FINDING A VOICE FOR WALES: ASSESSING THREE PHASES OF CONSTITUTIONAL DEVELOPMENT IN WALES

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Abstract

Since the early 1990s, the United Kingdom has experienced significant formal constitutional change, both at the centre and territorially. Devolution to Scotland has attracted much attention, but Wales has been much less studied. The process of sub-state constitutional development in Wales has however been far-reaching, significant and rapid, as that country has sought to develop new political institutions and a constitutional identity alongside its pre-existing political and cultural distinctiveness.

This paper examines three chronological phases in the development of Welsh devolution. These are: first, that between c. 1994-9 which produced the Government of Wales Act 1998 and established the National Assembly for Wales; second, the process surrounding the Richard Commission (which sat between 2002-4 and produced a detailed report in 2004); and third, the subsequent process (2004-6) that produced the Government of Wales Act 2006. It will assess each phase of development in itself, and compare each with the others in terms of a) the extent to which the process and its outcomes reflected consideration of the constitutional norms and principles b) the practical issues involved; c) the importance of party-political considerations; d) the extent to which the process involved broader representation from the public and civil society; e) the extent to which the process was autochthonous ('made in Wales'), or involved other interests f) the extent to which each process produced, or could reasonably be expected to produce, a durable set of constitutional arrangements, and g) the extent to which each stage commanded (or might be expected to command) political legitimacy.

These processes have involved the interplay of party-political and broader constitutional considerations, with a significant intergovernmental element involving the UK Government and the UK Parliament. The paper argues that the limited opportunity for direct public involvement in the first and third phases (those which have led to actual rather than proposed change) have produced less transparent, workable proposals, largely driven by considerations of party politics and in particular the interests of the Labour Party. This resulted in proposals which may have been capable of being politically realised but which also exhibited considerable shortcomings, which in turn affect their durability, and also at least potentially their legitimacy. The process which was most free from party-political considerations and involved the broader public in its work produced a scheme which was widely admired but not did not sustain enough political support to translate it into reality. The paper concludes by relating these features to other aspects of constitutional change in the United Kingdom, and concludes that these processes are not unique to Wales but reflect broader characteristics of constitution-making in the UK.
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Introduction

This paper is concerned with the development of Wales’s devolved constitution, which has been in a state of constitutional flux since proposals for devolution returned to the political agenda in the middle 1990s. The paper focuses on three key phases: that between 1994 or so and 1999, which resulted in the passing of the Government of Wales Act 1998 and the establishment of the National Assembly for Wales; the review of devolution carried out by the Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, chaired by Lord Richard, in 2002-04; and the process following publication of the Richard Commission’s report that led to the Government of Wales Act 2006 and the conferring of legislative powers on the National Assembly. This has been a rapid change in a short period of time, brought about by two factors: the attempt within Wales to define itself politically, its cultural distinctiveness being well-established and accepted, and the inherent characteristics of the schemes of devolution themselves. The interaction of these factors has created a potent dynamic for change.

Devolution in the UK was a new approach to territorial politics, embraced by Labour in opposition during the 1990s and largely driven by Scottish concerns. These were fuelled by the experience of Conservative government from 1979 to 1997, which despite its strength enjoyed only limited electoral support in Scotland and Wales, and very limited Parliamentary representation from either country. After the devolved institutions assumed their functions in 1999, in Scotland it became a rather dull area of activity, until the Scottish National Party won more seats than Labour in the May 2007 elections and formed a minority government. In Northern Ireland (for which devolution legislation was also passed in 1998), the sputtering progress of the peace process meant that devolution was suspended on several occasions, including from October 2002 to March 2007. Key to this was the role of the Labour Party, which not only held office at UK level from 1997 but also dominated coalition governments in Scotland (with the Liberal Democrats) and in Wales. On a UK level, devolution ‘bedded in’ with remarkable ease and speed, partly because many of the more difficult issues were not immediately visible. This did not mean those issues were not present, just that there were not immediately pressing (Trench 2005; Jeffery 2007).

Assessing devolution in Wales (or elsewhere) is not easy. One tendency has been to say ‘devolution succeeds if …. happens’ – for example if the institutions involved have legitimacy (e.g. Curtice 2005). They therefore address outcomes of devolution by reference to criteria of what devolution was intended or expected to achieve, to judge its ‘success’ or otherwise. Such approaches are understandably subject to criticism. Constitutional change cannot be assessed in the same way as ordinary public policies (where such an approach is often used) – they are different, seeking to achieve a wider range of objectives than ordinary policies, in a more complex environment. Another problem with such ‘consequentialist’ approaches is that the criteria by which they assess success or failure are usually chosen post facto by those
doing the assessment, and are essentially subjective. Moreover as Kay (2003) points out, self-government has an inherent value which needs to be recognised however ‘badly’ or ‘well’ such institutions perform. He therefore argues that an ‘ontological’ approach is necessary rather than a consequentialist one. Taken to an extreme, however, such an approach can imply that any judgement of success or failure is impossible, and that would lead scholars to abandon all efforts to assess the success or of any constitutional reform.

It is debatable whether either approach can be used exclusively to assess devolution; both sides of the coin need to be considered to establish what it is like. If the task is to be attempted, both approaches need to be reconciled, and the scope of the enquiry narrowed. The latter is dealt with here by looking at processes of constitutional review and change in order to examine and compare with each other, rather to look at a single process in isolation. Wales offers a very unusual (possibly unique) opportunity to do so, with three distinct process taking place in one country within a short period of time.

To undertake this evaluation, this paper uses seven criteria:

- **Consideration of constitutional norms**: whether and to what extent norms of what a ‘good constitution’ should be played a part in the process
- **Importance of practical issues**: whether and to what extent the changes or proposed changes addressed practical considerations, and so were capable of being realised in practice
- **Party political considerations**: whether and to what extent the proposals were dominated by party politics, or sought to create a suitable constitution for a broader range of interests (both those of all parties, and those of interests not represented by any party)
- **Broader representation**: whether and to what extent the process engaged broader interests, particularly among the general public and organised civil society, or whether it was dominated by political elites and ‘insiders’
- **Autochthonous nature of the process**: whether and to what extent the process was a Welsh one, underpinned by finding Welsh solutions to Welsh problems, or was driven by other (non-Welsh) factors
- **Durability**: whether the proposals were (or could reasonably have been expected to be) durable, or whether they were sufficiently flawed that they were (or could be expected to be) short-lived
- **Legitimacy**: whether the proposals commanded legitimacy, or could have been expected to command legitimacy.

These criteria incorporate elements of both ‘consequentialist’ and ‘ontological’ approaches, with (by focussing on the process of change more than its outcome) an emphasis on the latter. They also look at a range of issues: the process of considering

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1 The paper therefore omits a number of important issues that would be included in an overall assessment of devolution in Wales, including political issues such as the performance of the political parties or the role and personalities of leaders and politicians, including the resignation of Ron Davies as Secretary of State in late 1998, shortly before the Assembly election campaign began, and the success or otherwise of the various policies pursued by the National Assembly and Welsh Assembly Government.
and implementing constitutional change (the first two), the substance of that change (the next three), and the outcome of it (the last two). Although they can be applied to each set of changes this creates certain problems, as the Richard Commission recommendations were not implemented and the 2006 Act proposals have only recently come into force. Some judgments must therefore necessarily be tentative or hypothetical, although the focus on process again limits this. In this way, these criteria give a general approach to assessing these three phases of constitution-making in Wales and the proposals resulting from each phase.

The next section of this paper discusses the distinctive character of Wales as a country and its development as a political system within the United Kingdom. The following three sections discuss in some depth the chosen phases of Wales’s constitutional development, looking at the process that took place, what changes it produced or recommended, how those worked or were received, and it then assesses them by the seven criteria discussed. The conclusion briefly compares the three processes with each other and draws some broader implications for constitutional politics in the United Kingdom from the experience of constitutional change in and for Wales.

**Background: Wales in the United Kingdom**

Some background about Wales, its distinctiveness and is place in the United Kingdom may be useful for those unfamiliar with this case.

Wales is a largely hilly, even mountainous country of about three million people on the western edge of Great Britain with a clear and distinct cultural identity, underpinned by the distinctive Welsh language. It has been under English dominance since the early middle ages (if not earlier), and was legally incorporated into England in 1536. Since then, Wales has formed part of one legal jurisdiction with England. Unlike Scotland, which retained a number of key distinct institutions (including legal, religious and educational institutions) when it became part of the United Kingdom in 1707, Wales had few such institutions at the time of Union, many of those it had were abolished with its absorption into England if that had not happened before, and in any case it did not enter Union as a partner but was absorbed following conquest (Davies 1994).

Wales’s culture is marked by other traits, including a distinctive Celtic culture, as well as language (see generally Morris 1999). These serve to distinguish it from England if not other societies around the world and notably include a strong sense of community, and an attachment to music and song (the two coming together in such institutions as local and national Eisteddfodau, or cultural festivals, and the famous male voice choirs). Industrialisation in the second half of the nineteenth century transformed a poor rural economy and society, with south Wales being particularly transformed. This created an economy reliant on extractive industries (slate quarrying in the north, coal and iron ore in the south) and secondary processing (steel manufacturing in the south). However, by the 1980s Wales was becoming post-industrial economy, with traditional industries retrenching as a result of international market conditions, depletion of the mines, and deliberate (UK) government policies. The results had been mass unemployment, and bitter divisions arising from the 1984-5 Miners’ Strike.
This also led to a sense of political alienation. Although Wales had voted strongly for Labour candidates during the 1980s and 1990s (returning 20 Labour MPs out of 38 at the 1983 elections, 24 out of 38 in 1987, and 27 out of 38 in 1992), these had had no impact on the choice of government and minimal impact on government policies. Instead Wales had been administered by a sequence of Secretaries of State (ministers in the UK Government) with no domestic background — they were seldom Welsh themselves, either by personal origins or by the constituencies they represented, and had few ties to Wales before or after they left office. This was understandably seen as almost a form of colonial rule, certainly not a democratic one. By the middle 1990s, there was considerable unease about the way Wales was governed, at least among those interested in such matters.

This should not be taken to imply that Wales is a united or homogenous country. It remains relatively poor, with (in 2001) only 78 per cent of UK average gross value added, on a per capita basis (making it the poorest region in the United Kingdom). It has significant internal divisions, along a number of lines of cleavage. Class is relatively unimportant; there is still a strong self-perception of Wales as a working-class country, however distant that may now be from the facts. More important are language, region, and transport networks. Geography dictates that, while Wales is next to England, it is also closely tied to England in many ways. The transport networks of south Wales link naturally to those of south-west England: the M4 motorway and Great Western railway mainline connect this part of Wales to Bristol, the Thames Valley and London. North Wales’s links are to north-western England (Chester and Liverpool in particular); in mid-Wales it is Birmingham and the English west midlands. This integration has many day-to-day impacts; Aberystwyth, a university town and tourist resort in mid-Wales, has never properly recovered from the loss of holiday-makers from Birmingham (with the onset of cheap package holidays to the Mediterranean in the 1960s), while south-eastern Wales, around Cardiff and Newport, effectively forms part of a single labour market with Bristol in England. But while east-west transport is relatively easy, north-south travel is much harder. Road links are poor, slow and over winding mountainous routes, while rail lines go through England and until very recently there was no direct service from north to south Wales at all — it was necessary to change at Shrewsbury, in England.

Far from all people in Wales are Welsh speakers, either. While language is commonly regarded as a hallmark (if not bearer) of national identity, that view has to be qualified in the case of Wales because only 21.7 per cent speak the language (according to the Welsh Language Use Survey: Welsh Language Board 2004; most of those do, however, use the language every day). That proportion has grown in recent years. For many years during the nineteenth or early twentieth centuries the language was at best tolerated and at worst proscribed, and speakers were actively deterred from using it. Between such approaches and the pressures faced by minority languages generally in the later twentieth century, it is not surprising that the language was in very serious decline by the late twentieth century. It was rescued by a combination of devoted and tenacious advocates, and government regulation. The former not only sought to use the language themselves but to put great pressure on

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2 I should note that I am not a Welsh speaker myself, and do not have personal experience of the cultural world that is expressed through the Welsh language.
governments to recognise it and facilitate its use. The establishment of a Welsh-language TV channel in 1982, Sianel Pedwar Cymru, was achieved only through the leader of Plaid Cymru (the Welsh nationalist party), Gwynfor Evans, embarking on a hunger strike and insisting he would continue it until either the UK Government agreed to establish the channel or he died. With the establishment of a ‘national curriculum’ for education in schools in 1986 the Conservative UK Government recognised Welsh distinctiveness by including specific provision for Wales. The national curriculum provided for all children in Wales to be taught the Welsh language, and for it to be used as a medium of instruction in schools teaching either bilingually or wholly through the medium of Welsh. And further legislation (the Welsh Language Act 1993) established a Welsh Language Board to promote use of the language, provided for Welsh to be used in all dealings with public bodies and authorities in Wales if the user wished, and required such bodies to prepare schemes to enable them to deal with such demands.

The politics of Wales have revolved around the electoral strength and political culture of the Labour Party in Wales. Welsh Labour is rooted in a broader working-class culture, particularly in (once) industrial south Wales, where historically it formed part of a web of communal institutions that supported all aspects of life, and in which membership was largely assumed. In that sense, the Labour Party believes it is the dominant force in Welsh politics, despite only polling a plurality (never in modern times an outright majority) of votes. (This belief is reinforced by the strength Labour exhibits in Westminster elections, where the first-past-the-post electoral system means it secures the vast majority of Welsh seats.) Even though many of those institutions have weakened with the decline of industry and broader social changes, the Labour Party in Wales continues to assume that it represents and even embodies ‘Welshness’ in its political form to an extent unusual in democratic societies (for insiders’ accounts, see Smith 19993 especially chapter 8; Morgan and Mungham 2000, chapters 1-3).

Much of the rise of Welsh nationalism in the twentieth century related to language. Political nationalists were first and foremost concerned with language issues, initially mobilised around issues of language rights and protecting the language and its speakers, and as they mobilised in more directly political terms language and cultural issues remained to the fore. This led to outright hostility toward the British state, including firebomb attacks on RAF training bases in north Wales during the second world war, and some speeches by the leader of the Welsh nationalists, Saunders Lewis, expressing qualified support for Hitler (or at least a lack of support for Britain’s war against Nazi Germany and its allies). This handicapped Welsh nationalism as a political movement in the immediate aftermath of the war, but the continued decline of the language on the one hand, and perceived lack of regard for broader Welsh interests from the UK Government on the other, led to a strong revival of nationalism during the 1960s and its emergence as a serious political force. The most dramatic early manifestation was the election of Gwynfor Evans to Westminster after the 1966 by-election in Carmarthen (making him the first nationalist MP from Wales or Scotland in recent times) (for the early growth of Plaid Cymru see Butt Phillip 1975). Subsequently, the Welsh nationalist party Plaid Cymru (‘the Party of Wales’) has polled 10 or 11 per cent in Wales as a whole at Westminster elections, and regularly secured the election of three or four MPs from constituencies in the Welsh-speaking heartlands of north and west Wales. (That can lead to a misleading
view of Plaid as still a language-based party, and one of the north and west. It is not – it has many non-Welsh speaking members, draws support from all parts of Wales, and since 1999 has won control of local councils in the south. But only in the north and west is its strength concentrated enough to be able to win Westminster representation through the first-past-the-post electoral system.) What Plaid is clearly not is a party seeking rapid secession for Wales from the United Kingdom: while that is a goal for many in the party, it is by no means universally shared, and even its advocates accept it is some considerable way away. Plaid’s goal is best understood as being to secure the ambiguous concept of ‘self-government’, which for some serves as an end in itself and for others as a stepping-stone to full-fledged independence.

The need to find ways of recognising Wales’s political distinctiveness, in the face of growing support for Plaid Cymru, led to the introduction of a measure of administrative (but not political) devolution for Wales in the 1960s. In 1964 a Secretary of State for Wales was established, supported by a Welsh Office which brought together a number of areas of government activity, and which accreted more functions during the 1960s, 1970s and 1980s. The establishment of the Wales Office was itself the outcome of serious disputes within the Labour party when in office, and was opposed by many Welsh Labour politicians, including notably Aneurin Bevan, who saw such arrangements as inherently divisive of government authority and undermining the unity of the working class. Under Conservative administrations, the Welsh Office was a low-ranking ministerial job, attractive chiefly because of the range of functions it allowed a minister to deal with. Although its responsibilities were initially very limited, over time it became responsible for health services, education, local government, housing, planning and environmental matters, and many aspects of agriculture, for example, and in many of these areas the public sector functioned in distinctive ways in Wales. Secretaries of State for Wales may have claimed they were able to temper the impact of UK Government policies and make a marginal if worthwhile difference in conditions in Wales – but academic appraisals (e.g. Griffiths 1999) suggest that the difference made by administrative devolution to policies determined at UK level was minimal at best. The Welsh Office had minimal scope to change policies in practice, little skill or experience in policy development, and essentially found ways of applying the same policies as in England in a Welsh institutional context. The most marked policy innovation of the Welsh Office in the 1980s and 1990s was also its most controversial: the use of various ‘quangos’ (quasi-autonomous non-governmental organisations) to discharge public functions including managing the health service, promoting economic development or funding the arts. Such quangos were composed of appointed members, not elected ones, and were effectively beyond scrutiny by any elected body, as their accountability was to the Secretary of State who appointed them (and he had little time to do so, even if he had the inclination).

The idea of political devolution had been largely quiescent for much of the twentieth century, but returned to the fore in the 1960s. This appears to have been driven partly by the failure of administrative devolution to minimise the impact of political nationalism, and partly by pressures from within the Labour party to secure a degree of self-rule for Wales. As Wyn Jones (2007) has shown, this approach resulted directly from the position taken by George Thomas as early as 1967 to indicate how far (but no further) Welsh Labour MPs would tolerate plans for devolution. Wales therefore played a significant part in the territorial constitutional debates of the 1970s,
with a general majority recommendation for elected devolution from the Kilbrandon Royal Commission which reported in 1973, and legislation passed in 1978 providing for an elected Welsh Assembly, with executive but not legislative powers inherited from the Welsh Office. The Assembly failed, however, to come into being – at a referendum in March 1979 it was rejected by a majority of nearly 4 to 1, on a turnout of 58.3 per cent. (A proposal for an elected, legislative Scottish Assembly was put to the electorate on the same day, and supported by a majority of 52 per cent to 48 per cent of those voting, but it failed to cross the super-majority threshold of support from 40 per cent of the electorate as a whole, so also never materialised.) The limited powers of the Welsh Assembly may have been one factor in its demise – they inspired little enthusiasm even from advocates of devolution. More important, however, may have been the divisions within the Labour Party and wider labour movement, whose support was equivocal at best and which failed to deliver much of way of tangible support for the proposition or to mobilise activists to campaign in its favour at the referendum (Foulkes, Jones and Wilford 1983).

The result of all these processes, by the middle 1990s, was a state of uncertainty. It was clear that administrative devolution did little to temper the impact of Thatcherism, and contributed to distancing the public in Wales from their government. The power of quangos meant that there was a widely-shared perception that government in Wales needed to be made more democratic. More general factors (notably the change in public mood in Scotland, to support legislative devolution there as ‘the settled will’ of the Scottish people) meant that the issue of the UK’s territorial constitution as a whole was clearly on the agenda. However, it was much less clear what Wales’s place in the reshaping of that territorial constitutional would be.


The making of the new Welsh constitution

Wales’s limited perception of itself as a distinct political entity, and partly of the various political forces involved – mostly notably, internal divisions within the Labour Party in Wales about whether they wanted devolution, and what sort of devolution they wanted. An important factor was clearly the personal position of Ron Davies MP, Labour’s leader in Wales and shadow Secretary of State. Davies was strongly committed to securing devolution for Wales, and used Tony Blair’s request for support in his leadership bid in 1994 to obtain a commitment from Blair to support devolution for Wales as well as Scotland (Morgan and Mungham 2000: 99-100). Davies also obtained a commitment from Blair that the new Assembly should be ‘inclusive’, meaning it would be elected using a system of proportional representation, not the ‘first past the post’ system used for Westminster elections. This was important for securing support from the other parties, notably the Liberal Democrats and Plaid Cymru, for Davies’s plans – essential both for mounting a successful referendum campaign (which Blair also decided would be necessary), and more generally for overcoming lasting resentment from the way the 1979 referendum campaign had been run. However, this would make it much harder for Labour to secure a majority, although it appears to have believed that this would still be possible.
When the Labour UK Government was elected in May 1997, it did so on a manifesto that contained commitments to deliver extensive constitutional reform. For a range of reasons (discussed in Trench 2007), including the inability to deliver change in public services as it had committed to stay with spending plans put in place by the Conservatives for two years, these became not only a top priority for the new government, but in fact its main area of activity. (At least in the UK context, constitutional reform has the merit of being cheap.) Devolution for Wales was not top of that list: devolution for Scotland, implementing the European Convention on Human Rights in domestic law and Parliamentary reform, particularly of the House of Lords, were. However, Welsh devolution was on the list, and within days of taking office officials were working out how to deliver the plans for it. The result was a white paper (Welsh Office 1997) published in July, with a referendum on the plans held on 18 September (a week after the referendum in Scotland on devolution plans there). The central feature of the white paper was a combination of plans for a non-legislative but elected Welsh Assembly, which would take on the functions of the Secretary of State for Wales, the Welsh Office and many Welsh quangos, in a democratised form. This was essentially the same proposal as had been rejected by the people of Wales at the 1979 referendum, though with fewer Assembly Members (the exact number in 1978 would have been around 80, though it was not specified in the Act: Foulkes et al 1983, p. 63).

The Assembly would have a single chamber, and be a single body corporate in law. That meant that there would be no formal separation between its executive and deliberative or legislative functions, which would all be exercised as part of one entity. This approach is well-established for local government in the United Kingdom, but was unique to Wales (devolution to Scotland and Northern Ireland involved separate parliaments and executives). In other respects – such as finance and involvement in European Union business – the proposals were essentially the same as those developed for Scotland. As for Scotland, there would continue to be a Secretary of State sitting in the UK Cabinet, but he would have very few executive functions and would largely be responsible for liaison between the UK Government and National Assembly, for representing Wales in the UK Government and representing the UK Government in Wales. What was most novel was probably the electoral system: the ‘additional member system’ (as most notably used in Germany), with 40 constituency members (one for each of the existing Westminster constituencies in Wales), and 20 top-up members elected from regional lists. (With such a small number of top-up list members, the system is only somewhat proportional and still gives a significant advantage to the party able to win constituency seats. That was quite deliberate, to enable Labour to maintain its position while delivering the promise of ‘inclusiveness’.)

In developing these proposals, the Welsh Office had very extensive autonomy. This was partly for the positive reason that the centre of government in Whitehall (the Cabinet Office, particularly its Constitution Secretariat) played only a co-ordinating role, and left policy-making to the appropriate departments, subject to securing

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As regards finance, the Assembly was to be (and has been) financed by a block grant from the UK Government, calculated using the so-called ‘Barnett formula’. For a general discussion of how the formula works and its implications see Heald and Macleod 2002; and more briefly House of Lords 2003, chapter 3.
approval from the relevant Cabinet Committee (known as DSWR: Devolution for Scotland, Wales and the Regions) when necessary. That committee met frequently in the spring and early summer of 1997, but devolution for Scotland was its most pressing concern and the focus of most attention. Wales largely followed behind in Scotland’s slip-stream. That concern with other issues is the second reason why the Welsh Office was free to develop its own proposals; not for the first or last time, autonomy was a consequence of other places being the main centre of concern. During the course of drafting (and partly to accommodate Plaid Cymru) the name of the Assembly was changed from ‘Welsh Assembly’ to ‘National Assembly for Wales’. However, a good deal of the detail in the bill (such as the arrangements for its political management – the idea of a ‘first secretary’ and cabinet, forming part of the Assembly) being inserted only during Parliamentary consideration of the bill, and because of the way this was drafted sitting awkwardly with other provisions. Indeed, interviewing has suggested a striking difference between the drafting of the Scotland Act 1998 and the Government of Wales Act: the drafter of the Scotland Act was conscious that he was drafting a constitution for Scotland, and that consequently it was imperative to ensure clarity and accessibility in the statute, while the drafter of the Government of Wales Act approached it as any other complex statute, and allowed it to become complex and hard even for lawyers to follow (Trench 2007). Nonetheless, the basic structure of those proposals – the elected Assembly with executive-only functions – was a long-standing fixed point of Labour policy (Wyn Jones 2007).

The commitment to a referendum (if nothing else) meant that it was necessary for the proposals to be at least minimally attractive to other parties, particularly Plaid Cymru and the Liberal Democrats. The absence of their support in campaigning for a ‘yes’ vote would be highly damaging. The fact that there was to be an Assembly at all was a major factor in favour of such an alliance, as this was a long-standing goal of both parties. This need for support constrained to an extent the extent to which the plans could serve solely Labour interests. However, while consultation with non-Labour parties about the shape of devolution took place, outside the work that was done to prepare for the referendum campaign and later manage it this was limited (Jones and Balsom 2000, especially chapters 3-4). Despite divisions within the ‘yes’ campaign and limited public support or interest, but helped by an utterly lacklustre and poorly organised ‘no’ campaign, the referendum was won – but by a wafer-thin margin, of 50.3 per cent to 49.7 per cent. Turnout was low – only 50.1 per cent across Wales, and the difference between the two sides was less than 7000 votes. Closer analysis of the vote showed stronger support for the Assembly among younger voters (those under 44) and Welsh-speaking ones, and in the west of the country (Wyn Jones, Trystan and Taylor 2000).

After the referendum, a body called the National Assembly Advisory Group (NAAG) was established, to prepare the standing orders and other detailed procedures for the new Assembly. NAAG incorporated a wide range of interests in party, geographical and linguistic terms, held nine public meetings as part of its consultation work between December 1997 and April 1998, and produced detailed proposals for the Assembly’s working arrangements (Jones 2000, 190-92). However, although NAAG worked in a relatively open and consensual way, its overall impact has to be regarded as limited – not just because of the limited extent to which the public indeed engaged
with it, but because it was filling in matters of detail after the major decisions had been made elsewhere.

The 1998 Act received royal assent and became law on 31 July 1998. Administrative preparations for devolution began, and the first elections were held on 6 May 1999. Labour won 28 seats (seen as a very bad performance), Plaid Cymru 17 (seen as a very strong one), the Conservatives 9 and the Liberal Democrats 6.

The 1998 arrangements in practice

The 1998 arrangements proved very hard to make work in practice. Part of the reason was the tension between the idea of inclusive consensus government and the normal practice of politics. As Labour refused to contemplate a coalition government, it formed a minority government and was dependent on support from the other parties in the Assembly – most commonly Plaid Cymru. This was, however, an uneasy alliance, which quickly became very awkward. Eventually Plaid lost confidence in the ability of the government to deliver what Plaid saw as vital requirements for Wales, notably over additional funding from the UK Treasury to support the EU Objective 1 programme for West Wales and the Valleys. As a result, in the autumn of 1999 Alun Michael, the Assembly’s First Secretary, was removed in the course of a debate expressing no confidence in him. (In extremely confused events, Michael resigned expecting to be immediately re-nominated as First Secretary, but the Presiding Officer took his resignation at face value, accepted it and closed the session: see Thomas and Laffin 2001; Osmond 2000.) This episode was a major test of the 1998 Act provisions: it proved that there were serious shortcomings in arrangements for advising Assembly officers and the ‘single body corporate’ model, since roles and responsibilities were unclear and poorly understood, and in a crisis the attempts to smooth over the difficulties that had worked so far failed. It also revealed a serious lack of clarity in important aspects of the Act’s provisions.

After Michael’s departure, Rhodri Morgan became Labour leader and First Minister and, in October 2000 formed a coalition with the Liberal Democrats. This provided more stable government but appears to have been an uncomfortable experience for both parties, and after the 2003 elections Labour again chose to govern alone.4

There were other respects in which the 1998 arrangements (of which there is a clear account in Patchett 2000) rapidly emerged as seriously flawed. One was the ‘single body corporate’ in which executive and legislative and deliberative functions were combined. These had become evident in the 2000 row that led to Alun Michael’s departure. There was confusion about who was in fact responsible for making policy or running services: Assembly Secretaries/ministers (either individually or collectively), the Assembly as a whole, or what. Assembly Secretaries (as they were initially called) sat as members of Assembly committees, and committees were supposed to develop policy as well as scrutinise actions of the executive. This caused considerable practical difficulties (civil servants felt that they were not servants of the Assembly but worked for ministers, and the Assembly had no separate sources of

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4 In 2003, Labour won 30 of the 60 seats. As both the Presiding Officer and Deputy Presiding Officer came from the opposition, this meant that Labour had a working majority of one seat, sometimes two. However, this changed in 2005 with the expulsion of one AM for standing against an official Labour candidate; at that point, it became vulnerable to defeat if the opposition parties combined.
advice). The roles of back-bench AMs individually, and of Assembly committees, were similarly unclear, and the lack of staff resources aggravated the disadvantage in which they found themselves. It also caused political problems. It was hard for the government to claim credit for its actions when they were also largely developed by the opposition parties, and likewise hard for opposition parties to object to policies they had supported in committee.

The result was an increasing separation of executive and legislative functions, and an assertion of the authority and status of the executive side. When he took office in 2000, Rhodri Morgan signalled the start of this by adopting the title ‘First Minister’ (rather than ‘First Secretary’), and similarly designated his colleagues as ‘Ministers’ not ‘Secretaries’. The establishment of the Assembly Review of Procedure took this process further, notably in its final report of February 2002, by emphasising the need to separate deliberative and legislative functions from executive ones. This led to the adoption of the name ‘Welsh Assembly Government’ for the executive side from 1 March 2003, and the steady development of its own resources to support the deliberative and legislative side of the Assembly in the Office of the Presiding Office (which eventually became known as the Assembly Parliamentary Services). Rawlings (2003a) describes this process as a move from a ‘Welsh Office plus’ model of devolution, rapidly through a ‘corporate/collaborative’ one, to a parliamentary model. As Rawlings puts it, what emerged within the shell of the single body corporate was a ‘virtual parliament’ (but not one actually or in law). To put it slightly differently, the Assembly responded to finding that the model set out in the 1998 Act was both unworkable and inappropriate by adopting ways of working around those difficulties, but the underlying problems of the formal structure was not something that could be resolved by the Assembly itself.

Second, there was the question of the powers of the Assembly. The Assembly was dependent for legislative powers on what it was granted by Westminster. This led to a process of negotiation around each individual bill introduced at Westminster touching on devolved executive functions. In some cases the Assembly was successful in seeking powers, in other cases it was less so. The result, however was a time-consuming process which resulted in huge variation in the extent of the Assembly’s powers, a high degree of inconsistency in what the Assembly could do from field to field, and a situation of such complexity that it could not be easily explained to the general public or even legislators. Nor was there any official attempt to map this complex situation and identify what the Assembly’s powers are; this was only done by a website set up by the Law School at Cardiff University, initially with funding from the Arts and Humanities Research Board, later also with money from the Office of the Presiding Officer and Welsh Assembly Government, but not from any UK institutions (Lambert and Miers 2002). Academic comment (e.g. Rawlings 2001, Patchett 2005) and official reports (House of Lords 2003, chapter 4, House of Commons 2003) focussed on these problems and attempted to find ways of improving the situation, but could offer little given the nature of the situation that had been created.

Nonetheless, the creation of the Assembly led to a growth in public support for devolution, as is shown clearly by the changes shown in table 1. Particularly between 1997 and 1999, there was a significant growth in support for the Assembly (or something even more powerful than what had been offered in 1997), and
a significant decline in opposition to it.

Table 1: Constitutional Preferences in Wales 1997-2007

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<tbody>
<tr>
<td>Be independent, separate from UK and EU or separate from UK but part of EU</td>
<td>14.1</td>
<td>9.6</td>
<td>12.3</td>
<td>13.9</td>
<td>11.5</td>
<td>12.2</td>
</tr>
<tr>
<td>Remain part of the UK with its own elected Parliament which has some lawmaking and taxation powers</td>
<td>19.6</td>
<td>29.9</td>
<td>38.8</td>
<td>37.8</td>
<td>42.1</td>
<td>43.8</td>
</tr>
<tr>
<td>Remain part of the UK with its own elected Assembly which has limited law making powers only</td>
<td>26.8</td>
<td>35.3</td>
<td>25.5</td>
<td>27.1</td>
<td>25.0</td>
<td>27.5</td>
</tr>
<tr>
<td>Remain part of the UK without an elected Assembly</td>
<td>39.5</td>
<td>25.3</td>
<td>24.0</td>
<td>21.2</td>
<td>21.3</td>
<td>16.5</td>
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<tr>
<td>N of respondents</td>
<td>641</td>
<td>1173</td>
<td>1044</td>
<td>935</td>
<td>955</td>
<td>837</td>
</tr>
</tbody>
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Assessing the 1998 arrangements

An assessment of the arrangements put in place by the Government of Wales Act 1998 using the seven criteria set out above leads to the following conclusions:

a) Consideration of constitutional norms: while the white paper proposals stressed the importance of more democratic and accountable government, this was not thought through in detail or applied in a consistent manner in the Act, nor did they play much role in debates about the content of the Act. These principles were used for rhetorical purposes during the referendum campaign, but in a general rather than specific way. Instead, within the broad goal of creating a National Assembly, the Act’s provisions were largely developed as ad hoc solutions to issues as they arose.

b) Importance of practical issues: these were highly important, particularly in the extent to which they built on the powers and resources of the Welsh Office. However, the workability of the proposals in practice were not taken into account except at later stages (by NAAG) but took no account of how the arrangements would work in practice. In reality, as discussed above, they proved to be unsuitable to the practical demands placed on them and were rapidly amended and reshaped.

c) Party political considerations: these were highly important. There were concessions to the interests of non-Labour parties in the form of aspects of proportionality in the electoral system and the fact that this was an
d) Broader representation: this was very limited. In general there was little attempt to involve or engage civil society. There were two exceptions to this: the referendum campaign itself, and the work of the National Assembly Advisory Group in preparing for the new Assembly’s working arrangements. However, the low turn-out in the referendum suggests that this failed to engage great public interest, and even NAAG engaged with only a limited number of people.

e) Autochthonous nature of the process: the 1997-9 process was autochthonous to a degree. The Welsh Office and other groups in Wales were largely able to develop their own approaches to devolution. However, the (largely formal) consent of Parliament was needed to give effect to the proposals, and UK Government departments and interests were involved and able to ensure that their pressing concerns were not threatened by what was proposed. Moreover, the most important Welsh interests involved were those within the Labour Party, and these had to take into account interests of other sections of the Labour Party as well.

f) Durability: the arrangements were clearly not durable – not only did they end up being wholly replaced just eight years later, but they triggered a protracted constitutional debate practically from the first sitting of the Assembly, and were extensively modified in their operation in practice within the first few years of their operation.

g) Legitimacy: the legitimacy of the arrangements was limited. While endorsed at a referendum, the narrow result and low turn-out limited the impact of this and led to opponents of the Assembly (if few in number) continuing vocally to attack its existence and call for its abolition. While public support for the Assembly grew once its establishment was underway, the subsequent need extensively to change the arrangements further limited its legitimacy. There is even an argument that the Assembly’s legitimacy was due not to the referendum, but to the ability of the institution to adapt to new realities and demands – that it enjoyed legitimacy despite the model approved by referendum, not because of it.

The first wave of Welsh constitution-making therefore succeeded in established an elected Assembly (a huge achievement), but in conditions that limited wider participation in the process and produced an unworkable and short-lived scheme.

2002-4: the Richard Commission – an independent commission

The work of the Richard Commission

The 2000 coalition agreement between Labour and Liberal Democrats made use of independent ‘commissions’ to consider major issues where it had not been possible to reach agreement between the parties in coalition negotiations. Such commissions should not be regarded as attempts to find a neutral and technocratic solution to
problems as a way of deferring consideration of them, in the hope that the commission might identify an acceptable and workable solution and in the meantime enabling the parties to proceed with the important business of government. In Wales, there were to be two such commissions: one on the electoral system for local government, to consider the key Lib Dem demand of a proportional voting system (strongly resisted within Labour), and one on the powers and electoral arrangements for the National Assembly itself. The latter became, in due course, the Richard Commission.

The chairman chosen for the Commission was Lord Richard of Ammanford, a senior Labour politician originally from Wales. Lord Richard had held a number of important posts, including UK Ambassador to the United Nations, European Commissioner, and (in the first years of the Blair Government) leader of the House of Lords charged with reforming the House. While he appeared within Wales to be a very significant UK-level politician, his standing in London was in fact weakened by his inability to deliver an acceptable form of Lords reform for Blair and subsequent dismissal from government.

The Commission had ten members, including Lord Richard. Four were nominated by the major political parties in Wales: Labour nominated a former MP and Minister at Westminster, the Liberal Democrats a former (Conservative) Member of the European Parliament, and the other party nominees had comparatively low political profiles. The other five nominees were chosen following public advertisement and application, on merit, in accordance with the ‘Nolan’ principles on public appointments. Two were former local authority chief executives, one was a farmer, one a businesswoman, and the fifth the retired ‘clerk of the Parliaments’ at Westminster (most senior appointed official of the House of Lords).

The Commission’s processes were careful and deliberative. As it described them in its report:

Between October 2002 and September 2003 we held 115 evidence sessions, 3 seminars, and issued 2 consultation papers. We received over 300 written submissions. We held 9 meetings, starting in Swansea and ending at the National Eisteddfod in Meifod. We observed the Assembly in plenary and in committee, visited the Scottish Parliament in Edinburgh, met the Speaker of the Northern Ireland Assembly and visited Westminster, to meet MPs, Peers and others, three times. (Commission on the Powers and Electoral Arrangements of the National Assembly for Wales 2004, para. 16)

The Commission also emphasised its overall approach was based on two assumptions: ‘First, that gains in democracy and accountability are valuable in themselves. Second, that more open, participative and responsive governance is likely to produce better policy outcomes.’ (Commission on the Powers and Electoral Arrangements 2004, para. 8)

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5 Lord Richard said after the report was published that the members had been deliberately chosen to have no expressed public views about the future form or powers of the National Assembly. Consequently several academic experts who had applied to be members of the Commission and who were otherwise were well qualified were not appointed.
What it produced was a detailed report of some 260 pages (plus 40 pages of annexes), as well as copious evidence that was not printed but made available on CD-ROM and through a website. The report analysed with great care and thoroughness key issues in the practice of government in Wales at the time. These included both issues of Wales’s ‘domestic’ government (chapter headings included ‘The role and structure of the Assembly’, ‘The scope and adequacy of the devolved powers’ and ‘The scrutiny of unelected public bodies’), and of how Wales fitted into the broader framework of government within the United Kingdom. It took account of popular views, as shown both by survey evidence and the public meetings held by the Commission, and was able to draw on considerable academic work underway at the time in the context of research programmes on devolution funded by the Economic and Social Research Council and the Leverhulme Trust.

The key recommendations were:

- A National Assembly formally separate from the Welsh Assembly Government (an end to the ‘single body corporate’)
- With 80 Members, elected by the single transferable vote system With legislative powers on ‘the Scottish model’ (a general grant of legislative powers, subject to ‘reservations’ to the UK of matters including foreign affairs, defence, currency and the macro-economy, social security and welfare benefits, and micro-economic or demand-side regulation)
- To take effect by 2011
- And a transitional arrangement for Westminster to confer extra powers by ‘framework legislation’ during the interim period.

The report was agnostic about whether there needed to be a further referendum on introducing these changes, and left that decision to Westminster. It was also agnostic about whether the Assembly should have powers to vary taxes, let alone raise significant elements of its income by taxes under its control. The report was a unanimous one, although this was qualified to an extent by a letter from Ted Rowlands (the commission member nominated by the Labour Party) questioning whether change was needed at that time and emphasising that a referendum would be needed for such change, but endorsing the report’s model if change were to come.

Reaction to the Richard report

The Richard report was widely welcomed by academics (e.g. Rawlings 2004; contributions to Osmond 2005; Jones and Williams 2005). As for political parties, there was general support from Plaid Cymru, Liberal Democrat and Conservative parties – but this was of little practical importance, given Labour’s position. Labour’s response was mixed, and is discussed in detail below. An all-party group called ‘Tomorrow’s Wales/Cymru Yfory’ was established by the Archbishop of Wales to campaign for implementation of the report.6

So far as the general public is concerned, the lack of opinion polling following the publication of the report (a recurrent problem in Wales) means that it is hard to say

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6 I should declare a personal interest; in July 2006 I became constitutional advisor to Cymru Yfory.
what level of support the report actually enjoyed. However, a commercial opinion poll carried out by NOP in May 2004 suggested that 60 per cent of the Welsh public agreed that ‘the Welsh Assembly should be given greater law-making powers’, and 28 per cent disagreed. Compared with earlier polling posing different questions, this suggests a significant boost in support for a legislative assembly (Osmond 2004), although the differences in questions mean that only limited weight can be attached to this. Table 1 suggests that there was already a significant boost in support for a legislative Assembly by 2003.

The Richard Commission clearly had the effect of fuelling the debate about Wales’s constitutional future, and in that sense had a very considerable impact. However, its proposals were not implemented (and those subsequently adopted in the 2006 Act were a long way away from what was recommended by the Commission). In that sense, it cannot be regarded as a success.

Assessing the Richard report

An assessment of the arrangements proposed in the Richard report is necessarily difficult; while one can draw conclusions about the process followed, any comment about what might have happened had the Richard recommendations been implemented as recommended is necessarily hypothetical.

a) Consideration of constitutional norms the Richard Commission was rooted in constitutional principles, and sought to ensure that these principles were fully implemented in its recommendations.

b) Importance of practical issues: the Commission was practical in the sense that it drew lessons from how the arrangements put in place in 1998 had worked, and sought to suggest a better system rooted in that experience. However, it was flawed in two respects. It proved to be politically unpalatable to key veto players (notably Welsh Labour MPs, but also other sections of the Welsh Labour Party). It was also unclear about how the transition from the present system to that recommended would work, and the arrangements that would apply during the extended transition period it anticipated.

c) Party political considerations: these had only a limited impact. Two factors were important: the broad composition of the Commission, and the lack of Labour’s dominance on it, and the fact that it relied heavily on the evidence before it. This appears to have helped ensure unanimity among the commissioners as well as the quality of the report (McAllister 2005). The composition of the commission may also have helped ensure that it responded to the overall weight of evidence before it, and to resist very clear suggestions about what it should do from those who ultimately would determine what would happen. This most notably applies to remarks made by Peter Hain, then the UK Government’s Secretary of State for Wales, about what he would consider appropriate recommendations and what he would not in his evidence to the commission, indicating that the criterion he would use to judge any recommendation would be whether it would improve public services in Wales or not.
d) **Broader representation:** this was extensive, both in terms of the influence it exercised on the commission and in the numbers of people who submitted evidence to the Commission or otherwise engaged in its work.

e) **Autochthonous nature of the process:** the Richard report was highly autochthonous. All its members had close connections with Wales, and many had been involved in Welsh government. The interests they consulted were largely in Wales (or concerned with the government of Wales), and the report was driven by concerns to secure the best constitutional arrangements for Wales.

f) **Durability:** this necessarily involves hypothesising. The arrangements proposed were designed to be durable once in place, and were regarded by academic observers as being likely to be so.

g) **Legitimacy:** again, it is impossible to assess whether something that was never in fact implemented would have been legitimate if it had been implemented. Nonetheless, the evidence of public opinion in support of the proposals (and, as shown in table 1, for an elected parliament of the sort recommended by the Commission), as well as the deliberative process that had produced them, suggest that they would have commanded a high level of legitimacy.

On this basis, the nature of the process that produced the Richard report and the quality of the result produced a report that satisfied many of the criteria set out above. Its weakness was the limited extent to which it was politically acceptable and the lack of detail about transitional arrangements, which proved to be its undoing.


Following publication of the Richard report, a debate opened up, but the most important part of this was within the Labour Party. Within days, Rhodri Morgan was seeking to distance himself and the party from important recommendations of the report (in the process seeking to cherry-pick from among its recommendations, despite the firmness with which Lord Richard emphasised it was a package to be dealt with as a whole). The most controversial item was the electoral system, and the recommendation for the use of the single transferable vote, closely followed by the idea of a swift move to a fully-legislative Assembly. At a special conference in September 2004 the Welsh Labour Party adopted a paper entitled ‘Better Governance for Wales’ setting out a very different approach to an enhanced Assembly. By this point it was evident that leadership of the process had shifted from Rhodri Morgan, the First Minister, to Peter Hain, Secretary of State for Wales in the UK Government (and MP for a Welsh constituency). In June 2005 the UK Government issued a white paper (Wales Office 2005) bearing the same name, setting out the recommendations adopted by Labour at its special conference would be implemented, and elaborating them in some detail. These recommendations were subject of academic criticism (most notably Trench 2005b), but formed the basis of a bill introduced by the UK Government at Westminster in December 2005. This received approval from both Houses of Parliament, received royal assent in July 2006, and the bulk of its provisions came into effect after the in elections to the National Assembly in May 2007. Its parliamentary progress was generally smooth, with few amendments needed and no opposition ones successfully made, although there had been anxiety in December 2005 about whether the bill would be introduced at all, and Tony Blair had
to be personally convinced of the need for it. (Wyn Jones and Scully 2008 forthcoming give an admirable account of the process of making the 2006 Act.) In working on the bill, there was extremely close co-operation between the Welsh Assembly Government and the Wales Office; indeed, the bill team working on the bill for the Wales Office were seconded from the Assembly Government.

The key elements of the scheme set out in *Better Governance for Wales*, and in the 2006 Act, are the following:

- An end to the ‘single body corporate’ and a formal, legal split between the executive functions of the Welsh Assembly Government and the legislative and deliberative ones of the National Assembly.
- An Assembly still with 60 Members, and still elected using the ‘additional member system’
- But with a prohibition on any candidate standing as both a constituency candidate and for a regional list.
- A complicated scheme for giving the Assembly ‘framework powers’ and ‘enhanced legislative powers’, the latter providing a mechanism to confer powers over specific ‘matters’ relating to 20 broadly-defined ‘fields’ by a form of secondary legislation at UK level, on application by the National Assembly.
- Provisions for the Assembly to acquire ‘primary legislative powers’ over the 20 designated ‘fields’, after a referendum – and so become a fully-fledged legislature for Wales.

The provisions relating to ‘enhanced legislative powers’ are particularly complex. These were portrayed as a more effective set of transitional arrangements than those proposed by the Richard Commission (Rhodri Morgan introduced them referring to a diagram in the report as being ’13.2 plus’). There is however a belief that many in Labour (including many Westminster MPs) hope that this transitional period will be very protracted, and that a referendum on primary legislative powers will take a very long time to materialise.

These ‘enhanced legislative powers’ work by reference to a Schedule to the Act (Schedule 5), which sets out the legislative powers of the Assembly but which was largely blank when the Act was passed. That Schedule can be amended by a ‘legislative competence order’ (LCO), a form of secondary legislation made following short debates in each House of Parliament (but avoiding the complex and time-consuming processes associated with an Act of Parliament). The idea is that Schedule 5 will, at any time, set out what the Assembly’s legislative powers are, and that it will be updated to reflect these as they develop – an ingenious piece of constitutional and legal engineering, which combines political flexibility with legal certainty at any point in time, but at the price of making it hard to say what the Assembly’s powers are in a general way.

However, the process by which the Assembly acquires such powers is complicated and likely to be protracted (only one LCO has so far been passed at Westminster, so it is early to say). Proposals can be formulated by the Assembly Government, a committee or a back-bench AM. If approved by the Assembly, these are subjected to pre-legislative scrutiny, in Cardiff Bay and at Westminster. Following that
consideration, a proposal has to be tabled in the Assembly and then formally submitted to the Secretary of State for Wales, who can decide whether to submit it to Parliament or not. (If he chooses not to, he has to give his reasons to the First Minister within 60 days, but faces no other sanction.) The proposal is then considered in both the Commons and Lords, and has to be voted on after a 90-minute debate. If rejected, that is the end of the matter. It is passed, it is then for the National Assembly to legislate. An informed guess is that the whole process will take between 18 and 24 months from start (proposal for an LCO in the Assembly) to finish (an enacted Assembly Measure, as Assembly legislation at this stage is known). Equally, Schedule 5 can be amended by Acts of Parliament, if it is convenient (and agreed between governments, but not between legislatures) that the powers of the Assembly should be extended in this way. This means that there continues to be intergovernmental bargaining about each individual Westminster bill touching on devolved executive functions.

As regards a referendum, there is similarly a wide range of possibilities but little certainty about whether it will be called or when. The inclusion of the ‘primary legislative powers’ and referendum provision were regarded as major victories for advocates of ‘maximal devolution’, including particularly Plaid Cymru. However, the calling of a referendum requires a resolution by the National Assembly (acting by a two-thirds majority), which has to be proposed by the Assembly Government. That then needs to be approved by the Secretary of State in London, who will submit it (or not) to Parliament where it needs approval of both Houses of Parliament. This therefore needs the approval of five distinct veto players in two different tiers of government, one acting by a super-majority. In reality, this gives an absolute veto on constitutional progress to Labour, which cannot be imagined to win less than one-third of the seats in the National Assembly no matter what happens to it elsewhere.

The result is a brilliant piece of politics, but a confusing piece of constitutional law. I have said of this elsewhere that ‘the Act opens a door for a journey – but one for which the destination, the duration and even the route to be taken are unknown. Instead of a route map, it is a right to roam’ (Trench 2006: 696).

Three other aspects of the Act merit discussion. First is the ban on ‘dual candidacy’, or candidates standing for election to the National Assembly both for a particular constituency and on a regional list, which was an issue raised almost exclusively by Labour AMs. (In the 2003 elections, Labour won all its 30 seats from constituencies, and none on regional lists. It has never had more than 2 list AMs.) Their view was that successful list candidates from other parties were using that as a platform to campaign for election in that constituency, and that this was somehow improper. Similar tensions do not arise in other countries that use this electoral system, even Scotland, but are a major source of concern to Labour in Wales, and this provision attracted broad support within the party and was therefore included. Opposition to its inclusion (notably in the House of Lords, from Tory and Liberal Democrat peers) melted away in the face of threats that the bill might otherwise be lost.

Second, the UK Secretary of State for Wales retains extensive functions under the Act. He makes a number of key decisions, including whether or not to submit requests for LCOs to Parliament, whether to intervene if Assembly legislation exceeds devolved legislative competence or otherwise threatens UK interests, and whether to
submit a request for a referendum on ‘primary legislative powers’ to the UK Parliament. In addition he has a right to ‘participate’ but not vote in Assembly plenary sessions, and to receive all papers for Assembly plenary sessions and committee meetings. (So far, Secretaries of State have been very reluctant to make any use of these powers in practice, but in different political circumstances that might change.) These provisions survive even after a referendum to confer primary legislative powers on the Assembly. The scope this creates for a minister in one tier of government to involve himself in the processes of another, autonomous legislature are strange comparatively, defy most notions of the appropriate division or separation of power in democratic governments, and even within the United Kingdom lack precedent (they are not paralleled in Scotland or Northern Ireland).

Third, the number of Assembly Members remains limited to 60. This was a key part of Labour’s internal compromise in September 2007 – the determination was not to create more politicians, especially as this might threaten the number of Westminster MPs from Wales. This means that the Assembly is comparatively small (with 1 AM for every 50,000 people in Wales it is proportionately lower than many other regional or constituent-unit legislatures). It creates serious staffing problems, as it means that there are only 44 or 45 back-bench members (those without ministerial responsibilities or those of being a party group leader), and that creates problems finding enough AMs to sit on the numerous committees that exist, especially given the statutory obligations to ensure party balance on those committees. This in turn means that there may be problems in ensuring effective scrutiny of legislative proposals and Assembly Government actions by the Assembly.

The 2006 Act in practice

The 2006 Act has led to a very significant change in how the National Assembly works. This has been aided by the outcome of the 2007 elections, when Labour did poorly (winning only 26 seats), and Plaid Cymru found itself having to decide what the government should be (see Osmond 2007 for details, and also Wyn Jones and Scully 2008). Ultimately a coalition between Labour and Plaid was formed, dubbed the ‘One Wales’ coalition, with a detailed coalition agreement that inter alia commits the parties to supporting, and campaigning for a ‘yes’ vote in, a referendum on primary legislative powers by 2011 at the latest. (In other words, there will be a referendum at the same time as the next National Assembly elections, or sooner.)

Three aspects of the new arrangements merit comment. First, the transition to the new arrangements has caused considerable problems. In particular, the Assembly’s standing orders had to be re-written for the new Assembly (and then formally made by the UK Secretary of State, although he accepted a draft prepared by the Assembly). Work on this started very late, public consultation was limited and hasty, and in the end the standing orders were both sketchy in content and largely based on those adopted in Scotland in 1998, rather than developed autochthonously. Transitional work was made more difficult by staffing problems, themselves aggravated by the departure of the Assembly’s clerk after he was advised that he would not be a welcome applicant for that post in the new Assembly. The Assembly has therefore made slow progress in developing the internal capacities necessary as preconditions for having and exercising legislative powers.
Second, there have been real difficulties for Assembly Members and others in understanding the new system and how it works. This has been most marked in relation to acquiring legislative powers – there has been confusion about the sorts of provisions and scrutiny appropriate at the stage of obtaining powers (through LCOs) compared with that when actual legislative (an Assembly Measure) is on the table.

Third, the process by which legislative powers are acquired is resulting in a confusing pattern to Schedule 5, which varies hugely in the level of detail for particular matters, and how broadly or narrowly they are defined. Just nine months after it came into use, Schedule 5 is already a confusing piece of legislation, hard to find or even for specialists to make sense of.

Assessing the 2006 Act

Using the seven criteria, one can draw the following conclusions about the arrangements created by the 2006 Act:

a) **Consideration of constitutional norms**: the 2006 Act was not concerned with constitutional norms, but achieving a workable political compromise first within the Labour Party and secondly with other supporters of devolution to secure its passage, and also with redressing perceived grievances arising from the existing arrangements (notably over the electoral system). Constitutional principle was no part of this compromise, and indeed some of those involved in the process are inclined to regard such principles as having no part to play in constitution-making.

b) **Importance of practical issues**: practical considerations, in the sense of ensuring workable provisions, played a limited role in framing the 2006 legislation. Separation of legislative and executive functions was plainly desirable, and could be achieved as it attracted universal political support. However, they played a minimal role in relation to the provisions for ‘enhanced legislative powers’ and the amendment of Schedule 5 by LCO – an ingenious legal solution to a political problem, but one that no lawyer or constitutionalist would adopt if there were not a compelling political reason to do so.

c) **Party political considerations**: these had a huge impact. The main features of the Act were principally designed to accommodate views within the Labour Party, and to find a compromise between differing views within Labour. Secondarily, they were designed to recruit support from other parties, notably by offering a legislative Assembly – but with considerable hurdles to be overcome to achieve that.

d) **Broader representation**: consultation on the detailed proposals was carried out, but only on the white paper *Better Governance for Wales* or the bill – not the proposals that shaped the white paper. Responses to this were in any event limited in number. In addition, several Parliamentary committees at Westminster considered the white paper or bill, and took evidence on its implications. However, none of these processes resulted in significant changes to the proposals.

e) **Autochthonous nature of the process**: the process that produced the 2006 Act was autochthonous only to a limited extent. While the Labour Party’s
f) **Durability**: while it is hard to say how durable something will prove less than a year after it came into effect, many aspects of the 2006 Act do not look to be durable. The ‘enhanced legislative powers’ provisions in Part 3 are intended to be transitional, and are already facing difficulties which will result in serious problems if they should last for more than a relatively short transitional period. Even with ‘primary legislative powers’ other institutional features of the Act – notably the ongoing powers of the Secretary of State and the limitation on the number of AMs – are likely to cause problems.

g) **Legitimacy**: the limited public engagement with the process of making the Act, the limited attention it was given in Wales (there was negligible coverage of it in either the print or broadcast media), and the fact that it was designed to accommodate the views of only one party have to affect its legitimacy. However, recent polling evidence (set out in Table 1 above) suggests a broad degree of support for greater devolved powers after passing of the Act, if not for its detailed provisions.

The 2004-7 process was a largely closed one, driven by the views of politicians (mainly within the Labour Party) about what was and was not possible or acceptable. Consideration of broader principles or the views of other interests was very limited. The outcome is ingenious but convoluted, and will create many technical problems if it should last for more than a few years.

**Conclusion**

The three phases of constitution-making for Wales offer two different approaches to constitutional change and constitution-making. The first and third were relatively closed processes, subject to political bargaining and compromises mainly within the Labour party. In the case of the 1997-99 process, those compromises produced an institution which rapidly acquired considerable public and popular support, but which was ill suited to public or elite expectations of what it should do and to the working of practical politics. In the case of the 2004-06 process, it is too early to tell – but such data as we have indicate that public opinion has run ahead of institutional developments, despite only limited awareness of what has in fact been done. In the case of the 2002-04 work of the Richard Commission, the outcome remains the clearest and most cogent statement of Wales’s constitutional needs. It is also the one that sought most thoroughly to ensure that it involved all shades of opinion, and to engage the public in its work. The Commission is sometimes regarded as ‘the
constitutional convention that Wales never had’ (in contrast to Scotland, where such a convention which sat between 1989 and 1995 was a major milestone on the road to devolution). That may be an exaggeration, but the Commission’s work is, an overall assessment, the best attempt to resolve constitutional issues in Wales that there has been in modern times. However, the Richard Commission’s strength was also its weakness – its failure to take into account political considerations that would make it attractive to politicians, because it took broader interests into account.

To summarise the overall performance of each process, table 2 sets out their overall ratings:

Table 2: A summary of the three processes

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<td>Consideration of constitutional norms</td>
<td>Low</td>
<td>High</td>
<td>Low</td>
</tr>
<tr>
<td>Importance of practical issues</td>
<td>High</td>
<td>Medium</td>
<td>Low to medium</td>
</tr>
<tr>
<td>Party political considerations</td>
<td>High</td>
<td>Low</td>
<td>High</td>
</tr>
<tr>
<td>Broader representation</td>
<td>Medium</td>
<td>High</td>
<td>Low</td>
</tr>
<tr>
<td>Autochthonous nature of the process</td>
<td>Medium</td>
<td>High</td>
<td>Low to medium</td>
</tr>
<tr>
<td>Durability</td>
<td>Low</td>
<td>Hypothetical: probably high</td>
<td>Hypothetical: probably low</td>
</tr>
<tr>
<td>Legitimacy</td>
<td>Initially low, rapidly increased</td>
<td>Hypothetical: probably high</td>
<td>Medium</td>
</tr>
</tbody>
</table>

In a comparative context, two features are distinctive about the process of devolution in Wales. One is the extent to which the processes of constitution-making and institution-building have progressed in tandem with processes of national definition in a political and constitutional sense. This has not been a case where a ‘people’, clearly identifying themselves as such, have sought autonomy and then engaged in debate about what form or extent that autonomy should take. ( Stateless nations such as Scotland, Flanders or Catalonia demonstrate that pattern: see Keating 2001). In that context, the Welsh pattern is unusual, and highly distinctive among minority nationalities. Wales has been defining its political nature through these processes. Table 1 suggests that in fact public opinion has for some time (certainly since 2001) been ahead of politicians, in wanting a more advanced form of self-government than has been under serious consideration. The fact that these two processes are simultaneously underway explains the continuing dynamic character of constitutional change. It also suggest that even with the open-ended provisions of Part 4 of the 2006 Act it is unlikely be finished with that Act.
The second distinctive feature is the extent to which it has been dominated by Labour party interests. This reflects not just the role of the Labour Party in Wales and its distinctive culture, but also broader issues of the working of the UK’s unwritten, and essentially political, constitution. In such a context, there are no formal rules or procedures for amendment, and the chief constraint is what is politically acceptable or practicable. This therefore privileges those in power at a particular time (rather than ensuring that a wide range of interests are involved), and the doing of deals within an elite rather than the incorporation of a broader range of interests. These comments could be made about other aspects of the post-1997 UK Labour government’s constitutional reform programme, but in relation to Wales they are particularly appropriate as the shortcomings in that process have meant that constitutional debate has become a permanent feature of politics in Wales. A further consequence of the unwritten constitution is not its often-vaulted flexibility but an inflexibility that comes with this; the fact that it privileges limited and incremental change over radical far-reaching change. Again, in Wales we have seen a repeated process of adjusting previous arrangements rather than making a coherent, thought-through attempt at fundamental change. In this respect, the UK’s constitution exhibits a high degree of path dependency.

What Wales therefore demonstrates is of interest for constitutional processes in the UK more generally. The distinctive characteristics of Wales mean that the issues involved in constitutional politics are more susceptible to develop over time than is the case for other issues, but these processes develop in a context that is incremental, open-ended and political rather than formal, legalistic or radical.
Bibliography


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