CHAPTER SEVEN

The New Model Wales

Richard Rawlings

The United Kingdom is currently undergoing a rapid process of fundamental constitutional change. One of the chief developments is a redistribution of law-making and governmental powers to different territories of the Union. It is a programme of devolution, as befits an unwritten constitution characterised by the doctrine of Parliamentary Sovereignty, and not federalism. The case of Wales, historically closely integrated with England,[19] presents here its own challenges. The aim of this article is to examine the process of change for Wales, to explicate and critically assess the Welsh scheme of devolution, and to consider possible future development in a broad legal and constitutional setting.

1 Introduction

'Wales has always been now. The Welsh as a people have lived by making and remaking themselves in generation after generation, usually against the odds, usually within a British context. Wales is an artefact which the Welsh produce. If they want to. It requires an act of choice.' (Gwyn A. Williams[20])

On 18 September 1997 the people of Wales made a choice, by referendum. In the summer of 1999 the National Assembly for Wales will open for business. This article develops a series of major themes in this context. The first theme concerns the *sui generis* nature of the scheme and the way in which this reflects a distinctive territorial history. The model is primarily one of executive devolution, which includes the transfer of various subordinate law-making powers. An Assembly, not a Parliament as in Scotland,[21] is justified on grounds of less consensus for change and closer integration with England. The scheme is thus seen to present a dual character: transformative, when read in light of the retarded development of a distinctive Welsh polity; limited or 'gentler' devolution in the context of a reinvented Union.

A second major theme is introduced: the dynamics of devolution and the way in which these operate at various levels. Implicit in executive devolution is the ongoing allocation of powers via primary legislation. This alone ensures that the devolution of today is not the devolution of tomorrow. So too the architecture of the scheme reflects and reinforces an evolutionary approach with an in-built capacity for change. Hence a framework is demonstrated within which the Assembly can develop organically.

Devolution to Wales must also be seen in the light of a programme of redistribution of powers which is asymmetrical in character. Attention is here drawn to interplay in the

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19 Symbolised by the formal incorporation of Wales into England in the so-called Acts of Union 1536, 1543.

20 *When Was Wales?* (1985), p.304.

21 *Scotland's Parliament*, Cm 3658 (1996); Scotland Act 1998.

territorial reforms of the two elements of commonality and diversity. Hence there are parts of the Welsh scheme which basically reflect the needs and demands of other territories, pre-eminently Scotland. So too, the overarching process puts in question the durability of this scheme, as more advanced forms of devolution are seen operating elsewhere in the Kingdom. Wales is *sui generis* but it is not an island.

The pragmatic quality of the new construction is another related theme. Stress is here laid on the strong role in the policy-making of responsive factors. The clearest example concerns the recent experience of government in Wales under the Conservatives. Attention is also drawn to the influence on institutional design of the mode or process of delivery, not least in terms of internal Labour Party politics. It is to this effect a story of reform suffering from a poor beginning, which finds tangible expression in the scale of, and limits to, revision of the scheme in the course of legislative and administrative process.

Legal and administrative complexity is a theme inevitably associated with executive devolution. A horizontal division of law-making functions is involved, as distinct from legislative devolution and a vertical division of primary law-making powers. Technically-speaking, it is the case that doing less is harder, as regards construction of the framework and modalities of this form of devolution. Disaggregation of the law-making process both creates new opportunities and implies costs. Executive devolution underscores the potential of an infusion of legal values and techniques, given the close interaction of different law-making bodies. Attention is thus drawn to the great importance in the scheme of the political and administrative values of cooperation and coordination.

A further theme is the high degree of innovation and experimentation found in this scheme. One element is the novel choice of internal architecture. There is a mixing of executive and secondary legislative functions in the Assembly, a body corporate, [22] as well as the pairing of a Cabinet oriented form of administration with a strong system of committees. A linking element is the role of the scheme in the Labour Government's constitutional project of 'a new kind of politics'. It is an elusive concept which has in this context been assigned a jumble of meanings: accessibility and permeability of the political network, consensus and cooperation, an end of tribalism in local politics. More concretely, the Secretary of State, Ron Davies, has spoken of an Assembly 'based on principles of partnership, democracy and inclusiveness'.[23] A bold claim, and one which provides relevant criteria to judge the arrangements.

Wales is also to be reinvented in terms of regional government in Europe. This is a dimension which points up the major role in current UK constitutional reform of considerations of economic development, as well as the broad influence now exercised in domestic law and politics by supra-national modes of ordering. Put another way, the arrangements demonstrate the relevance to internal constitutional design of the broad currents of transnationalism and globalisation, as constituted in the context of their relationship with the new dynamics of local nationalism.

The final theme concerns the role and interplay of different forms of law in the new construction. This article demonstrates how fundamental this is in the design and to proper evaluation of it. A paradox is identified. The legislation, the Government of Wales Act

22 Government of Wales Act 1998, section 1.

23 House of Commons Debates, vol. 298, col. 757 (22 July 1997).

1998, is a long and complicated affair,[24] yet long silences punctuate the statutory provisions. There is great reliance, first, on standing orders or the internal law of the Assembly, and, second, on inter-institutional administrative agreements or 'concordats' to help structure extra-territorial relationships. The explanation involves both the complexity of executive devolution and the evolutionary approach, that is, permissive legislation and the benefits associated with informal or 'bureaucratic law' of flexibility and the scope for institutional learning. But further, the choice of soft law techniques like the concordats is seen to express values of coordination, collaboration and partnership associated with the general New Labour project of modernisation and changed democratic culture. It involves to this effect a reworking of the informal character of the British Constitution.

All this goes to make up what I call the new model Wales. It represents not only a turning point in the history of the territory, but also a fascinating development in constitutional law and politics, an important moment in the constitutional and legal history of the United Kingdom. In contrast, the silence of the public lawyers has been deafening.[25] It illustrates the narrow trajectory of so much of the scholarship, not only court-oriented, but also, reflecting and reinforcing an idea of the unitary state,[26] Anglocentric and geared to the Metropolis.[27] It is time to broaden horizons.

2 Conditions of Change

North and south, urban and rural, English and Welsh speaking, the territorial history of Wales is in so many ways parochial and fragmented.[28] As 'an imagined political community'[29] the Welsh nation has been more imagined than most![30] Argument over devolution to Wales has rumbled on and off for a century: Cymru Fydd and 'home rule all round', and on through a Speaker's Conference (1919/20), a 'Parliament for Wales' campaign (1950s), and a Wales Act 1978 aborted by referendum.[31] In this perspective, the current choice represents so much more than institutional change, the erection in Cardiff of a gleaming new Assembly building.

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24 At 159 sections and 18 Schedules, it is almost half as big again as its Scottish cousin. The voluminous first Transfer of Functions Order must also be counted.

25 Save for a few disparaging remarks from Cambridge: Sir David Williams, 'Devolution: The Welsh Perspective' in A. Tomkins (ed.), *Devolution and the British Constitution* (1998). This is not to overlook excellent contributions from other quarters. See especially Constitution Unit, *An Assembly for Wales* (1996); also Institute of Welsh Affairs, *Making the Assembly Work* (1997).

26 Notwithstanding the distinctive Scots legal tradition. On the dominance of adjudication, observe the scholarly attention lavished on the Human Rights Act 1998.

27 A familiar theme in recent historical writing: L. Colley, *Britons: Forging the Nation, 1707-1837* (1992); A. Grant & K. Stringer (eds.), *Uniting the Kingdom? The Making of British History* (1995); and for critique, C. Harvie, 'A United Kingdom?' (1997) 18 *Welsh History Review* 700.

28 See J. Davies, *A History of Wales* (1990).

29 B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1991).

30 On the central place of myth in the idea of 'Wales', see Gwyn A. Williams, *Madoc: The Making of a Myth* (1979); id., *The Search for Beulah Land: The Welsh and the Atlantic Revolution* (1980).

31 Chronicled by K. O. Morgan, *Wales in British Politics 1868-1922* (1980, 3rd ed.); id., *Rebirth of a Nation: Wales 1880-1980* (1981).

It reflects and reinforces deep social, economic and cultural changes, symbolised in the historical idea of 'rebirth of a nation'. Giving Wales its first-ever democratically elected and accountable government, the project constitutes an energising element, while posing no serious threat to the integrity of the Union. The nomenclature of a 'National Assembly for Wales' is peculiarly apt. The body provides, on the one hand, a focus for Welsh identity and democratic culture, devolution being far more than the simple transfer of powers. It is, on the other hand, an institution that has self-consciously to stress inclusiveness, if only because of the many historical divisions of interests.

It does not pay to be too romantic. The scheme incorporates major constraints on the potential of territorial politics being properly realised. And, as indicated, it is shaped by many diverse factors: a mix of the positive and responsive, some general in character, some particular to Wales. Let us look at some important ones.

2.1 Ghost in the machinery

The present devolutionary scheme has both in legal and political terms been strongly influenced by the Wales Act 1978. On the one hand, it is only natural that lessons should be learned from the unseemly demise of that statute, and requisite avoiding action taken. This is shown by resort to a pre-legislative referendum, in effect to preclude sustained Parliamentary opposition. On the other hand, major elements of the scheme have been lifted from the 1978 Act, as founded on the report of the Kilbrandon Commission.[32] The model was after all ready made and widely understood in Welsh Labour Party circles. The textual similarity with Labour policy documents when in opposition is striking.[33] Nowhere is the influence more keenly felt than at the base line of executive devolution. Quite how a minority recommendation to this effect in Kilbrandon came to be translated into statutory form in 1978, in contrast to legislative devolution for Scotland, remains a mystery.[34] Yet the general approach has now been renewed, a case of back to the future.

However the evident continuity should not be allowed to obscure important legal and constitutional differences. The new arrangements have vital elements contrary to old orthodoxies more prevalent at the time of Kilbrandon. An Additional Member System (AMS), not simply 'first past the post', is one illustration. Again, over a generation there has been great growth and considerable qualitative change in the formal rule-making practices of Government.[35] Framework legislation is now standard; delegated powers appear in broad, experimental forms; and so-called 'Henry VIII clauses', which allow the executive to amend

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32 Report of the Royal Commission on the Constitution, 1969-1973 (1973) Cmnd 5460. See also *Democracy and Devolution: Proposals for Scotland and Wales* (1974) Cmnd 5732.

33 Especially *Shaping The Vision* (May 1995). See also *Preparing For A New Wales* (May 1996). See for discussion, A. Thomas, 'The Welsh Assembly Debate: 1979 Revisited?' (1995) 15(2) *Public Money and Management* 6.

34 D. Williams, above, n.8. Only two of the eleven Commissioners who signed the main Report favoured executive devolution for Wales; six favoured legislative devolution.

35 C. Harlow and R. Rawlings, *Law and Administration* (1997, 2nd ed.) chapter 6. See also G. Ganz, 'Delegated Legislation: A Necessary Evil or a Constitutional Outrage?' in P. Leyland and T. Woods (eds.), *Administrative Law Facing the Future* (1997).

or repeal primary legislation, are back in fashion.[36] In this context, the dividing line between executive and legislative devolution is likely to be more blurred than previously anticipated.

An important aspect is the scope for change in the course of construction. Turning to the internal architecture of the Assembly, developments late in the process show ministers and civil servants tacking away from a committee system redolent of local government in the 1970s. Special reference must be made to the National Assembly Advisory Group (NAAG) established by the Secretary of State as machinery to underscore the principle of inclusiveness amid renewed divisions associated with a close vote in the referendum.[37] Charged with assisting in the preparatory work on standing orders,[38] NAAG has played an important role in shaping internal Assembly process, while also providing 'cover' to ministers and officials in moving towards a more dynamic model of administration.

2.2 Overtones of colonialism. Quangoland

History does not stop in 1979: Wales is 'now'! The current scheme is in part a critical response to the modalities of governance in Wales over the intervening period. Expressed slightly differently, immediate historical experience is writ large in the legislative and institutional design, a classic theme in constitution writing.

Devolution is not novel in Wales, in the restricted sense of administrative devolution or decentralisation. Established in 1964, the Welsh Office, situated in Cardiff and headed by a Secretary of State with a seat in the Cabinet, became part of a familiar model of territorial government, encompassing Scotland, Wales and Northern Ireland.[39] Commencing with local government, housing and planning, the story is of a gradual accretion of administrative functions;[40] a process that notably continued under the Conservatives in industrial and economic development functions. By 1996, the Welsh Office was responsible for overseeing annual spending of some £6.5bn: social security apart, the great proportion of identifiable general government expenditure in Wales.[41] Yet there was limited regional autonomy. The

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36 See in particular the Deregulation and Contracting Out Act 1994. Henry VIII clauses feature widely in Labour's constitutional reforms, as in the Human Rights Act 1998. See further, D. Miers, *The Deregulation Procedure: An Evaluation* (1999; Hansard Society for Parliamentary Government).

37 Ron Davies, House of Commons Debates, vol. 302, cols..340-341 (3 December 1997). Members have been drawn from the different political parties, as well as from business, local government and the voluntary sector.

38 To this effect NAAG, a non-statutory body, has paved the way for the standing orders Commissioners appointed under sections 50-51 of the Act. See NAAG, *National Assembly for Wales. A Consultation Paper* (April 1998); id., *Recommendations* (August 1998).

39 For developments in England under the Conservatives, centred on the establishment in 1994 of integrated regional offices, see B. Hogwood, 'Regional Administration in Britain since 1979: Trends and Explanations' (1995) 5 *Regional and Federal Studies* 3.

40 Education, health and social services had followed by the 1970s, and on through the environment, culture and language. Administrative devolution as a process is traceable to the establishment in 1907 of the Welsh Department of the Board of Education.

41 HM Treasury, *Public Expenditure: Statistical Analyses 1997/8*, Cm 3601, Table 7.7. And see for details, Welsh Office, *Departmental Report*, Cm 3915 (1998). However, the Welsh Office does not have responsibility for police, fire and other protective services. These reside with the Home Office.

standard view is of a Department tightly constrained by the British constitutional framework, engaged for the most part 'in the humdrum business of implementing policies decided elsewhere' and introducing 'modest variations where it can to suit the conditions, needs and idiosyncrasies' of Wales.[42] The high degree of integration with England is also underscored, as exemplified by the absence of a separate legal system.

The long years of Conservative rule from 1979, juxtaposed with the continuing dominance of Labour in electoral politics in Wales, served to heighten awareness of the democratic deficit in this model of government. Economically and in social terms, the early 1980s are a watershed in modern Welsh history, as industries like coal and steel experienced the full force of Thatcherite policies.[43] Devolution re-emerged as a policy option inside the Labour Party, as that strand of socialist politics familiarly associated with bureaucratic centralism 'suffered a crisis of confidence [and] found itself labelled as ... anachronistic.'[44] Then there is the image of the Governor-General, the Cabinet being represented in Wales by a succession of Secretaries of State drawn from English constituencies.[45] It suffices to add that during this period the special checks associated with Parliamentary accountability for Wales proved largely illusory.[46]

Concern at a lack of accountability was fostered by the 'onward march of the quangos'.[47] By 1995 over a third of all Welsh Office expenditure was devoted to Non Departmental Public Bodies (NDPBs); bodies such as the Welsh Development Agency (WDA), Land Authority for Wales and Tai Cymru (Housing for Wales) had a major role in the Welsh economy. 'Vice-regal' is one description of the extensive powers of patronage held by the Secretary of State; there came to be more 'new magistracy'[48] than local councillors. Nor was legitimacy enhanced by a series of financial scandals, centred in particular on the WDA.[49] In historical terms Kenneth O. Morgan spoke of democracy in Wales 'from dawn to deficit'; an 'insidious web of influence which has resulted from institutional decline', an 'insensitive state [which] has become insulated from the people it serves'.[50] Welcome to quangoland.

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42 J. Kellas and P. Madgwick, 'Territorial Ministries: The Scottish and Welsh Offices' in P. Madgwick and R. Rose (eds.), *The Territorial Dimension in United Kingdom Politics* (1982), p.29. A recent study reaches a similar conclusion, European regional policy notwithstanding: D. Griffiths, *Thatcherism and Territorial Politics. A Welsh Case Study* (1996).

43 See to this effect, J. Davies, above, n.11, chapter 10.

44 A. Thomas, 'Wales and Devolution: A Constitutional Footnote?' (1996)(4) *Public Money and Management* 21 at 24.

45 From 1987: Peter Walker, David Hunt, John Redwood, William Hague. John Redwood's failed attempt at *Hen Wlad fy Nhadau* has become part of Welsh folklore.

46 For example Standing Order 86 (all Welsh MPs entitled to sit on committees established to scrutinise specifically Welsh legislation) was suspended during 1993-94 in face of the Labour majority.

47 J. Osmond, 'Re-making Wales', in J. Osmond (ed.), *A Parliament for Wales* (1994).

48 Typically with disproportionate Conservative representation: see K. Morgan and E. Roberts, *The Democratic Deficit: A Guide to Quangoland* (1993); J.B. Jones, 'Welsh Politics Come of Age. The Transformation of Wales since 1979' in J. Osmond (ed.), *A Parliament for Wales* (1994).

49 See Public Accounts Committee, *Welsh Development Agency Accounts 1991-92,* HC 353 (1992-93).

50 K.O. Morgan, *Democracy in Wales. From Dawn to Deficit* (1995) at pp.1, 6.

It is not simply that the New Public Management was allowed to run wild in Wales. Here as elsewhere in the Kingdom, much of the development came at the expense of local government. Thus key functions were transferred, as in housing and education, and there was the tough financial constraint that became so familiar under the Conservatives. Perhaps there was a special sensitivity to this, given the historical importance of local government in Wales as the only home-grown tier of democratic authority.

Unaccounted and unaccountable is a fair description of much of the governance of Wales in the recent period. A sense of political disenfranchisement could only be sharpened by the paucity of local Conservative representation. In institutional terms Conservative reforms are seen in paradoxical fashion to have eased the passage of the new model Wales. Thus the march of the quangos led to increased institutional differentiation between Wales, Scotland and England, so producing a more evident Welsh 'state' machinery.[51] Again, abolition of an upper tier of local government,[52] itself an historic centre of opposition to devolution,[53] worked to create institutional space for a new kind of territorial government, drawing the sting of objections of over-government. Then there was the idea of the 'hidden' layer of territorial government.[54] A new construction could plausibly be presented as part of a long-established process of devolution, in effect a catching-up, a democratisation of existing powers. Expressed slightly differently, the democratic deficit grounded the case for reinventing a polity in expressly Welsh terms. Unionism has once again proved its own worst enemy.[55]

2.3 New Labour, new constitutional prospect

What then of the place of Wales in the broader UK process of constitutional reform? This was the most radical aspect of New Labour's election manifesto, now bearing fruit in a welter of legislative and executive activity.[56] On the one hand, the quest for 'a new politics' is hardly confined to Wales. On the other hand, asymmetrical devolution means variable geometry, underscoring the way in which general principles of modernisation and decentralisation are mediated in the light of local conditions.

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51 A theme developed by B. Hogwood, above, n 21. See also J. Bradbury, 'Conservative Governments, Scotland and Wales. A Perspective on Territorial Management' in J. Bradbury and J. Mawson (eds.), *British Regionalism and Devolution. The Challenges of State Reform and European Integration* (1997).

52 A system of unitary local authorities was introduced by the Local Government (Wales) Act 1994.

53 See for example J.B. Jones and R.A. Wilford, 'Implications: Two Salient Issues' in D. Foulkes, J.B. Jones and R.A. Wilford (eds.), *The Welsh Veto. The Wales Act 1978 and the Referendum* (1983).

54 V. Bogdanor, *Power and the People* (1997), at p.41.

55 An historical theme familiarly associated with Home Rule and Ireland.

56 From Scottish devolution to the Human Rights Act 1998, and on through freedom of information, London government and reform of the House of Lords. Not forgetting the great prize of democratic renewal and prospect of peace in Northern Ireland: John Morison (1998) 25 *Journal of Law and Society* 510.

Different from the 1970s is the tone of the Government's language: far more positive. For devolution is a sine qua non of New Labour's constitutional thinking.[57] 'Subsidiarity is as sound a principle in Britain as it is in Europe.'[58] Devolution has often been advocated as a tool of more effective government. However, the basic project, 'bringing Government closer to the people', is not only about constitutional reform but also about creating a newly textured democratic culture. Splendidly envisioned, this represents the so-called 'Third Way' in politics;[59] hence the mantra of partnership and cooperation, self-governance and the search for mutually advantageous, collaborative solutions. And, in particular, of inclusiveness, which is signalled in devolution by innovative techniques of political participation and representation. Rooted in the politics of difference, and putting in issue the meaning of ideas of 'Britishness', this reflects and reinforces the contemporary sense of a more cosmopolitan society, whose people have multiple identities.[60]

The language however glosses over so many of the constraints and difficulties.[61] Take the complexities of intra-territorial divisions of interests; a typical New Labour usage, 'Wales as a community of communities', is less than illuminating. Then there are the strong pressures – financial, European, party political – for uniformity in policy making in the United Kingdom. It will be seen that ways in the scheme for mediating the potential of conflict both express New Labour's cultural ambition and demonstrate remarkable optimism.[62]

Given the comparative weakness of the local economy, a strong linkage in New Labour theology between economic reconstruction and democratic renewal has special resonance in Wales. In the words of the White Paper, 'one of the Assembly's most important tasks will be to provide clear leadership and a strategic direction to boost the Welsh economy'.[63] It should 'develop ... distinct policies to respond to Wales's particular needs' and 'raise Wales's profile'. There is clear recognition of the processes of economic globalisation, and of the need to identify strengths, establishing conditions for indigenous industries with a

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57 Set texts include A. Wright, *Citizens and Subjects: An Essay on British Politics* (1994); P. Mandelson and R. Liddle, *The Blair Revolution: Can New Labour Deliver?* (1996), especially chapter 8. For an overview of implementation, see A. Gray and B. Jenkins, 'New Labour, New Government? Change and Continuity in Public Administration and Government 1997' (1998) 51 *Parliamentary Affairs* 111.

58 New Labour, *Because Britain Deserves Better* (1997), p.33.

59 For discussion, fittingly conducted via website, see http://www.netnexus.org/3way/debate.htm.

60 See for work in the Scottish context, J. Mitchell, *Strategies for Self-Government* (1996); also, A. Brown, D. McCrone and L. Paterson, *Politics and Society in Scotland* (1996). See further, M. Leonard, *Britain TM. Renewing Our Identity* (1997). As regards the emergent context of European citizenship, see J. Weiler, 'Epilogue: The European Courts of Justice: Beyond "Beyond Doctrine" or the Legitimacy Crisis of European Constitutionalism', in A. Slaughter, A. Stone-Sweet and J. Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence* (1998).

61 See, for the anti-devolutionist, P. Norton, 'Confusion and Conflict: The Perils of Devolution' in A. Tomkins (ed.), *Devolution and the British Constitution* (1998).

62 A theme pursued especially in Part 6 of this chapter, in the context of soft law techniques.

63 *A Voice for Wales,* Cm 3718 (1997), para.2.1. See further R. Mackay, B. Morgan and G. Holtham, *The Economic Impact of a Welsh Assembly* (1997). And see below, and chapter 6 above, on the European dimension.

comparative advantage.[64] Attention is thus drawn to the changing nature and trajectory of regional development, away from large-scale public investments and diversionary policies so familiar in the 'old' Wales, and towards a new framework which encompasses both inward investment and an 'info-structure' of business services, skills and social capital.[65] The Welsh Development Agency, greatly strengthened, is tellingly relabelled 'a new economic powerhouse'.[66] The shaping of regional government by competitive forces is brilliantly illustrated.

2.4 Beyond the Anglocentric State

An important topic is the multi-faceted relationship of Wales with the other territories of the Union, underscored in the shifting constitutional scene by considerations both of architectural design and possible future development. The Scottish Question is a familiar theme in modern Welsh history, that is, the dominance of Scotland in Britain's constitutional debate, the related sense of devolution to Wales as a pragmatic add-on which enables Scottish devolution to be presented in terms of subsidiarity. As regards the present scheme, despite the basic difference of executive and legislative devolution, Scottish influence is manifest in such important elements as electoral system and judicial process. Looking forward, implicit in asymmetrical devolution is a continuing pull from Scotland: enhanced pressures in Wales to move to a more advanced form of devolution.

Then there is the English Question, more specifically the role and potential for English regional government in New Labour's programme of reform. This development is signalled by a directly elected Mayor for London, and, more cautiously, by regional development agencies and voluntary regional chambers.[67] A broader significance for the Welsh scheme as useful role model is in this context easily envisaged; an enhanced range of constitutional possibilities precisely because of the more limited or 'gentler' form of devolution. Further than this, there must be a question concerning the sustainability of the Welsh scheme in the absence of similar flanking developments in England, such will be the political and administrative complexities for the centre otherwise associated with a sui generis scheme of executive devolution.

Turning to Northern Ireland, the Stormont years obviously serve to illustrate the dangers of devolution: at one level, intra-territorial divisions of interests, manipulation and exploitation; and, at another, the politics of a territory turning inwards. It is, however, appropriate to

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64 Ibid., chapter 2. Priorities typically include education and training, 'partnerships for economic prosperity' involving public, private and voluntary sectors, and 'jobs and investment ... to the less prosperous parts of Wales.' See further, Welsh Office, Pathway to Prosperity: *A New Economic Agenda for Wales* (July 1998).

65 Change previously discernible in the work of the Welsh Development Agency: K. Morgan, 'The Regional Animateur: Taking Stock of the Welsh Development Agency' (1997) 7 *Regional and Federal Studies* 70.

66 Cm. 3718, para.2.5.

67 Greater London Authority (Referendum) Act 1998; *Building Partnerships For Prosperity,* Cm 3814, 1997; Regional Development Agencies Act 1998. Not forgetting the parallel process of modernisation in local government: Department of Environment, Transport and the Regions, *Modern Local Government. In Touch with the People*, Cm 4014 (1998); Welsh Office, *Local Voices. Modernising Local Government in Wales* Cm 4028 (1998).

observe how the Agreement now reached in multi-party talks not only assumes Welsh and Scottish devolution but also envisages the development of multilateral and bilateral arrangements at UK territorial as well as national level. Briefly, this involves the British-Irish Council,[68] composed of representatives of the various administrations and charged with cooperation on matters of mutual interest. As a separate territory Wales has a useful role to play in grounding the so-called 'east-west' relationships, representing old Celtic associations together with the Union. But further, administrative and political space is created for Wales in such fields as transport links and the environment, as also cultural matters and joint approaches to EU issues.[69]

Cross-fertilisation of ideas and techniques; the territory both as object of reform and key to unlock further constitutional options; opportunities presented by less Anglocentric forms of territorial networking: all these are critical elements in the environment of the new model Wales. To pursue the argument, a high degree of contingency, and of reflexivity, characterises the process. A recurrent theme is the strength of the dynamic of constitutional change. At one level, the hegemony of New Labour's territorial vision is hardly assured.[70] At another level, there is a conjectural quality to the design of the architecture, an aspect it will be seen which is brilliantly illustrated in the matter of Wales and Westminster. The new model Wales is an experiment that reflects and reinforces an uncertain constitutional prospect.

2.5 Meso government in Europe

The European dimension is qualitatively different from the 1970s. Much is heard of the 'hollowing out of the state',[71] even of a 'Europe of the Regions'.[72] For this is an era of multi-layered governance, the relocation of decision-making powers from the central state to supranational institutions and to territories and localities.[73] Reference may here be made to the rise of regional or 'meso' government, meaning the emergence across most of Western Europe of an intermediate level of government between the central and local tiers of national

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68 Or 'Council of the Isles', constituted under Strand Three of the Agreement. See *The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland,* Cm 3883 (1998), pp.14-15; and, for discussion, John Morison, above, n. 39.

69 Notably, the Republic is in the process of establishing new offices in Cardiff. The broader dimension of regional government in Europe is discussed below.

70 Scotland springs immediately to mind. For competing perspectives on likely developments, see A. Barnett, 'Constitutional Possibilities', (1997) 68 *Political Quarterly* 361; T. Nairn, 'Sovereignty After the Election' (1997) 224 *New Left Review* 3. See further, J. Barnes, *Federal Britain: No Longer Unthinkable?* (1998).

71 R. Rhodes, 'The Hollowing Out of the State: The Changing Nature of the Public Service in Britain' (1994) 65 *Political Quarterly* 138.

72 In extreme form the thesis that regions will develop a direct dialogue with Brussels such that the nation state withers away. See A. Adonis and S. Jones, *Subsidiarity: History, Policy and the Community's Constitutional Future* (1991); also, R. Leonardi and R. Nanetti (eds.), *The Regions and European Integration* (1990).

73 G. Marks, 'Structural Policy in the European Community', in A. Sbragia (ed.), *Euro Politics. Institutions and Policy Making in the 'New' European Community* (1992); id., 'An Actor-Centred Approach to Multi-Level Governance' (1996) 6 *Federal and Regional Studies* 20.

administration.[74] Experience varies, with a range of types of regional government among and within states, but certain main factors are typically identified: the needs of economic development and competition, administrative and political overload of the central state, demands for democratisation and participation, minority nationalism, and European integration.[75] Notably, a strong regional focus has developed inside the European Union, which has in turn generated interest in creating regional administration to respond to schemes.[76] Under the Conservatives, the United Kingdom emerged as the odd man out, alone among the larger EU states in lacking elected regional government. But the concept of meso government in Europe helps to explain the new design in Wales. It encapsulates the idea of economic development and opportunity as motor of constitutional change.

There were initiatives to build on. One reason why in recent years the Welsh Office has taken on a more distinctive 'national' identity is in order to respond to the opportunities presented by UK membership of the European Union.[77] Take the structural funds, of huge significance to Wales, where administration and implementation have been assigned to the region.[78] Their possible reduction in the context of EU enlargement only strengthens the case for competitive regional development.[79] Again, illustrative of the different forms of regional politics, territorial representation is not confined to a few members in the European Parliament and on the advisory Committee of the Regions, but encompasses lobbying and interest representation in Brussels.[80] Particularly striking are the close links, technological as well as cultural, which have been established with the four 'motor' regions of Europe: Baden Wurttemberg, Lombardy, Rhone-Alpes and Catalonia. Nothing better illustrates the potential for profitable regional networks, in this instance outside the formal EU framework.[81]

The procedures for taking account of distinctive Welsh interests in the UK negotiating position have of course been developed in Whitehall arrangements. It is the familiar catalogue of Cabinet and inter-departmental committees, the collective policy line in UKREP

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74 L.J. Sharpe (ed.), *The Rise of Meso Government in Europe* (1992); also U. Bullmann, 'The Politics of the Third Level' (1996) 6 *Regional and Federal Studies* 3.

75 M. Keating, 'Regional Devolution: The West European Experience' (1996) (4) *Public Money and Management* 35; also J. Hopkins, 'Regional Government in the EU' in S. Tindale (ed.), *The State and the Nations: The Politics of Devolution* (1996); S. Rokkan and D. Urwin, 'Introduction: Centres and Peripheries in Western Europe' in S. Rokkan and D. Urwin (eds), *The Politics of Territorial Identity* (1982).

76 C. Harvie, *The Rise of Regional Europe* (1994); see also B. Jones and M. Keating (eds.), *The European Union and the Regions* (1995).

77 J. B. Jones, 'Welsh Politics and Changing British and European Contexts' in J. Bradbury and J. Mawson (eds.), *British Regionalism and Devolution. The Challenges of State Reform and European Integration* (1997), pp.44-45.

78 Payments will total some £1,280m in the five years to the millennium: Cm 3718, para.3.45.

79 The Welsh Office is currently pressing hard for Objective One status for most of Wales.

80 Notably via the Welsh European Centre, established in 1992 to act as a facilitator and source of advice.

81 See further J. Gray and J. Osmond, *Wales in Europe. The Opportunity Presented by a Welsh Assembly* (1997).

and the Council of Ministers.[82] In this context, New Labour rhetoric carries the danger of inflated expectations. The Assembly will have to operate within, as well as on, the parameters of UK European policy-formation, while devolution may serve to heighten tensions between regional and national policy lines in some EU matters.[83] The White Paper trumpeted the opportunities. As will be seen, the legislation is generally silent on meeting the challenge.

3 Delivering Devolution

3.1 Party, people and Parliament

Devolution to Wales lays bare some general criticisms of the Government's approach to constitutional reform. The first concerns a tendency to the ad hoc and piecemeal, notwithstanding clear connections between various elements of the programme.[84] In this context, conflict in the Welsh Labour Party was a critical political factor shaping the sui generis model:[85] less internal architectural logic, more an internal compromise between opponents of devolution and those favouring a more advanced arrangement on the Scottish model. The result it will be seen is some of the least satisfactory features of the new construction.

The so-called 'new politics' in Wales is in large measure a product of the old. The territory has been treated differently from Scotland in terms not only of the model of devolution but also in the mode of delivery. So there was no equivalent to the Scottish Constitutional Convention established in 1989, both as a mechanism for building cross-party consensus and for raising the level of debate on the opportunities and challenges presented by a national assembly.[86] While the explanation lies in Labour's need to establish internal agreement, the omission is most unfortunate by reason of the many intra-territorial divisions of interests.

Second but related, concern is expressed regarding the sheer pace of reform.[87] It has meant for Wales a White Paper, referendum and draft legislation within six months of the General Election. This is explicable in terms of the momentum of the Scottish project, but problematical in Wales because of a political failure of Labour in opposition to establish credible proposals, and, in particular, the many complexities involved in executive

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82 See for details, A. Weston, *Devolution and Europe,* House of Commons Library Research Paper No.97/126 (December 1997).

83 Agriculture, fisheries and development funds spring immediately to mind.

84 See in the context of Scottish devolution, N. Walker, 'Constitutional Reform in a Cold Climate: Reflections on the White Paper and Referendum on Scotland's Parliament' in A. Tomkins (ed.), *Devolution and the British Constitution* (1998).

85 R. Hazell, 'Watching Wales', *Prospect* (August 1997); also G. Holtham and E.Barrett, 'The Head and the Heart: Devolution and Wales' in S. Tindale (ed.), *The State and the Nations: The Politics of Devolution* (1996)

86 Underscored in Scotland by the constitutional Claim of Right asserting that sovereignty and the right of self-determination reside in the Scottish people. See Scottish Constitutional Convention, *Scotland's Parliament. Scotland's Right* (1995).

87 Importantly, for present purposes, by leading advocates of constitutional change: R. Hazell, 'Devolution and Constitutional Reform' in A. Tomkins (ed.), *Devolution and the British Constitution* (1998).

devolution. Considerable improvements have been made to the scheme in the later stages of construction, using the resources of Government. But the process involves mitigating the adverse consequences of an inadequate original design and is thus subject to major limitations.

Also troubling is the use made of the pre-legislative referendum, which has become a symbol of New Labour's constitutional design. [88] The people of Wales would be empowered[89] but only on restrictive terms dictated by Labour's own trials and tribulations. Hence, a fine example of the structuring and confining of popular discretion, the referendum question was yes/no on executive devolution. [90] As a tool of (political) entrenchment, the referendum is the best available means within the Westminster tradition of sovereignty. In the case of Wales it operates in two opposite ways: on the one hand, to blunt any Conservative ambitions of policy reversal; on the other, to suggest the absence of any popular mandate for bringing into the scheme primary legislative or tax varying powers.

What of the chilling effect of a device long seen as hostile to parliamentary government? Legislative scrutiny was necessarily constrained by this manifestation of popular democracy. Ministers, when it suited, could plead the text of the White Paper as the 'manifesto' on which the people had voted. Again, in the pursuit of constitutional reform, the Government proved willing to depart from established constitutional practice, a Committee of the Whole House to examine bills of 'first-class constitutional importance'.[91] Eventually an arrangement was made keeping all matters on the floor of the House but subject to a very strict timetable.[92] Even so, the legislation was substantially improved.[93] For it is precisely the complex and experimental nature of the scheme which has served to underscore the importance of the Parliamentary process.

The fact that the referendum vote was in favour of devolution demonstrates a sea- change in Welsh opinion since 1979.[94] The continuing tensions and divisions were, however, brilliantly

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88 See for general discussion, Electoral Reform Society and Constitution Unit, *Report of the Commission on the Conduct of Referendums* (1996); G. Marshall, 'The Referendum: What, When and How?' (1997) 50 *Parliamentary Affairs* 307.

89 This was not the policy of the Welsh Labour Party, the decision to consult the people only coming after intervention from London, a nice irony in the politics of devolution.

90 Referendums (Scotland and Wales) Act 1997, section 2 and Sched.2. As in 1979 the poll was restricted to people living in Wales: the exercise of an English 'veto' could not be countenanced.

91 A motion splitting the committee stage of the Wales Bill was carried, which reserved from standing committee only six major clauses: House of Commons Debates, vol.. 302, cols. 900-906 (9 December 1997).

92 Seven days in Committee and two days for Report and Third Reading.

93 Especially as regards the basic internal architecture of the Assembly: see below.

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1979 Referendum	*1997 Referendum*
Yes: 20.3%	Yes: 50.3%
No: 79.7%	No: 49.7%
Turn out: 58.8%	Turn out: 50.1%

illustrated by the narrowness of the margin: some 7,000 votes out of 1,110,000.[95] Further than this, the process was characterised by mass indifference, barely half of those eligible electing to vote. The result would have been different had there been the kind of 'fancy franchise' or threshold requirement operative in 1979.[96] The referendum is thus seen in paradoxical fashion to have crystallised the issue of legitimacy. Popular expression of 'a settled will' for constitutional change was lacking, unlike in Scotland.[97]

3.2 Fixing the future? Composition and election

The new Assembly involves an additional member system, but it has shrunk in size from the 80 members envisaged by the Wales Act 1978. How this happened is, in the words of the Secretary of State, 'a long and complicated story about internal Labour Party politics.'[98] Put briefly, it involves intervention from London, to the effect that the Welsh Party look again at a system of proportional representation, previously rejected in favour of first past the post.[99] The upshot is an Assembly of 60 members, consisting of 40 Members elected by 'first past the post' from constituencies identical to the parliamentary constituencies, and 20 Members elected under AMS from five electoral regions.[100] This represents a carefully contrived political balancing act. On the one hand, first past the post hardly gelled with a 'new politics' of inclusiveness. On the other hand, the arrangements exhibit a desire to stack the cards in favour of the Labour interest.

'Straightforwardly obscure' is an apt description of the electoral system. It turns on the d'Hondt formula,[101] non-transparent and complicated for voters. The Government has been at pains to stress how the formula compensates for electoral imbalances created in the first past the post section. The system 'will ensure, as far as possible, that the Assembly reflects the diversity of modern Wales geographically, culturally and politically.'[102] But this is not

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95 Analysis of the results emphasises the importance of generational difference, younger people being more favourably disposed to devolution, as well as geographic (east-west), social class and linguistic divisions. See D. Balsom, 'Assembly Poll Revealed Unity Amidst Diversity' (1997) *Agenda* (Institute of Welsh Affairs) (3) 11. See further on the referendum campaign, L. McAllister, 'The Welsh Devolution Referendum: Definitely, Maybe?' (1998) 51 *Parliamentary Affairs* 149.

96 When against the Government's wishes, Parliament required 40% of those eligible to vote in favour. Famously the amendment proved crucial in Scotland.

97 Where the 'yes' vote was 74.3% for the Scottish Parliament, and 63.5% for tax-varying powers. In Wales, the Government predictably moved to re-emphasise inclusiveness, as demonstrated by the work of the NAAG.

98 Ron Davies, House of Commonse Debates, vol. 302, col. 676 (8 December 1997). See R. Deacon, 'How The Additional Member System Was Buried And Then Resurrected In Wales', (1997) 34 Representation 219.

99 *Representing Wales*, the new policy document, was ratified by a Welsh Labour Party conference in February 1997, only two months before the General Election.

100 Sections .2-7, and Schedule 1.

101 The first additional member is identified by taking the number of constituency seats won by each party in the region, adding one (so providing 'the divisor'), and dividing the number of each party's list votes in the region; the calculation is then repeated for the second to fourth additional members, factoring in any additional member seats allocated in previous rounds.

102 Cm 3718, para.4.3.

the whole story. The d'Hondt formula is recognised to favour major parties by reason of the numerical progression.[103] The Welsh scheme also provides for a less proportionate outcome than in Scotland because there are fewer additional members with which to 'compensate' for first past the post. [104] Furthermore, this is a 'closed' list system, regional electors being unable to express a preference for individual party candidates.[105] Party patronage predominates; for the Labour hierarchy, a new form of an 'old' politics.

The design illustrates the scope of, and limits to, a process of asymmetrical devolution. On the one hand, the system is borrowed from Scotland, having been advocated there by the Constitutional Convention.[106] The Welsh Office was hemmed in, different versions of AMS proving too distracting for the Government. On the other hand, all attempts in Parliament to establish greater proportionality and thus to unstitch an internal party compromise were predictably rejected by the Secretary of State. The chief imponderable concerns the fact that, as recommended by the Scots, electors have two votes, one for the 'Assembly constituency' and one for the 'Assembly electoral region'.[107] The prospect opens up of differential voting or so-called 'ticket-splitting', most obviously to curb the size of the Labour bloc.[108]

The further issue is raised of the effectiveness of the Assembly. A strong system of committees being part of the internal architecture,[109] it must seriously be questioned whether 60 members is a sufficient number,[110] all the more so, because, in the name of inclusiveness, there is a requirement of party balance in most committees.[111] The danger arises of too much

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103 In contrast to the Sainte-Lague formula, which uses as devisors odd numbers beginning at 1. For discussion of the variants of AMS, see T. Mackie and R. Rose, *International Almanac of Electoral History* (1992, 3rd ed); also R. Blackburn, *The Electoral System in Britain* (1995).

104 A ratio between the sections of 33:67 as against 43:57 in Scotland where the Parliament is established with 73 constituency Members and 56 'additional' Members. One more 'additional' member in each of five Welsh electoral regions would achieve a ratio of 43:57. See P. Dunleavy, H. Margetts and S. Weir, *Devolution Votes: PR Elections in Scotland and Wales*, Democratic Audit Paper No.12 (September 1997), ch.3. The ratio is prescribed in the legislation, so governing future reviews by the Boundary Commission; see Schedule 1, para.8.

105 The European Parliament Elections Act 1998 goes further, providing for closed lists in a pure regional list system.

106 And resembling in turn the German system. See *Scottish Constitutional Convention,* above, n. 69, pp.21-22.

107 The AMS system originally considered and rejected by the Welsh Labour Party in favour of 'first past the post' would have given electors only one vote. *Preparing for a New Wales* (May 1996).

108 The likelihood of ticket-splitting is highlighted by the research from Democratic Audit, above n. 87. See further, I. Byrne, 'Voting for the Assembly' (1997) *Agenda* (Institute of Welsh Affairs) (3) 17.

109 The late shift from a local government towards a Cabinet model notwithstanding; see below.

110 A concern strongly voiced by the Institute of Welsh Affairs, *The Operation of the National Assembly,* IWA Discussion Paper No.6 (1998), pp.3-5.

111 See for example, sections 57 and 59 (Subject Committees and Subordinate Legislation Scrutiny Committee). The most important exception is the Executive Committee; see below. NAAG estimates that seven to 11 committee members will generally be required to secure a reasonable party balance; above, n. 21, recommendation 40.

dependence on the civil service, which would be a fine irony given the democratic deficit that developed under the Conservatives.

Enough has been said to identify the composition and election of the Assembly as significant flaws in the new construction. Fixing the future is never easy, and the electors have a capacity to respond by differential voting. Nonetheless, overly influenced by internal party considerations, insufficient attention has been paid to the principle of inclusiveness in determining the extent of proportional representation. Expressed slightly differently, more should have been done to address the evident problem of legitimacy.[112] We note too the borrowing from Scotland, and on less good terms. Here, as so often in the long saga of devolution, Wales has been treated as the poor relation.

4 Internal Architecture

4.1 Towards a Cabinet style

Post-referendum, public debate largely focused on the distribution of power inside the Assembly. Much was open to contention, a feature connected to the general character of the statute and the mix of detailed provision and major gaps or 'silences'. It links in turn to an important aspect of Government policy: effectively a self-denying ordinance, a constitutional understanding, reflecting and reinforcing the principle of devolution, that prescribing internal modalities is essentially for the territory and not the centre. That said, the Government was persuaded to move, not entirely unwillingly, towards a more executive-driven style of administration. Reference may here be made to the more conventional model of government devised for legislative devolution to Scotland; a separate Executive drawn from and accountable to the Parliament, as enshrined in the statute.[113] As indicated, in the case of Wales internal architecture takes on a more distinctive or hybrid character and is basically modelled via the internal law of the Assembly.

Discussion has largely been framed in terms of a Cabinet model versus a committee or local government model of administration.[114] These are ideal types, expressive of competing values in institutional design. An initial disposition towards a committee model shows the role of the Wales Act 1978 in the construction. Key features were to be replicated: powerful subject committees; an Executive Committee, composed of leaders of other committees; no power of dissolution. Also derived from the Wales Act is a most important constitutional feature: the Assembly as body corporate or collective repository of legal functions, as distinct from a formally empowered, separate, Executive.[115] Correctly, the committee model became increasingly criticised in the course of construction. Participation by minority parties requires firm institutional underpinning in a territory electorally dominated by one party. Yet

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112 An assurance to the Liberal Democrats that the electoral system would be reviewed if the results were not proportionate is hardly sufficient (see House of Commons Debates, vol. 309, col. 773 (26 March 1998)).

113 Scotland Act 1998.

114 The framework highlights the confines of traditional constitutional analysis, given the context of territorial government. This is underscored by the diversity of local government practice and parallel shifts in that context to more dynamic, executive-led, forms of administration. See above, n. 50.

115 See for details, V. Bogdanor, *Devolution* (1979), chapter 7.

an argument from inclusiveness could be turned on its head. Informal and closed arrangements, the political caucus as the real locus of decision-making, is commonly identified as a major vice of the local government model.[116] Then there are the competing functional values of efficiency and effectiveness in administrative decision-making epitomised in the view of the committee model as unduly cumbersome and tending to strategic incoherence. In the event, the case for a more Cabinet-style of government was taken up not only by all the opposition parties, but also by most of the Welsh establishment.[117] It encapsulates the need for sharper lines of accountability to the Assembly; and, further, a desire to cement its status and so avoid the charge, to which the Government was sensitive, of 'a glorified county council'.

4.1.1 Delegation and contrivance

The place in the new construction of the hierarchy and combination of norms can now be demonstrated. Three key elements lock up together. The Act typically provides the basic or outline structures:[118] an Assembly First Secretary elected by the Assembly as a whole; an Executive Committee appointed by the First Secretary and made up of Assembly Secretaries; Assembly Secretaries who will also be members of Subject Committees; Subject Committees, whose other members will be elected by the full Assembly in accordance with party balance; Chairs of Subject Committees similarly elected; and any other committees and sub-committees which the Assembly decides to establish.[119] The design then entails building in flexibility through broad powers of delegation, both from the Assembly as a whole and as between the diverse actors.[120] The very character and status of the Assembly will be greatly influenced by the way in which these powers are exercised. Notably, there is much freedom for manoeuvre at the locus of public controversy, that is, the nature of relations between the Executive and Subject Committees, and thus the position of the Assembly Secretaries. The third element is the standing orders by which some or all of the delegations may be concretised, and in particular the statutory procedure for making them. The permissive style of the legislation should not be allowed to obscure the major role played by Ministers and officials in shaping the internal architecture. Briefly, the rules are made by the Secretary of State on the basis of a draft prepared by Commissioners, to whom, and building on the work of the NAAG in a pathfinding role, statutory guidance is given.[121] The standing orders are then entrenched, override by the Assembly requiring a two-thirds majority.[122]

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116 Not least in South Wales. See further, Constitution Unit, above, n. 8, chapter 6.

117 Including the Welsh CBI, the Welsh Local Government Association, and the Institute of Welsh Affairs. The NAAG also argued in this direction.

118 See especially sections 52-61. Notably it is proposed that the Executive Committee should be known as the Assembly Cabinet; NAAG, above n. 21, recommendation 7.

119 As discussed below, the statute also provides for regional committees, a subordinate legislation scrutiny committee and an audit committee. There must also be a Presiding Officer and a Deputy Presiding Officer elected by the Assembly.

120 Sections 62-63. Naturally some powers cannot be delegated, as in the realm of audit: section 60.

121 The initial guidance, in the form of a letter to Gareth Wardell, chair of the Commissioners, was given immediately following Royal Assent. NAAG's final recommendations were generally commended.

122 Sections 46, 50-51. The Assembly would thus be able, in New Labour-speak, 'to hit the ground running'.

How then was a Cabinet model granted precedence? Better late than never, the Government tabled amendments on Commons Report transferring the power to appoint (and dismiss) Assembly Secretaries from the Subject Committees to the Assembly First Secretary; underwriting the power to delegate Assembly functions to the First Secretary, and thence to Assembly Secretaries; and requiring standing orders to provide for oral and written questions on the parliamentary model.[123] The Secretary of State also made clear his intention to entrench the delegations in a pro-Cabinet style;[124] that is, by providing in standing orders that the exercise of the statutory discretion to delegate functions be routed through the Assembly First Secretary and not via the Subject Committees. A rebalancing is identified: on the one hand, the strong steer from the centre, a firm push for the Assembly along the continuum between the local government and Cabinet models; and, on the other, a procedural space for territorial autonomy, the potential for movement back by a special majority of the Assembly.[125]

The order in which areas of activity inside the Assembly are determined has been reversed. Whereas it was previously envisaged that the pattern of Subject Committees would emerge via the route of standing orders and the Assembly, it will now be the First Secretary who determines the pattern by his or her choice of portfolios for Assembly Secretaries. Achieving this has involved a singular use in the legislation of the concept of accountability. It amounts to a sleight of hand, necessary because of the limits on the rebalancing process. The First Secretary will give an Assembly Secretary his or her functions by means of delegation. Also, but separately according to the legislation, [126] the First Secretary will allocate to the Assembly Secretary 'accountability' as defined in terms of answering questions, the assumption being that the range of accountability will mirror the range of functions that are delegated. Then, a second mirror effect, it is stated that the division between the Subject Committees of the fields in which those committees have responsibilities, and the division between members of the Executive Committee of the fields in which accountability is allocated to members of that committee, shall be the same.[127]

It is of course tempting to gloss over these intricacies, but that would be to miss the point. The discussion demonstrates that the initial choice of constitutional design was woefully uninformed. The late shift towards a Cabinet model may be read as an attempt to mitigate the adverse consequences. It is this process of change without abandoning the basis on which a referendum was fought which has engendered all the contrivance.

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123 Sections 53, 56 and 62. So too the statute no longer provides for Assembly Secretaries to be leaders (and not simply members) of the Subject Committees. See for the original provisions, clauses 52-58 of Bill 88 of 1997-1998.

124 Ron Davies, House of Commons Debates, vol. 309, col. 538 (25 March 1998).

125 Thus the Government resisted attempts further to entrench a Cabinet system in the statute: House of Lords Debates, vol. 590, cols. 369-371 (3 June 1998).

126 See sections 62(5) and 56(3) respectively.

127 Section 57(4).

4.1.2 Going on

A series of features serves to underscore the special character of the scheme and, in particular, the broad scope for organic development. A necessary element of flexibility is introduced by allowing Assembly Secretaries to be appointed outside the framework of the subject committees.[128] The way is opened to a Financial Secretary and proper management of the budgetary process, as also to an Assembly Business Manager.[129] The reasonable suggestion is made of six subject committees, linked to the three broad themes of social, economic and environmental issues.[130] Such a pattern would clearly be open to variation or adaptation by reason of changing political and administrative priorities in the responsibilities given to the Assembly Secretaries. A demand will also arise for 'horizontal' programme committees. An equal opportunities committee is the obvious candidate.[131]

A 'new kind of politics' entails minimising the bipolarity so familiar at Westminster.[132] Critical to the development are the precise functions of the Subject Committees. Their role is envisaged to extend well beyond that of scrutiny of the Executive on the Westminster model. They will be multifunctional, not only combining the roles of standing and select committees, but also enabling the minority parties to play a distinctive and influential role in the Assembly's policy process. Hence suggested headings include proposing initiatives, reviewing outcomes, and making recommendations on resource allocation.[133] To this effect, Government rhetoric marks both the movement towards, and distance from, a pure Cabinet model. Reference is made to 'partnership' between majority and minority parties, the principle, central to this unique design, of Assembly Secretaries and Subject Committees working in harness.

How can civil servants be fitted into the scheme? Virtually all Welsh Office staff will transfer to the Assembly. They will however, as part of the 'glue' of the Union state, remain members of the Home Civil Service.[134] The peculiar mix of Assembly functions clearly presents difficulties. The Act notably provides not only for delegation to officials[135] but also for the Permanent Secretary to organise staff allocation, an attempt to guarantee the principle of freedom from political interference.[136] Certainly job differentiation and relations between

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128 It is proposed that the standing orders specify a maximum of 8 Assembly Secretaries, of whom a maximum of two would be available for non-Subject Committee functions. See sections 53(3) and 56(4); and NAAG, above, n. 21, recommendation 34.

129 Linked in turn to an all-party Business Committee; see NAAG, ibid., recommendations 4,38.

130 NAAG, *Consultation Paper*, above, n. 21, paras.3.25-3.26.

131 See also NAAG, above n. 21, recommendation 55.

132 An aspect notably stressed by Charter 88: M. Mitchell, *Standing Orders, A New Political Culture for the National Assembly for Wales* (April 1998).

133 NAAG, *Recommendations*, above n. 21 , paras. 5.6-5.7.

134 See section 34.

135 Section 63(1). Parliamentary counsel was apparently not convinced that *Carltona Ltd. v. Commissioners of Works* [1943] 2 All ER 560 would otherwise apply in the context of the Assembly.

136 Section 63(2).

officials will require careful management. To this effect the proposal that Assembly and committee clerks be organised in an Office of the Presiding Officer,[137] so underwriting independence, can only be considered a beginning. Presumably it will often be a case of 'Chinese walls'.[138]

4.1.3 Necessary but insufficient

The changes made to the internal architecture do not go far enough.[139] In particular the concentration of patronage in the hands of the First Secretary cuts across an open politics expressed constitutionally in terms of checks and balances. Values like inclusiveness and partnership present a compelling case for requiring ratification by the full Assembly of Executive Committee appointments.[140] Again, take the issue of the extent of collective responsibility. Despite the move towards Cabinet-style government, there is no provision for early elections, unlike in Scotland. Strong potential exists for political deadlock.

The balancing of competing values is questionable. At one level, some of the argumentation concerning the design of 'a new politics' does not inspire confidence. It is suggested that 'without slowing down the decision-making process', minority parties and back benchers will 'have real opportunities to [exercise] influence.'[141] If only the values of efficiency and effectiveness were so easily incorporated! At another level, a confusion of constitutional roles is implicit in the model of partnership. This is illustrated in scrutiny of the Assembly Secretary by the Subject Committee of which he or she is a member. How viable is this arrangement, especially given the political leadership he or she supplies through the medium of party?[142] There is a strong case, based on separation of powers, for decoupling these structures and substituting looser requirements of consultation and participation.[143] In this perspective, the process of mitigating the consequences of the original design could not go far enough, precisely because of its character. So too, as the Secretary of State is fond of saying, devolution is not an event, but a process. A potential mismatch exists between the internal architecture now established and the powers of the Assembly if law-making capacity increases significantly, as through framework legislation.[144]

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137 NAAG, *Reccomendations,* above, n. 21, para. 4.6.

138 Staff guidance states: 'Individual civil servants will ... take their instructions from the Assembly as a whole, or from its committees or the Assembly Secretaries, to the extent that the Assembly has delegated powers to them': Welsh Office, *Devolution and the Civil Service: Staff Guidance,* February 1998, para.14.

139 The sustainability of the committee structures in light of Assembly composition has already been questioned.

140 As by affirmative resolution. NAAG has recommended a notification requirement for Executive Committee appointments and allocation of portfolios; above, n. 21, recommendations 2 and 3.

141 NAAG, *Consultation Paper*, above, n. 21, para. 3.5. The initial guidance to the standing orders Commissioners appears to strike a different note, placing much emphasis on the need for the Assembly to operate effectively and efficiently; letter to Gareth Wardell, above n. 104..

142 Explanation in Parliament of the relationship between Assembly Secretary and Subject Committee was notably vague: House of Commons Debates, vol. 309, cols. 542-573 (25 March 1998).

143 As proposed by the Institute of Welsh Affairs, above, n. 93, pp 5-6.

144 A theme pursued in section 5 of this chapter.

Ultimately of course so much depends on personalities and parties, the propensity for compromise, an aptitude for experiment. But we see the great dependence in the scheme on the cooperation and goodwill of relevant actors: traits which inside the Assembly a partnership model is clearly meant to reflect and reinforce, but a chief source of vulnerability in the context of hard choices as in resource allocation. Internal architecture needed to be made more robust in Wales.

4.2 Law and democratic renewal

Typical of the age, the style or 'feel' of government assumes particular prominence in the new model Wales. The Assembly has the formidable job description of 'a modern, progressive and inclusive democratic institution'.[145] In practice, much that passes for a new kind of politics in Wales is very tentative. Yet ways of working are possible which build on best contemporary practice, functionally tailored to local conditions. [146]

Take the principle of integrity, which typically post-Nolan[147] is strongly represented in binding norms of practice and procedure. 'The public will need to feel confident that Members are there as representatives of the public good and not for personal gain'. [148] To this effect, stringent rules will be incorporated in standing orders [149] on registration, disclosure and conflicts of interests, standards of practice at Westminster being regarded as a minimum.

General requirements of public access to Assembly meetings and documents reflect the Government's commitment to Freedom of Information legislation.[150] It is in the context of devolution another aspect of government being brought closer to the people. There was here a notable conflict between style and structure. The Bill as originally drafted created Assembly Members Crown servants for the purposes of the Official Secrets Act 1989.[151] Reflecting requirements of confidentiality in a committee model of decentralised executive responsibilities, the provision illustrates the knock-on effects of the initial design. Such a grave inhibition of the democratic function of individual representatives could hardly be justified,[152] or, to put this slightly differently, the provision, although logical, cut across the

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145 Cm 3718, para.4.1

146 See especially NAAG, *Consultation Paper*, above n. 21, chapter 7: 'Modern Ways of Working'.

147 *First Report of the Committee on Standards in Public Life*, Cm 2850 (1995); D. Oliver, 'The Committee on Standards in Public Life: Regulating the Conduct of Members of Parliament' (1995) 48 *Parliamentary Affairs* 590.

148 NAAG, *Consultation Paper*, above n. 21, para.7.35..

149 Section 72; NAAG, above, n. 21, recommendations 63-68.

150 Section 70, but with the key exception of the Executive Committee. *Your Right to Know.* Cm 3818 (1997).

151 Clause 79. Relevant matters could include EU grants, foreign investment and police investigations.

152 Especially in the absence of Article 9 of the Bill of Rights. Arguably the provision was contrary to Article 10 of the European Convention (freedom of expression); see further, House of Commons

kind of principle which New Labour has espoused. In the event, the revision of internal structures has facilitated restriction properly targeted on the Executive Committee.[153]

Institutional differentiation, the further push which devolution gives to a Welsh 'state' machinery, is demonstrated in this sphere by redress of grievance. First, reflecting contemporary trends in law and administration associated with the Citizen's Charter, stress is appropriately laid on internal procedures for complaints against public bodies in Wales, including the Assembly, with special reference to accessibility, speed of process, and feedback into policy and performance.[154] Second, external review is made the task of a new Welsh Administration Ombudsman and not the Parliamentary Commissioner for Administration.[155] Looking forward, blocking-up of offices with the Local Government Commissioner for Wales is easily envisaged.

Much is heard in this context of the principle of equality of opportunity. The Assembly must make 'appropriate arrangements' aimed at securing that its business is conducted with 'due regard to the principle', and, similarly, in respect of the exercise of its functions.[156] Useful suggestions include flexible working practices via new technologies like video conferencing and the avoidance of very formal language.[157] Gender balance in candidate selection is properly regarded as a touchstone of the 'new politics'.[158] Although the White Paper stated that greater participation by women was essential to the health of democracy, the Government could only 'urge ... all political parties ... to have this in mind in their internal candidate selection processes.'[159] Law, in the guise of the European Equal Treatment Directive, was something to be avoided for this purpose.[160] The upshot inside the Labour Party has been a policy of 'twinning' constituencies.[161] Assuming effective implementation, it heralds a far more inclusive form of political representation in Wales.

Debates, vol. 309, cols. 721-735 (26 March 1998). Statements made in Assembly proceedings are absolutely privileged in defamation: section .77.

153 Section 53(4). And see House of Lords Debates, vol. 590, cols. 353-356 (3 June 1998).

154 NAAG, *Discussion Paper: Complaints Procedures* (1998). See generally, C. Harlow and R. Rawlings, above, n. 18, chapter 12.

155 Section 111 and Schedule 9. This is a change from the White Paper: Cm 3718, para.4.39. See for explanation, House of Lords Debates, vol. 590, cols. 442-445 (date .....).

156 Sections 48 and 120.

157 NAAG, *Consultation Paper*, above n. 21, paras.7.25, 7.28-29.

158 S. Edwards, 'Include us in: Women and a Welsh Parliament', in J. Osmond (ed.), *A Parliament for Wales* (1994). Only seven women have been elected MPs in Wales since women first gained the vote in 1918.

159 Cm 3718, para.4.7.

160 Directive 76/207. Especially relevant is the recent case law of the European Court in Case C450/93 *Kalanke* [1995] E.C.R. 1-3051; Case C409/95, *Marschall* [1997] All E.R. (EC) 865. The point did not go unnoticed in Parliament: House of Lords Debates, vol. 589, cols. 909-915 (11 May 1998).

161 The policy was confirmed by a narrow majority at the annual conference of the Welsh Labour Party in May 1998. Similar procedures have been devised in Scotland.

Bilingualism is an article of faith in the new model Wales. The Assembly must treat the English and Welsh languages equally in the conduct of business, so far as is appropriate and reasonably practicable.[162] Notably, Welsh as a language of the law is to be reinvented.[163] The English and Welsh texts of Assembly instruments will have equal legal status, and there is also a 'dictionary power' to prescribe Welsh equivalents to established English legal terminology.[164] The readiness of the legal profession in Wales to respond effectively in this new cultural milieu remains to be seen!

Enough has been said to show that the use of legal precept to advance the cause of a new politics in Wales is an important dimension of the scheme. It is further one which more conventional analysis of the peculiar institutional structures tends to overlook. Of course law can only do so much in this broad context, especially as regards tangential procedures and practices not under the direct control of the Assembly. Nonetheless, interventions of this kind, far from being a reason for 'disquiet',[165] have been correctly identified as a useful source of legitimacy for the new arrangements. The development entails, at one level, responding to previous defects in the government of Wales; and, at another, specific proposals within an overarching process of constitutional reform and modernisation in the United Kingdom. The new politics, such as it is, has far to travel; the use of legal precept provides, however, a generous measure of assistance.

5 Law-making and Adjudication

5.1 Assembly functions and process

In executive devolution attention naturally focuses on the arrangements for formal rule making. How could it be otherwise given the horizontal division of labour? Evaluation involves consideration of a series of linked issues: the content and style of the transfer of functions; the opportunities for, and constraints on, a creative use by the Assembly of delegated legislation; the Assembly's law-making procedures, as prescribed especially by standing orders; and, last but not least, the exercise of influence by, and potential input of the Assembly into the primary legislative process, itself one aspect of a wider question of relations with Westminster. This is a field in which the Secretary of State has been bullish, playing up the law-making capacity of the Assembly, and portraying the ability to influence UK legislation and the right of implementation if appropriate as potentially 'the best of both worlds.'[166] Much of this enthusiasm will be shown to be misplaced.

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162 Section 47. Some prioritisation will be necessary in the early days given the resource, recruitment and training implications of the process. See further NAAG, above, n. 21, reccomendation 22; Welsh Language Board, *Meeting the Translation Requirements of the National Assembly for Wales* (1998).

163 Building in turn on the Welsh Language Act 1993, as also the administrative practice of the Welsh Office in such fields as local government law and planning.

164 Section 122.

165 D. Williams, above n. 8, p.27.

166 R. Davies, 'The tools for the job', (1996) (4) *Agenda* (Institute of Welsh Affairs) 18, at p. 19.

5.1.1 A triumph of particularity

Initially, the National Assembly will gain most of its functions by means of Transfer of Functions Orders.[167] The first order will transfer virtually all the statutory functions of the Secretary of State for Wales. [168] Provision is also made for additional transfers by order – functions exercised by other Ministers in relation to Wales – as well as by primary legislation.[169] Notably, the Assembly will gain powers under 'Henry VIII clauses' to amend or repeal primary legislation for the purpose of restructuring public bodies in Wales. [170] The use of this technique underscores, on the one hand, the potential for expansive development of Assembly authority, and, on the other, the limited capacity of the Assembly to take policy initiatives in the absence of general legislative powers.

The scale of the transfer of functions must be kept in perspective. Certainly the Assembly will be responsible for making regulations and issuing statutory guidance or directions in fields as important as education and health, economic development and the environment. But as with Scotland, it is a cardinal principle of Government policy to retain overarching functions which operate on a common basis in the different territories: not only foreign affairs, defence and macro-economic policy, but also social security, taxation and policy on fiscal and common markets.[171] Further, aside from the horizontal division of law-making powers, the transfer of functions is less generous than to Scotland. Notably, reflecting the legal integration of England and Wales, responsibility for the general criminal law and civil law is retained in London. In practice, separate Welsh legislation has been rare and legislation with a distinctive Welsh dimension has not been very common.[172] Presumably this will alter, such are the dynamics of devolution, but in the foreseeable future only over a limited area.

There is an important technical difference from the Scottish model. Whereas the Assembly is assigned specific functions field by field, the Scottish Parliament is afforded general legislative competence subject to reservations. Here the legacy of the Wales Act 1978 is obvious, although, even more inflexibly, the detail was then included in a schedule to the statute.[173] Predictably, the draft first Transfer Order is an unpleasing document. It represents a detailed trawl through some 300 Acts of Parliament, itemising precisely which functions, some major, many minor, are to pass to the Assembly. The package cannot be coherent, simply because the statutes have not been drafted with devolution in mind. Rather, the division between primary and secondary powers has tended to be ad hoc, a typical

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167 See for the major provisions, sections 21-22 and Schedule 3.

168 As promised in the White Paper: Cm 3718, para.1.8. The statute lists some 18 'fields' or subject-areas in which the Secretary of State must consider transfers: see section 22(2) and Schedule 2.

169 Notably, transfer back to Parliament by Order in Council requires the approval of the Assembly: section 22(4)(b).

170 Sections 27-28 and Schedule 4.

171 Cm 3718, para.1.9. Northern Ireland is different again, reflecting in particular the previous scope of devolution to Stormont. See John Morison, above, n. 39.

172 See for statistics, R. Davies, above, n. 149.

173. Wales Act, 1978, Schedule 2, some 25 pages long. The change is explained by the expansion of Welsh Office powers since 1978.

manifestation of British constitutional pragmatism.[174] The Assembly will find that its powers are of uneven width and depth.

Why this mode of delivery? The answer lies in the preference for an evolutionary approach as against starting afresh with a set of principles to guide the allocation. Clearly the more radical option was daunting and time-consuming, and, from the viewpoint of the civil servant, listing the specific powers may help to minimise the risk of vires disputes. There is nonetheless a heavy price to pay in terms of general clarity and transparency; at worst, a raising of false expectations of independent action by the Assembly. It is in reality a Wales of bits and pieces.

5.1.2 Diversity and constraint

In executive devolution the general power of policy initiative clearly resides with central government, the Assembly being unable in the Minister's words 'to conjure legislation from the air and call it secondary legislation'.[175] Attention thus focuses on the drafting of future primary legislation, since it is a question of deciding how much responsibility for policy should be transferred in relevant fields, unlike in legislative devolution. The Government of Wales Act can only be a beginning, the ambit of Assembly discretion having to be continually determined statute by statute. 'Every Bill a devolution Bill'.

The logic of devolution is diversity. 'As a general principle', the Government 'expects Bills that confer new powers and relate to the Assembly's functions ... will provide for the powers to be exercised separately and differently in Wales; and to be exercised by the Assembly.'[176] A further boost for framework legislation is therefore signalled, to 'allow for maximum discretion at the Welsh level'.[177] One issue is the judicial response, as when assertions of unreasonableness are engendered by subsidiary legislation at variance with England, and whether an appropriate measure of autonomy will be accorded a territorial administration crowned with democratic legitimacy. Notably the statute provides a measure of protection by expressly providing for the different exercise of functions in Wales.[178]

Is there then 'a Welsh veto'? Certainly Ron Davies in opposition raised the prospect of negative or blocking powers to frustrate primary legislation. This is the political imagery of a system for protecting Wales against a future Conservative Government, as grounded in the authority flowing to the Assembly from its democratic mandate. The matter may be tested by reference to the poll tax or community charge, effected by means of orders, regulations and prescriptions under diverse statutory powers. According to Ron Davies, it 'could not have

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174 Kilbrandon Commission, above, n. 15, paras. 828-846.

175 Win Griffiths, House of Commons Debates, vol. 304, col. 860 (20 January 1998).

176 Cm 3718, para.3.39. Reassurance was provided by stating the obvious: 'Parliament will continue to be the principal law maker for Wales .... The final terms on which an Act is implemented, including the means by which it is brought into force, will remain a matter for Parliament.'

177 'Labour's commitment [is] to ensure [that] all Westminster legislation will, wherever possible, reflect the demands of devolution': Ron Davies, above, n. 149, p.21. Will there be a knock-on effect on the framing of legislation for England?

178 See section 42.

been implemented in the face of Welsh Assembly opposition'.[179] This surely overlooks the central power of policy initiative, underwritten by the doctrine of Parliamentary Sovereignty. Once the pre-existing system of rates had been abolished, the Assembly would have had to introduce the tax, subject to details. Looking forward, there are bound to be opportunities to delay and hamper Government policy, a legal politics of technical wrangles and requirements. So much will depend, however, on the parameters of the relevant statute, as well as the practicality of other courses of action.

As a whole, the arrangements raise the spectre of 'cohabitation', as the French have learned to call it. Just as Labour promises to encourage discretion at the territorial level, so a Conservative Government, confronted by the reality of electoral politics in Wales, might well be tempted to curb the Assembly. This they could so easily do by increased recourse to primary legislation and by tight restrictions on, or definitions of secondary legislative powers. Of course this may develop as an area of constitutional conventions, an intrinsic part of the machinery of British government; alternatively guidelines may be generated structuring the territorial allocation of rule-making functions.[180] In practice much will surely depend on the conduct of the affairs of the territory in the early years, and whether the Assembly can quickly establish its authority and credibility.

5.1.3 Beyond Westminster. Procedural innovation

Secondary legislation will be a main output function of the Assembly. Inherited from the Secretary of State for Wales is responsibility for each year making hundreds of statutory instruments: in the pre-existing model, commonly exercised with other Ministers.[181] Although Welsh regulations may be expected to follow the English template in many cases,[182] the workload will clearly be considerable, especially given the immediate prospects of new framework legislation. How will the law making be driven? The White Paper was coy, barely distinguishing the roles of the Executive Committee and Subject Committees in the preparation and submission of draft orders.[183] Now, however, in line with the late shift towards a more Cabinet style of government, something resembling a (secondary) legislative programme is envisaged, the Assembly Secretaries commissioning officials to draft orders on the basis of Executive Committee policy. [184]

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179 Above, n. 149, p.18.

180 This is in fact the German practice, the product of a federal system and policed by a Constitutional Court.

181 The Secretary of State is estimated in an average year to make approximately 150 instruments on his own, about 100 of which are local instruments, and 400 with other ministers; Twenty-Seventh Report of the Joint Committee on Statutory Instruments, Appendix 1, para.7, HC 33-xxvii (session 1997-1998). It will of course be open to the Assembly to change existing secondary legislation where functions are transferred.

182 Doing otherwise obviously has resource implications.

183 Cm 3718, paras.4.22-4.23. Typically however the power of financial initiative is placed firmly in the hands of the Executive Committee: section .68.

184 NAAG has recommended placing the key power to initiate legislation in the hands of the Assembly Secretaries; above, n. 21, recommendation 69.

The procedure illustrates a statutory framework that allows for organic development. It is typically governed by standing orders; the Act identifies only some matters for prescription and is largely silent about content. Critical to the enterprise is the decoupling of Assembly order-making from the Westminster machinery.[185] Parliamentary scrutiny of secondary legislation is disapplied.

Read in the light of Westminster practice, the normal process[186] envisaged for Assembly order-making displays some innovative features.[187] It is for example the requirement that draft orders be approved in plenary session, which opens up the prospect of debating amendments.[188] There is a general requirement of regulatory appraisal, whereby the administrative practice of compliance cost assessment is embedded in Assembly process.[189] Again, it is important to reconcile the desire for thorough scrutiny with the need to avoid overload at the expense of other business. The way forward involves extending flexibility in the ordinary process through standing orders. Briefly, it entails a choice of 'full' procedure, the Subject Committee engaged in line-by-line scrutiny, and, where appropriate, taking evidence and consulting on draft orders; and 'fast-track' procedure, clearly appropriate for the many standard or technical matters, where the Subject Committee is bypassed in favour of the Assembly Secretary.[190]

Enough has been said to demonstrate how the process bridges traditional distinctions in Westminster law making. Several main features are of a kind familiarly associated with the making of primary legislation. In the words of the White Paper, 'The Government's proposals imply a far greater degree of democratic scrutiny of secondary legislation affecting Wales than is possible now.'[191] This represents a powerful argument, not only for judicial deference, but also for the whole project of executive devolution: delegated legislative powers matching delegated democratic authority. The question of feedback into Westminster procedure, which otherwise will look tawdry in comparison, is raised directly. A case perhaps for institutional learning by the Mother of Parliaments!

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185 Swction 44, following the example of the Wales Act 1978. Save where the order is made jointly with a Minister or where it relates to a 'cross-border' matter, al secondary legislation made by the Assembly will be known as an Assembly Order.

186 Emergency procedure allows any of the requirements here discussed to be disapplied: section 67. Safeguards include judicial review and a negative resolution procedure where Assembly approval has been bypassed.

187 Familiar elements include a Welsh equivalent of the Joint Committee on Statutory Instruments to scrutinise *vires* as distinct from merits and policy (the Subordinate Legislation Scrutiny Committee (SLSC)). Liaison will clearly be necessary, one facet of an evolving Assembly/Westminster relationship; see further below.

188 Sections 66(2) and (7); NAAG, above, n. 21; recommendation 69. .

189 Section 65: business interests must be consulted if the costs of compliance 'are likely to be significant'. Attempts in Parliament to prescribe appraisal of social and environmental costs were firmly resisted. House of Commons Debates, vol. 305, cols. 809-811 (2 February 1998).

190 As envisaged by NAAG, above n. 21, recommendation 69 and Annex B. The procedures come together at the SLSC stage.

191 Cm 3718, para.4.23.

5.2 Wales and Westminster

Territorial relations with Westminster will obviously be of huge importance. One aspect concerns the interplay in the model of asymmetrical devolution of common elements and separate territorial features. Considerations of the impact on Parliamentary practice and procedure of the devolution programme as a whole will inevitably influence arrangements for Welsh business. Particular demands will be placed on Westminster by the *sui generis* model of executive devolution. A second aspect concerns the conjectural quality to the design of the architecture. Classically these are matters not of statutory design but of development via the internal law of Westminster, a factor which helps to explain the low salience of the topic in the course of construction. Yet the impact will surely be considerable.

Executive devolution undercuts the idea of a single process of creating, administering and amending laws. How then to preserve the best of an integrated system? Intricate representational issues also arise, centred on the continuing role at Westminster of Welsh MPs, both individually and collectively, and of the Secretary of State for Wales. Attention rightly focuses on the various relationships of accountability inherent in an additional democratic tier of government, and, in particular, the broad scope for evolutionary change.

The main challenge is, in paradoxical fashion, to avoid the muffling of a voice for Wales: the bad bargain, whereby discrete, local control is achieved only at the cost of much influence in Westminster/Whitehall, on which, in executive devolution, the territory is so reliant. Invoking the concept of partnership, the Government's approach demonstrates once again high dependency on political and administrative goodwill. As well as limited statutory provision, and corresponding reliance on soft law techniques,[192] there is an important intermediary role between the Assembly and the Cabinet for the Secretary of State for Wales.

5.2.1 Influence and access

The Assembly will clearly have a close and continuing interest in the primary legislative process at Westminster. Policy development at territorial level will generate calls for new statutory powers; there will be concern to avoid new legislation cutting across or preventing implementation of existing policies.[193] The Assembly will, in the words of the White Paper, be able 'to seek to influence' the process.[194] Hence the Act provides for the Secretary of State to consult the Assembly about the Government's legislative programme, coupled with, on the one hand, the right of the Secretary of State to attend Assembly plenary sessions, and, on the other, general Assembly powers of consideration and debate, and to make representations, on any matter affecting Wales.[195] As machinery for preserving Welsh input into primary law making, these provisions are typically skeletal, especially since the

192 Especially in the form of 'concordats', discussed in section 6 in the context of Assembly relations with Whitehall.

193 In addition, that is, to the need to plan for implementation of secondary legislation required by new primary legislation; Welsh Office, NAAG, *The Assembly and Westminster* (1998).

194 Cm 3718, para.3.38.

195 Sections .31, 33 and 76.

consultation requirement is loosely drawn.[196] True, the shift towards a Cabinet-style improves matters at the early stages, Assembly Secretaries now being better placed to liase with Ministers over Government proposals. There remains, however, the uncomfortable prospect of the Assembly as supplicant or lobbyist in the Westminster process. In the words of the White Paper, 'the Assembly will need to establish a close partnership with Members of Parliament representing Welsh constituencies.'[197] This is very different from the situation of the Welsh Office as part of central government.[198]

There is in fact a strong case for moving beyond the model of influence to crystallise in Parliamentary practice and procedure rights of Assembly participation in the legislative process; in short, formal acceptance of the idea of privileged access in contrast to the ordinary processes of interest representation. One might for example like to see some requirement that draft amendments proposed by the Assembly be considered by the House of Commons. A ''fast-track' procedure for Assembly-sponsored primary legislation, effectively a territorial right of legislative initiative, might be introduced.[199] Such developments have, for the time being, proved too bold for the Government, yet such is the dynamic of constitutional change that evolution in this general direction may be anticipated. The parallel process of modernisation of House of Commons procedures needs to be borne in mind.[200] If systems of pre-legislative scrutiny take off at Westminster, space would be created for participation by Assembly representatives, perhaps via a new form of joint machinery.[201]

5.2.2 Representation and accountability

The White Paper assumes that the Secretary of State continues to speak for Wales in Cabinet discussions on policy, primary legislation and funding, being informed, but not bound by, the Assembly's views.[202] He or she will also have the lead responsibility within the UK Government for sustaining good working relationships between the Assembly and Government departments. Yet this will be a Minister with few officials and without the

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196 The Minister must consult 'as soon as reasonably practicable', but need not do so in respect of Bills about which he deems it 'inappropriate' to consult the Assembly. The annual Finance Bill might be an example.

197 Cm 3718, para.3.37. There will clearly be an element of dual mandate in the transitional period prior to the next General Election. The Assembly, however, is designed to be a full-time body. For a suggested monthly timetable, see NAAG, *Recommendations*, above n. 21, Annex D.

198 See further K. Patchett, 'Power and Politics', (1996) (4) *Agenda* (Institute of Welsh Affairs) 16.

199 As proposed by Plaid Cymru, Press Notice, 27 November 1997; and see House of Lords Debates, vol. 590, cols. 302-303 (2 June 1998). The Government has conceded Assembly powers to promote and oppose private Bills in Parliament: section 37.

200 Select Committee on Modernisation of the House of Commons (the Taylor Committee), *The Legislative Process*, House of Commons paper 190 (Session 1997/98).

201 Such matters are currently under discussion by the Select Committee on Procedure. Looking further ahead, the prospect arises of territorial representation in a reformed second chamber of Parliament. See Constitution Unit, *Reform of the House of Lords* (1996).

202 Cm 3718, paras.1.17, 3.34-3.35.

influence associated with responsibility for major public functions.[203] As the context of law making demonstrates, there is also great scope in the scheme for conflict or activity by a Secretary of State hostile to the Assembly. It could be, far from a duet, two politicians, one a Secretary of State and a member of the UK Cabinet, the other an Assembly First Secretary now emboldened by Cabinet-style government in Wales, both claiming to represent and articulate the interests of the territory.[204] Reinvention, evolution, or evaporation: nothing better illustrates the uncertainties associated with executive devolution than the future role of the Secretary of State.[205]

Different but related is the vexed issue of the knock-on effects on scrutiny by the Westminster Parliament. The White Paper for example clearly hinted at abolition of the Welsh Grand Committee, on the basis that its deliberative functions would effectively be overtaken by the new democratically legitimate national forum.[206] Then there is the Welsh Affairs Select Committee, machinery established to shadow a Department that will have virtually ceased to exist. The question of Questions points up the complexities of executive devolution. The range will be narrower, and the need to answer them less frequent, given the diminution in ministerial responsibility. The boundaries however will be imprecise. Questions aimed at devolved activities in Wales, but couched in terms of a need for fresh primary legislation, can be anticipated! Looking forward, there is a powerful case for a single territorial committee at Westminster. In addition to the residual functions, such a committee might sensibly take on some new activities, for example pre-legislative scrutiny and periodic review of the workings of the devolutionary scheme. Further, in the context of the UK, such matters could be included in one of a series of 'Parliamentary concordats' that might usefully be made between Westminster and the new representative institutions in different territories of the Union.

The respective roles of MPs and Assembly Members may also cause problems especially when they are not of one party. Individual representatives at Westminster will clearly have a continuing constituency interest in the activities and powers of the Assembly. Will conventions arise to regulate boundary disputes in the handling of complaints and grievances by the different actors?[207] More fundamental, there is the so-called West Lothian Question, why MPs from devolved jurisdictions should vote on English matters and not vice versa, which famously is not intended to be answered.[208] Some of the sting is drawn in the case of

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203 The White Paper speaks of the Minister retaining 'a small team of civil servants', typically working 'in partnership' with the Assembly and other Government Departments on policy matters: Cm 3718, para.1.19.

204 Prior to his sudden resignation as minister in October 1998, Ron Davies was expected to serve for the first few months both as Assembly First Secretary and as Secretary of State for Wales.

205 It is possible to envisage a Cabinet Minister responsible for intergovernmental relations with the different territories, especially in light of the limited role assigned the Secretary of State for Scotland. See further, Constitution Unit, above, n. 8, chapter 7.

206 Cm 3718, para.3.44.

207 As has happened with MPs in the case of the Parliamentary Commissioner for Administration. See G. Drewry and C. Harlow, 'A "Cutting Edge"? The Parliamentary Commissioner and MPs' (1990) 53 *Modern Law Review* 745; also R. Rawlings, 'The MP's Complaints Service' (1990) 53 *Modern Law Review* 22 and 149.

208 T. Dalyell, *Devolution: The End of Britain?* 1977), esp. chapter 11.

Wales, given that Westminster will still legislate for the territory. But the Question will not go away, especially since Wales, in population terms, remains over-represented in Parliament[209] and that, given the prospect of framework legislation in fields of Assembly competence, there will be a less good case for a specifically Welsh dimension to scrutiny. A general weakening of the influence of Welsh MPs is easily envisaged and this may, over time, strengthen the case for true legislative devolution.

5.3 Courts and legal culture

'For Wales, see England.' Nowhere does this notorious nineteenth century classification[210] have more force today than in the court system and legal culture. The position is in stark contrast to that in Scotland, and, if to a lesser degree, Northern Ireland. There is in turn an awkwardness in the case of devolution to Wales concerning the judicial architecture. To handle 'devolution issues', a special jurisdiction is established across the different territories of the Union.[211] But retained for Wales is a court system indistinct from that of England. Speaking more generally, devolution heralds a greater role for legal considerations and techniques in the conduct of government. The pathology of court action is one aspect of this development.

5.3.1 Devolution and legalisation

This infusion of law is at one with other key elements in the broader UK process of constitutional reform, most obviously human rights legislation. But further, in the case of Wales, Assembly operations will be prone to legal challenge by reason of the many complexities and tensions implicit in executive devolution. Examples are easily envisaged of court action as a vehicle for intra- as well as extra-territorial divisions of interests. Thus an expansive interpretation by the Assembly of secondary law-making powers under protective legislation invites challenge from private or commercial interests. Or, a telling case of intra-state litigation in a format of multi-layered governance, a local authority is provoked by technical wrangling at territorial level over central government policy to try to force implementation. In a setting of diversity and constraint on Assembly powers, the range of potential challenge can scarcely be exaggerated.

The arrangements contained in the White Paper are in this respect of limited utility. Perhaps hopefully, it is stated that 'close consultation between the Assembly and Whitehall will minimise the risk of disputes between them'. Official controversies that do arise about the Assembly's use of its powers may be referred to the Law Officers in expectation of speedy settlement.[212] But a basic constitutional issue is raised of conflict of interest. How can the Law Officers, part of the machinery of central government, properly continue to serve Wales

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209 The White Paper (Cm 3718, para.3.37) promised that 'setting up the Assembly will not reduce Wales's representation in Parliament'; in contrast to Scotland, where the number of seats will be reviewed by the Parliamentary Boundary Commission. The Welsh quota in population terms would be 33 MPs.

210 It comes from the *Encyclopaedia Britannica*: see K. Morgan, above, n.14 (1981), p.3.

211 This is achieved by replicating provisions in the different devolution statutes.

212 Cm 3718, paras.3.42-3.43.

in such matters?[213] Again, as our examples showed, many of the legal disputes associated with executive devolution will not be contained in Assembly/Whitehall relationships. 'Partnership', the political and administrative cooperation and coordination so emphasised in the scheme, is to this effect a limited strategy. Disruptive legal action by powerful third parties cannot be wished away.

It is not surprising then that one of the first appointments made on behalf of the Assembly has been that of a Chief Legal Adviser. As the senior authoritative source of legal advice across the full range of subjects for which the Assembly is responsible, he or she will be a law officer for Wales in all but name. Key areas of responsibility will include the legality of proposed Assembly action, as also liaison with Whitehall Departments in the development of the powers of the Assembly going before Parliament.[214] His team will initially comprise some twenty lawyers, a complement that is expected to grow to meet the needs of the Assembly. Nothing better illustrates the more expansive role for law involved in devolution.

5.3.2 Recycling the Judicial Committee

The special jurisdiction for 'devolution issues' is a complicated arrangement.[215] At the apex of the system is the Judicial Committee of the Privy Council. A hierarchy of reference powers operates through which relevant matters arising in the courts can ultimately be transferred to the Judicial Committee, including from the House of Lords. The machinery is thus characterised by dualism, an interplay of special with general court procedures.[216] Different but related is the provision of 'fast-track' procedure, whereby both the Attorney-General and the Assembly can go direct to the Judicial Committee for a decision.

Why the Judicial Committee for Wales? Why target special procedures on what in the case of the Assembly will be subordinate legislation? A choice of the House of Lords and ordinary procedure would have fitted the unity of the English and Welsh legal system. The explanation lies in Scottish sensitivities[217] and the desire of Government to establish a common pattern of jurisdiction in devolution issues.[218] Paradoxically, it is an illustration of the secondary place of Wales in the UK programme of devolution.

The dualist machinery will necessarily bring with it the disputes over competence that have become so familiar in judicial review proceedings.[219] Statutorily defined, 'devolution issues'

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213 In Scotland by contrast, there will be liaison between the Lord Advocate (Scottish Executive) and the Advocate General for Scotland (UK Government).

214 Welsh Office, *Job Description for Chief Legal Adviser* (July 1998). Winston Roddick Q.C has been appointed Counsel General.

215 Section 109 and Schedule 8.

216 Instructive in this context are the workings of the Government of Ireland Act 1920; see H. Calvert, *Constitutional Law in Northern Ireland* (1968), chapter 15.

217 Centred on historical resistance to a role for the House in Scottish appeals, as also its position as part of the UK Parliament; C. Boyd, 'Parliament and Courts: Powers in Disputes Resolution', in T. St.J. Bates, *Devolution to Scotland: The Legal Aspects* (1997).

218 Win Griffiths, House of Commons Debates, vol. 305, col. 927 (3 February 1998).

219 Under the rubric of procedural exclusivity, following *O'Reilly v. Mackman* [1983] 2 A.C. 237.

cover matters of Assembly vires, including compatibility with Community law, where references to Luxembourg are likely to complicate matters still further, and European Convention rights, where Strasbourg and national courts will share a complex jurisdiction.[220] Many matters that might be considered relevant are apparently excluded, including much of the interpretation of primary legislation in relevant fields. Again, it is not the intention to restrict 'any other rights in law' to challenge the Assembly's exercise of functions.[221] Judicial review and ordinary civil action will have significant roles to play, both as first vehicle for 'devolution issues' and as separate avenue of redress. Let us hope that not too many litigants are lost in this jungle.

The special jurisdiction does have two features that might usefully be exploited. The first is provision for 'abstract' in addition to 'concrete' or *a posteriori* review; in effect, an advisory declaration on the legality of proposed action. This allows practical constraints on the grant of ordinary remedies to be side-stepped, such as reliance by third parties. It is in turn a significant constitutional development, opening the way to more judicial activism in this context.[222] The second feature concerns court composition and the potential of territorial representation. The Judicial Committee has considerable flexibility in terms of membership, extending to those who hold or have held 'high judicial office'.[223] A practice could emerge of including judges with strong Welsh connections on panels hearing disputes involving the Assembly.[224] Better to secure judicial authority and legitimacy, there is a strong case for this happening.

Seen in historical perspective, there is fine irony in recycling the Judicial Committee, with its associations with Empire and jurisdiction over dependent territories. Looking forward, there are pointers here which join with others in the broader process of constitutional reform – such as human rights legislation and reform of the House of Lords – to a properly established Constitutional Court for the United Kingdom.

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220 See sections 106-107 and Schedule 8, para.1.

221 Notes on Clauses, with reference to Schedule 8. Section 110 however empowers a court or tribunal to remove or vary the retrospective effects of holding subordinate legislation *ultra vires*, a subject of anxious debate in Parliament: House of Commons Debates, vol. 309, cols. 738-749 (26 March 1998); House of Lords Debatres, vol. 590, cols. 990-994 (9 June 1998).

222 See further, Sir John Laws, 'Judicial Remedies and the Constitution' (1994) 57 *Modern Law Review* 213.

223 Schedule 8, para.33; including judges of the High Court and Court of Appeal.

224 Precedent exists, despite the absence of separate Welsh courts: *Morris v. Crown Office* [1970] 1 W.L.R. 792.

5.3.3 Unfinished business

Devolution, even of the 'gentler' kind practised in Wales, is indicative of a more pluralistic form of legal culture. Yet, moving on from the special jurisdiction, the current prospect entails a few judges sitting locally in Wales as an extension of the High Court in London. This hardly squares with the aspirations represented by a 'National Assembly'. Historians might also regard as a cruel joke a retitling of the Lord Chief Justice of England as Lord Chief Justice of England and Wales:[225] belated recognition at the very moment of devolution! More seriously, taking into account administrative and political diversity and the process of legalisation, and, more broadly, heightened awareness of cultural and linguistic factors, there is seen to be a missing piece in the jigsaw. Devolution points to distinctive legal institutions at territorial level. Why not a High Court of Wales?

6 Multi-layered Governance. Wales in the United Kingdom in Europe

Fundamental to the workings of devolution is the state of relations with the other tiers of government. Crafting is required of a whole series of arrangements; in an era of multi-layered governance, at local, central and supra-national levels. The task is certainly problematic in the case of Wales. Inside the territory, there is the historical legacy of fragmentation and limited development of a 'national' polity. As regards central government, special demands and pressures are generated by executive devolution and the horizontal division of law-making powers. And, for a small region placed on the edge of the Atlantic, it is both important and difficult to be heard amid the cacophony of voices in Europe.

The broad institutional environment of the Assembly was examined in the White Paper. A concept of partnership was invoked, emblematic of New Labour's constitutional thinking. Thus the Assembly's partners were listed ambitiously as local authorities and other public bodies in Wales, the voluntary sector, central government in Whitehall, and European institutions.[226] The concept is now reflected in the style of, or, perhaps more accurately, a lack of legal provision. Formal arrangements are not dictated. The preference is for facilitative framework structures and the flexibility of soft law techniques. Some of the arrangements are seen to be appropriate, others not.

6.1 Interior relations

Central to the design is the idea of opening the Assembly to, and drawing to it, other interests in society. Hence the statute signals a series of arrangements designed to foster relationships between the Assembly and various public and private institutions in Wales.[227] The provisions are more or less skeletal in quality. General consultation with business interests is required as the Assembly considers appropriate.[228] The Assembly must make a scheme setting out how it proposes to promote the interests of voluntary sector organisations.[229] The Assembly is

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225 Lord Chancellor's Department, Press Notice; *The Times,* 3 August 1998.

226 Cm. 3718, para.3.1.

227 The Assembly is also empowered to conduct territorial and local polls for ascertaining the views of electors about whether or how any of its functions should be exercised : section 36.

228 Section 115, effectively a model of goodwill.

229 Section 114, building on a voluntary sector compact developed by the Welsh Office.

required to make a similar scheme on sustaining and promoting local government, and to establish and maintain a Partnership Council with local authorities.[230] Let us focus on the last aspect.

6.1.1 Discretion and dialogue

A danger of devolution is centralisation, the sucking-up of powers from local government to the territorial level, contrary to the principle of subsidiarity. [231] There is a related concern too about local government being cut off from central government, still the basic provider in Wales of statutory powers and public funding. What then, in terms of a new pyramidal model of government authority, of the prospects for territorial/local relations?

The Assembly will take over responsibilities for funding local government, for the exercise of important default powers, and, via secondary legislation, for much of the strategic direction of local decision-making. The scheme of executive devolution means that the Assembly cannot directly attack local government's statutory powers, however it is precisely the lack of political space engendered by the scheme which may tempt the Assembly to encroach on the local government sphere. The Assembly after all has no power of taxation, while spending by local government currently makes up nearly half of the Welsh Office budget.[232] There is an added twist. Recent Government proposals on the reform of local government in Wales assign to the Assembly a primary role in driving forwards the process of modernisation.[233] Briefly, it will mean for the Assembly additional responsibilities in terms of review and monitoring of council structures and performance, together with new reserve powers and powers of guidance. Notably, the Government intends that any primary legislation that is required should be framed in such a way as to give the Assembly the maximum flexibility to act through secondary legislation.[234] How then, in this broad context, to encourage cooperation, and not conflict and confusion, between the two tiers of government? The frameworks established by the statute are both important and innovative.

Once again, the terms of the local government scheme are not prescribed in the legislation, so preserving flexibility and Assembly autonomy. An outline of the Assembly's vision for local government over a period of years, setting out in specific and practical terms how both the Assembly and local government will contribute to achieving it, is the likely way forward.[235] The Partnership Council, which will consist of Assembly members and representatives of local government, is given a wide remit, including advice to the Assembly on matters relating to the exercise of any of its functions, and advice to local authorities generally.[236] Notably,

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230 Section 113.

231 A principle which informs the European Charter of Local Self-Government, which the Government has recently ratified.

232 Welsh Office, above, n. 50, para. 5.3.

233 *Ibid.*

234 *Ibid.*, para.2.3.

235 Welsh Office and Welsh Local Government Association, *The Local Government Scheme* (April 1998).

236 Section.113 and Schedule 11.

the prevailing sense is that guidance to authorities 'which emanates from partnership and shared ownership is likely to be more influential than guidance determined solely by the Assembly.'[237]

These structures, in facilitating the new forms of intra-territorial government relations, strike a reasonable balance. A framework for dialogue is established with local government collectively. The Assembly is effectively charged with being proactive and constructive. The next step, a statutory duty to have regard to plans and strategies of individual councils, was rightly rejected, by reason of the national character and strategic competence of the Assembly, as also the scope for formal legal conflict. [238] Speaking more generally, recognition of the functional limits of law, the inability of legislation fully to prescribe the tone and substance of the relationship between local government and the Assembly, has powerfully influenced the Government's approach. The Partnership Council will in turn have a critical role to play in grounding the informal 'rules of the game' and conventional understandings historically so important in local government law and practice.[239]

6.1.2 A fragile polity

In euro-speak Wales is a 'region', but what of the 'regions' of Wales? In light of a peculiar demography, especially population concentrated in the south-east corner of Wales,[240] and a powerful sense of parochialism in Welsh history and politics, controversy over their representation in the Assembly was only to be expected. Paradoxically, designed in part to overcome suspicion in the interior of concentration of power in Cardiff, the arrangements serve to highlight the difficulty in Wales of conjuring a new territorial constitution and mature body politic.

Once again, the statutory provisions exemplify both the preference for framework structures and the importance of the internal law of the Assembly. Geographical meaning must be given in standing orders to a duty to establish committees for 'North Wales' and 'each of the other regions'. [241] Notably, the question of boundaries of regional committees was the issue on which the NAAG received the most comments and on which there was least agreement.[242] Competing models are easily envisaged, precisely because of the multiple divisions of interests. The existing proposal, for four 'regions' following a pattern established for the Welsh Development Agency,[243] further illustrates the major role of economic considerations in shaping the new model Wales.

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237 Welsh Office and Welsh Local Government Association, *Partnership Council – Preparing the Ground* (April 1998), para.7.

238 Win Griffiths, House of Commons Debates, vol. 305, col. 932 (3 February 1998).

239 See generally M. Loughlin, *Legality and Locality: The Role of Law in Central-Local Government Relations* (1996).

240 Again, major transport links run east-west, a function in part of integration with England.

241 Section .61. In the words of the Minister, 'concerns were identified from the start that North Wales felt isolated from Wales as a whole': Win Griffiths, House of Commons Debates, vol. 305, col. 798 (2 February 1998).

242 NAAG, above, n. 21, para.5.24.

243 *Ibid.*, para.5.28.

The legislation makes clear that regional committees have an advisory, not an executive role. This gels with a more Cabinet-style form of government, and, further, helps to preserve the political and administrative space of local government. Notably, ministers resisted several attempts in Parliament to strengthen the position of regional committees. A blocking power on Assembly action, as proposed by the Conservatives,[244] was hardly the stuff of a strategic 'National' Assembly. Closer to the mark was the idea of a duty on the Assembly to have regard to the advice of a regional committee. [245] Once more however, practical workings, and thus the influence exercised by such committees, were left to organic development. This is all at one with a consensual ideal and the way in which assumptions of cooperation and goodwill pervade the design of the scheme of devolution. Too much faith has been placed in the fragile polity of Wales.

6.1.3 From quangocide to oversight

'Partnership' with other public bodies in Wales will necessarily cover a multiplicity of arrangements. The strong role of responsive factors in policy-making is shown in the light of the democratic deficit that developed under the Conservatives. Rhetoric in opposition has, however, been modified in government. Uppermost in Labour's political campaigning was the need to confront Conservative quangocracy: decisive action was promised, to include 'a bonfire of the quangos'. [246] Fortunately, given the many familiar advantages of agencies operating at arm's length from government, greater emphasis has now been placed on reform and revision[247] and, in particular, on democratic oversight, a critical element, recent Welsh history so clearly shows, in securing legitimacy.

The strategy of reform fits with the chief role of economic development in the design of the new model Wales. Pride of place thus goes to the statutory creation of an enlarged and newly empowered Welsh Development Agency. [248] Looking forward, the Assembly is also given extensive powers to remodel public bodies in Wales, which include the powers under 'Henry VIII clauses' to amend or repeal relevant primary legislation.[249] This is all at one with the trend towards territorial institutional differentiation.

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244 See House of Commons Debates, vol. 307, cols. 754-784 (2 March 1998).

245 As proposed by the Liberal Democrats; see House of Commons Debates, vol. 309, cols. 708-713 (26 March 1998).

246 See L. McAllister, above, n. 78; also, R. Hazell, above n. 70.

247 Central government action includes reconfiguring hospital trusts and transferring the important housing functions of Tai Cymru first to the Welsh Office and then to the Assembly.

248 Involving merger with the Development Board for Rural Wales and Land Authority for Wales: sections 126-139 and Schedules 13-15. See further, Welsh Affairs Select Committee, *The impact of the Government's devolution proposals on economic development and local government in Wales,* House of Commons paper 329-I (Session 1997-98). Notably the Assembly has to make a scheme setting out how it proposes, in the exercise of its functions, to promote sustainable development: section 121.

249 See above.

The task of oversight is expansively defined and it will be a major function of the Assembly. Inherited from the Secretary of State are powers of appointment, typically made subject to Nolan-style discipline,[250] and issuing of directions to public bodies. Review and monitoring will be buttressed in Select Committee style by extensive powers to summon witnesses and examine documents.[251] Central to the design are the new Office of Auditor General for Wales, another distinctively 'national' institution, and the specialist Audit Committee of the Assembly.[252] More detailed investigations, as these bodies come under pressure from Assembly members to act over alleged irregularities, may be anticipated.

These arrangements provide the basis for proper accountability in the context of arm's length relationships. They touch however on some general problems in the new model Wales. One issue concerns internal architecture and the balancing of functions between Assembly Secretary and Subject Committee. The initial design, whereby the Secretary would have had a dominant role in supervising public agencies,[253] was lopsided. A rebalancing in favour of ordinary Assembly members is more appropriate.[254] A second issue concerns territorial competence. The Assembly's powers of examination are directed, in impeccable constitutional logic, to those bodies for which the Assembly is responsible,[255] which means in practice the WDA but not the Health and Safety Executive and utilities regulators. Thus the Assembly will have to 'invite' agencies with a British remit to give evidence on their operations inside the territory. No doubt in some sectors a partnership model will operate effectively by reason of mutuality of interest between Assembly and agency,[256] elsewhere the lack of legal powers may well prove a real hindrance. This is a salutary reminder both of the need for good liaison with Parliament and of the jurisdictional divisions in devolution as highlighted in a Wales of 'bits and pieces'.

6.2 Concordats of the constitution

A major feature of the new form of territorial relations with central government is the use made of non-statutory agreements or 'concordats'. Inter-institutional arrangements of this kind are a species of 'pseudo-contract', a genus that in recent years has taken on considerable significance in processes of 'reinventing government'. By pseudo-contract I mean the use in public administration of contract-type arrangements which are not true contracts in the legal

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250 'Essential to restore public confidence in unelected bodies', Cm 3718, para.3.16. The (U.K.) Commissioner on Public Appointments will monitor appointments made by the Assembly.

251 Sections 74-75.

252 Sections 60 and 90-96. In the words of the Notes on Clauses, 'the audit arrangements for the Assembly and the public bodies for which it is responsible are to be separate from those which apply in England.' There is still however a line of financial accountability to Parliament, via the Comptroller and Auditor General and the Public Accounts Committee: sections 101-102.

253 See NAAG, above n. 21, paras. 6.8-6.11.

254 NAAG, above n. 2, para. 5.

255 Section.74 and Schedule 5; Cm 3718, paras. 3.18-3.22.

256 Relations with the CRE, EOC and proposed Disability Rights Commission spring to mind, especially in light of the Assembly's legal duties as regards equality of opportunity. A board member for each of these agencies is now to be appointed with the Assembly's agreement.

sense of an agreement enforceable in the courts.[257] The concordats will set the ground rules for administrative cooperation and exchanges of information between the Assembly and Whitehall Departments. Arrangements of a similar kind will obtain for Scotland and Northern Ireland. However, because of executive devolution and the horizontal division of law-making powers, concordats will have a particular resonance in Wales.

Concordats being in principle voluntary, it will ultimately be for the Assembly and the UK Government to decide their precise ambit and content. Ministers have however set about formulating principles. Arrangements will be contextual or functionalist in character, not a generic code but typically a series of bilateral agreements between the individual departments of the Assembly and Departments in Whitehall. Concordats will 'set down common processes and the main features of good working relationships, rather than specify substantive outcomes'.[258] A measure of their importance may be gleaned from proposed standard terms: consultation on proposals for legislation and executive action, including advance notification; the voice of the Assembly to be heard on 'cross-cutting' subjects such as social exclusion; joint working, including participation in the Whitehall comitology; confidentiality within these arrangements; liaison on EU and international matters. Procedures for dispute resolution will also be necessary, in practice administrative negotiation and arbitration, together with machinery for the review and monitoring of operations.

The aims according to ministers are to provide the parties 'with the confidence that working relationships will be conducted properly' but 'to avoid constraining [them] in their actions within their fields of competence'. The purpose is 'to preserve the good working relationships which currently exist', an expression of the mutual interest in ensuring that the business of government is conducted smoothly and efficiently.[259] However things are not so simple. Concordats are qualitatively different, uncharted constitutional territory, precisely because the Assembly is not a Whitehall animal. The parties are not equal parties. Arrangements will also need to be sufficiently robust to cope with a situation of 'cohabitation'.

6.2.1 Lack of underpinning

The use of concordats raises issues of status and control familiarly associated with soft law and 'quasi-legislation'[260] Whereas in formal legal terms such arrangements appear low in the hierarchy of rules governing administration, the civil servant naturally sees things differently. Thus other, less formal, instruments are already envisaged by way of supplement and to preserve flexibility.[261] Parliamentary supervision over the concordats is lacking, a common feature of pseudo-contract as a form of administrative rule making. Their publication in draft and final form in accordance with freedom of information policy is no substitute for

257 C. Harlow and R. Rawlings, above n. 18, pp. 210-213.

258 Welsh Office, *Concordats* (February 1998), para. 4.

259 *Ibid.*, paras. 1, 4.

260 C. Harlow and R. Rawlings, above n. 18, chapters 6-7; G. Ganz, *Quasi-legislation: Recent Developments in Secondary Legislation* (1987).

261 Welsh Office, above n. 241, para. 2.

requirements of Westminster scrutiny. Notably, since the capacity to contract clearly exists,[262] great care has to be taken to avoid true contractual status. An intention to create legal relations will be firmly disclaimed.[263] However this is not the full story. A shadow is cast by the judicial review doctrine of legitimate expectation, a standard technique by which the courts invade soft law territory, so importing a measure of stability and security.[264] Thus there is obvious potential for judicial involvement in the event of a serious breakdown in relations, if only because the concordats will be dealing with procedural matters, such as consultation, where the doctrine has already made strides.[265]

Ministers resisted a series of attempts to create formal procedural requirements for the making of concordats.[266] Paradoxically, legitimate expectation was invoked to justify an absence of statutory provision, on the basis that the doctrine would not permit one party 'suddenly to whip away the concordat'.[267] However the protection of the common law is necessarily limited and uncertain. Why not bolster the position of the territory in the discussions with powerful Whitehall Departments? The concordats are a fine example of the reworking of the informal character of the unwritten constitution. But as what follows will further illustrate, soft law usage of this kind demands firmer underpinning in a changed constitutional landscape.

6.3 Finance: continuity and change

Wales is financially dependent on England and will continue to be so.[268] How then to reconcile a principled autonomy with harsh economic fact? Government strategy is to use existing administrative arrangements on the transfer of resources, subject to novel requirements of openness and transparency. This approach fails however to secure an appropriate degree of stability for devolved government.

The Assembly is given responsibility for virtually the entire Welsh Office budget. It will exercise discretion to determine and manage spending priorities across broad swathes of public administration. An annual statement will set out priorities and objectives, together with detailed financial allocations.[269] Yet fiscal accountability is lacking, given the absence

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262 Unlike in the analogue of the framework document of a Next Steps Agency, where the agency does not have separate legal personality.

263 Welsh Office, above n. 241, p. 1.

264 *R. v Secretary of State for the Home Department, ex p. Asif Khan* [1985] 1 All E.R. 40; *R. v Secretary of State for the Home Department, ex p. Hargreaves* [1997] 1 All E.R. 397.

265 *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374.

266 See for example Ron Davies, House of Commons Debates, vol. 309, col. 617 (25 March 1998).

267 Lord Falconer, Solicitor General, House of Lords Debates, vol. 588, col. 1132 (21 April 1998).

268 In 1995/96 identifiable general government expenditure in Wales was on a per capita basis 12% above the UK average. GDP is currently some 83% of the UK average and 80% of the EU average. See for details, R. Twigger and J. Dyson, Public Expenditure in Scotland and Wales, House of Commons Library Research Paper No.97/78 (June 1997).

269 See section 86.

of tax-varying powers.[270] The territory is kept dependent, harsh economic fact reinforced by a constitutional division of labour.

This is the realm of the 'Barnett formula',[271] whereby, in the course of the Public Expenditure Survey, the financial 'block' of a territorial department has been adjusted to reflect changes in comparable programmes in England, calculated on the basis of population shares.[272] The formula has in practice preserved a situation where per capita expenditure in the other territories is above that in England and, further, it offers solid administrative advantages, most notably in terms of territorial discretion[273] and conflict-avoidance. Hence the significance of a pledge in the White Paper that following devolution 'present arrangements for deciding the size of the budget allocated to Wales would be retained'.[274]

6.3.1 Beyond transparency

Pre-devolution, we find the Barnett formula described as a 'non-statutory policy rule based on a mutual understanding between parties within the policy network, the implementation of which is subject to both sides observing behavioural "rules of the game".'[275] A lack of transparency can here be seen as functional, obscuring the transfer of resources and so mediating tensions within the union state. This is a classic example of the traditional style of British government based on discretion and a high degree of trust. In contrast, the Government has now disclosed the principles on which the formula operates,[276] the full block and formula rules will be available, and a concordat on financial conversations between the Assembly and Treasury will also be published.[277] The new dispensation is partly a challenge to an old constitutional culture.

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270 Limited tax-varying powers are granted to Scotland: Scotland Act 1998, Part IV. See further on the link between autonomy and the financial arrangements of devolution, Institute for Fiscal Studies, *Financing Regional Government in Britain* (1996).

271 Originally designed with the prospect of devolution in the 1970s. See D. Heald, 'Territorial Public Expenditure in the United Kingdom' (1994) 72 *Public Administration* 147. The formula was first applied to Wales in 1980. Currently, the 'block' accounts for 97% of annual Welsh Office spending, some £7bn.

272 A ratio for Wales of 6.02%, following revision in 1992 based on the 1991 Census of Population.

273 At least at the margins, the principle being one of freedom to allocate the block between programmes: in effect, the basis of the Assembly's discretion.

274 Cm 3718, p. 25.

275 C. Thain and M Wright, *The Treasury and Whitehall: The Planning and Control of Public Expenditure, 1976-1993* (1995), p. 307.

276 HM Treasury, *Principles to Govern Determination of the Block Budgets for the Scottish Parliament and National Assembly for Wales* (1997); and see Second Report from the Treasury Committee, *The Barnett Formula,* House of Commons paper 341 (Session 1997-98).

277 Peter Hain, House of Commons Debates, vol .305, col. 894 (3 February 1998). Sooner rather than later there will have to be a new needs assessment, though Wales should have little to fear from this precisely because it is so disadvantaged. The last official assessment was HM Treasury, *Needs Assessment Study – Report* (1979).

Soft law is however still seen as the appropriate option. The financial arrangements, so prominent in the White Paper, are not found in the statute. Section 80, intended by the Government as the vehicle for existing arrangements, states baldly: 'The Secretary of State shall from time to time make payments to the Assembly out of money provided by Parliament of such amounts as he may determine.' The legal check, such as it is, consists of obligations on the Secretary of State to detail and explain the basis of estimated payments on an annual basis.[278] His pivotal position in the scheme is further illustrated: the Secretary of State 'will provide the channel through which the Assembly can conduct any discussions it might wish to have with the Government on financial matters.'[279]

Surely more should have been done to secure the financial structure in the new climate of transparency? A statutory provision, establishing guidelines and setting out relevant criteria, would have been appropriate.[280] A strong case is raised for statutory procedure, under which the Assembly would have rights to be consulted and make representations.[281] In other words, a constitutional guarantee that the Assembly be associated with changes to, and be able to raise issues concerning, a financial structure on which it is made wholly dependent.

6.4 Cardiff and Brussels (via London)

One of the key challenges in constructing the new model Wales is to maximise the influence of the territory in Europe.[282] How to achieve this, given the supervening architecture of the nation/member state, asymmetrical devolution, and an unwritten constitution? Although diverse avenues of access and influence are demonstrated in an era of multi-layered governance, the indirect route via London will surely be of overriding importance, that is, the scope for, and force of, territorial inputs into UK European policy-formation. Territorial interests will wish to explore the potential for direct representation in Brussels, including informal channels, by way of supplement and reinforcement.[283]

6.4.1 Rhetoric and reality

The statute does the bare minimum in fitting the territory into the EU framework. It is made clear both that transferred functions will empower the Assembly in various Community

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278 Section .81.

279 Cm 3718, para. D.14. For example, 'If it has any concerns about the detailed operation of the block formula, the Assembly will be able to make representations to him'.

280 Subject perhaps to an order-making power for a measure of flexibility. Both the Liberal Democrats and Plaid Cymru moved relevant amendments: House of Commons Debates, vol. 305, cols. 863-895 (3 February 1998).

281 In addition, that is, to the general power to make representations. Consultation with the Assembly over reform was promised in the White Paper: Cm.3718, para. D.12.

282 For authoritative criticism of previous arrangements, see Welsh Affairs Select Committee, *Wales in Europe*, House of Commons paper 393-I, (Session 1994-95).

283 See further, J. Gray and J. Osmond, above n. 64. For a general legal perspective, see B. Hessel and K. Mortelmans, 'Decentralised Government and Community Law: Conflicting Institutional Developments' (1993) 30 *Common Market Law Review*, 905; also, T. St.J. Bates, 'Devolution and the European Union' in T. St.J. Bates (ed.), *Devolution to Scotland: The Legal Aspects* (1997).

competences,[284] and that the Assembly has no power to act in a way incompatible with Community law (a 'devolution issue').[285] Similarly, a Community obligation of the United Kingdom is also an obligation of the Assembly, if, and to the extent, that it falls within the Assembly's functions.[286] The Secretary of State will have concurrent powers with the Assembly to make subordinate legislation for the purposes of implementing Community law.[287] These limited legal provisions stand in marked contrast to the White Paper, which so trumpeted the opportunities, economic and otherwise, for Wales in Europe. Paradoxically, they also serve to highlight the potential for central/territorial government conflict in the context of Europe.

The Secretary of State has identified consideration by the Assembly of European legislation as a 'key element' helping 'to strengthen Wales' voice in Europe'.[288] But why should the Assembly succeed where Parliament itself has so often failed? The multi-faceted EU decision-making process raises formidable obstacles to inputs from national or regional assemblies.[289] The Secretary of State has also stressed the margin of appreciation that the Assembly will have in implementing Community policy.[290] Yet this is limited by the choice of a scheme of executive and not legislative devolution. Moreover, the White Paper made clear that the Assembly would be liable to meet any financial penalties the EU imposed arising from non-compliance by the Assembly with its Community obligations.[291] Hence audit, coupled with the European legal doctrine of state liability,[292] will operate to constrain territorial diversity in this field.

This is all part of a legal and political problem associated with multi-layered governance in Europe. Central government may devolve functions, but, in the role of member state, has to retain responsibility. The tensions are further illustrated by the issue of Cardiff in Brussels. First, it will be for the Assembly to decide the form of its own presence, influenced no doubt by the experience of other regional governments. Nods and winks, only formal adherence to the UK negotiating line in certain matters, can be expected. Second, the Assembly will be incorporated into the UK representation. There has here been a notable shift in Government thinking. The White Paper suggested a strong central government model: participation by the Secretary of State in, and the Assembly only advising, UK delegations; representatives of the

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284 The Assembly will be designated under section 2(2) of the European Communities Act 1972 as a body to make regulations; see section 29.

285 Section 106(7).

286 Section 106(1). The vexed issue of the sharing of quantitative UK obligations will be dealt with by means of ministerial order making powers: section 106(2)-(6).

287 Schedule 3, para.5.

288 Welsh Office, Press Release 20 February 1998. A standing programme committee on European issues is proposed: NAAG, above, n. 21, recommendation 78.

289 For discussion in the Westminster context, see C. Harlow and R. Rawlings, above, n. 18, pp.170-175.

290 Implementation 'in a way that [the Assembly] considers best takes account of Welsh interests'; Welsh Office, above, n. 271.

291 Cm 3718, para.3.48. Brokered perhaps by withholding of monies by the Treasury.

292 *Francovich and Bonafaci v. Italy* [1991] E.C.R. 1-5357.

Assembly confined to the advisory Committee of the Regions.[293] Later however, opportunities in devolved matters for attendance by the Assembly Secretaries at the Council of Ministers, as also secondment at official level to UKREP, were conceded.[294] Territorial representation of this kind is a matter of status. The Assembly is given a limited partnership role in supporting and advancing the UK line in the formal EU process. It also represents a successful demand for more parity with Scotland, a good indication of the pressures for advancement liable to arise inside the model of asymmetrical devolution.

The roles and relationships of central and territorial government will once more be a subject of concordat in EU matters. It is important to bear in mind the nature of the realm in which such an arrangement will operate. Thus the need for efficient and effective means of coordination and cooperation is underscored, not only by the constraints of the single policy line of the member state, but also by the sophisticated and dynamic bargaining process which operates at supra-national level. The view from Whitehall will clearly be critical. Notably, it will be for the lead UK Minister to decide upon representation at meetings of the Council of Ministers. There will apparently be no presumption of attendance by Assembly representatives, but the Minister is to have regard to the need for the Assembly to be represented on matters directly relevant to its devolved responsibilities.[295]

Looking forward, the first challenge is to preserve the voice of Wales in EU matters, especially via the London connection. A belief, which Government rhetoric has encouraged, that Wales, through the Assembly, can achieve a more substantial role in EU policy and law-making process is largely wishful thinking. The recourse, in the format of concordat, to soft law and not hard law techniques reflects the concern of central government to retain responsibility in EU matters. But further, the territory is denied a proper measure of certainty or security. Thus flanking measures, procedural duties on creating concordats, or formal legal specification of heads of agreement, were once more refused by ministers.[296] The concept of regional government in Europe has not been sufficiently developed in the design of this devolutionary scheme.

7 Conclusion: Some Fundamentals

Devolution is at the heart of New Labour's constitutional project. It marks great changes in the distinctive political and legal culture familiarly associated with A. V. Dicey and characterised by such notions as the Anglocentric state and a subsidiary role for law in government and politics. Devolution to Wales is an important component of the project. The Assembly will be a major testing ground of efforts at a richer, more nuanced form of

293 Cm 3718, paras. 3.49-3.53. And see on Assembly representation on the Committee of the Regions, Schedule 12, para.34.

294 Welsh Office, Press Release, 11 September 1997; House of Commons Debates, vol. 305, cols. 772-774 (2 February 1998).

295 Welsh Office, *The Assembly's Relations with Europe* (1998), para.5.

296 See House of Commons Debates, vol. 305, cols. 762-774 (2 February 1998).

democratic culture. It will bring important budgetary and law-making powers closer to the people. Devolution will also draw a line under the democratic deficit that developed under the Conservatives. Viewed in terms of the historical development of Wales, it amounts, if not to an act of creation, then to a political metamorphosis.

The design of the Welsh scheme shows many good points. It would be wrong to ignore such aspects as the imaginative arrangements on territorial/local government relations, or the work done on such matters as equality of opportunity and the cultural heritage of language. Even from a narrow legal perspective, there are notable achievements: not yet territorial judicial review, but separate and open rule-making and distinctive machinery for accountability and alternative dispute resolution. It becomes necessary to think in terms of a new administrative law of Wales. Again, in evaluation, it is important to bear in mind the uncharted nature of the territory. Mistakes were inevitable, given the sharp learning curve confronting the actors. Similarly, a large measure of uncertainty was bound to characterise the process of construction.

There is nonetheless too much about the scheme that disappoints. It is not simply that Wales has once again been treated as a second-class member of the Union. The product has been prejudiced by the nature of the decision-making process. Old governmental assumptions have held true, a rich constitutional discourse has not had the opportunity to develop. So let us in conclusion focus on the way in which the new model Wales has been produced.

My starting point is the contradiction at the heart of the process. The Government has preached a new inclusive style of politics for the Assembly. But it has practised a closed and elite form of constitution making. Thus important parameters of the scheme were set inside the Party. The people were invited only to assent. Practice and procedure is to be determined by the Secretary of State in standing orders Concordats are a matter for the corridors of Whitehall, beyond the control of Parliament. There is a clear difference with events in other territories. Scotland has a Constitutional Convention. Northern Ireland sees multi-party talks. In Wales an advisory committee reports to the Minister.

An essential feature of the design is the use made of different modalities of law. Attention has been drawn in this article to the permissive or skeletal quality of provisions concerning Assembly relationships; the innovative use of concordats; and an internal law of the Assembly extended artificially to the basic form of government. One function that these modalities serve is to preserve the kind of freedom of manoeuvre of government so familiar in the unwritten constitution. New Labour, old prerogative!

Different but related is the high dependency of the Welsh scheme of devolution on administrative and political goodwill. It is to this effect a flimsy construction, which presupposes consensus and cooperation for legitimacy and effective operations. Informal and soft law techniques have many uses, but more should have been done to provide for bumpy conditions. Detailed legal rules were in general correctly avoided. But what of the supportive role for law, meaning in this context basic procedural rights on the making of soft law and to guarantee a voice for Wales on the wider stage? It was an occasion for a third way in terms of legal technique.

Insufficient attention has been paid to constitutional values in the design of the architecture. At one level, rhetorical appeals to a concept like partnership have clouded important issues, for example in relation to regional government in Europe. At another level, as shown in the

role of party political considerations in the design of the electoral system, it is the failure by Ministers to live up to ideals such as inclusiveness which accounts for major defects of the scheme. At base is the issue of the form of government. The late revision provides for a stronger political centre inside the corporate body of the Assembly, a considerable improvement. But it is still an uneasy compromise between competing values, with not enough weight given to the constitutional demand for separation of powers.

Ultimately, there is seen to be a failure of constitutional vision. It is a very British way of doing things! Strongly influenced by responsive factors, the policy-making is pragmatic in character. An informal and evolutionary approach is preferred, better to preserve flexibility and scope for adaptation. Fortunately because the United Kingdom has a first-class civil service, some of the detail is brilliant. But where is devolution, tellingly labelled a process by the Secretary of State, supposed to be leading in Wales? Legislative devolution is the obvious answer, because ten years hence it will not appear such a great leap for Wales. If so, there is much to be said for going direct. Many of the problems discussed stem not from devolution *per se,* but from the brand of devolution applied to Wales. A choice has been made. We shall see what artefact the Welsh produce.