CHAPTER ONE

The Devolution of Powers from Central Government

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1 Introduction

In 1997 a White Paper, *A Voice for Wales (Llais dros Gymru)*,[1] appeared with proposals designed - in the words of the Prime Minister - to "give Wales an exciting new role within the United Kingdom". Later in the year the proposals were endorsed by a referendum, which remains controversial both on grounds of outcome (a tiny majority from a turnout of only 50.1 per cent of the electorate) and of fairness.[2] In 1998 the Government of Wales Act (1998 c. 38) emerged, with 159 sections and 18 schedules; and this was followed in 1999 by the National Assembly for Wales (Transfer of Functions) Order which came into force on 1st July 1999.[3]

The structure is in place. In successive Parts the Act provides for the National Assembly for Wales (especially on membership and elections), for Assembly functions, for Assembly procedure, for Assembly finance, for other provisions about the Assembly (including sections on Community Law, Human Rights, international obligations, local government, the investigation of complaints, and Welsh public records), for the reform of Welsh public bodies, and for supplementary matters. None of the different Parts of the Act is watertight. Despite the remarkable detail of the legislation, there are inevitably many blurred edges; and much will depend on efforts to get the Assembly to work under the Act, and on the effectiveness of non-statutory arrangements between London and Cardiff on consultation, the exchange of information and co-operation generally.

2 The National Assembly for Wales: a Constitutional Perspective

The status and powers of the National Assembly will be the subject of increasing interest and concern. The Government of Wales Act, however, needs to be put into its constitutional perspective.

First, the Act provides for a novel form of the division or distribution of powers, a process long familiar in federal schemes and visibly adopted - with quasi-primary legislation in mind - in Scotland and Northern Ireland. One of the main lessons of federal experience, however, is that practice often deviates from theory; and much has depended on judicial interpretation of the constitution. The decision of the Supreme Court of the United States in *McCulloch v Maryland* is an outstanding example of the critical role played by the courts.[4]

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1 Cm 3718.

2 Committee on Standards in Public Life, *The Funding of Political Parties in the U.K*, Cm 4057-1.

3 S.I. 672 of 1999.

4 17 US (4 Wheat.) 316 (1819).

Even in the absence of a written constitution and without any quasi-primary legislative power, there are bound to be problems of the distribution of powers; and these problems in Wales will emerge in the light of experience and need to be solved through consultation (not least between Whitehall and Cardiff but also between Cardiff and local government in Wales), through the formal transfer of functions by Order in Council which can also be formally varied or revoked if approved by the Assembly, through the Assembly's own actions of an executive nature and through the powers of subordinate legislation, and not least through judicial adjudication on devolution issues. At the third reading of the Government of Wales Bill, Win Griffiths M.P. (of the Welsh Office) said that the legislation was intended to create "a robust framework with sufficient flexibility ... to enable an elected institution to establish itself, to grow, to respond to change and, I am certain, to flourish".[5]

The distribution of powers, legislative and executive, will be constitutionally important in the United Kingdom as a whole. Where Scotland is concerned there will be wide legislative devolution, involving some tax-raising powers as well, with respect to all matters that are not specifically reserved - in contrast to Wales where the lesser devolution of powers is achieved only with particularity, with (in other words) the express itemisation of functions to be entrusted to the Assembly. The Government's proposals for a Mayor and Assembly for London are also relevant to issues of the distribution of powers: the Mayor will have major responsibility for transport, economic development, strategic planning and the environment,[6] and his or her proposed role and that of the Assembly invite comparison in part with the devolution of power in Wales.

The changes envisaged both in the government of big cities and in local government generally are a reminder of the continuing importance of local government.[7] *Llais dros Gymru* referred expressly to a partnership between Welsh local authorities and the National Assembly, and the Government of Wales Act (section 113) provides inter alia that the Assembly "shall establish and maintain a body to be known as the Partnership Council (Cyngor Partneriaeth Cymru) consisting of Assembly members and members of local authorities in Wales. There is clearly a significant measure of unease about reconciling Assembly powers, limited to a form of executive devolution, and local government powers, bearing in mind Jeremy Thorpe's assertion in 1976 that the Welsh Assembly as then proposed would be "a sort of Glamorgan County Council on stilts."[8]

In one sense, the Assembly has been entrusted with a unique consultative role for Wales, providing a forum for consultation or participation involving, in addition to local authorities, the Secretary of State for Wales through his entitlement (under section 76) to attend and participate in any proceedings of the Assembly (with full access to papers); a variety of voluntary organisations (section 114) in accordance with a scheme made by the Assembly to promote their interests; and business organisations which the Assembly is mandated (section 115) to consult. In addition, the Assembly will have a consultative role with regard to the Government's legislative programme in each session of Parliament and with regard to public

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5 House of Commons Debates, vol. 309, col. 785 (26 March 1998).

6 Cm 3897 (1998).

7 Cm 4014 (1998).

8 House of Commons Debates, vol . 903, col. 254 (13 January 1976).

appointments in Wales designated by Order in Council (sections 31 and 30). As if to underline its unique consultative role, the Assembly is obliged (section 70) to ensure openness in all its proceedings and, subject to exceptions allowed for by standing orders, in all proceedings of committees and sub-committees.

The National Assembly has to begin its work with powers of a remarkably detailed nature. By virtue of the Act itself there are extensive discretionary powers entrusted to the Assembly as to the reform of Welsh health authorities and other public bodies, the implementation of European Community law, the support of cultural and recreational activities, making appropriate representations on any matter affecting Wales, the setting-up of public inquiries and the holding of polls regarding the exercise of its functions, promoting (or opposing) any private bill before Parliament, and instituting legal proceedings, to say nothing of its broad financial and budgetary powers and its powers of subordinate legislation.

There is much else, of course, as the White Paper initially indicated in mid-1997, though it was made clear that the Government did not propose "to transfer to the Assembly responsibility for functions which currently operate on a common basis throughout the United Kingdom. These include foreign affairs, defence, taxation, macro-economic policy, policy on fiscal and common markets, social security and broadcasting." [9] The White Paper insisted also that Wales and England "will continue to share a common legal system and Parliament will continue to pass new legislation for Wales."[10] Dicey's doctrine of the sovereignty of Parliament - which looks distinctly vulnerable if not blown apart by the impact of Community law, by the quasi-federal scheme of devolution accorded to Scotland and proposed for Northern Ireland, and by the possible implications of the Human Rights Act - will prevail in Welsh affairs without raising any of the terrors anticipated by Dicey in the context of Home Rule. Executive devolution comes close to the definition suggested in 1913 for the term "devolution": "a delegation which postulates that the authority making the delegation shall retain effective control over the exercise of the powers delegated and shall have an effective right to resume them."[11]

3 The Continuing Impact of Parliamentary Sovereignty

This selective survival of parliamentary sovereignty is critical in an assessment of Welsh-style devolution. It means that amendments of the Government of Wales Act, however trifling, will need to be referred back to Westminster, doubtless with appropriate representations and consultation. To progress to a form of legislative devolution akin to that of Scotland, as Plaid Cymru would wish to do,[12] would require a major legislative initiative at Westminster, and the time for such legislation may not easily be available given the competing demands of constitutional measures yet to come and given what might be reluctance to reopen a constitutional package for Scotland and Wales which was neatly assembled and competently tied up in the surge of 1997-98. Whatever the effectiveness of concordats between Cardiff and Westminster and whatever the schemes of informal contact,

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9 Para. 1.9.

10 Para 3.33.

11 House of Commons Debates, vol. LIII, col. 1322 (9 June 1913).

12 *The Times*, 13 April 1999, at 12.

nothing can be done to amend the Government of Wales Act short of full parliamentary legislation. There is no Henry VIII clause available under the Act to provide a fast-track procedure of amendment, and it remains to be seen what provision for consideration of Welsh affairs will be made by the House of Commons after the establishment of the National Assembly.

Another factor which militates against easy amendment of the Government of Wales Act is the fear of knock-on effects of new Parliamentary legislation. Lord Williams of Mostyn (in the second reading debate in the House of Lords,[13] said that many amendments to the Government of Wales Bill had been secured in the House of Commons, Lord Thomas of Gresford said that we should not fight the referendum again,[14] and Lord Falconer of Thoroton (then Solicitor-General) claimed that we "have to create an institution that works" under the Act.[15] To change, by Parliamentary legislation, what has now been assembled in the legislation could endanger the balance attained under the various agreements and understandings and could presumably embarrass the Government in existing and forthcoming elements in its programme of constitutional reform.

Freedom of Information provides an example. The original proposals for a new law, set out in the White Paper of late 1997,[16] already spoke of differences arising because of the different species of devolution for Wales and Scotland. The proposed legislation would, it seems, cover the National Assembly (as a Crown body) but the Scottish Parliament would have a discretion as to openness and freedom of information "within devolved areas in which it is competent to enact primary legislation."[17] In a different area, the Council on Tribunals - in its latest Annual Reports - noted that detailed arrangements for tribunals north of the Border will be implemented by subordinate legislation under the Scotland Act 1998.[18] By contrast the Council noted that, while powers to make procedural rules for certain tribunals in Wales (e.g. mental health review tribunals) will be exercised by the Assembly instead of by the Secretary of State, the original Bill made insufficient provision for continuing requirements to consult the Council under the Tribunals and Inquiries Act 1992; and the same insufficiency applied to statutory inquiries (e.g. in planning matters) previously held by or on behalf of a Minister. An amendment to the Bill was needed, at the behest of the Council on Tribunals, to extend the definition of "Minister" in the 1992 Act to include the National Assembly.[19]

Yet another consequence of the parliamentary legislation, which was barely recognised at the outset, concerns the pay and other allowances of Members of the National Assembly, office support for Members, and salaries of the First Secretary for Wales, of the Assembly Secretaries together with the Finance Secretary and the Trefnydd (Business Manager), and of

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13 House of Lords Debates, vol. 588, cols. 1033 ff. (21 April 1998).

14 Ibid., col. 1044.

15 Ibid., col. 1129.

16 *Your Right to Know Freedom of Information.* Cm. 3818 (1997).

17 Ibid., at 2.1.

18 Council on Tribunals: *Annual Report for 1997-98.* House of Commons paper 45, para. 2.13 (15 December 1998).

19 Para. 33 of Sch.12 to the Act. See also ibid., para. 2.15.

the Presiding Officer of the National Assembly. These matters have been the subject of two recent Reports of the Senior Salaries Review Body relating to devolution in Scotland, Wales and Northern Ireland, and there has been broad acceptance by the Government of recommendations contained therein, subject to further study by the relevant bodies on allowances and subject also, significantly covering pay and allowances, to a review of the position in 2001.[20]

4 Devolution and Constitution

Tales of the unexpected will continue to emerge as the implications of devolution become more and more evident; and it is reasonable to bear in mind that experience of devolution has as yet been confined to that of Northern Ireland under the Government of Ireland Act 1920 up to the resumption of Direct Rule in 1972. That scheme itself was the accidental by-product of the Home Rule pressures of 1886, 1893 and 1912-14, and the Kilbrandon Commission was later to note, in its Report of 1973, that "Northern Ireland, by one of history's choicest ironies, is the one place where Liberal home rule ideas were ever put into practice - and by a solidly Unionist government. It can truly be said to have been given a constitution that it did not want and that was designed for another place."[21]

Could it now be said that Wales has been given a constitution that it does not want? This is plainly not the time to reopen the debates on the referendums and on the Government of Wales Bill, but it is not inappropriate to attribute some of the hesitations and ambiguities of the scheme of executive devolution to inadequate consultation, both in 1974 and in 1997. It should be placed on record:

- that only two of thirteen Commissioners who reported in 1973 had favoured executive devolution for Wales;
- that six (a majority) of the eleven Commissioners who signed the main Report favoured legislative devolution for Wales on identical lines to that proposed for Scotland;
- that an obscure process of consultation in the summer of 1974 led to governmental abandonment of legislative devolution;
- that executive devolution was adopted as the core of schemes for Wales which eventually foundered in 1979;
- that there was relatively little public debate on devolution for the next decade or two (in striking contrast to the Constitutional Convention in Scotland from 1989) save for that inspired by bodies such as the Institute for Public Policy Research and the Constitution Unit based at University College, London;[22]
- that a White Paper (admittedly in accordance with an Election pledge) appeared in July 1997 with a haste that affected both the printers and the Stationery Office in London; that a referendum campaign was waged over the dead months of the year producing a result which was both positive and inconclusive (a "yes" vote on a small turn-out by the barest of margins);

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20 Senior Salaries Review Body, Report No. 42 (Cm 4188, 1999) and Report No. 43 (Cm 4246, 1999).

21 Cmnd. 5460, para. 1249..

22 Respectively, *The Constitution of the United Kingdom* (1991) and *An Assembly for Wales, Senedd i Gymru* (1996).

- that a Bill of almost crippling detail was then produced and ultimately amended and enacted in 1998; and
- that we are now moving forward - "going over the top" might be a better term - in a haze of constitutional ambiguity.

This constitutional ambiguity is reflected in the continuing association of Wales with Scotland in the rhetoric of constitutional change, whereas in truth the schemes adopted for each are like chalk and cheese. Wales is so far down the ladder that, in the British-Irish Council allowed for in the Good Friday Agreement and to "comprise representatives of the British and Irish Governments, devolved institutions in Northern Ireland, Scotland and Wales, when established, and, if appropriate, elsewhere in the United Kingdom, together with representatives of the Isle of Man and the Channel Islands," the Welsh Assembly is currently the least powerful of the elected assemblies involved. Yet the Institute for Public Policy Research had envisaged the sharing of legislative power between Parliament and elected Assemblies for Scotland, Wales, Northern Ireland and twelve English regions. For its part, the Constitution Unit - aware that Labour had executive devolution in mind - regarded such a scheme is "unlikely to be a satisfactory or durable solution" even if - because of ambivalence in Wales about an Assembly at all - it may be "a necessary first step."[23] As suggested above, however, new proposals will face a range of obstacles, and Wales for some time yet may have to endure a low profile constitutional position.

There is, of course, another interpretation altogether of Welsh devolution. In the third reading debate, Ron Davies M.P. declared that, if the Union is to prosper, "it will surely be on the basis of bringing government closer to the people whom it serves,"[24] and Lord Williams of Mostyn, in the second reading debate in the Lords, emphasised democratic accountability to the National Assembly.[25] The effect of the Bill, he suggested. would be to transfer virtually all of the functions of the Welsh Office and its budget to the Assembly together with authority over all quangos in Wales.[26] A considerable element of executive discretion, then, would be transferred, even if much of the budget of £7 billion would already be effectively committed in a given year and variations would have to be undertaken at the margins - especially since there is, by definition, no tax-raising power accorded to the National Assembly.

5 The National Assembly for Wales: Transfer of Functions

The powers given to the National Assembly both by the Government of Wales Act and by the Order in Council are not inconsiderable. The list set out in the Order in Council is bewildering in its variety, taking us on a trip involving very many public statutes including the Literary and Scientific Institutions Act 1854, the Corn Returns Act 1882, the Physical Training and Recreation Act 1937, the Agriculture Act 1947, the Cremation Act 1952, the Opencast Coal Act 1958, the Public Lavatories (Turnstiles) Act 1963, the Leasehold Reform Act 1967, the Conservation of Seals Act 1970, the Race Relations Act 1976, the Zoo

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23 *An Assembly for Wales, Senedd i Gymru* (1996), para. 132.

24 House of Commons Debates, vol. 309, col. 758 (26 March 1998).

25 House of Lords Debates, vol. 588, col. 1034 (21 April 1998).

26 Ibid., col. 1033.

Licensing Act 1981, the Education Reform Act 1988, the Environmental Protection Act 1990, the Water Industry Act 1991, the Further and Higher Education Act 1992, the Environment Act 1995, the Dogs (Fouling of Land) Act 1996, and the Education Act 1997. There is also a list of some private and local statutes.

These powers or functions are to be expected under a system of executive devolution. Much more challenging or innovative at first sight will be the area of subordinate legislation within which the Assembly will exercise its only legislative functions - secondary, nor primary. The White Paper of 1997 gave some prominence to subordinate legislation. There will be a subordinate legislation scrutiny committee (section 58) with its membership determined by standing orders; the standing orders must also provide procedures for the preparation, making, confirmation and approval of subordinate legislation (section 24); such procedures must include provision for a "regulatory appraisal" as to costs and benefits (save in special circumstances) (section 65); "Assembly general subordinate legislation" must be laid in draft and approved by the Assembly (section 66) though there is also provision (section 67) for the "disapplication" of procedural requirements in particular circumstances but with a 40-day period for challenge.

The volume of statutory instruments relating to Wales is already considerable, though many of the statutory instruments are technical, detailed and uncontroversial. Writing some years ago about subordinate legislation in general, the late Stanley de Smith commented

> "Open a recent volume of Statutory Instruments and read the first hundred pages. The tedium of wading through a mass of abstruse technicalities, barely comprehensible to anyone lacking expert knowledge of the subject-matter, is at least an instructive experience; and if one has the moral stamina, one can plough on through another five thousand pages. With such dull subject-matter, delegated legislation is in fact a dull subject for many of us."[27]

Today, the volume and the range is much greater. Transferred powers - that is, powers previously vested in the Secretary of State - cover such areas as local government, housing, transport, agriculture, the environment; and obviously subordinate legislation in such areas is bound to be important. The implementation of Community law will also bring in subordinate legislation authority for the Assembly (section 29). Moreover all subordinate legislation is likely, through the procedures set out in the Act, to be more closely scrutinised than has hitherto been possible in the more crowded timetable of Parliament at Westminster.

6 The National Assembly for Wales: Judicial Challenge

It is perhaps worth speculating on the likelihood of challenging Assembly subordinate legislation in the courts.[28] The principal substantive challenge apart from straightforward ultra vires claims would be under the heading of unreasonableness, presumably as defined by Lord Russell of Killowen in the byelaw case of *Kruse v Johnson* - where Lord Russell spoke for six judges in a highly unusual seven-man Divisional Court.[29] "If, for instance," he

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27 *Constitutional and Administrative Law* (5th ed 1985, ed. Street and Brazier), p. 347.

28 See chapter 4 below (ed).

29 [1898] 2 QB 91.

declared, "they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires."[30]

Lord Russell coupled that definition with a call for judicial restraint in considering the actions of elected local authorities, and that call would obviously extend to the activities of the National Assembly. Even so, subordinate legislation - which might give rise to many devolution issues - could not and should not be immune from judicial scrutiny. The entire scheme of devolution allows for a distinctively Welsh leaning in the exercise of devolved powers, but there are legal as well as practical considerations to be taken into account when subordinate legislation made under statutes covering England and Wales show a sharp deviation in Wales; and it is constitutionally appropriate to ask why the ordinary courts would continue to rule on subordinate legislation applicable in England or applicable in Wales in non-devolved matters and why the ordinary courts would continue to adjudicate on the vires of local byelaws alongside a scheme under which Assembly subordinate legislation - where challenged on devolution issues - would be subject to an elaborate mechanism of control involving the Judicial Committee of the Privy Council. The uncertain and probably anomalous nature of the procedures for resolving devolution issues shows, in my view, the need for a standing constitutional commission for the United Kingdom, charged with continuing oversight of the working of devolution in different parts of the kingdom and with offering a stimulus for amendment of Parliamentary legislation speedily and on a visibly detached or impartial basis. Anomalies in the working of the Government of Wales Act are bound to emerge, and a standing commission would do more than any other device to ensure that Welsh devolution is a process rather than an event.

7 Conclusions

I have attempted an account of the Welsh dimension in devolution at various stages in the last thirty years. In 1972, ahead of the Kilbrandon Report, I wrote on the Constitution of the United Kingdom,[31] noting that in terms of administrative decentralisation Wales has lagged behind Scotland. Two years later, at a conference in Cardiff in the wake of Kilbrandon, I wrote directly on Wales and Legislative Devolution,[32] tracing arguments on devolution over a hundred years, considering the Kilbrandon proposals, and suggesting that neither federal government nor legislative devolution was likely to work satisfactorily under a selective scheme from which England and the regions of England were excluded. More recently, at a conference in Cambridge in January 1998 (but earlier at two London conferences in late 1997) I expressed reservations about the White Paper and the Government of Wales Bill,[33] while at the same time recognising the inevitability of ambiguity in constitutional innovations. The Irish Home Rule Bill of 1886, for instance, was condemned by one M.P. on the grounds that it "sweats difficulties at every paragraph, every provision breeds a dilemma,

30 Ibid., pp. 99-100.

31 [1972] *Cambridge Law Journal* 266.

32 *Devolution* (1975, ed. Harry Calvert), ch.v.

33 *Constitutional Reform in the United Kingdom: Practice and Principles* (1998, ed. Beatson, Forsyth and Hare), ch. 4 , "'Devolution: the Welsh Perspective".

every clause ends in a cul-de-sac, dangers lurk in every line, mischief abounds in every sentence, and an air of evil hangs over it all."[34]

A number of writers have offered helpful analyses of recent developments: Vernon Bogdanor in several publications,[35], Rodney Brazier,[36] and Richard Rawlings.[37] The National Assembly Advisory Group has played an important part in carrying the message in Wales - its Consultation Paper, for example, has a useful flow-chart on Subordinate Legislation Procedures.[38] The National Assembly, when it finally gets under way, will not lack outside scrutiny despite the absence of a standing commission for the United Kingdom.

Perhaps I might be allowed one or two final observations which go beyond the initial legal and constitutional commentaries. For the first half of this century, attitudes in Wales were dominated by issues transcending assertions of Home Rule or devolution, and it would be wrong to assume some coherent, progressive movement towards devolution over the years. The Welsh language, which duly secures some measure of protection under the Government of Wales Act, did not necessarily carry with it a political agenda, as I found in and around Carmarthen, where the language remained strong, during my own upbringing in the 1930s and 1940s. There were instead two particularly telling factors. One was clearly economic, with Wales leaving behind the relative prosperity of the years before 1914, albeit attended by much hardship and appalling industrial conditions, and proceeding to the bleak interwar years of depression and unemployment. Alan Bullock, in his biography of Ernest Bevin, commented at one point that Bevin in 1934 "knew at first hand, as all too few Ministers and civil servants did, the physical desolation and the human degradation of industrial Wales. In London 8.6 per cent of the population was unemployed, in Oxford and Coventry, 5 per cent, even in Birmingham no more than 6.4 percent. In Abertillery the figure was 50 per cent and in Merthyr Tydfil 61.9 per cent, although many of the men had already left to seek work elsewhere."[39] The economic position after World War 2 improved somewhat, but Wales still lags behind in economic strength; and Ron Davies, in the White Paper of 1997, was surely right to give prominence to the need "to provide clear leadership and strategic direction to boost the Welsh economy" and it may be that the National Assembly, through careful and imaginative juggling of its allotted powers and through partnership with other bodies, will establish its credibility and earn acceptance more in the economic area than any other.

The second telling factor in the first half of the century was the experience of war. Recently I spent four to five days in the battlefields of the Ypres Salient and the Somme, and in the numerous memorials and cemeteries I saw ample evidence of the Welsh contribution. In his *History of Wales*, John Davies notes that 13.82 per cent of the population of Wales had joined the armed forces compared to 13.3 per cent of the population of England, a factor partly

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34 House of Commons Debates, vol. CCCVI, col. 362 (28 May 1886).

35 For example, *Power and the People: A Guide to Constitutional Reform* (1997).

36 "The Constitution of the United Kingdom." [1999] *Cambridge Law Journal* 96.

37 "The New Model Wales." (1998) 25 *Journal of Law and Society* 461; (reprinted as chapter 7 below; ed).

38 See the Consultation Paper, *National Assembly for Wales* (1998).

39 *The Life and Times of Ernest Bevin, Vol. I - Trade Union Leader 1881-1940* (1960), pp. 539-40.

explained by the proportionately higher number of young men in Wales. Davies points out that, in spite of the savagery of the war, for half a century after 1918 "there were in every community in Wales men who remembered the war as their only exciting experience," and in such a climate - despite some lingering hopes of Home Rule All Round - constitutional experimentation won little support.[40] The Second World War underlined, though less vividly, what was effectively an outward rather than an inward approach, reflected in strong support for Labour representation at Westminster as a means of improving economic conditions.

The National Assembly has, however, now been established and the first few years of its existence will be challenging. Executive devolution is on trial, and there will be inevitable problems of adaptation. The scheme is a crucial experiment in decentralisation and regional democracy, and its effect will doubtless be closely monitored as a unique attempt to bring government closer to the governed.

40 J. Davies, *A History of Wales* (1993), pp.513 and 614.