

New development: The evolution of Welsh devolution

Sir Jon Shortridge

This article traces the evolution of the current Welsh devolution settlement from its beginnings at the time of the 1997 general election through to the present day. It provides a context for the growing debate about whether Wales is now ready for a settlement which provides full law-making powers on the Scottish model.

Devolution was one of the Labour party's major manifesto commitments in 1997. Their key commitment was to Scottish devolution, but there was a recognition that something had to be offered to Wales (and Northern Ireland) as well. The view at the time—which was certainly correct—was that Wales was simply not ready for full-blooded devolution on the Scottish lines with a parliament and primary legislative powers. So the favoured concept which emerged was one of an Assembly providing 'administrative devolution'. But this took Labour into largely uncharted constitutional waters. Their model was not based on successful arrangements elsewhere. Insofar as it was based on anything it seemed to be on local government, which administers services devolved from a combination of parliament and government.

The Welsh Office was not able to undertake any preparatory work until the general election was called. Once this happened, I was able to set up a small team of officials, which immersed itself in such details of Labour's thinking as were available. In order fully to understand the issues, we drafted a white paper during the election period which we presented to Ron Davies when he was appointed secretary of state for Wales on 7 May 1997. Davies was a strong advocate of devolution. His ideas were radical and strongly egalitarian. On his appointment he set up a programme board, which he chaired, to develop the ideas and policies in more detail. The redrafted white paper that emerged from this—*A Voice for Wales*—was published in mid July, some 10 weeks after Labour came to power. Among other things, this provided the route map for the establishment of the Assembly in May 1999 and for it to take over the responsibilities of the Welsh Office in July 1999.

The Assembly's design

As originally constituted, the Assembly was a corporate body combining the roles and responsibilities of a legislature with those of an

executive. It had the power to make regulations, but not to create primary legislation. The founding legislation—the Government of Wales Act 1998—simply took a snapshot of the Welsh Office's powers at the point of devolution and transferred them to the Assembly. This meant that the powers had some jagged edges—the Welsh Office had opportunistically accreted powers to itself over the years, and there was thus no overarching conceptual framework. But it also meant that the powers the Assembly received were largely uncontroversial because there was, for the most part, no need to seek further transfers from Whitehall departments. The main exceptions to this were where powers overlapped the border with England, for example in the case of river basins.

The net effect of all this was that the Assembly could make its own secondary legislation within the framework of the primary legislation that it had inherited from the Welsh Office, and oversee the administration of services in Wales in the following areas: health; social care; education and training; economic development and transport; housing and community services; local government, planning and the environment; arts, culture and the Welsh language. It also had the freedom to allocate its budget of £7 billion (now £15 billion)—which it received as a block grant determined by the infamous Barnett formula from government.

Apart from being something of a constitutional novelty itself, Ron Davies also built into the design of the Assembly some novelties of his own. In particular, the governing legislation imposed some very important statutory duties on it—to have regard to equality of opportunity in everything it did, to work in partnership with local government and the voluntary sector, and to take full account of sustainability in all its actions. From the beginning, the Assembly was 'technologically-enabled'—with all members receiving their papers electronically and having screens at their seats in the chamber which they

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could use to send messages and to receive briefings. The Assembly was designed for the whole of Wales, not as an institution which would maintain a monopoly of power for the Labour party. The electoral system—under which 40 members were directly elected and the remaining 20 were allocated by a regional list system—was devised so that majority governments would be the exception not the rule. And a system of subject—not select—committees was created. These were party balanced and matched ministerial portfolios. As originally envisaged these committees, not the Assembly cabinet, were to become the policy-making powerhouse—devising policies which reflected the needs and wishes of Wales as a whole, not just ones perceived through the lens of the governing party or coalition.

Flaws in the design

It quickly became apparent that the original Assembly was not fully fit for purpose—it had been designed in a hurry on the basis of a political specification which had not been fully thought through. Unlike Scotland, the settlement had not emerged from the deliberations of a cross-party and cross-society constitutional convention which gave it an immediate legitimacy. Politicians saw the central flaw in its design as the mixing together of the legislature with the executive. The senior Assembly members—those who had previously been MPs—hated it, and as a result the radical thinking that underlay the corporate body model—that the elected representatives of Wales from all parties should find a way of working together to deliver outcomes that were in the best interests of Wales as a whole—was never given a fair trial. It is interesting that the UK's new local government model, which emphasises the scrutiny role of the opposition parties and the backbenchers creates similar tensions, but is being made to work reasonably effectively.

It did not take long for the Assembly to realize that the primary legislative framework within which it had to operate did not permit it to make the kind of innovations required to meet the particular needs of Wales. It is not much help having a big budget if you are not empowered to spend it in what you consider to be the best interests of Wales. To get the legislative changes it required, Wales had to secure a place for one of its bills in the UK government programme. At most, Westminster was prepared to give it one bill per session. Compare this with the freedom that the Scottish Parliament and the Northern Ireland Assembly had to legislate pretty much as they wished in their areas of devolved

competence, and you can see why resentment and frustration built up in Wales.

The obvious solution was for the Assembly to be able to make legislation itself, on the Scottish model. But this in turn meant that the corporate body model simply would not do. A serious legislature with serious primary legislative powers needs to operate on a conventional parliamentary model with a clear separation of powers rather than with the cosy consensuality implied by the original corporate body.

Towards a solution

These tensions and pressures meant that, in the early years, the Assembly was not always a comfortable place to be—especially if you were a chief executive with statutory responsibility for both the legislative and the executive arms of the Assembly when certain key members were seeking to assert that these two arms must be kept totally separate. It was not comfortable for some of the key politicians either. Alun Michael, the first 'first secretary' was unceremoniously removed from office (in 2000) in what was in effect a political coup. And the presiding officer, Dafydd Elis Thomas, who was seen by some as a malign influence seeking to exercise inappropriate power and influence, became the victim of some very nasty personal attacks. But, slowly, a *modus vivendi* emerged based mainly on the mutual trust that existed between the new first minister (as he preferred to be called) Rhodri Morgan and the presiding officer.

Central to this was the establishment in 2002 of the concept (it had no statutory force or meaning at the time) of the Welsh Assembly Government (WAG). This differentiation between the government and the Assembly—the executive and the legislature—meant that the Assembly could increasingly operate in accordance with parliamentary conventions, bringing the government, not (perversely) itself, to account. This simplified the relationship with the secretary of state for Wales. Establishing the concept of the WAG helped to legitimize the reality which was that the secretary of state's main relationship and dialogue was with the first minister and not with the Assembly at large.

Another key change was in the nature and composition of what were originally called 'subject committees'. In time, they became much more like conventional select committees. Ministers ceased to be members and, unlike parliament, the committees themselves became cross-cutting and so did not match particular ministerial portfolios—which meant that several ministers could be, and were, accountable to individual committees.

A qualified success

Despite its difficult birth, the Assembly in many ways has been a triumph—not least because it has been able largely to surmount the problems caused by its original design and deliver some real and important benefits for Wales. From my perspective its most important achievements are as follows.

It has ensured that the Welsh budget is much more effectively spent than it was in the past. This is because the final budget is the outcome of a process that involves all 60 elected members and all the Welsh political parties. It thus reflects the needs of Wales much better than it ever could under the old system where budget outcomes were very largely the result of a dialogue between the secretary of state, two junior ministers and their officials. This is a huge improvement, and one which more than justifies the constitutional change that Welsh devolution represents.

The quality of political and administrative decision-making is much better too. This is because the decision-makers, both political and official, are subject to much greater—and better—scrutiny than was ever possible in the past. And the proximity and accessibility of the Assembly and its government to Wales mean that politicians are able to hear informed views and advice from a wide variety of people and interest groups. It is certainly not the case that civil servants are the monopoly providers of advice to ministers.

The Assembly government has secured for itself a reputation for good quality administration and financial management. I was very clear from the outset that, given the very narrow majority in favour of devolution, the fledgling Assembly might well not have survived the kind of scandals that have afflicted Whitehall in recent years. So I and my colleagues were determined that we should achieve the highest standards we could both for the Assembly and its government, and for the people of Wales. In the process we scored some notable successes. Our record for making subsidy payments to farmers is among the best in Europe. Major capital projects—such as the Assembly building itself—have been delivered largely on time and on budget. Legislation—both primary and secondary—has been well prepared. And there have been hardly any successful challenges of decisions in the courts.

In policy terms, successive Assembly governments have, within the constraints imposed by its lack of primary legislative powers, successfully embarked upon a series of innovative reforms. They have led the way in providing free access to services either for all or for particular groups—public transport, prescriptions, hospital

parking, swimming. Many of these initiatives are designed to deliver wider health benefits as the focus from the beginning has been to use the Assembly's powers to improve the health of the nation, not solely to tackle ill health more effectively. They have also taken their own distinctive line on education—looking to improve the overall educational experience. So the present government has largely abandoned the testing regime it inherited, introduced a Welsh baccalaureate, and most recently introduced a radical policy of learning through play up to the age of seven—the 'foundation phase'. In other areas, it has proved willing to confront difficult issues in a way that the UK government has avoided. Thus it has taken the unpopular decision to cull badgers in certain carefully defined circumstances. It is also developing innovative ways of working with local service providers to improve the quality and accessibility of local services.

Finally, although many of its first members were politically inexperienced, it has demonstrated that it has as an institution the political maturity to function effectively without a government which has the kind of overall majority which has become the norm in Westminster. Indeed, in the nearly 11 years of its existence it has only fairly briefly had one majority (Labour) government. For the rest of the time it has operated with three minority Labour governments, a Labour–Liberal coalition and, since July 2007, a Labour–Plaid coalition.

Where next?

The next stages in the evolution of devolution in Wales have been clearly set out in the Government of Wales Act 2006. This is another innovative and creative piece of legislation, which seeks to navigate a path to full devolution of powers for Wales on the lines of the Scottish settlement. The ultimate goal, for which the legislation makes provision, is a referendum on full legislative powers. All that is now required for this to happen is an affirmative resolution passed by a two-thirds majority in the Assembly and a simple majority in both Houses of Parliament. The working assumption has been that this referendum would be held in time for the new Assembly elected in 2011 to operate from the outset with full primary legislative powers within its areas of administrative competence. But both the governing parties—Labour and Plaid Cymru—recognize that it would put the cause of devolution in Wales back by a decade, or perhaps longer, if this referendum were to prove unsuccessful. This is why a Convention,

chaired by Emyr Jones Parry, was established in 2008 to test public opinion and determine whether Wales was ready for this change. This Convention published its report in November 2009. It argued that an early referendum could be won, but that this outcome could not be guaranteed—thereby underlining the political risks and choices that remain.

The 2006 Act recognized that, in advance of a referendum, something had to be done to provide the Assembly with better access to primary legislative powers. The solution it has come up with is to enable the Assembly to seek the agreement of the UK government to submit proposals to parliament that the Assembly be granted legislative competence in certain defined areas. These proposals take the form of legislative competence orders which, when passed by parliament, give the Assembly enduring primary legislative powers in the areas concerned. Under this approach the Assembly is enabled to build up primary legislative powers incrementally over time.

This is an ingenious interim solution, but one which is proving difficult to implement in practice. There are a number of stumbling blocks. The UK government does not always want to provide the Assembly with a 'blank cheque' to legislate in specific fields. It can also be nervous about allowing Wales to embark on courses of action with which it does not approve. And MPs (Welsh ones especially) similarly tend to argue that Parliament should not be able to grant such open-ended powers to the Assembly since this usurps its role. All this, of course, ignores the fact the parliament has already given a much more extensive blank cheque to Scotland and Northern Ireland, and that the powers themselves are to be exercised by the democratically-elected representatives of the Welsh people.

Partly as result of all this, the process for securing the competence orders is in some cases proving inordinately long. In my view, the procedure is itself flawed in that it gives a role to the UK government at all. The Assembly government has first to secure the UK government's agreement to its proposals before then engaging with the UK government in the long and tortuous negotiations with parliament that are often needed to secure the legislative competence the Assembly is seeking. It would be constitutionally much neater if the Assembly were to petition parliament direct for its powers. It would then be up to the UK government to decide whether it wanted to oppose the Assembly's request on the floor of the House.

Conclusion: whither Wales?

Welsh devolution has come a long way since the 1997 general election was called and the detailed work on designing the original National Assembly for Wales began. I am in no doubt that, in time, Wales will be granted full parliamentary powers on the Scottish model. Quite when that will be is open to question. The omens for securing these powers in time for them to be exercised by the third—2011—Assembly are not good. The Convention has exposed the risks, and it is by no means clear whether both Plaid and Labour will be prepared to proceed with a referendum until they can be more confident that they will secure a 'yes' vote.

And then there are developments in Westminster to think about. By June 2010 there may well be a Conservative—or Conservative-led—government there. Although it seems likely that this would support the necessary resolution in parliament that is needed before the referendum on full legislative powers can take place, it is less clear whether the vote would be held early enough for the referendum to be held in advance of the 2011 Assembly elections.

Whatever happens, the story of Welsh devolution has a few more chapters left in it yet. One of these will involve debate around whether the Assembly should be granted powers in new areas such as for the police and for building regulations. Another may well be headed 'the Barnett formula'—the debate about the future of the formula is hotting up mainly because it clearly provides Scotland with a disproportionate financial benefit.

I conclude with a plea. For all its recent successes Wales remains on most measures one of the poorest parts of the UK. The Barnett formula is designed to make the Assembly's expenditure per head converge with that of comparable English departments over time. This in itself represents a huge challenge. There is certainly no case for further reducing the Assembly's present budget in relation to those comparable budgets in England at the present time, and it would be a travesty if that were to happen solely as a result of a change in the way Scotland is funded.

It can be argued that one of the reasons Wales is so relatively poor is that it had been governed from England for too long. Eleven years into devolution, Wales seems to be weathering the present recession better than those of the past. But it still needs to receive greater public expenditure support than England. Continued funding through the Barnett formula is the least it deserves in present circumstances. ■