

QUASI-LEGISLATIVE DEVOLUTION. POWERS AND PRINCIPLES

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“If executive devolution is to prove effective, two fundamental problems will need to be resolved. First, primary legislation for Wales will have to be drawn up more loosely than primary legislation for England, so as to give scope to the Assembly. . . . Second, principles must be devised to regulate the dividing line between primary and secondary legislation.”

Vernon Bogdanor²

Designed as a contribution to the Welsh constitutional development, the purpose of this study is threefold. First, it is intended to provide a basic conceptual framework, so far sadly lacking in the general discussion, for evaluation of the design and continuing evolution of the current scheme of executive devolution. Secondly, the aim is to elaborate the scope for and scale of development of legislative practice and procedure inside the parameters of the Government of Wales Act 1998 (GWA). The third and related aim is to construct a set of principles relating to the policy for allocating powers to the Assembly, in keeping with the spirit of the devolution legislation. As the opening quotation suggests, the fact that such principles have not so far been articulated in a public or transparent way is one of the most striking features of the Welsh devolutionary development. Evidently, it has been too sensitive a matter.

The study is divided into four main sections. Part I focuses on certain key features of the model of executive devolution in general and of the Welsh scheme in particular. The chief theme is the legal and administrative complexity involved in the constitutional development and the associated difficulties. Part II presents a novel ideal-type for the purpose of legal and constitutional analysis, what I have called 'quasi-legislative devolution'. Used in tandem with a competing concept, 'strict executive devolution', it serves to illuminate the considerable flexibility of, or strong organic element in, the basic statutory design. The space for and fact of, as well as the limitations on, a continuing evolutionary development under the auspices of the GWA is the main theme of this section. In Part III the link with legislative practice and procedure is elaborated, both in terms of primary or Westminster legislation bearing on Assembly functions and the exercise by the Assembly of its subordinate law making powers. The vexed issue of Assembly input into the central government lawmaking machine is seen at the core of the current constitutional debate in Wales. Part IV presents a set of what I have called 'devolution principles'. As well as encouraging consistency and transparency in the law-making process, the principles are

¹ I am grateful to participants at the Lord Morris seminar on 'The Subordinate Law Making Powers of the National Assembly for Wales', held in Cardiff in January 2001, for comments on a draft of the study. The usual disclaimer applies.

² V. Bogdanor, *Devolution in the United Kingdom* (Oxford, 1999), pp. 259-260.

designed to underscore important constitutional and administrative concepts associated with the basic idea of devolution of power.

For the avoidance of doubt, the argument in this study is not one in favour of the model of executive devolution.³ The approach is one of constructive engagement with the devolutionary scheme under which the people of Wales are presently governed, in the certain knowledge that the search for improvements will also point up major shortcomings in that scheme.

I. EXECUTIVE DEVOLUTION: A MAP OF EMPOWERMENT

Welsh devolution is well known to have introduced into Britain a new and untested set of constitutional arrangements: a form of executive devolution that includes the transfer of various subordinate or secondary law-making powers. It contrasts with legislative devolution as in Scotland, the more powerful and straightforward allocation of primary legislative functions to the territory. The nomenclature provides the clue: an ‘Assembly’ in Wales, a Scottish ‘Parliament’.

In practice, as a method of allocating law-making functions, executive devolution involves from the standpoint of the lawyer four main elements. The first relates to the vertical division of primary law-making powers that is used both in legislative devolution and federal systems. The UK Government, in devolving powers to Scotland, Wales and Northern Ireland, has naturally retained core elements of the functions of the state: not least defence and foreign affairs, general taxation and immigration and nationality laws. In the event, reference is made in Schedule 2 of the GWA to certain ‘fields’ or subject-areas for the transfer of functions. They include economic development and transport; agriculture and fisheries; health, social, and housing policy; local government and education; and planning and the environment.⁴ Beyond this range of functions in public law are many parts that Assembly laws cannot and will not reach.

The second main element is the horizontal division between primary and secondary law making powers that is the hallmark of executive devolution. It is the question not of whether but of how much legislative power relating to a function should be transferred. In the event, a key feature of the implementation of the Welsh scheme is the specific enumeration of the powers devolved statute by statute. There is in other words no general secondary legislative competence for the Assembly in fields of transferred functions. Also relevant is the way in which the dividing line may be blurred by for example the use of so-called Henry VIII clauses, statutory provisions that allow primary legislation to be repealed or amended by means of

³ Or, rather, against a scheme of legislative devolution, which elsewhere I advocate; R. Rawlings, ‘The New Model Wales’ (1998) 25 *Journal of Law and Society* 461; id, *Delineating Wales: Legal and Constitutional Aspects of National Devolution* (University of Wales Press, forthcoming).

⁴ See general discussion, K. Patchett, ‘The New Welsh Constitution: The Government of Wales Act 1998’, in J. Barry Jones and D. Balsom (eds.), *The Road to the National Assembly for Wales* (University of Wales Press, 2000).

secondary legislation. The GWA so empowered the National Assembly for certain limited purposes.⁵

The issue arises of overlapping jurisdiction, which is so familiar in constitutional systems of divided competence. Joint and concurrent powers with central government, as well as consultation and consent requirements, are as the third element a significant feature of the new devolutionary architecture in Wales. Not surprisingly, so-called 'cross-border' matters involving England and Wales furnish various examples.⁶ But easily the most important in terms of the legal and constitutional development is the supervisory power of central government in ensuring the implementation of European Community legal obligations. It is a necessary consequence of the legal and political responsibility of the UK Government in the role of Member State of the European Union.

The following diagram represents this part of the story.

⁵ See GWA, sections 27-28 (reform of Welsh health authorities and other public bodies).

⁶ There are also many examples in the agricultural and industrial fields.

Executive devolution, however, is a moving target. The method implies an ongoing allocation of powers as new statutes come on stream: the fourth element. The Assembly has in this way been a recipient of functions virtually from the moment of its birth. The element of flexibility is further developed in the GWA.⁷ The Assembly was first empowered by means of statutory instrument, in the form of a Transfer of Functions Order.⁸ As the Government had promised in the devolution White Paper,⁹ this operated to transfer nearly all of the statutory functions of central government formerly exercised under the auspices of the Secretary of State for Wales. The power exists to make additional orders, in effect transferring functions exercised by other Ministers in relation to Wales. Put simply, while the GWA makes reference to the transfer of functions in certain fields, it does not so restrict the process that is executive devolution.¹⁰

Legal complexity: political and administrative difficulties

To develop the theme, the diagram both illustrates the great complexity that is associated with the scheme of executive devolution and is deceptively simple. Almost the first thing one learns when studying the scheme is that the dividing line between primary and secondary legislation for the purposes of the Assembly is effectively a zigzag. For reasons of speed and avoidance of conflict with Whitehall Departments, it made sense – politically and administratively speaking – to base the initial Transfer Order on the delegated powers that over the years the Welsh Office had come to exercise. But as Rachel Lomax, the then Permanent Secretary pointed out:¹¹

“The Secretary of State's present powers have accumulated piecemeal over a long period of time, and the distinction between matters that are dealt with in primary and secondary legislation has reflected pragmatic considerations as much as principle.”

In turn, the basic Transfer Order is an extraordinary document. Some 350 Acts of Parliament have had to be listed, containing functions transferred to the Assembly. References to excepted and partially excepted sections abound, as also powers exercised concurrently or jointly with central government. Such is the painful detail of definition and sub-definition that the technical guide to the Order runs to over 500 pages.¹² It was clearly a most laborious task, involving a series of drafts and consultation exercises, and taking almost a year to complete.

⁷ See especially GWA, sections 21-22.

⁸ National Assembly for Wales (Transfer of Functions) Order, No. 672, 1999.

⁹ *A Voice for Wales*, Cm. 3718 (1997).

¹⁰ Those wanting a comprehensive list of the functions of the Assembly are referred to Welsh Legislation Online: www.wales-legislation.org.uk

¹¹ Quoted in V. Bogdanor, *op cit* p 258; and see for general discussion, D. Lambert, ‘The Government of Wales Act – An Act to be Ministered in Wales in Like Form as it is this Realm?’ 30 *Cambrian Law Review* (1999) 60.

¹² Welsh Office Devolution Unit, Technical Guide to the Transfer of Functions Order (1998); and for the so-called popular version, *id*, Making the Difference in Wales. A Guide to the Powers of the National Assembly for Wales (1998).

The political and policy processes in Wales are directly affected in a number of ways. First, the evident patchwork of devolved functions serves to fuel demands for additional powers from Westminster. This has been a constant refrain among Assembly Members.¹³ Expressed slightly differently, the evident complexity operates to underscore the unstable character of the devolutionary scheme.

Secondly, there is a basic problem of the Assembly achieving coherent policies when faced with rule making powers of uneven width and depth. The difficulty is apt to surface in so called ‘cross-cutting issues’, where especially by reason of the *ad hoc* historical development a matching division of primary and secondary legislation cannot be taken for granted. The scheme is thus not well suited to that most fashionable of official pursuits: ‘joined up government’.

The design – and in particular the lack of governing principles – is also a recipe for inefficiency and intergovernmental tensions or conflict. It cannot be supposed that the transfer of functions to the Assembly has been a purely technical matter. Here it suffices to observe that some Departments have been more receptive to the current Welsh political metamorphosis than others.¹⁴

Further, the principle of intelligibility, which is considered so important in constitutional documents, is offended. Who other than a lawyer¹⁵ or official could give any meaningful guidance on the legislative competence of the Assembly? This feature is the more striking, because of the great stress placed in the devolutionary design on transparency and bringing government closer to the people.¹⁶ Intelligibility of functions or powers is a *sine qua non* of the practice of inclusiveness.

We begin to see why the demand for a system of principles will not go away. That is, at least for so long as the scheme of executive devolution endures.

II. INTRODUCING QUASI-LEGISLATIVE DEVOLUTION

Properly to understand the devolutionary process in Wales, it is necessary to look beyond the standard dichotomy with legislative devolution and to consider possible competing models of executive devolution. To this end, assuming a Welsh style system of specific empowerment, and focusing on the constitutional and legal aspects, let us consider the minimal and maximal scenarios. The concept of quasi-legislative devolution serves here as the counterpoint to a strict or narrow view of what UK Ministers have been pleased to call the ‘devolution settlement’ for Wales.

Competing concepts: strict executive devolution and quasi legislative devolution

¹³ See further below, in the context of subsequent primary legislation.

¹⁴ The theme is elaborated in R. Rawlings, *Delineating Wales*, *op cit*. And see below, Part III.

¹⁵ See on the exceptional legal dimension to the Welsh devolutionary scheme, R. Rawlings, ‘Living With The Lawyers’ (1999) (3) *Journal of the Institute of Welsh Affairs* 32; and W. Roddick, *Crossing the Road* (Law Society in Wales, 1999).

¹⁶ See for discussion, R. Rawlings, ‘The New Model Wales’, *op. cit*.

Aspect	Strict executive devolution	Quasi legislative devolution
A. Internal architecture		
1. Government structure	Committee or classical local government model	Cabinet model
2. Assembly workings	Corporate form (inclusiveness)	Parliamentary style (oppositional)
B. Secondary legislative powers		
1. Range of transfer of functions	Narrow	Broad
2. Form of delegation	Limited, tight definitions	Framework legislation; Henry VIII clauses
C. Role in primary legislative process	Model of influence	Privileged access
D. Taxing power	None	Tax-varying function

This conceptual framework is helpful in a number of ways. As indicated, it serves to highlight both the room for manoeuvre or spectrum of possible approaches within, and the overarching constraints of, the legislative scheme of the GWA. For example a most important feature is the absence of an Assembly power of taxation. Underwriting the devolutionary process by so providing a measure of fiscal freedom and accountability would obviously require primary legislation. For contrast, reference can be made to the internal re-balancing of roles in terms of the cabinet and committee models of administration that is permissible via a system of broad delegation of functions.¹⁷

Similarly, a conceptual framework is established with which to test the strength and trajectory of the constitutional development in Wales. For according to a well-known saying, devolution is a process not an event.¹⁸ A good illustration involves the (legal) concept of the Assembly as a corporate body, which cuts across constitutional demands for the separation of powers.¹⁹ Entirely predictably, one issue that has arisen is the nature of the relationship between, on the one hand, the Presiding Officer of the Assembly and his staff, and, on the other, the devolved administration or Welsh Government as represented by the Cabinet. In the event, one of the most striking features of what has been an ongoing constitutional metamorphosis of the Assembly post-devolution is the increased separation or independence of the Office of the Presiding Officer (OPO). In turn, the rise of OPO is correctly seen as part of a more general move towards a parliamentary style or form for the Assembly.²⁰ The sudden appearance, in the context of the

¹⁷ GWA, sections 52, 63.

¹⁸ R. Davies, *Devolution: A Process not an Event* (Institute of Welsh Affairs, 1999).

¹⁹ GWA, section 1.

²⁰ See for example J. Osmond, 'A Constitutional Convention by Other Means: The First Year of the National Assembly for Wales', in R. Hazell (ed.), *The State and the Nations* (Imprint Academic, 2000).

coalition or ‘partnership government’ that came into being in October 2000, of the titles ‘First Minister’ and ‘Leader of the Opposition’, provides a different kind of marker here. Discussion of the principles to govern the allocation of powers cannot sensibly take place divorced from this broader constitutional and political context.

Certain key factors that go to the substance and workability of a scheme of executive devolution are underscored. The first one is easy and effective access to the primary lawgiver. In terms of the formal parliamentary process, arrangements may on the one hand amount to little more than the standard indirect techniques for exercising influence, and, on the other, involve the concept of privileged access for the devolved administration. This is not to overlook the broader issue of intergovernmental relations, and that access into the central government (lawmaking) machine which is so necessary for the efficient and effective operation of devolutionary arrangements, and of executive devolution in particular.²¹

The second factor, identified by Bogdanor in the opening quotation, concerns the basic way in which the division of primary and secondary law-making powers is approached. It could (continue to) proceed *ad hoc* in a typical manifestation of the British tradition of constitutional pragmatism. Or, in recognition of the new devolutionary paradigm, it may involve a serious attempt at developing a set of constitutional principles to guide the division - the second main purpose of this study.

The style or form of the delegation of secondary legislative powers is a third and related factor. To explicate, under a strict regime characterised by limited legal autonomy, the devolved administration finds itself curbed by tight restrictions on or definitions of secondary legislative powers; as also perhaps by an increased recourse to primary legislation. In contrast, techniques of legislative drafting may be used which boost the discretionary power of the devolved administration in secondary law making.²² Framework legislation, whereby myriad rule-making powers are exercised inside the broad parameters of legislative policy, is a potent method. All the more so, if it comes with a liberal sprinkling of Henry VIII clauses. At the extreme end of the spectrum, it becomes necessary to think in terms of quasi-legislative devolution. This would involve a devolved administration in making the kind of policy rules commonly expressed in, but without the proper status of, primary legislation.

The GWA once again provides a flexible framework here, so allowing for considerable movement in terms of drafting practices and techniques inside the formal legal parameters of the so-called devolution settlement. Arrangements akin to the classic Henry VIII clause, whereby the Assembly

²¹ See for general discussion, R. Rawlings, ‘Concordats and the Constitution’ (2000) 116 *Law Quarterly Review* 257; also R. Hazell, ‘Intergovernmental Relations: Whitehall Rules OK?’ in R. Hazell (ed.), *The State and the Nations* (Imprint Academic, 2000).

²² See for an early discussion in the context of the Assembly, P. Silk, ‘The Assembly as a Legislature’ in J. Osmond (ed.), *The National Assembly Agenda* (Institute of Welsh Affairs, 1998).

may apply with modifications the provisions of primary legislation, or disapply those provisions and make separate provisions for Wales, could for example be more widely used. Again, it would be possible under the auspices of the GWA to adopt an approach that is standard in other constitutional systems of divided competence, the devolution of functions by reference to subject-area.²³

One could envisage the allocation of law-making functions to the Assembly developing over time as an area of constitutional convention, effectively the sub-text of this study. Changing political hues in Wales and at Westminster, however, may produce substantially different results. The potential in terms of the delegation of functions for a pendulum effect flows directly from the ongoing allocation of powers that is part of executive devolution. For the purpose of this discussion, some recent comments by the Assembly First Minister could hardly be timelier:²⁴

“What we often find difficult is individual parties or individuals in the Assembly taking an *a la carte* approach... If they want an issue debated in the Assembly because they think that they might have a better chance of having a different outcome here than if it is debated in Westminster, they are all in favour of greater powers for the Assembly. If they think that there is a better chance of getting their way in Westminster they do not want the power devolved to the Assembly. You must have a set of principles. . . You must be consistent in your principles and in your attitude to devolution, and not pick and choose just because it suits you on a particular issue.”

“In theory, a future government of another colour... could cheat us of our rights by putting almost nothing down for secondary legislation. There is nothing in the British constitution which states what proportion of a Bill confers powers by secondary legislation and when it is all done in the primary legislative Act. One could leave almost nothing to the discretion of the Assembly. There is nothing that lays down any procedure that guarantees powers to the Assembly. It is not a problem provided there is a Labour Government.”

To anticipate the argument, the set of governing principles proposed in this study is in part designed for the situation of administrations of different political colours, or ‘cohabitation’ as the French like to call it. The people of Wales deserve better than a constitutional structure that is reliant on Labour Party hegemony.

III. OUTPUTS AND INPUTS

What then of the state of play? It should surprise no one to learn that the qualitative issue of the ongoing legislative treatment of the Assembly, the statutory outputs, and the logically prior matter of privileged access to the central government machine, the legislative inputs, have moved rapidly

²³ The approach for example of the Scotland Act 1998, predicated on the reservation of areas of competence to Westminster, bears no repetition here.

²⁴ *Official Record*, 12 December 2000.

centre-stage in the new Welsh polity. Such considerations being of the essence of the constitutional situation of Wales, it is only natural that different political actors should seek to maximise or minimise the extent of the difficulties. As Rhodri Morgan wryly observed of the period immediately prior to the Queen's Speech in December 2000:²⁵

“During the past few weeks I have answered 23 Assembly questions on what the Cabinet has been doing to influence the process and content of primary legislation. Each time, I have referred to the efforts of the Cabinet and officials to get the best deal in relation to primary legislation.”

Three major contributions convey the flavour. The Presiding Officer (and Plaid AM) Lord Elis Thomas has expressed considerable dissatisfaction, to the extent of raising the question, ‘National Assembly, a Year in Power?’ As indicated, the administrative history of the territorial department that was the Welsh Office casts a long shadow:²⁶

“The current basis of the Assembly's powers displays no constitutional logic, but was based entirely on the political processes of the gradual acquisition of powers within the Office of the Secretary of State for Wales. Devolving “secondary legislation”, as a category, makes no constitutional sense, because it is itself legislatively various.”

More recently, the ministerial architect of Welsh devolution (and backbench Labour AM) Ron Davies has contended that ‘if devolution for Wales was an accepted part of the mindset of Whitehall, it would show.’ ‘A common approach would inform all Departmental legislation and a common principle underpinning the Government's approach with the evidence. There isn't and that's worrying. . .’. Perhaps hopefully, Mr Davies believes that the centre understands:²⁷

“Westminster knows that the Assembly cannot deliver its full potential within the structure currently operating and that if it fails to be more expansive and responsive to the needs of the National Assembly, the calls for full powers over primary legislation will be irresistible.”

Labour's Business Secretary, Andrew Davies, has mounted a robust defence. The argument is typically one of general improvement in the light of early difficulties. This fits with the strong theme in the UK devolutionary development of experimentation and broad scope for institutional learning or adaptation.²⁸ In the Minister's words:²⁹

“Contrary to what some have said. . . we have an excellent track record in influencing primary legislation. . . However, we cannot take that for granted. The Cabinet will continue to

²⁵ *Official Record*, 19 December 2000.

²⁶ Lord Elis Thomas, ‘National Assembly, A Year in Power?’, lecture delivered to the Institute of Welsh Politics, Aberystwyth, 2000.

²⁷ R. Davies, ‘In Search of Attitude’ (Memorandum, December 2000).

²⁸ See for elaboration in the Welsh context, R. Rawlings, ‘The New Model Wales’, *op cit.*

²⁹ *Official Record*, 19 December 2000.

press for legislation that reflects the needs of Wales and respects the Assembly's role. . . ”

“The choice before us today is simple. We can carry on making a real and positive difference to primary legislation affecting Wales, or we can descend into making self-indulgent points to which no-one, least of all Parliament and the UK Government, will pay attention. . . ”

At the same time, however, such political controversy should not be allowed to obscure the important legal issues or lawyerly concerns that are raised in this context. By which is meant especially the techniques and pre-existing canons of, and the scope post-devolution for creativity in, legislative or parliamentary drafting. Together, that is, with the difficulties the practitioner may have in fully grasping the intricacies of what may now properly be called the emergent Administrative Law of Wales.³⁰ This in turn is apt to feed back into the constitutional debate. Or, as one might say, the ‘technical’ is ‘political’.

Administrative and political dialogue

The ongoing allocation of powers to the Assembly is essentially the product of an administrative and political dialogue or negotiation with central government departments, extending to the UK Cabinet Office and the new Wales Office. It is in other words a closed and elite form of constitution building, typically conducted far from the public gaze.³¹ Different but related, the approach reflects the strong sense of pragmatism in the devolutionary development. Insiders attest to the standard Whitehall mixture of give and take, to a heavy emphasis on personal dealings, and – perhaps more virulently than before – to turf wars. An official involved in producing the first Transfer of Functions Order gives a whiff of the flavour:³²

“If the. . . process illustrates anything about the way government works it is to do with quite how entrenched Ministers’ and Departments’ views can become in interpreting what would appear to be a fairly straightforward construction. . . and quite how many obstacles can be thrown in the way.”

Not that central government is a monolith, or that much in the exchanges is other than routine. At the same time, the current style of proceeding – very fluid and informal – shows a natural tendency towards the patchwork approach to the allocation of powers: more a matter of immediate responses, less the sense of constitutional vision. Expressed slightly differently, the conditions are ripe here for yet further legal complexity. A related feature is

³⁰ This is not to overlook the many interesting questions that arise concerning judicial review and so-called ‘devolution issues’. See generally on this aspect, Sir John Thomas, ‘The Legal Implications of Welsh Devolution’, in D. Miers (ed.), *Devolution in Wales: Public Law and the National Assembly* (Wales Public Law and Human Rights Association, 1999).

³¹ It should be noted that for the purpose of the Freedom of Information Act 2000 information is exempt information if its disclosure ‘would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration’ (section 28).

³² Quoted in R. Rawlings, *Delineating Wales*, *op cit*.

criticism on the floor of the Assembly of the lack of transparency, with Cabinet Members having to defend the case for confidentiality in the discussions about primary legislation with central government.³³

Devolution and evolution

The interplay of the twin elements of continuity and change lies at the heart of the UK devolutionary development. In the case of Wales, the pace of the evolutionary process has not slackened – quite the reverse. There is first a major role for, and emergent sense of, autochthonous constitutional development. Secondly, various elements of the process, some positive, others negative, reinforce the case for a set of organising principles for the devolution of powers. Let us look more closely.

Primary legislation: Turning first to the style and substance of the later primary legislation relating to Assembly functions, the UK legislative programme for 1999/2000 – the first full year that the Assembly was up and running – demonstrates several important traits. The volume of legislation dealing with the transfer of powers to the Assembly is increased. Whereas in the previous parliamentary session only 5 statutes had made provision for devolved functions, there were 14 such statutes in this session of Parliament. At the same time, there is an ever more bewildering array of provisions concerning, or references to, the Assembly, in part no doubt a reflection of the predilections of the individual Parliamentary or legislative draftsmen. Sometimes separate parts of an Act relate to Assembly functions, on other occasions the Assembly is given equivalence to a Secretary of State, and on other occasions again parallel powers are set out in particular sections. It is a case of complexity piled on complexity.³⁴

The wide variety of general approaches to devolution is a particularly striking feature. At one end of the spectrum may be placed the Transport Act 2000.³⁵ In most parts of the legislation the rule making powers will be exercised not by the Assembly in relation to Wales but by UK Government Ministers. Various and specific functions relating to roads and bus services in Wales are devolved to the Assembly, but almost nothing in relation to the railways. Whither an integrated transport policy or joined up government? At the other end of the spectrum are several statutes that demonstrate a major and genuine attempt to legislate distinctively for the needs of Wales, including by generous grants of secondary lawmaking powers. The Learning and Skills Act 2000 for example incorporates in separated parts of the statute provisions relating solely to Wales reforms for the post-16 education structure that had been proposed by the Assembly. Then there is the Care

³³ See *Official Record* 23 January 2001. The ministerial architect of the devolutionary scheme has added his voice to the calls for more openness: R. Davies, 'In Search of Attitude', *op cit*.

³⁴ See further, Lord Prys Davies, *The National Assembly: A Year of Laying the Foundations* (Law Society in Wales, 2000). This is not the place to rehearse detailed criticisms of specific provisions.

³⁵ See on the background, Welsh Affairs Committee, *The Transport Bill and its Impact on Wales*, HC 287 (1999-2000); and for the responses of the UK Government and the National Assembly, HC 497 (1999-2000).

Standards Act 2000, which in the compelling circumstances of a major scandal³⁶ established the Children's Commissioner for Wales.

The Local Government Act 2000 deserves a special mention. It has raised the delicate issue of the nature of the relationships or spheres of authority between the different tiers of government after devolution. In the event, in such areas as 'best value' policy and the internal restructuring or modernisation of local government, the DETR has retained key powers on an England and Wales basis, or under the traditional rubric of central-local government relations. So also, the legislation occasioned a dispute about the scope of Henry VIII powers for the Assembly, with the DETR insisting on a conservative approach. The affair is the more noteworthy, since for the first time the Assembly Cabinet broke cover in the official discussions, complaining publicly at the turn of events.³⁷

The attenuated programme that was the Queen's Speech in December 2000 demonstrates similar features. Five of the 16 Bills are of particular relevance to the Assembly's responsibilities, on subjects as diverse as health and social care, homes, and regulatory reform. The flagship measure here is the Children's Commissioner for Wales Bill, a positive outcome for the Assembly, which has prioritised the matter on an all-party basis, and a genuinely innovative piece of legislation. In terms of the ongoing constitutional development, the Bill stands for what the Assembly First Minister has said should become established practice: each year at least one Assembly sponsored Bill in the Westminster legislative programme.³⁸ More blurring, that is, of the practical distinction between legislative and executive devolution. At the same time, the Children's Commissioner Bill illustrates some basic limitations. As well as being a more restrictive measure than at least some of its advocates had envisaged,³⁹ the Bill has had to be fitted into the pre-existing statutory framework, with the constraints on legislative drafting that this implies. The specific or restricted form of Henry VIII clause that is adopted for Assembly purposes is also noteworthy in this respect.⁴⁰ Put simply, while this is 'go it alone' legislation, it is not 'do as you please'.

As well as the unceasing complexity, the new Bills amply convey the sense of different authorship. A point that has perhaps been underestimated in the design of the devolutionary scheme is the extent to which the UK legislative programme is driven by individual Departments. That there are for example different approaches to the changing of Assembly functions and laws through the exercise of new Ministerial order-making powers, centred on the requirement or otherwise of the consent of the Assembly, is a notable

³⁶ See *Lost in Care – The Report of the Tribunal of Inquiry into the abuse of children in care in the former county council areas of Gwynedd and Clwyd since 1974* (the Waterhouse Report), HC 201 (1999-2000).

³⁷ See *Assembly Record*, 4 July 2000.

³⁸ See *Official Record*, 21 November 2000. This is not to overlook the constraints imposed by a crowded legislative timetable at Westminster, or the difficulties implicit in a situation of political cohabitation. See further below.

³⁹ Most notably in terms of the focus on devolved functions; see for analysis, House of Commons Research Paper 01/05, *The Children's Commissioner for Wales Bill* (2001).

⁴⁰ See Children's Commissioner for Wales Bill, clauses 3-4.

feature.⁴¹ To this effect, the case for organising principles relating to the allocation of devolved powers grows stronger by the day.

The detailed explanatory memoranda that accompany Government Bills are also relevant. On the one hand, they serve to point up the awesome task that the skeletal Wales Office now faces in representing Welsh interests in the ongoing primary legislative process. As regards the Bills particularly affecting Wales, some but not all memoranda refer to input from the territorial department. On the other hand, the memorandum on the Special Educational Needs and Disability Bill shows best practice in this sphere.⁴² A section on the territorial coverage of powers is included, which elaborates the position in the various countries including that in relation to the Assembly. That this is not replicated elsewhere demonstrates once again the disjointed approach and the room for improvement in the practice and procedure of legislative drafting in the light of the devolutionary development.

Standing Orders: The elaboration of a tolerably efficient set of subordinate law making processes in the Assembly is an evolutionary development of the first importance, and one that is now underwritten by a codification of the relevant provisions in standing orders.⁴³ An internal process of streamlining and improved co-ordination has thus created space for meaningful debate in those cases displaying real scope for separate policy development or diversity in law.⁴⁴ In contrast, the report of the National Assembly Advisory Group,⁴⁵ on which much of the original procedure was based, showed a poor grasp of the realities of secondary legislation. There was insufficient provision for channelling the mass of dull and technical measures or for coping efficiently with the major driving force in the Assembly lawmaking process of Westminster and European requirements.

The fact that elaborate procedures are available for the use of generous grants of subordinate lawmaking powers remains an important strength of the Assembly legislative process.⁴⁶ Emblematic of the blurring of the distinction between legislative and executive devolution, these forms of democratic scrutiny incorporate some of the features of the primary legislative process in the UK Parliament.⁴⁷ So too, they were much

⁴¹ See for example Regulatory Reform Bill clause 1(4); Countryside and Rights of Way Act 2000 section 52(3); and Local Government Act 2000 section 5(4). And see below, Part IV.

⁴² See further, *Thirty-Seventh Report from the House of Lords Select Committee on Delegated Powers and Deregulation*, HL 130 (1999-2000); and for discussion, D. Lambert, 'A Voice for Wales: The National Assembly for Wales' (2001) 1 *Welsh Legal History Journal* (forthcoming).

⁴³ See Standing Orders 22-30, as approved by the Assembly in December 2000; and for general discussion, R. Rawlings, 'Scrutiny and Reform. Assembly Law Making and the Role of the Legislation Committee', in J. Barry Jones and J. Osmond (eds.), *Inclusive Government and Party Management* (Institute of Welsh Affairs, 2001).

⁴⁴ Especially through the introduction of the so-called standard accelerated procedure.

⁴⁵ National Assembly Advisory Group, *Recommendations* (1998).

⁴⁶ In the form of the so-called standard and extended procedures.

⁴⁷ See for discussion, Lord Elis Thomas, *op cit*.

trumpeted in the devolution White Paper as an advance on the oversight of secondary legislation typically practised at Westminster.⁴⁸

Once again, the pressures for and processes of change are ongoing: a state of perfection in Assembly legislative practice and procedure there is not! One looks forward to the development of a more innovative legislative programme under the auspices of the new coalition or 'partnership government',⁴⁹ and in particular to a more proactive role in terms of scrutiny and oversight for the Assembly's Legislation Committee.⁵⁰ For present purposes, the broad constitutional significance of the internal reform of lawmaking procedure should be emphasised. Allowing for better targeting of the Assembly's Rolls Royce machinery for democratic scrutiny, it reinforces the case for a more generous allocation of devolved functions.

Amendments have also been made to standing orders formalising a process of debate and approval of Assembly proposals for primary legislation.⁵¹ The new provisions effectively expand on the statutory duty of the Secretary of State for Wales to consult the Assembly each year about the UK Government's legislative programme.⁵² A parallel procedure has thus been created, whereby the Assembly Cabinet brings forward a set of proposals for primary legislation in the following session of the UK parliament: a kind of preliminary Welsh Queen's Speech.

The development brilliantly illustrates the special demands of the scheme of executive devolution, a need to ensure timely input by the Assembly at the different stages of the preparation of Government Bills, and for the Assembly Cabinet to deal proactively in these matters. Notably, a planning framework has also been put in place at official level, whereby the various Groups in the Assembly Administration are now expected to come forward with ideas for Wales-only pieces of primary legislation: an Assembly shopping-list. Of course there is no getting away here from the high dependency on administrative and political goodwill that is involved in the brand of devolution applied to Wales. In paradoxical fashion, such measures – a louder 'voice for Wales' – also serve to highlight this aspect.

Soft law: From the legal perspective, a major feature of the UK devolutionary development is the strong use of 'soft law', in the broad sense of rules of conduct which have limited or no legally binding force; and in particular, of inter-institutional agreements in the guise of concordats or protocols.⁵³ On the one hand, it demonstrates the pressing need to maintain effective liaison

⁴⁸ *A Voice for Wales*, Cm.3718, paragraph 4.23.

⁴⁹ It is a major element of the first Annual Government Business Programme; see *Official Record* 21 November 2000.

⁵⁰ See for general discussion, R. Rawlings, 'Scrutiny and Reform', *op cit.*

⁵¹ See SO 31.

⁵² GWA, section 31; and see for general discussion, K. Patchett, 'Dealing with Primary Legislation', in J. Osmond (ed.), *The National Assembly Agenda* (Institute of Welsh Affairs, 1998).

⁵³ See generally, R. Rawlings, 'Concordats of the Constitution' *op cit.* The Assembly Cabinet will agree a concordat, whereas a protocol may involve the Assembly *qua* Assembly.

arrangements between the central and territorial layers of government, not least by reason of the increased complexity and reach of policy problems that is such a feature of contemporary public administration. On the other hand, it reflects the long silences in the devolution legislation concerning the structures and processes of intergovernmental relations, the official preference being for facilitative framework structures and the flexibility of soft law techniques. 'Concordatry' in other words is part of the 'glue' of the reinvented Union State.

In practice, the recourse to and reach of individual concordats will vary tremendously. It is not surprising to learn of the Welsh arrangements being slow to emerge, given both the intricacies of the devolutionary scheme and the benign political conditions that have facilitated the fluid and informal processes of dialogue between administrations. At the same time, concordatry has special resonance in the case of Wales. Simply put, the basic concept of 'no surprises' takes on a whole new meaning in the constitutional situation of horizontal division of lawmaking powers. The relevant instruments deal at considerable length with the procedures for Assembly inputs into the UK Government legislative programme, or in the terminology of this study with the gradual elaboration of arrangements for privileged access over and above the ordinary processes of interest representation.

The Concordat between the Assembly Cabinet and the Wales Office was published in January 2001.⁵⁴ Perhaps it is reassuring to know that 'both parties agree that good working relationships between them are vital to the public interest and to the effective governance of Wales'. They 'are committed to working together wherever it is appropriate, and to doing so through the agreed processes set out in this concordat'. But further, and specifically by reason of the model of executive devolution, 'it is essential that the Assembly Cabinet is informed of any proposals for new primary or secondary legislation at the earliest possible date'. Where appropriate, the Wales Office will facilitate the consultation 'and ensure that the Assembly's views are fully considered by the UK Government'. On the one hand, the Concordat builds on the amendments to Assembly standing orders: the First Minister undertakes to communicate to the Secretary of State the terms of any resolution of the Assembly requesting the UK Government to make or amend primary legislation. On the other hand, certain habits die hard. 'Parliamentary Counsel is unwilling to accept instructions from lawyers of the Office of the Counsel General of the Assembly'; which translated into practice means that skeleton Bill teams will have to be seconded to the Wales Office for the purpose of Wales only legislation. There is also much stress on the importance of maintaining confidentiality in the new modalities of intergovernmental relations: a general principle of the system of concordats.⁵⁵

⁵⁴ The full text of the Concordat is available on the Assembly web site.

⁵⁵ Memorandum of Understanding and supplementary agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales, and the Northern Ireland Executive Committee, Cm. 4806 (2000), paragraph 11.

Although debated and accepted by the full Assembly in February 2000,⁵⁶ the Protocol on Assembly Proposals for Primary Legislation had still not been signed off by the Secretary of State at the time of writing. It goes however to the heart of the scheme of executive devolution. On the one side, the Assembly agrees to co-ordinate proposals for primary legislation with the UK Government's internal consideration of its legislative programme, especially in the timing. On the other side, there are commitments by the Secretary of State to consider such proposals fully; to convey them to ministerial colleagues as appropriate; and – most important – to bring the proposals to the attention of the Legislative Programme Committee (LP) of the UK Cabinet. At the same time – continuity and change – the new modalities are made subject to old constitutional constraints. 'The content of the Queen's Speech is necessarily confidential, and can in no circumstances be made known to the Assembly. . . before it is delivered.' 'The above procedures are thus without prejudice to the UK Government's ultimate right to determine the final content of its legislative programme for each Parliamentary session without informing the Assembly'. At the more practical level, 'Both parties recognise that pressure for Parliamentary time, and for space in the UK Government's legislative programme, is intense'. So there can be said to be no guarantees, express or implied, or in lawyer's parlance no legitimate expectation.

A third instrument, a so-called devolution guidance note, is of a different order, being an internal UK Government communication issued by the Cabinet Office. Entitled 'Post Devolution Primary Legislation affecting Wales', it was finalised in February 2001, drafts of the document having done the official rounds for over a year.⁵⁷ The purpose of the guidance is 'to facilitate the efficient conduct by the UK Government of its legislative business.' 'Disagreements are an impediment to that and it is in the Government's interests that potential disagreements are identified as early as possible through consultation'. Ensuring that by the time proposals to introduce legislation reach the Legislative Programme Committee 'all devolution-related issues. . . have been addressed and so far as possible resolved' is seen as the essential requirement. Coupled, that is, with the recurring theme of confidentiality in the post-devolutionary system of government. 'Where the possibility of particular legislation has not been publicly announced, information going to the Assembly Cabinet should be passed in confidence.' It will be 'a matter for agreement whether, and to what extent, confidentiality must constrain wider consultation by the Assembly Cabinet and in no circumstances will the Assembly Cabinet circulate or allude to Bill material without the consent of the lead Department'. Such agreement, if reached, 'may depend on the duty of confidentiality extending to other bodies consulted by the Assembly Cabinet'.

In view of the track record of different approaches to legislative provisions concerning the Assembly, special requirements to explain to the Legislative Programme Committee those proposals involving distinctive Welsh provisions, or changes to the existing functions of the Assembly, suggest an

⁵⁶ See *Official Record*, 2 February 2000.

⁵⁷ It is available on the UK Cabinet Office web site, under the reference DGN 9.

additional potential. Exceptions to what is accepted to be the general rule ‘that a new function created by the Bill will pass to the Assembly in cases where it already exercises similar functions within that subject area’ are also made subject to this procedure. In covering some largely technical points about referring to the Assembly in primary legislation, an annex to the document supplies some further nuggets that point the way forward. ‘Commencement provisions in a Bill. . . should normally apply on equal terms to England and Wales, and to Ministers and the Assembly’. ‘A Bill should not normally subject the actions of the Assembly to Ministerial consent or approval (or vice versa).’ ‘New public bodies which fall solely under the Assembly’s control should normally be subject to its general powers to reform public bodies in Wales’, that is including certain limited Henry VIII powers.⁵⁸

In summary, the instruments fulfil a function of procedural co-operation, being principally concerned with processes of communication and consultation. They demonstrate once again considerable administrative and political creativity in the face of the awkward character of the devolutionary scheme. At one and the same time, there is recognition of, but only a touching on, the function of substantive policy co-ordination, which – including the articulation of powers and responsibilities between levels of government – is a familiar feature of intergovernmental agreements in advanced constitutional systems of divided competence.⁵⁹ There is room here for a set of organising principles.

A corporate view: The formal response by the Assembly to the last Queen’s Speech is an event of some significance in the constitutional development. Passed unanimously, the resolution signals further internal changes, as well as expressing a demand for more generous allocation of powers in primary legislation. For convenience, it is set out in an annex to this study.

The resolution involves a modest attempt to render the Assembly Cabinet more accountable. Sundry consultation and reporting requirements make it clear that a wholly secretive or old-style Whitehall model of political and administrative negotiation is lacking in democratic legitimacy for the task of determining the ambit of devolved competencies. On constitutional as well as political grounds, the pressure for greater transparency in this sphere will not go away.

The innovative use of the Assembly’s subject committees, as a vehicle both for generating inputs into Westminster Bills, and for facilitating outputs in terms of implementation or the exercise by the Assembly of its new powers, is a welcome development. Such a process only became fully manageable once coalition government had secured working majorities on these committees. Let us hope that the Members are properly briefed and adequately resourced, and that the Assembly will be given adequate time to debate the committees’ reports. Looking forward, the use of the committees further strengthens the case for a set of organising principles relating to the

⁵⁸ See further below. And see above, n 4.

⁵⁹ J. Poirier, ‘The Functions of Post-Devolution Concordats in a Comparative Perspective’ (2001) *Public Law* (forthcoming).

policy for conferring powers. Otherwise the new machinery could itself prove the agent of a patchwork approach.

The substantive demand is a form of legislative drafting that will permit the Assembly 'maximum flexibility' in policy development and implementation in the major fields of devolved competencies. This can be seen to reflect a general sense of frustration among Members with the patchwork approach to the allocation of powers. It reinforces an earlier resolution that also had broad support: 'The Assembly continues to support the principle that primary legislation affecting Wales should confer all appropriate functions on the Assembly in a flexible way. . .'.⁶⁰ In fact, a feature of the debate in plenary session is the recognition that the Members themselves may have difficulty in fully comprehending the powers and functions of the Assembly.⁶¹ That is, the problem of intelligibility writ large, or a particular kind of democratic deficit.

The open-ended nature of the formula is also important. In the event, and highlighting once again the scope for organic development provided by the GWA, it proved an easy vehicle for all-party support in the Assembly. That 'maximum flexibility' means different things to different actors was made abundantly clear in the political exchanges.⁶² Read literally, the formula suggests great chunks of framework legislation and wide ranging Henry VIII type powers, or the chief means previously identified for the Assembly migrating towards, if not to, the state of affairs that I have called quasi-legislative devolution.

A special word is in order here about Henry VIII clauses, there having been much loose talk about them in the Assembly. Such clauses come in all shapes and sizes. While many deal with detail and in particular the making of consequential or transitional arrangements, the more important ones allow a Minister to change the substance of legislative policy, according to more or less prescribed statutory limits.⁶³

What then of the various options in the case of the Assembly? At one end of the spectrum, so-called 'tidying up' Henry VIII clauses should pose little difficulty, as the GWA itself illustrates.⁶⁴ At the other end of the spectrum, the broad-ranging Henry VIII clause has so far remained the more notable by its absence, as in the case of the Local Government Act 2000. Hesitant steps allowing the Assembly to occupy at least some of the intermediate ground are visible in the current crop of Government Bills.⁶⁵

To approach the matter solely in terms of the Assembly's position is futile. Notwithstanding the fact that delegated powers have increasingly appeared in

⁶⁰ *Official Record*, 2 February 2000.

⁶¹ And notably stressed outside the Chamber by the Deputy Presiding Officer, John Marek: see *Western Mail*, 10 January 2001.

⁶² *Official Record*, 19 December 2000.

⁶³ See for classic examples, the Deregulation and Contracting Out Act 1994, the Human Rights Act 1998, and the Government's current Regulatory Reform Bill. And see for discussion in the context of the 1994 Act, D. Miers, *The Deregulation Procedure* (Hansard Society 1999).

⁶⁴ See above, n 4.

⁶⁵ See above, n 39.

broad and experimental forms in recent years, the historical antipathy of Parliament to Henry VIII clauses should not be lightly dismissed.⁶⁶ In the case of the Assembly, a demand for general Henry VIII powers invites the response 'dream on'. It is vulnerable to the argument, not least round the UK Cabinet table, of standing for legislative devolution by the back door. So also, the classic constitutional objection based on the threat to Parliament's position can be said to be heightened under the scheme of executive devolution, despite the Assembly's own claim to democratic legitimacy and more elaborate procedures. The UK Minister exercising Henry VIII powers is not only changing Parliamentary law but is also responsible to Parliament.

Turning the argument round, the alternative technique of granting powers to apply with modifications the provisions of primary legislation may be said to have a more general application in the case of the Assembly. It is less challenging than the widely drawn Henry VIII clause in terms of UK constitutional theory and practice, a case less of rewriting statute law and more of building on Parliament's intention. We leave the point here, to pick it up later on.

Review of procedure: Nothing better illustrates the continuing evolutionary development than the Assembly Review of Procedure, first announced by Rhodri Morgan in the very different situation of a minority administration,⁶⁷ and now up and running with a view to completion by December 2001. As well as the First Minister, the Review Group includes the Presiding Officer, the other party leaders, and other senior political figures in the Assembly. On the one hand, in the interests of political consensus and speedy resolution, it is agreed that the review will not 'produce recommendations which would require changes to the devolution settlement and/or the Government of Wales Act 1998.' On the other hand, the issues identified for consideration are not confined to the Assembly's internal procedures but extend to its relationships: 'the Assembly, Wales and beyond', and more specifically 'the Assembly, the UK Government and Westminster'.⁶⁸ Enough has already been said in this study to show that the question of lawmaking for Wales, and in particular the range of approaches that is possible within the parameters of the GWA, including the Assembly's view of them, is of the essence of the matter.

To push home the point, the current Assembly review gives an opportunity for Members and officials to engage with the strategic issues of legislative drafting and practice raised in this study.⁶⁹ That is, with the aim of a clearly articulated view as to how new primary legislation should be constructed for the purposes of the Assembly. Let us hope that the elected representatives are

⁶⁶ See for general discussion, C. Harlow and R. Rawlings, *Law and Administration* (Butterworths, 2nd ed. 1997), chapter 6.

⁶⁷ See *Official Record* 12 July 2000. As distinct from the Independent Commission into the Assembly's Powers and Electoral Arrangements, promised for 2002-3.

⁶⁸ Details of the review are available on the Assembly web site.

⁶⁹ Perhaps in tandem with the Welsh Affairs Committee (of the UK Parliament), which recently announced an inquiry into the way in which Welsh interests, including the interests of the Assembly, are taken into account in the drafting of primary legislation and its passage through Parliament (Press Notice No. 7, 2000-2001). This study has been submitted in evidence both to the Review Group and the Committee.

attracted by the idea of a set of principles. It would be a sure sign both of the seriousness of the review and of the process of constitutional maturation in the new Welsh polity.

IV. IN SEARCH OF PRINCIPLES

Complaining of incoherence or lack of principle in the constitutional allocation of functions is the easy part. Assuming the legislative framework of the GWA, how might the ongoing empowerment of the Assembly be put on a more rational basis? One could hardly envisage uniformity in legislative style and substance such are the multifarious situations or policy contexts of contemporary public administration. Short that is of adopting an extreme form of quasi-legislative devolution – by which point the case for legislative devolution would surely have been conceded. Again, it is idle to pretend there is an optimum allocation, distinct that is from an exercise of political judgement or the measure of the enthusiasm for the devolutionary project.

After the Welsh Office

Perhaps then one can understand the allure of a single, general principle: the Assembly to have those powers that would be allocated to Wales under the central government model of territorial administration. The principle can clearly be a useful one in dealing with recalcitrant Whitehall Departments, most obviously in terms of attempts to whittle down or rein back the Assembly's powers. Notably, it can be said to represent a continuation of the initial design of the devolutionary policy – the transfer of powers from the Welsh Office to the Assembly. Its pull inside the devolved administration is attested by an Assembly official:⁷⁰

“The test we always try to apply and with varying degrees of success with Whitehall Departments. . . is if there was no devolution which Secretary of State would you expect to get the power. . . . We haven't got much on the statute book so far but what we've got is pretty much what we expected, what we would have had, had there still been a Secretary of State for Wales.”

The principle however is insufficient. Without more, the positive element, that if the Welsh Secretary would have gained the powers the Assembly should have them, can so easily translate into the negative.

But further, the principle will not wash. First, in adopting an essentially static view of the Welsh constitutional development the approach grates with the basic legislative design of the devolution statute. More especially, it is no defence to equate the principle with the model of executive devolution. As this study has been at pains to stress, there is more than one approach available under that general rubric, and in particular within the flexible framework with an in-built capacity for change that is the GWA.

Second, it does not do simply to read across from one constitutional model to the other. There is now the small fact of a national, representative institution

⁷⁰ Quoted in R. Rawlings, *Delineating Wales*, *op cit*.

to consider. Let us also keep in mind the loss of administrative and political flexibility that the scheme of executive devolution has entailed, in the sense that powers previously allocated under the general rubric of 'Secretary of State' have now to be identified as the powers or otherwise of the Assembly. To seek to apply the same general principle in such changed legal conditions is a recipe for difficulties, and will tend to err on the side of caution.

Third but related, an historical approach of this kind suggests a clear basis for allocation of powers to the Secretary of State for Wales prior to devolution. However, as Rachel Lomax observed, and the original Transfer of Functions Order makes so abundantly clear, this never happened. Welsh Office powers 'grewed like Topsy'. The methodology of the principle is thus flawed from the very beginning. As regards the ongoing allocation of powers, who can say what powers the Secretary of State for Wales would have but for the Assembly? It is time to depart this realm of constitutional fiction.

A very different starting point is suggested by Paul Silk, the new Clerk to the Assembly. In his words, 'A Whitehall which is sympathetic to the administration in Cardiff, and which wishes the Assembly to fly, is likely to frame its primary legislation in a way which gives the maximum of flexibility to the Assembly.'⁷¹ Effectively, this is the position now reached by the Assembly in its resolution on the Queen's Speech. But further, the Clerk thinks this implicit in the promise made to the people of Wales in the devolution White Paper:⁷²

"As a general principle, the Government expects Bills that confer new powers and relate to the Assembly's functions, such as education, health and housing, will provide for the powers to be exercised separately and differently in Wales; and to be exercised by the Assembly."

On closer inspection, however, this proves to be a false dawn. Cleverly crafted or wonderfully ambiguous, the pledge is also compatible with an allocation of powers under what I called 'strict executive devolution'. The major question of the width and depth of future Assembly powers is thus glossed over.

Once again it is behind the scenes, including in the facilitative role that the Wales Office now plays on behalf of the Assembly in Whitehall,⁷³ that a rudimentary discourse of devolution principles has begun to develop. It is interesting to observe for example that consistent with the approach in the original Transfer of Functions Order, Parliamentary and Ministerial controls have generally been disappplied in respect of the Assembly in subsequent UK legislation. To this effect, the recent devolution guidance note is intended to reflect as well as structure UK Government practice. In contrast, a year on from devolution the most that a central government lawyer could say of framework legislation was that the position 'is still developing', while the question of handing the Assembly Henry VIII powers had been 'a major

⁷¹ P. Silk, 'The Assembly as a Legislature', *op cit*.

⁷² *A Voice for Wales* Cm. 3718 (1997), paragraph 3.39.

⁷³ See Wales Office, *First Departmental Report*, Cm. 4620 (1999-2000).

source of contention'.⁷⁴ Evidently, the model of political and administrative negotiation is not so easily operated.

Next step

Let us then elaborate a set of principles governing the allocation of powers. That is - once it has been decided that a Bill relating to Assembly functions should be prepared – the basis on which the UK Government could reasonably be expected to proceed.⁷⁵ It is the logical next step in the Welsh constitutional development, as the Assembly First Minister has apparently now recognised.

A Set of Devolution Principles

New functions given to a Minister for separate exercise in England to be given to the Assembly for separate exercise in Wales within the subject fields set out in Schedule 2 of the GWA.

Functions in respect of Wales to be vested in a Minister, or in a Minister and the Assembly acting jointly, only where it is intended that the particular area of public administration should be undertaken on a common England and Wales, GB or UK basis.

New functions to pass to the Assembly in cases where it already exercises similar functions within that subject field.⁷⁶

Policy functions for separate exercise in Wales not to be vested specifically in the Secretary of State for Wales.⁷⁷

Save with the consent of the Assembly, its existing powers not to be reduced in new primary legislation by giving concurrent functions to a Minister, or imposing consent requirements, or by specifying in the legislation matters that have previously been functions of secondary legislation exercisable by the Assembly.

Provisions giving the Assembly new functions to be drafted to allow the body flexibility to develop its own policies; including, where appropriate, provision for secondary legislative powers different from those given to a Minister for separate exercise in England, or which proceeds by reference to the subject-matter of the Bill.

Permissible to vest in the Assembly Henry VIII powers to amend statutes for defined purposes, as also powers to apply with modifications the provisions of primary legislation, the test being whether the particular powers are justified for the purpose of the effective implementation of the relevant policy. Where alternatively such powers are to be vested in a Minister for separate exercise in England, they will be vested in the Assembly for

⁷⁴ Quoted in R. Rawlings, *Delineating Wales*, *op cit*.

⁷⁵ The further question of the appropriate fields or policy areas of devolved functions lies outside the scope of the study. The subject of fox hunting has typically fuelled debate in the Assembly about this: see for example, *Official Record*, 27 June 2000.

⁷⁶ The principle echoes the recent devolution guidance note.

⁷⁷ As indicated in the text, there are in fact very few powers vested in a named Secretary of State.

separate exercise in Wales, with if necessary the Assembly being required to place its relevant Orders before Parliament for the purpose of the negative resolution procedure.⁷⁸

Assembly to have the commencement powers in relation to the provisions in Bills granting it powers. Where the Minister is to have commencement powers in respect of England the Assembly will have the same powers in respect of Wales.

These principles are designed to incorporate a series of important constitutional and administrative concepts. The first principle is appropriately described as the bottom line, or in terms of a constitutional and political doctrine of the devolutionary minimum. Giving Wales *qua* Wales its first-ever democratically elected and accountable government, the Assembly should be treated no less favourably than a Minister is in respect of England.

The difference from and the similarity to a general principle based on the powers of the Welsh Office are important features. At one and the same time, the new principle is forward-looking, or targeted on the emergent patterns of allocation of powers, and is well suited – like the historical approach – to defending the Assembly from the withering of powers. It is then vital to the devolved administration, as well as having obvious attractions in the conduct of the political and administrative negotiation with central government. In particular, in the small world of legislative drafting, it is apt to appear the most economical approach, both in terms of administrative and professional resources and the demands on time in the Westminster programme.

But this principle too should not be considered sufficient or all embracing. Not only does it yoke together two different constitutional models. But also, to the extent that the principle operates on a stand alone basis, the spectre is raised of an overly Anglo-centric approach to the development or drafting of new powers, in line with the prevailing views and concerns of the powerful central government departments in London.⁷⁹ In contradistinction, that is, to the devolutionary idea of a territorial government best equipped or specifically empowered for local conditions. To invoke an old and notorious saying, 'for Wales see England'.

Secondly, the fact of, and need to allow for, the dynamic character of the devolutionary process is recognised in the design. The principles, as well as being an advance on the current patchwork approach to the allocation of powers, should themselves be sufficiently flexible to facilitate, and not to hinder, a continuing evolutionary development. To this effect, the Assembly is explicitly confirmed as the prime repository for the ongoing allocation of powers in fields of devolved functions. For the reasons explained, this is at one with the legislative scheme of the devolution statute.

⁷⁸ See in relation to this, the application of Parliamentary control which continues in the circumstances set out in sections 44(2) and (4) of the GWA and sections 1-3 of (Assembly) Standing Order 23.

⁷⁹ See for general discussion, M. Laffin, A. Thomas and A. Webb, 'Intergovernmental Relations after Devolution: The National Assembly for Wales' (2000) 71 *Political Quarterly* 223.

Confirmation of the devolutionary logic of policy diversity and legal pluralism, thereby underpinning a constitutional claim to general or flexible forms of legislative drafting, is the third and related aspect. Guidance is specifically given on the availability of a range of techniques previously seen to come within the ambit of the GWA, from framework legislation to subject-area designations, and on up to Henry VIII clauses. As explained, the power to apply with modifications the provisions of primary legislation is especially well suited here.

Effective implementation, a not unfamiliar refrain in the contemporary canons of public administration, is the fourth main concept. Its use is in helping to determine when special powers that may be devolved are allocated to the Assembly. At the risk of stating the obvious, the approach cannot guarantee a straightforward result. Rather the aim here is to structure the inter-change now taking place inside the new structures and processes of intergovernmental relations.

There are conscious echoes here of the principle of subsidiarity, familiar from, and continuing to be elaborated in the context of, the European Union, not least in terms of the so-called post-Nice agenda and the idea of more precisely delimiting competencies as between different tiers of government.⁸⁰ Perhaps it is relevant to note that the Assembly First Minister has embraced the broad interpretation of this idea, whereby the competencies of 'regional' or territorial governments inside the EU Member States are included as in the case of the Assembly.⁸¹ A set of organising principles of the kind proposed in this study would also sit comfortably with this vision.

The other element incorporated in the principles is a protective one, which links in terms of the overarching UK devolutionary development to the political science concept of quasi-federalism, or the general sense that power devolved, far from being in the famous phrase 'power retained', is power transferred.⁸² In the case of Scotland, the idea finds concrete expression in the so-called Sewel Convention, whereby the UK Government undertakes to proceed on the basis that 'the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature'.⁸³ Presently, in the case of Wales, the idea finds limited expression in s. 22(4) of the GWA, effectively a constitutional lock or ratcheted approach to the allocation of powers, whereby a transfer of functions order can only be varied or revoked under the statute with the Assembly's approval.⁸⁴ In the spirit of that provision, the protection of the Sewel Convention would be explicitly extended to the Assembly under the principles, so reflecting and reinforcing the importance of its secondary legislative powers. The underlying concept here is one of comity or mutual

⁸⁰ See for discussion in the Welsh context, J. Gallacher, *After Nice: Devolution on the EU Agenda* (Wales European Centre, 2001).

⁸¹ See *Official Record*, 19 December 2000. It is too early to say whether this interpretation will prevail.

⁸² See for general discussion, V. Bogdanor, *op cit.*

⁸³ House of Commons Debates, 21 July 1998, column 791; Memorandum of Understanding, *op cit.*, paragraph 13.

⁸⁴ An approach that now finds echoes in the subsequent primary legislation: see especially Regulatory Reform Bill, clause 1(4).

respect between jurisdictions, one that is familiar in advanced constitutional systems of multi-layered democracy.⁸⁵ In the event, since the Assembly came into being, the political focus has been very much on the issue of more generous devolution of powers. However, to repeat, this is not the whole picture.

Implementation: flexibility and resource

For the avoidance of doubt, the principles are not intended as a vehicle for legal action. They are designed as a useful addition to, and to fit with, the general development in soft law techniques that has accompanied the UK devolutionary process, and which has itself involved strenuous efforts to limit the role of the courts in disputes between the different administrations.⁸⁶ Assuming that the Assembly has the will to ask, it would be a case of seeking the support especially of the UK Cabinet Office, and in particular of the argument being won in the Devolution Policy Committee (DP) of the UK Cabinet. An appropriate means would then be a statement of the principles in a (second) legislative protocol between the Assembly and the Secretary of State for Wales. This would be the first step to a hardening into constitutional convention.

It is further envisaged that the principles would operate on the basis of 'normal' practice, similar in fact to the operation of the Sewel Convention, as also to the relevant provisions of the recent devolution guidance note. Once again, a measure of flexibility would be maintained, underscored in the case of central government by the doctrine of Parliamentary Sovereignty. So also, consistent with practice in the general system of concordats, there would need to be provision for review and elaboration or amendment in the light of practical workings. The principles are not designed to be exhaustive.

Different but related, the principles should not be seen as antithetical to the processes of political and administrative negotiation that lie at the heart of the new modalities of intergovernmental relations, and which have special importance in the sphere of executive devolution. Moving beyond the patchwork approach, characterised by an overwhelming sense of pragmatism, need not entail a rigid framework for the policy for conferring powers on the Assembly. Establishing a firm collaborative basis with sufficient clarity and flexibility to allow, on the one hand, for the effective management of continuing relations, and, on the other, ample scope for responsiveness to change or institutional learning, is of the essence of this kind of principled approach.

Appropriate flanking developments include the reworking of, and in particular much greater consistency in, legislative drafting practices and conventions in light of the scheme of executive devolution. Separate parts and sections of statutes concerning Wales, clear references to the Assembly and explanation of the territorial dimension to the allocation of powers: such

⁸⁵ Especially in Germany: see for an introduction, P. Blair and P. Cullen, 'Federalism, Legalism and Political Reality: The Record of the Federal Constitutional Court' in C. Jeffery (ed.), *Recasting German Federalism* (Pinter, 1999).

⁸⁶ Including by an expansive development in machinery for alternative dispute resolution; see R. Rawlings, 'Concordats of the Constitution' *op cit.*

matters may sound dull and technical especially to the non-lawyer. Yet they help to convey the underlying message of this study, the pressing need for a measure of constitutional vision in developing the novel and untested arrangements that comprise Welsh executive devolution. Principles relating to the policy for, and with regard to the method of, conferring powers on the Assembly, must be intertwined.⁸⁷

Of course principles of this kind can only go so far in promoting the values of rationality and efficiency, and of transparency, in the processes of government. All the more so, it may be said, given the multifarious policy contexts that are involved here, as also the continuing sway of old habits of centralism. However, turning the argument round, the principles would be a valuable resource for the Assembly, especially given the legal and administrative vulnerability of the institution; and, further, serve as both a practical instrument and constitutional benchmark for the conduct of central/territorial relations.

To expand the point, the principles have been chosen as a means of grounding the political and administrative exchange between Cardiff and London, and of facilitating democratic accountability. They are designed to broaden horizons inside government: not so much fragmentation of powers, more a general understanding of the constitutional role and position of the Assembly. To this effect, it should be recognised that the current methods have important costs, including for the centre. Not least, it can be said, in terms of the time and energy involved in determining anew – or squabbling over – specific allocations of powers, and the demonising of certain UK Government Departments that has been an uncomfortable feature of the Welsh devolutionary development in the initial phase. A set of organising principles to help smooth the ongoing allocation of powers is not only in the interests of the Assembly.

CONCLUSION

In the prophetic words of Sir David Williams: 'Executive devolution is on trial, and there will be inevitable problems of adaptation'.⁸⁸ Nowhere, it may be said, is this better illustrated than in the constitutional fundamental that is the ongoing allocation of functions to the Assembly. At one and the same time, the process demonstrates a strong evolutionary development in terms of the practice and procedure, including behind the scenes, and the limitations or difficulties associated with the strong dose of pragmatism or piecemeal approach, as also with the basic scheme of executive devolution.

The concept of quasi-legislative devolution is presented here as a useful tool for analysing the scope for, factors in, and implementation of, a migration in Wales to a more generous form of the so-called devolution settlement. Expressed slightly differently, the concept serves to underscore, in tandem with that of strict executive devolution, the way in which the current Welsh

⁸⁷ The related question of taking into account the bilingualism of Assembly order making in the drafting of the enabling primary legislation is outside the parameters of this study.

⁸⁸ D. Williams, 'The Devolution of Powers from Central Government', in D. Miers (ed.), *Devolution in Wales: Public Law and the National Assembly op cit*, p. 10.

devolutionary scheme can be operated with more or less enthusiasm, including differentially in terms of the fields of, and Departmental responsibilities bearing on, the devolution of powers.

The case for a set of principles to govern the ongoing allocation of functions to the Assembly is the central argument of this study. The potential contribution is multi-faceted, from promoting efficiency and effectiveness in the practice of lawmaking for Wales to establishing a tolerably coherent and user-friendly system of empowerment, and on through helping to secure a proper measure of constitutional intelligibility and democratic legitimacy for the Welsh devolutionary development. To end at the beginning, such principles are a necessary element in the elaboration of the new Welsh Constitution, that is, if the model of executive devolution is to be taken seriously. Whether that model proves sufficient for the people of Wales, time will tell.

ANNEX: ASSEMBLY RESOLUTION ON THE QUEEN'S SPEECH, 19 DECEMBER 2000.

Amended motion:

the National Assembly notes the content of the UK Government's legislative programme for 2000-01 and regrets the absence of measures to deal with the crisis in rural Wales;

calls on the First Minister to publish a detailed account of the procedure through which the Assembly can influence the content of the government's legislative programme;

notes that the following proposed Bills are of particular relevance to the Assembly's responsibilities and calls on the First Minister and the Secretary of State for Wales to ensure that all Bills which impact on the functions and responsibilities of the Assembly are drafted in such a way as to permit the Assembly maximum flexibility in implementing their provisions and developing policy in the areas concerned:

Children's Commissioner for Wales

Health and Social Care

Homes

Regulatory Reform

Special Educational Needs and Disability

remits the above Bills to the relevant Subject Committees (1 and 2: Health and Social Services; 3: Local Government and Housing; 4: Economic Development; 5: Education and Lifelong Learning) for further consideration as to the provisions they should make for Wales and how the Assembly might use its new powers therein;

calls on the relevant Assembly Ministers to make a statement prior to the conclusion of the passage of these Bills through the UK Parliament detailing the extent to which any amendments to the Bills reflect the representations made by the Assembly;

calls on the Executive to consult the Assembly on which Wales only Bill should be requested in next year's UK legislative programme;

requests that each Committee report to the Assembly by 13 February 2001;

notes that the Hunting Bill is of particular relevance to Wales, and refers the Bill to the Agriculture and Rural Development Committee for consideration of its bearing upon Wales, and requests the Minister for Rural Affairs to report on the application of the proposed legislation in Wales; and

reaffirms its previously stated belief that the abolition of defendants' right to opt for jury trial proposed in the re-introduced Criminal Justice (Mode of Trial) Bill amounts to a serious erosion of civil liberties.