

Old Wine in New Bottles?

Relations between London and Cardiff after the Government of Wales Act 2006

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Summary of Key Points

- The Government of Wales Act 2006 is a major step in Wales's constitutional development. Its provisions for extending the National Assembly's legislative powers are likely to have a considerable impact. However, it is hard to say exactly what effect they will have, as the arrangements for extending these powers remain open-ended.
- The process that produced the 2006 Act was profoundly different to processes of constitutional change in federal or regionalised European states. This confirms the differences between UK and such systems.
- The way separation of the Welsh Assembly Government (WAG) and the National Assembly for Wales has been achieved will reinforce executive dominance of intergovernmental relations.
- The Act's mechanisms for conferring legislative powers on the National Assembly by orders in council and Westminster legislation are complicated. There are concerns about how conferrals of powers by each route will work, and whether there will be different approaches to scrutiny depending on the route used. Amending the National Assembly's powers by Westminster primary legislation will mean that the Westminster agenda continues to drive developments in Welsh devolution.
- If Parliament were to seek to use approval of orders in council as a means of shaping or controlling Assembly policy, that would be constitutionally undesirable and possibly dangerous. It will be difficult for Parliament to draw a line between maintaining a proper control of legislative powers conferred on the Assembly, and improper attempts to determine Assembly or Assembly Government policy.
- The instability and political difficulties created by these steps mean that it is desirable that stages 1 and 2 are genuinely transitional, and that the move toward an Assembly with primary legislative powers be a rapid one.
- The Secretary of State will play a key role in making decisions about grants of powers and any move to primary powers. It will be a challenge for him or her to distinguish between the role of constitutional guardian and party-political concerns.
- In the longer term, it may be in the interests of a UK Government of a different political make-up to the Assembly Government to prefer a rapid move to primary powers. That will be particularly the case if a Conservative government at Westminster faces one dominated by Labour or Plaid Cymru in Cardiff Bay. This would minimise possible administrative, political and constitutional objections to its policies from Wales.
- More broadly, the Act and the arrangements it creates will not affect the key characteristics of intergovernmental relations in the UK – bilateral relations, asymmetry, informality, and the dominance of the UK Government. Nor does the Act touch on financial matters, which are likely to be a significant source of tension in the future.

a bill and the quick and orderly passage of that bill with very few amendments. While Parliamentary scrutiny of both the white paper and the proposals was careful and thorough,

Constitutional Convention sat in Edinburgh and reached conclusions about the framework of Scottish devolution that were subsequently largely followed by the Labour government after the 1997 election.

This process indicates not just the distinctive nature of devolution in the United Kingdom. It also illustrates the extent to which Whitehall and Westminster continue to dominate the politics of the UK as a whole. In particular, it emphasises the extent to which the autonomy of the devolved territories is contingent on the UK level's assent, whether tacitly or explicitly.¹¹ But it also fits more generally the pattern of what we know about how intergovernmental relations work in the devolved UK.¹²

While the 2006 Act increases the scope of Wales's autonomy and the power of the Wales's devolved institutions, the UK Government will remain highly important in Wales as well. The Act ensures that the UK Government serves as the constitutional gatekeeper, and will continue to do so. The UK Government will remain a major governmental player in its own right, responsible for just over half of identifiable public spending in Wales.¹³ Given England's proximity to Wales and the degree to which devolved and non-devolved functions overlap and intertwine with one another, the UK Government will also remain a major source of policy debate and policy initiatives, influencing the policy options available to the devolved Welsh institutions as well as the (UK) media debate. None of these factors will be fundamentally changed by the new arrangements of the 2006 Act, even as the Act restructures the relationship between the National Assembly and its executive and creates a path for acquiring legislative powers.

The new Assembly and executive

One of the most important changes in the 2006 Act is to restructure the Assembly. The single body corporate will be abolished and replaced by an elected Assembly with deliberative, legislative and scrutiny functions, and a Welsh Assembly Government responsible for executive functions, notably developing and implementing policy. This change marks a significant departure from the 'inclusive' model of devolved government set out in the 1997 white paper and 1998 Act, but has attracted support from all parts of the political spectrum.

However, its consequences are not altogether clear. It is questionable whether the new Assembly will have very much to do until significant legislative powers are conferred on it, as most of its present functions are to be conferred on the new Assembly Government (including much of its existing legislative role), and the extent to which it takes on an active scrutiny role will depend partly on formal provisions in its new standing orders and partly on political willingness to do so after the 2007 elections.

¹¹ The issue of 'contingent autonomy' is discussed in A. Trench (ed), *Devolution and Power in the United Kingdom* (Manchester: Manchester University Press, forthcoming 2007), particularly chap. 12.

¹² For discussions of intergovernmental relations in the UK as they presently work, see House of Lords Select Committee on the Constitution, Session 2002-03 2nd Report, *Devolution: Inter-Institutional Relations in the United Kingdom*, HL 28 (London: The Stationery Office, 2003), A. Trench *Devolution and Power in the United Kingdom* op cit, and (with a focus on

Moreover, the Assembly will lose the control it presently enjoys because the executive's powers are delegated by the Assembly to the First Minister and thence to other ministers, and some of the other key mechanisms for ensuring that the Assembly is involved in political measures by the executive are also lacking under the new arrangements. One is the removal of ministers from Assembly subject committees (although that is intended to improve scrutiny). Another is the new requirement that, to remove the First Minister, a replacement must be nominated and secure the support of a majority in the Assembly. A no-confidence motion can paralyse government and trigger a crisis, but not directly remove him or her.¹⁴ This mechanism resembles the 'constructive vote of no confidence' used in Germany, and will prevent the sort of parliamentary manoeuvrings that led to Alun Michael's downfall in 2000.¹⁵

This change will have significant implications for relations with Whitehall. Intergovernmental relations in the UK are already largely a matter for executives. While parliaments are perhaps more engaged and interested than in many federal systems, they remain secondary actors.¹⁶ The 2006 Act will enable the Assembly Government, once appointed, to act with relatively little restraint. Even a minority government will have considerable power, and it may well be hard for the Assembly to press a reluctant Assembly Government to take on more legislative powers, or to give it clear instructions about h

At first, it appeared that the three stages would overlap. That no longer is the case. Stage 1 – the ‘wider and more permissive powers’ promised in the white paper – were a feature of legislation in the 2005-6 Parliamentary session. This approach was set out in detail in the November 2005 revision of Devolution Guidance Note 9 on *Post-Devolution Primary Legislation affecting Wales*, issued by the Department for Constitutional Affairs, which provided that all bills should confer general powers on the Assembly to act in the areas that are the subject of the bill.¹⁷ However, bills introduced in the 2006-7 Parliamentary session show a different approach, with an eye to the new

problem of a high degree of variation in the powers conferred on the Assembly will continue.²⁸ Indeed, there will be no fewer than nine ways of conferring powers on the Assembly.²⁹ This is likely to worsen the existing difficulties in ascertaining what powers the Assembly has -- especially if stage 2 should last for an extended period.

The powers of the Secretary of State and the Wales Office

One other curiosity of the 2006 Act is the extensive powers it gives to the Secretary of State. He (or she) remains the godfather of devolved Welsh government, whether or not s/he has a firm political base of his own in Wales. The Secretary of State will fix dates for general elections to the

However, there is one significant difference between the Scotland and Northern Ireland legislation and that for Wales. That is the provision enabling the Secretary of State to intervene if s/he considers that a clause 'might have a serious adverse impact on water resources in England, water supply in England or the quality of water in England'.³³ This of course reflects geographical factors absent for Scotland and Northern Ireland – physical proximity to England, and the fact that a number of reservoirs and water catchment areas supplying England are located in Wales. The possible impact of such a clause is very wide, given the extensive water supplies to England that come from Wales and the increasing demands for water in England (especially with population growth and declining rainfall in south-eastern England). As a generous level of rainfall is likely to be seen as more and more of a natural resource for Wales, this may become a source of tension in the years to come.

The Secretary of State will therefore be a gatekeeper for the use of Wales's devolved powers and any increase in them, and also an important actor in how Wales uses them. At least while Labour remains in office in London, the Secretary of State is likely also to be a prominent figure in Welsh politics and perhaps to see him or herself as leader of Welsh Labour MPs at Westminster. As both a party-political figure and the head of the Wales Office, s/he will have much influence over Welsh government behind the scenes. To date, however, Secretaries of State have made only rare and reluctant

Government's legislative programme. It is therefore perhaps better to view the Secretary of State as a *deus ex machina* in Welsh politics rather than a direct presence in the Assembly. The question, however, is how long s/he should retain such a role. For Scotland, the Secretary of State is an important link between the Scottish and UK Governments but has a very limited formal role. As framed, the 2006 Act gives him these powers indefinitely. To the extent such powers are justifiable, it is as a reflection of the transitional nature of Welsh devolution so far, and of the continuing close relationship between the devolved institutions and Whitehall. Why they should therefore persist after primary legislative powers are conferred is unclear.

The place of the Wales Office is more immediately palpable, and unlikely to diminish. The Office does more than merely support the Secretary of State, but has a very substantial workload of its own, as intermediary between the Assembly Government and Whitehall departments, and as Whitehall's source of expert advice on Welsh devolution. While much goes on directly and bilaterally between Whitehall officials in 'line' departments and their counterparts in the Assembly Government, there is a substantial volume of work (often arising from Westminster legislation) that needs the Wales Office's advice and assistance. The importance of constitutional issues since 1999 and particularly since 2004 has reinforced this. The 2006 Act means those constitutional issues remain high on the agenda. With the added work arising from orders in council, and the need to scrutinise Assembly legislation to ensure it is within devolved competence as well, the Wales Office's role will become larger than ever – and given its modest size (it has only two lawyers, for example) it can also be expected to grow quite significantly, even if it should be nominally subsumed into some broader 'ministry of devolution'.

The transition to Stage 3

The transition to stage 3 will depend heavily on decisions taken by the Secretary of State. The first set of decisions relates to how stage 2 works in practice, something which it is impossible to foretell at this point. One possibility is that orders in council will be used only slowly and to a

powers to the Assembly that it has largely the same powers that stage 3 would grant, but without a referendum. One unusual feature of the Act is that it is simply impossible to say. At some point, however, the issue of a referendum will arise – if only to maintain the legitimacy of the National Assembly rather than to extend its powers.

While the Assembly may ask the Secretary of State to hold a referendum, that decision will require not just the support of a majority of AMs but also has to be initiated by the Assembly Government, not a backbencher. The Secretary of State not only has to decide whether to call a referendum, but also the important issue of what the wording of the referendum question should be (something criticised by the Commons Welsh Affairs Committee and both the Constitution Committee and Delegated Powers and Regulatory Reform Committee in the Lords).³⁴ Two significant powers are therefore left in the hands of the UK Government, enabling the UK Government to make key decisions about Wales's constitutional future. Given the way political and constitutional issues intertwine in the devolution arrangements, it would be absurd not to expect party-political considerations not to play a major part in how those decisions are made.

Legislation at Stage 3

Stage 3 resembles the Richard Commission recommendation that devolution to Wales follow the legislative model as applied to Scotland, by conferring what the UK Government calls 'primary legislative powers'.³⁵ It does not exactly follow the Richard recommendation; there is a significant difference between the approach of the Scotland Act 1998 and that taken in the white paper and the 2006 Act, as the National Assembly gets the power to legislate only for certain defined functions, not (as in Scotland) for all matters except those reserved to the UK Parliament.³⁶ This is largely due to the difficulties of devolving powers for a wide range of substantive matters, while retaining a single legal system and jurisdiction for both England and Wales. Even at stage 3, the Assembly will remain closely tied to Westminster. Westminster expressly retains formal power to legislate for all matters concerning Wales (s. 107(5)). *Better Governance for Wales* noted that the transfer of legislative powers 'would not necessarily mean that Assembly would become the principal law maker for Wales'.³⁷ It envisages a continuing major role for Westminster even regarding devolved matters, through motions at Cardiff Bay permitting Westminster to legislate for them (often known as 'Sewel motions' in relation to Scotland, although the term 'legislative consent motions' has recently been adopted).³⁸

Certainly, Sewel motions have been widely used in Scotland. There were 39 motions for 38 Westminster bills in the Scottish Parliament's first session (1999-2003), while Holyrood passed 62

³⁴ Welsh Affairs Committee *Government White Paper: Better Governance for Wales* op cit, para. 136; Select Committee on the Constitution *Government of Wales Bill: Report with Evidence*, op cit, para. 36; House of Lords Select Committee on Delegated Powers and Regulatory Reform, *Seventeenth Report* op cit, para. 37.

³⁵ There remains a legal issue as to whether legislation made

Acts during that time.³⁹ There were 31 further motions between June 2003 and November 2006, and 42 Holyrood Acts, although a comparison over three and a half years rather than a four-year Parliamentary session is inexact, given the nature of the legislative process at Holyrood. It is wrong to pay too much attention to these motions as such, as they are only one of a number of techniques used to deal with the existence of different parliaments with different priorities and procedures, and different governments. In other cases, powers have been transferred to the Scottish Parliament to enable it to act (usually by secondary legislation made under the Scotland Act), or Westminster legislation has been framed so as to allow Scotland to act in its own way at a different time. What the number of legislative consent motions tells us is that the issue of which

Life beyond legislation

This paper has so far concentrated on issues arising from legislation, and related and largely bureaucratic processes. So far, it has said nothing about the broader framework of devolution or of intergovernmental relations.

It is hard to see how these relations will change as a result of the 2006 Act. The key features of the present system – asymmetry, the entanglement of governments and their functions, and dominance by the Labour Party and the consensual climate that engenders – will not be affected by the Act. Asymmetry remains built in to the devolution arrangements, and will persist even after stage 3 is reached. That in turn leads to heavily bilateral relations, because matters that concern one devolved government do not concern the others, or concern them in different ways. The entanglement of governments means that much goes on behind the scenes to ensure that policy-making can proceed despite the many overlaps between devolved and UK functions. While the 2006 Act will change many detailed features of intergovernmental relations, it will not change this overall pattern. The consequences of this – informal intergovernmental relations, with relatively few meetings of ministers of any sort and minimal use of the Joint Ministerial Committee particularly in its ‘plenary’ form – will also be unchanged. The close entanglement which has been the foundation of Assembly-UK relations to date has depended on Labour dominance of government at both levels to work, and the Act appears to rely on this entanglement continuing at least for some time. In this respect, the Act reflects its origins in a carefully-crafted set of internal Labour Party compromises, which have taken that Labour dominance as a given. 4657312 I10o

governments in both Cardiff and London as well, as such a government in Wales will be dominated by Plaid Cymru and its generally left-wing positions.

Most important, nothing in the 2006 Act has touched on the most difficult of all intergovernmental issues: finance. In a Welsh context, finance will be contentious because the budget is the main way the Assembly can rein in the Assembly Government or shape its priorities. Disputes over the 2005 and 2006 budgets, with the opposition parties combining to defeat some of the Assembly Government's proposals (following Labour's minority), illustrate the point. They are also likely to be contentious because of the total amount of funding, and well-known problems with the Barnett formula, and in finding match-funding for the EU Convergence Fund monies that will replace Objective 1 from 2007.⁴⁰ Debates are already underway in Scotland about fiscal autonomy and what is (inaccurately) called 'fiscal federalism'.⁴¹

retained by the UK level (policing is the most notable example, and sometimes raised in private). This could be accomplished within the framework of the 2006 Act. Other changes, notably judicial devolution, could not and would need fresh Westminster legislation.⁴⁴ Apart from this, it will leave significant items of unfinished business on the table, which will need to be tackled sooner or later. One is the question of the size of the National Assembly and the number of AMs. Keeping the number at 60 (and not even providing a mechanism for increasing it to 80, the number many regard as necessary for it to function properly) simply means that size will remain an issue. Another is the role of the Secretary of State, and his continuing direct involvement in the Assembly. Such involvement is understandable while the Assembly remains tied to, and dependent upon, the UK Government and Parliament. If achieving 'primary legislative powers' were genuinely to mark an end to this transitional phase, that role should develop into the much more indirect one the Secretary of State for Scotland has.

The 2006 Act will change how Wales relates to the United Kingdom in a broad sense, and how day-to-day interactions work in a narrower one. The subject-matter of those relations will change somewhat, but not as much as some might expect. The framework of relations may change, but the substance of those relations and the overall structure in which they sit will remain the same. At most, it will be a case of old wine in new bottles. In many respects, however, even the bottles will be very similar to ones with which we are already familiar.

⁴⁴ See T. Jones and J. Williams 'Wales as a Jurisdiction' [2004] *Public Law* pp. 78-101.