the Agricultural Wages case had interpreted the meaning of "related to" broadly. Under the current conferred powers model, the Agricultural Wages decision has worked in the Assembly's favour. If, however, the same test were to be applied under a reserved powers model then the powers of the Assembly would be significantly

curtailed. Concern was expressed that the Assembly's powers could be reduced to a point where it had fewer powers than it had enjoyed before 2007. One participant considered Annex D of the St David's Day Agreement to be an attack on the Agricultural Wages decision, whilst another noted that the powers of the Assembly under Schedule 7 of the Government of Wales Act 2006 had already been curtailed by the Supreme Court decision in the Asbestos case.

Participants also expressed concern about some of the subjects that had been listed on Annex B as reserved matters. The presence of "*Criminal Law and Procedure"* and *"Civil Law and Procedure"* in the annex caused particular concern. It was argued that criminal and civil law are the very lifeblood of law and legislation and that their incorporation as general categories in a list of reservations (rather than the areas of policy embodied within them) amounted to what philosophers would term a *"category error"*. It was stated that changes have already been made to both in Wales, with the participant giving the example of The Human Transplantation (Wales) Act as a piece of legislation that has amended the civil law. One participant argued that Wales 4 should "*empower not neuter*" the Assembly, and that any move to reserve the criminal and civil law would have the opposite effect.

Another participant argued that even if their preference for having a short list of reserved powers was implemented, there should be a narrow test on the meaning of those reservations. The participant also suggested an alternative test of competence, one based on hierarchy. Under such a system there could be a wide test for those matters that, under the principles of subsidiarity should be reserved at Westminster and a narrower test for others. The centre of gravity test used by the European Union was cited as a potential model, and the body of case law that it has already established could be used as guidance for its implementation. This participant also viewed the criminal and civil law as key components of the Assembly's devolved powers arguing that they should be subjected to a narrow test under such a system, if they were not reserved.

Not only were there concerns that, if the reserved powers model as set out in the Saint David's Day Agreement were to be implemented then the powers of the Assembly would be reduced. Concern was also expressed that it could give rise to a system of legislating embodying elements familiar from the (discredited) former Legislative Competence Order (LCO) system. It was, in particular, the presence of reservations and carve-outs in Annex C of the agreement gave rise to these concerns and there were calls to clamp down on them in order to ensure clarity and transparency.

Participants also highlighted the importance on ensuring that there is a good relationship between the Parliaments and the Assemblies of the UK. There was widespread agreement that the conventions that govern intergovernmental relations could be strengthened. One contributor noted that lessons could be drawn from Canada, where there is a Federal Minister responsible for intergovernmental relations.

Stability is key for a Welsh reserved powers model

Stability was the other major principle that the participants agreed that should underpin any future devolution settlement. It was observed that this was in-keeping with the hopes expressed by the Secretary of State for Wales in his foreword to the *Powers for a Purpose* (St David's Day Agreement) document, where he stated *"It (the command paper) sets out the path to a clear, robust and lasting devolution settlement for Wales."* However there were

doubts expressed by the participants about how realistic this was.

One observed that if stability is achieved by minimising or reducing the need for legal challenge, then the reserved powers model underpinning the Scotland Act 1998 must be judged as being more successful than the 2006 Government of Wales Act. Of the 240 Acts passed by the Scottish Parliament, 16 have been subject to legal challenge but only two of these questioned whether a matter was reserved to Westminster or not. However the participant questioned whether this was as a result of the legislation or whether this was a consequence of the political climate in Scotland. It was noted that during the early days of the Scottish Parliament, the Scottish Executive was threatened with legal challenge on a number of occasions and amended their legislation to avoid this. It was suggested that this threat lost its potency following the formation of the first SNP government in 2007 and that, given the political environment in Scotland, future challenges to Holyrood legislation would be difficult.

Further to this, it was observed that while the Secretary of State for Wales has the power to veto legislation that s/he feels that it falls outside the National Assembly's competence, they have not chosen to do so, preferring to leave it to the courts. It was submitted that a possible reason for this was that it would be politically controversial for the Secretary of State to veto a piece of devolved legislation. Referring legislation to the courts was regarded as a more palatable option. It was suggested that such pressures might not change with a move to a reserved powers system in Wales.

The argument was made that one advantage that a devolved system enjoys over a federal system is flexibility. The devolution Acts not only transferred powers through primary legislation but also made it possible to amend the devolution settlement through secondary legislation. It was noted that the list of reserved powers in Scotland was amended nine times during the first six years of devolution. In contrast to this, the federal system in both the United States and Australia is dependent on the courts in order to make amendments. Furthermore it was noted that in other devolved countries such as Spain, court action was far more routine with hundreds of cases appearing in the courts each year. There was a general consensus that a system that led to as little litigation as possible was to be preferred.

A separate legal jurisdiction for Wales

A key focus of the workshop's deliberations was whether a separate jurisdiction should be established in Wales, and, in particular, whether or not a move to a reserved powers model would necessitate this.

One participant suggested there were four concepts that connect the law to a geographical entity:

- Jurisdiction – a concept used by the courts to decide whether or not they will listen to a case.
- Extent – the concept by which the courts will decide if a rule is a part of the law of England and Wales or the law of France.
- Application – the territorial limit of where the rule applies.
- Competence – this is the concept that performs as a territorial limitation for a parliament. There is no territorial limit on the power of the UK parliament, but there are territorial limitations on the devolved nations.

It was observed that there is only one body of rules in England and Wales, even though some rules are territorially limited. The participant suggested that, as such, the Welsh competence test was based on application.

One contributor argued that it would be hard to implement a reserved powers model without a separate legal jurisdiction. They cited the fact that in common law systems, a legislature is tied to a jurisdiction. It was argued that even if we wished to persevere with a common contract, trusts etc. law in England and Wales, this could be best served by a separate jurisdiction. The participant also suggested that in a common law system, the way that people are best informed of devolution is through the creation of a jurisdiction.

This view was shared by another contributor who argued that, once politics was split then the courts also need to be split. The contributor argued that few ever deny that the formation of a separate jurisdiction for Wales is the ultimate end point, and that, therefore, Wales 4 will not be the final devolution settlement unless a separate jurisdiction is formed as part of it.

There was some disagreement on need for the establishment of a jurisdiction from one participant. Whilst being 'indifferent' about whether or not this should happen, this participant that the formation of a 'test of jurisdiction' is more important than the establishment of a jurisdiction itself. This test would constitute a set of rules that say what belongs to Wales, and what belongs to England. The participant did not believe that this was dependent on the establishment of a separate jurisdiction.

A distinction between Wales, and Scotland and Northern Ireland that was raised, was that the Welsh Government could legislate on England without the need for the consent of the UK Parliament. Under section 108 of the Government of Wales, the Welsh Government can legislate for England with the consent of the relevant Whitehall department. To legislate on England, the Scottish and Northern Irish Governments would need to obtain an Order in Council. It was suggested that this might need revisiting.

Another concern of contributors was the perceived lack of openness around the legislative process that will lead to the implementation of Wales 4. A contributor suggested that the proposals would likely be the subject of a series of intensive negotiations over the next six months within Whitehall and between Whitehall and Cardiff. The participant foresaw that the Wales Office would trawl Whitehall for a list of reservation and exceptions which it would then collate, inviting the Welsh Government to respond. This list of reservations would be designed to protect the interest of their Ministers and departments than provide a coherent devolution settlement. The contributor expected the resulting negotiations with Cardiff to be *"frank"* and that bill emanating from them would to be substantially longer than the Scotland Act 1998.

There were concerns that such a process would provide only limited opportunities for public debate or external influence. A dim view was taken of this eventuality with one participant emphasizing the importance of this process taking place in public. A participant also suggested that it is important for the National Assembly to consider how it will try to influence the Wales Bill once it is published.

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