

# THE STRANGE RECONSTITUTION OF WALES

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The emergence of determinedly forward-looking and principled approaches to the design and workings of the territorial constitution is a notable feature of public life in contemporary Wales. First Minister Carwyn Jones has adopted a ‘new Union’ mind-set in the light of devolution, so championing a looser and less hierarchical set of UK constitutional arrangements in which, grounded in popular sovereignty, the several systems of representative democracy pursue self-rule and shared rule in cooperative fashion.<sup>1</sup> Building on, and even ranging beyond, the operational realities of quasi-federalism,<sup>2</sup> some basic tenets of constitutional policy for the UK as a multi- (pluri-) national state<sup>3</sup> are elaborated accordingly by the Welsh Government. Namely that the UK is best seen as a voluntary association of nations in which devolved institutions are effectively permanent features; in which the allocation of functions is based on the twin elements of subsidiarity and mutual benefit; and in which the relations of the four governments are characterised by mutual respect and parity of esteem.<sup>4</sup> A form of ‘Greater England’ unionism, one which tolerates only limited territorial difference,<sup>5</sup> this is not. Reference is also made in the context of Brexit to pooled and shared sovereignty within the UK,<sup>6</sup> a challenging notion in more ways than one. For an uncodified constitution historically grounded in parliamentary sovereignty, such an advanced and even radical set of official perspectives is the more noteworthy coming as it does from the only devolved government fully committed to the UK. Conversely, it has often appeared a somewhat lonely political position.

Principles-based analysis infuses the work of the independent Silk Commission, established in 2011 by the then UK Coalition Government and reporting on financial and legislative powers to strengthen Wales.<sup>7</sup> Any new devolutionary schema, the evidence-based evaluation made clear, should be constructed in terms of recognised good governance values: accountability – clarity – coherence – collaboration – efficiency – equity – stability – subsidiarity.<sup>8</sup> Yes, there were some slippery concepts here. Yes, there would inevitably be

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<sup>1</sup> See for example, Carwyn Jones, Institute for Government speech, October 15, 2014.

<sup>2</sup> V. Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009); M. Burgess, *In Search of the Federal Spirit* (Oxford: OUP, 2012).

<sup>3</sup> A-G. Gagnon and J. Tully (eds.), *Multinational Democracies* (Cambridge: CUP, 2001); M. Keating, *Plurinational Democracy* (Oxford: OUP, 2004).

<sup>4</sup> Welsh Government, written evidence to House of Lords Constitution Committee, *The Union and devolution*, Session, HL 151 (2015-16). The proper timing and conduct of any independence referendum or border-poll is another matter.

<sup>5</sup> C. Kidd, *Union and Unionisms* (Cambridge: CUP, 2008); L. Colley, *Acts of Union and Disunion* (London: Profile Books, 2014).

<sup>6</sup> Welsh Government, *Securing Wales’ Future* (2017), p. 28. A joint policy document with Plaid Cymru.

<sup>7</sup> P Silk (Chair), *Report of the Commission on Devolution in Wales: Part 1, Financial Powers to Strengthen Wales* (2012); *Part 2, Legislative Powers to Strengthen Wales* (2014).

<sup>8</sup> Silk Commission, Part 2 Report, para. 3.3.3.

trade-offs. And yes, there was naturally a major place for political judgement and ideology, as with the approach to social citizenship. One need not be a fetishist for a codified constitution however to frown on a constitutional journey without maps.

This high level interest in constitutional tenets and principles has several explanations. As part of a wider response, it reflects a genuine - unionist – concern to revamp the UK territorial constitution in the face of very serious pressures for break-up.<sup>9</sup> The approach is also directly instrumental in character: perhaps hopefully, a means to ameliorating the lack of political leverage that has plagued a country commonly regarded as the junior member of the UK family of nations. Not least, it may be said, when the dominant Labour Party interest in Wales<sup>10</sup> is in political cohabitation with a Conservative Prime Minister. At root, however, the approach is by way of counter-reaction to the arduous and convoluted nature of the Welsh constitutional journey over the last 20 years.

Constructing a strong and stable devolution settlement for a small polity long dependent on, and economically and socially highly integrated with, its large English neighbour was never going to be easy; the more so in view of the long-standing single legal jurisdiction of England and Wales. The successive bouts of Welsh devolution legislation bear ample testimony however to a lack of constitutional sensitivity on the part of Whitehall and Westminster. Approved narrowly by referendum and delivered under the original Government of Wales Act (GOWA) 1998, the first - executive - phase of Welsh devolution gave birth to a recognisably national polity.<sup>11</sup> But contrary to separation of powers, representative and governmental functions were combined in the new National Assembly for Wales in Cardiff Bay, which was itself limited to patchy secondary law-making powers based on previous territorial department functions. Developed via Part III of the Government of Wales Act (GOWA) 2006, the second – proto-legislative – phase established a mainstream structure of parliamentary government. Increased powers were given to make or modify legislative provision, but such ‘Assembly Measures’ were strictly confined under a conferred powers model to designated policy fields, as developed incrementally through an arcane process of Legislative Competence Orders.<sup>12</sup> Approved by convincing majority in another referendum in 2011 and automatically implemented under Part IV of the 2006 Act, the third – fully legislative – phase has in turn involved an intricate model of competence requiring that ‘Acts of the Assembly’ relate sufficiently to subjects listed in the statute.<sup>13</sup> The scheme quickly proved a recipe for litigation at UK Supreme Court level.<sup>14</sup> The Wales Act (WA) 2014 broke new ground in the fiscal constitution by establishing some Welsh taxing powers.<sup>15</sup> But reflecting the political tensions and also recalling the porous nature of the border with

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<sup>9</sup> Analogues include the (Calman) Commission on Scottish Devolution, *Serving Scotland Better* (2009); and, from civil society, Bingham Centre for the Rule of Law, *A Constitutional Crossroads* (2015), and Constitution Reform Group, *Draft Act of Union Bill* (2016). Carwyn Jones is also a prime mover in Labour’s recently established UK-wide ‘devolution taskforce’, with a view to some form of constitutional convention (as promised in the Party’s 2017 General Election manifesto).

<sup>10</sup> R. Scully and J. Larner, ‘A Successful Defence: the 2016 National Assembly for Wales Election’ (2017) 70 *Parliamentary Affairs* 507. Labour retained 28 of the 40 Welsh seats in the June 2017 UK General Election.

<sup>11</sup> R. Rawlings, ‘The New Model Wales’ (1998) 25 *JLS* 461.

<sup>12</sup> R. Rawlings, ‘Hastening slowly: the next phase of Welsh devolution’ [2005] *PL* 824; D. Moon and T. Evans, ‘Welsh devolution and the problem of legislative competence’ (2017) 12 *British Politics* 1.

<sup>13</sup> R. Scully and R. Wyn Jones, *Wales Says Yes* (Cardiff: University of Wales Press, 2012).

<sup>14</sup> *Local Government Byelaws (Wales) Bill 2012 - Attorney General Reference* [2012] UKSC 53; *Agricultural Sector (Wales) Bill – Attorney General Reference* [2014] UKSC 43; *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales* [2015] UKSC 3.

<sup>15</sup> The Tax Collection and Management (Wales) Act 2016 puts in place the necessary institutional framework.

England, the scheme involved the uneasy compromise of provision for a partial devolution of income tax coupled with a referendum ‘lock’.<sup>16</sup>

The continuing strong role of autochthonous - home-grown - institutional development is a significant feature. If necessity has often driven local constitutional invention, most obviously in the institutionally odd early years,<sup>17</sup> elite local actors have commonly exploited the opportunities provided by, while pointing up the deficiencies of, an unstable statutory – constitutional - framework. This largely explains the plethora of independent commissions across the successive phases of Welsh devolution: reasoned justification and wider ownership and valuable political cover for further devolutionary enhancement.<sup>18</sup>

At UK level, sustained criticism of Whitehall’s ad hoc and piecemeal approach to constitutional development, and, more particularly, failure to articulate a coherent vision of the UK’s territorial constitution, is a notable feature of the parliamentary scrutiny. To the extent of the House of Lords Constitution Committee warning of a risk to the Union if this constitutional mind-set – one typically associated with Westminster power politics and UK civil service pragmatism – persists.<sup>19</sup> Another familiar refrain is the patchy and fragmented nature of intergovernmental relations, where Whitehall inertia has again been criticised.<sup>20</sup> The Silk Commission expressed particular concern about this aspect.<sup>21</sup>

There were signs however at the beginning of the Brexit process of some sharper thinking about the Union. Attention is here drawn to the scope for Brexit-enabled centralisation, a key constitutional issue whirring away at official level and then gaining political traction. As against the template of ‘devolve and forget’, Prime Minister Theresa May spoke firmly of an extended UK Government responsibility to maintain and promote common - domestic - frameworks in place of the internally shared parameters of EU law.<sup>22</sup> Bearing directly on her Conservative Government’s new quest for ‘a global Britain’, and effectively heralding fresh debates over cross-cutting competences for, and reservations of competence to, Westminster and Whitehall, this then is the realm of reregulation in ‘the UK single market’.<sup>23</sup> It would be strange indeed if this aspect of ‘take back control’ had not raised the temperatures even in the pro-UK climes of Cardiff Bay; and the more so, in view of the large-scale functional fusion of UK Government with the government of England.<sup>24</sup> Envisaging the distribution of hitherto EU competences through the established statutory patterns of devolved and non-devolved competence, the Welsh Government has stood on the need for inter-governmental agreement when developing UK-wide frameworks in devolved policy areas.<sup>25</sup> Further illuminating the ‘new Union’ mind-set, this is significantly different from the centre’s preferred angle of approach as established prior to the 2017 UK General Election: a Westminster-based

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<sup>16</sup> See further, Silk Commission, Part 1 Report, chapter 8.

<sup>17</sup> R. Rawlings, *Delineating Wales* (Cardiff: University of Wales Press, 2003).

<sup>18</sup> Epitomised by the (Richard) *Commission on the Powers and Electoral Arrangements of the National Assembly* (2004).

<sup>19</sup> Constitution Committee, *The Union and devolution*, chapter 3.

<sup>20</sup> See latterly, House of Commons Public Administration and Constitutional Affairs Committee, *The Future of the Union: Inter-institutional relations in the UK* HC 839 (2016-17).

<sup>21</sup> Silk, Part 2 Report, chapter 5.

<sup>22</sup> Theresa May, Lancaster House speech, January 17, 2017; Scottish Conservative conference speech, March 3, 2017.

<sup>23</sup> This is not to overlook the possibilities of for example ‘GB’ arrangements in some sectors in view of the particular economic as well as political situation of Northern Ireland.

<sup>24</sup> R. Rawlings, ‘A Coalition Government in Westminster’ in J. Jowell et al (eds.), *The Changing Constitution* (Oxford: OUP, 8<sup>th</sup> edn. 2015).

<sup>25</sup> Welsh Government, *Securing Wales’ Future* (2017), chapter 7; id., *Brexit and Devolution* (2017). There is clear overlap here with the approach of the Scottish Government, *Scotland’s Place in Europe* (2016).

legislative holding pattern for the policy responsibilities being repatriated and parallel conversations with the devolved administrations on common frameworks.<sup>26</sup>

Against this backdrop, let us consider the constituting of the fourth main phase of Welsh devolution in just twenty years, in the Wales Act 2017. At the heart of the development is the move from a conferred powers model of devolution to a reserved powers one. We shall see how this has been partly framed by the work of the Silk Commission; partly influenced by the Scotland Act 2016, or more precisely the contribution of the Smith Commission in light of the pan-unionist vow at the height of the 2014 Scottish independence referendum of further, major constitutional change;<sup>27</sup> and partly driven by central government concern about expansive judicial interpretation of the pre-existing conferred powers model. The UK-wide vote for Brexit in June 2016, an outcome replicated in Wales against the advice of Welsh Labour ministers, will also be shown taking on particular constitutional and political significance in the final passage of the Bill.

Drilling down, we will examine how and why the developmental process has been an unsatisfactory and on occasion painful one and the ways in which the different stages have left their mark on the new constitutional statute. Ordered accordingly, the discussion illuminates the nexus of legal, political and administrative considerations. Such is the new Welsh saga of incoherent party political compromise and internal Whitehall machinations; poorly modelled draft Bill and alternative - 'shadow' - proposals; minimal recognition of legal distinctiveness and more mature fiscal framework; parallel and uneven legislative scrutiny and, giving a suitably taut ending, the vexed question of legislative consent amid a sea of Brexit-related uncertainty.

Enough has been said to introduce a series of related themes illuminated in this article. The first theme concerns the very different constitutional approaches of the two pro-Union governments. Especially in the light of pressures for separation or independence elsewhere in the UK, this is an aspect of domestic constitutional politics which is often overlooked. The debates around the Wales Act 2017 will be shown giving matters a hard practical edge. The more so, since the sub-state polity is seen undergoing a double constitutional transition: moving to a reserved powers model just as the external framework for devolution provided by UK membership of the EU is replaced. The second theme concerns the gruelling nature of the Welsh constitutional journey. We will see how a backward-looking and mechanical approach to constitutional design has again served to compound matters. A salutary reminder of the realities of constitutional change even in beneficent conditions of mature democracy, a further theme is the substantial 'trumping' of principles-based design. We see here how some initial high hopes of achieving a strong and stable constitutional settlement for Wales have been dashed by a combination of specific policy concerns, institutional politics and seeming lack of trust. As well as offering new opportunities for home-grown constitutional development, the Wales Act 2017 is in turn liable to generate further pressures for devolutionary advance through Act of Parliament, not least in terms of legal jurisdiction and the justice function. Interplay and influence across the UK's territorial constitution is another major theme, referencing, but not confined to, the legal and political pushes and pulls familiarly associated with a notably asymmetric UK devolutionary process. We shall see for example how the passage of the Wales Act 2017 casts new light on the scope for parallel and cooperative forms of democratic scrutiny.

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<sup>26</sup> Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (2017), Cm. 9446, chapter 4. An approach latterly pursued via clauses 10-11 of the European Union (Withdrawal) Bill (as presented).

<sup>27</sup> *Report of the Commission for further devolution of powers to the Scottish Parliament* (2014).

## Draft Wales Bill 2015

### *Dynamics and processes*

In introducing the draft legislation, the then Secretary of State for Wales Stephen Crabb appeared nothing but ambitious. The intention was ‘to create a stronger, clearer, and fairer devolution settlement for Wales that will stand the test of time’.<sup>28</sup> In the words of the Command Paper *Powers for a Purpose*, this demanded ‘a new way of thinking’.<sup>29</sup>

As with previous efforts, the draft Wales Bill 2015 was an exercise in the competing constitutional dynamics of asymmetry and equal treatment. In moving from a conferred to a reserved powers model, Wales was to have some provision derived from the earlier Scottish (and Northern Irish) statutes, as with elements of the test for legislative competence and much by way of reservations; some distinctive provision, as with other elements of the test for legislative competence and much more by way of reservations; and some provision not at all, as with creation of a devolved legal jurisdiction.<sup>30</sup> The role of institutional politics and belief systems commands attention here; as well as a natural inclination in the Assembly to seek greater parity with the Scottish Parliament, the familiar power-hoarding instincts of individual Whitehall departments coupled with the old, deep-rooted ‘England and Wales’ paradigm of law and administration.

The draft Wales Bill was one in a raft of territorial constitutional initiatives from David Cameron’s then newly elected Conservative Government.<sup>31</sup> Illuminating the pull and push of contemporary developments around the UK, some of the specifically constitutional provision was obviously read across from the contemporaneous Scotland Bill (now the Scotland Act 2016). The rise of EVEL - ‘English votes for English laws’ - is also very relevant. Highlighting the fact of twin legislative motors of legal divergence between England and Wales, it sharpens a continuing debate in Wales over the retention of the single legal jurisdiction.

A major complicating factor is the contrasting motivations behind the move to a reserved powers model for Wales. On the UK Government side, this entails deep antipathy to the ruling on the conferred powers scheme in the *Agricultural Sector* case.<sup>32</sup> Led by the Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd, the Supreme Court had held that Assembly legislation fairly and realistically relating to a devolved subject was within competence even if it also related to a subject not listed as devolved or excepted (a so-called ‘silent subject’). In so freeing-up some valuable legal and administrative space in which to develop cross-cutting policies, the Court was rightly concerned about the workability otherwise of a devolutionary framework of bits and pieces. Yet the ruling meant an open flank for Whitehall, which there was an understandable determination to close. Premised on the reverse dynamic whereby the standard competence test of ‘relates to’ determines aspects beyond – not within – competence,<sup>33</sup> and on the listing of hitherto ‘silent subjects’ as non-devolved, the constitutional technology of reserved powers provided the

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<sup>28</sup> HM Government, *Draft Wales Bill* (2015), Cm. 9144, p. 4.

<sup>29</sup> HM Government, *Powers for a Purpose: Towards a lasting devolution settlement for Wales*, Cm. 9020, 2015, para. 2.1.18.

<sup>30</sup> HM Government, *Draft Wales Bill*, Cm 9144, 2015.

<sup>31</sup> R Rawlings, ‘Riders on the Storm: Wales, the Union, and Territorial Constitutional Crisis’ (2015) 42 JLS 471.

<sup>32</sup> *Agricultural Sector (Wales) Bill – Attorney General Reference* [2014] UKSC 43.

<sup>33</sup> Via the combination of a ‘purpose’ and form of ‘pith and substance’ test: *Martin and Miller v Lord Advocate* [2010] UKSC 10.

essential means. Giving a particular meaning to ‘clarity’ and ‘stability’, this indicated some roll-back of Welsh devolved competence.

The Silk Commission had also ‘formed the firm view that a reserved powers model would be superior to the current arrangements’.<sup>34</sup> Much in the evidence spoke to the potential benefits for the sub-state polity in terms of subsidiarity, workability and citizen understanding. So too, a single core model of devolution outside England was attractive from a quasi-federal standpoint.<sup>35</sup> Silk’s detailed package of proposals on devolved powers and structures represented a step-change. If little around social security, then significant recommendations in terms of economic development, natural resources and institutional autonomy, and, highlighted by policing, prison and youth justice, much around the justice function of government broadly conceived. Underwriting the approach is the particular potential with small country governance for joined-up and collaborative approaches to policy development and implementation.<sup>36</sup> Yet there remained the basic comparative point that reserved powers models – like conferred powers models – come in many different shapes and sizes. A steep learning curve beckoned for those in Cardiff Bay tempted to assume the devolutionary gain in moving to the one constitutional format from the other.

The political and administrative processes in London ahead of the draft Bill provide a textbook example of how, in terms of basic good governance values and rational decision-making, not to proceed.<sup>37</sup> Established by the Secretary of State, this is the realm of the grandly-titled ‘St David’s Day process’, an exercise in constitutional design by lowest common denominator which effectively sought party political consensus at the expense of coherence and consistency. An aspect underscored by the secretive nature of the process and lack of any requirement to give reasons; and by the bystander status of the Welsh Government, an awkward feature seen replicated in the formal legislative proceedings. With Westminster representatives of each of the then four main political parties in Wales able to veto any individual recommendation, the scene was set for another constitutional scheme of bits and pieces. The Silk Commission’s proposals were chipped away at, and in relation to the justice function hollowed out.<sup>38</sup>

The follow-up is a sharp reminder of the importance in the law-making process of the policy conversion stage. Matters were compounded by internal Whitehall processes of trawling and reverse engineering, whereby individual departments were asked to give their own interpretations of the existing devolution boundary, a virtual invitation to expressions of institutional self-interest, and the answers accumulated in lists of draft reservations, most obviously at the expense of ‘silent subjects’. We touch here on the evident weakness of the Wales Office. Historically a minnow in Whitehall terms and reduced still further in the wake of devolution, the territorial department could only do so much by way of push-back against UK Government colleagues. Limited joint working with the Welsh Government also meant that those with the hands-on experience of devolution did not have clear sight of the

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<sup>34</sup> Silk Commission, Part 2 Report, para. 4.5.1.

<sup>35</sup> Wales Governance Centre (WGC) and Constitution Unit, *Delivering a Reserved Powers Model* (2015).

<sup>36</sup> A. Cole and I. Stafford, *Devolution and Governance* (London: Palgrave Macmillan, 2015).

<sup>37</sup> WGC and Constitution Unit, *Challenge and Opportunity: The Draft Wales Bill 2015* (February 2016). The author was Rapporteur.

<sup>38</sup> See *Powers for a Purpose*, Annex A.

developing draft legislation, better to advise and challenge.<sup>39</sup> So much, it may be said, for a new way of thinking.

The Secretary of State was in lengthy discussions with the Ministry of Justice (MoJ) about preserving ‘the integrity’ of the single legal jurisdiction in the context of a reserved powers model.<sup>40</sup> Or, with reference to the sprawling fields of civil and criminal law and procedure, what would be termed the ‘leeway and lock’ approach<sup>41</sup> of prescribing ‘a general level of protection for the unified legal system of England and Wales, whilst allowing the Assembly some latitude to modify these areas of law’.<sup>42</sup> Storing up difficulties, this in-house add-on to the St David’s Day process took place with no serious external testing or dialogue with civil society.

### *Good, bad and ugly*

Those devolutionary enhancements recommended by Silk that survived the St David’s Day process have predictably made it through to the Wales Act 2017. As regards practical policy development, they include significant new powers in a range of subject-areas such as energy and the environment, transport and marine licensing, and equality.<sup>43</sup> An accompanying general empowerment of Welsh Ministers to implement EU law<sup>44</sup> serves in suitably ironic fashion to underscore the fact of major constitutional legislation conceived and largely drawn up in a fundamentally different constitutional setting than today.

Showing the Scottish influence, and also fitting with the Welsh Government’s constitutional vision, the legislation declares the permanence of the devolved institutions and recognition of the Sewel Convention with regard to devolved matters. Not before time, other specifically constitutional provision buttresses the Assembly’s status as a self-governing institution, as with formal abandonment of arrangements for UK ministers to participate in proceedings, control via standing orders over the composition of committees, and power to decide its own name, for which read ‘The Welsh Parliament’.<sup>45</sup> Supplementary provision for Assembly legislation on financial control, accounts and audit also sits well in terms of sub-state autonomy and responsibility.<sup>46</sup>

The chief new instrument for locally owned constitutional development is however the wide-ranging legislative competence over Assembly electoral arrangements, powers which (as with the Assembly’s name) are correctly hedged about with a super-majority requirement.<sup>47</sup> A cautious approach might be anticipated, most obviously in view of the widespread public disaffection with the (Welsh) political class indicated by the Brexit vote. In the light however of concern about the capacity of a body comprising only 60 Members properly to hold the Welsh Government to account,<sup>48</sup> an independent expert panel would subsequently be established to advise the Assembly Commission on electoral reform.<sup>49</sup> With a view to the

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<sup>39</sup> Correspondence from First Minister to Secretary of State (National Assembly Constitutional and Legal Affairs Committee (CLAC), Deposited Papers, October 21, 2015); and vice versa, (Welsh Affairs Committee, published November 6, 2015).

<sup>40</sup> CLAC, Transcript of evidence, November 23, 2015, paras 33, 57.

<sup>41</sup> *Challenge and Opportunity*, chapter 5.

<sup>42</sup> Explanatory Notes to draft Wales Bill, para. 32.

<sup>43</sup> WA 2017, Part 2.

<sup>44</sup> WA 2017, s. 20.

<sup>45</sup> Presiding Officer, written statement, June 13, 2017.

<sup>46</sup> WA 2017, Part 1.

<sup>47</sup> WA 2017, ss. 9-10.

<sup>48</sup> UK’s Changing Union Project/Electoral Reform Society Wales, *Size Matters* (2013).

<sup>49</sup> Presiding Officer, written statement, February 1, 2017.

next Assembly elections in 2021, an expansive agenda covers the electoral system and number of Members and the lowering (from 18 to 16) of the minimum voting age.

But the downsides in the draft Bill weighed far more heavily on the sub-state polity. Long-winded, jumbled and inherently backward-looking, a proposed Schedule of general and specific reservations speaks volumes about the predations of the St David's Day process and power-hoarding antics in Whitehall. Lacking the disciplines of principled rationalisation and explanation, it ranges all the way from the constitutionally vital to the wholly ungenerous and eccentric, via the questionable and arcane. Close examination and comparison reveals much stretched drafting, or what by regulatory analogy was duly dubbed 'reservation creep'.<sup>50</sup> Major policy domains such as policing, prisons and criminal justice, where the political decision had been taken not to devolve in Wales, provide multiple examples. Repeating tricks of the trade such as exceptions to reservations and carve-outs to exceptions add to the particularity.

Viewed in the round, the draft listing demonstrates a basic failure in Whitehall to appreciate the challenges and opportunities of small country governance. Effectively squeezing and cluttering the devolved legislative space, some 34 pages of proposed reservations cut against the good governance values so emphasised by Silk. Not least in terms of subsidiarity, workability and coherence, as with the inhibiting effects on public business and especially cross-sectoral policy development and implementation; of clarity, as with the evident potential for legal uncertainty and dispute; and of strong citizen engagement and accountability.

Proceeding from a reasonable if unheralded policy rationale, that of protecting a broad swathe of UK/GB/England and Wales public bodies from unilateral and perhaps costly changes of function by the devolved institutions, the draft Bill contained an extended range of veto powers for UK (English) government ministers on democratically legitimated Welsh policy preferences.<sup>51</sup> The methodology proposed in this most complicated institutional context of multiple and variable mixes of functions was one of general definition and determinative tests premised on a distinction between 'reserved authorities' and (within devolved competence) 'Welsh public authorities'. This was an obvious source of political friction, and again of legal ambiguity and dispute.

And then there were the general restrictions in the draft Bill operationalising the model of leeway and lock. As part of a battery of legislative competence tests, whether or not the National Assembly was within powers would depend in many situations on whether the relevant provision was 'necessary'. The methodology was thus included in Schedule paragraphs covering not only cross-border (Welsh/English) provision, but also modifications to the 'criminal law' and the 'private law' broadly defined, as well as to 'the law of reserved matters', obviously a more voluminous category than the parallel one in Scotland from which the concept of necessity-testing was read across. Going in tandem with the general reservation of the 'single legal jurisdiction of England and Wales',<sup>52</sup> the approach represents a Whitehall counterblast against legal divergence between the two countries. An element of roll-back was again involved because provision could be within competence under the pre-existing conferred powers scheme if it provided for the enforcement of Assembly legislation,

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<sup>50</sup> *Challenge and Opportunity*, chapter 7. See also, T. Huckle, "'Fixes, Fudges and Falling Short'?" (Sir William Dale Memorial Lecture, 2015).

<sup>51</sup> Draft Wales Bill 2015, Schedule 2 inserting new Schedule 7B Part 1 para. 8 to GOWA 2006.

<sup>52</sup> See WA 2017, Schedule 1 inserting new Schedule 7A Part 1 para. 8 to GOWA 2006.



was otherwise appropriate for making such legislation effective, or was otherwise incidental to, or consequential on, such legislation.<sup>53</sup>

Constitutionally-speaking, this was a poor choice of model. In situations not covered by Convention rights or (as then envisaged) EU law, the contestable concept of necessity was liable to undercut political responsibility and accountability; cause problems of workability and chilling effects on policy development and implementation; and generate yet more legal uncertainty and dispute, with necessarily subjective and controversial decisions required of the judges. Far from mutual respect and parity of esteem, the burden of maintaining the ‘integrity’ of the single legal jurisdiction would be loaded firmly on Cardiff Bay.

Enough has been said to explain the torrent of criticism which greeted the draft Bill. Lawyers from the Assembly Commission picked apart the contents, so grounding detailed interventions by the Presiding Officer addressed to the Secretary of State.<sup>54</sup> The Assembly’s high-ranking Constitutional and Legislative Affairs Committee (CLAC) brought together concerns about substance and process, so speaking of legislation made for Wales rather than with Wales.<sup>55</sup> In a subsequent debate described as unprecedented by the Presiding Officer, the First Minister declared the draft Bill not fit for purpose, a sentiment echoed across the Chamber.<sup>56</sup> At Westminster, the Conservative-led Welsh Affairs Committee asked the Secretary of State to reflect,<sup>57</sup> while unusually the Welsh Grand Committee met to interrogate him.<sup>58</sup> Suffice it to add that the Lord Chief Justice was particularly active, publicly re-emphasising the need for constitutional drafting rooted in principle.<sup>59</sup> The Secretary of State rightly declared a legislative ‘pause’.<sup>60</sup>

### **Shadow draft Bill**

The MoJ had overplayed its hand. Proposals for (re-)establishing distinctive Welsh judicial institutions have rumbled around for many years, ranging - under the notoriously slippery rubric of ‘jurisdiction’<sup>61</sup> - through federal or quasi-federal ideas of a fully-fledged sub-state system with pan-UK linkage at the apex level, to more modest proposals such as a High Court of Wales. Conversely, there is a long line of rebuffs to Welsh constitutional recognition and development founded on the existence of the single legal jurisdiction of England and Wales.<sup>62</sup> This is epitomised with legislative devolution by a central government policy line against the reserved powers format, a seeming article of faith promptly abandoned in light of the *Agricultural Sector* case. With the appearance of the draft Wales bill, the debate over jurisdiction predictably reignited. For if, as the MoJ robustly maintained, the single legal jurisdiction required general protection in the form of heavy duty locks on Welsh legislative activity, then, increasingly went the argument in Wales, the fact of it had better be revisited.

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<sup>53</sup> GOWA 2006 s. 108(5). See further, *Local Government Byelaws (Wales) Bill 2012 - Attorney General Reference* [2012] UKSC 53.

<sup>54</sup> Assembly Deposited Paper 1481-11-16.

<sup>55</sup> CLAC, *Report on the UK Government’s Draft Wales Bill* (December 2015).

<sup>56</sup> *Record of Proceedings*, January 13, 2016.

<sup>57</sup> WAC, *Pre-legislative scrutiny of the draft Wales Bill*, HC 449 (2015-16).

<sup>58</sup> Welsh Grand Committee, Transcript of Proceedings, February 3, 2016.

<sup>59</sup> Lord Thomas of Cwmgiedd, “The Law of Wales’: Looking Forwards”, Legal Wales conference speech, October 9, 2015.

<sup>60</sup> Wales Office, press release, February 29, 2016.

<sup>61</sup> R. Percival, ‘How to do things with jurisdictions’ (2017) PL 249.

<sup>62</sup> T. Watkin, ‘Devious Debates and Devolution’ in Watkin (ed.), *The Welsh Legal Triads and Other Essays* (Welsh Legal History Society, 2012); also CLAC, *Inquiry into a Separate Welsh Jurisdiction* (2012).

Silk had touched lightly on the issue of courts and jurisdiction. Focused on additional powers rather than on constraints on powers associated with the single legal jurisdiction, the Welsh Government itself had not prioritised the matter.<sup>63</sup> The scene though was set in terms of two immediately graspable sets of views commonly rehearsed today in the local professional community. Proceeding on the basis that the single jurisdiction has served Wales well, practical concerns relating to the costs of change and local resources, the porous nature of the Welsh/English border and potential legal commercial disadvantage, as well as the gold-standard reputation of existing senior court structures. Reformist demands which reference the devolutionary dynamics and ongoing legal divergence, national identity and the social and linguistic condition of Wales, as well as legal business and service opportunities in a new jurisdiction.<sup>64</sup> Silk recognised that the balance of the argument was liable to shift with the facts on the ground of Wales developing a distinct legal personality.<sup>65</sup> But even the cautious call to review the case for devolving legislative responsibility for the court service and judiciary within ten years was vetoed in the St David's Day process.<sup>66</sup>

Could the flexible concept of a 'distinct' jurisdiction offer a way forward? This is shorthand in the Welsh constitutional lexicon for alternative - compromise – means of recognition and support for the growing Welsh statute book and – a matter of proper democratic concern – for regulating legislative overspill into England. Not a 'separate' jurisdiction involving full-scale devolution of responsibility for administration of justice, but denoting instead a field of policy choice which factors in practical strengths of the single legal jurisdiction. Perhaps chambers for England and for Wales within the existing structure of senior courts; or, more strongly, formal division into the law and senior courts of England and the law and senior courts of Wales, but with a common judiciary and legal professions.<sup>67</sup> In light of the draft Wales Bill, this injection of creative ambiguity into the debate gained much favour in the Assembly.<sup>68</sup>

To say that, broadly defined, the justice function is not devolved in Wales is an oversimplification. Various forms and models of decentralisation exist, from non-statutory advisory boards and sub-committees for Wales to stronger elements of 'regionalisation' such as the Administrative Court in Wales, and on through to Welsh commissioners and tribunals established under Assembly legislation.<sup>69</sup> Characteristically ad hoc and piecemeal, the development reflects both output values of efficiency and effectiveness and, increasingly pressed in recent years, input ones of accessibility, participation and representativeness. Resulting gaps, overlaps and problems of democratic accountability have further fuelled the constitutional demand in Wales for more principled approaches, more especially in the wake of the draft Wales bill.

Taking the opportunity presented by the legislative 'pause', the Welsh Government would break new ground in UK devolutionary politics by publishing a written constitution for the sub-state polity in the form of an alternative – 'shadow' – draft Bill. As against yet another amending statute, the draft Government and Laws in Wales Bill is determinedly broad, beginning with 'the Welsh Parliament' and legislative competence and process, and then a logical progression through the Welsh Government and executive functions, legal

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<sup>63</sup> Welsh Government, *Written evidence to the Silk Commission* (2013).

<sup>64</sup> Justice for Wales, *In support of a Welsh jurisdiction* (Cardiff, 2015).

<sup>65</sup> See Law Commission, *Form and Accessibility of the Law Applicable in Wales* (CP 223, 2015).

<sup>66</sup> Silk Commission, Part 2 Report, recommendation 28; *Powers for a Purpose*, Annex A.

<sup>67</sup> See further, *Challenge and Opportunity*, chapter 6.

<sup>68</sup> *Record of Proceedings*, January 13, 2016.

<sup>69</sup> H. Pritchard, *Justice in Wales* (WGC, 2016).

jurisdiction, finance and taxation. Designedly principles-based, with particular emphasis on subsidiarity,<sup>70</sup> it represents a fresh high-water mark in Welsh constitutional thinking.

Wales is today the odd one out in the common law world of state and sub-state polities in not having a single matching legislature and legal jurisdiction. The shadow draft Bill duly proceeds on the basis of not if but when. First, a strong model of ‘distinct’ jurisdiction for prompt implementation is drawn up.<sup>71</sup> Second, representing a twin strategy of future proofing and orderly preparation, a novel category of ‘deferred matters’ is specified for devolution a decade on, with Cardiff Bay able to legislate in them in the interim provided Westminster does not disapprove.<sup>72</sup> Greatly reducing the reservations alternatively envisaged by Whitehall, this includes - yes - courts and tribunals, criminal law and private law, and policing and prison, so effectively standing for a ‘separate’ jurisdiction in the medium term. Not surprisingly, however, the shadow draft bill had little immediate traction: all too challenging for London in particular in view of the St David’s Day process.<sup>73</sup>

## **Wales Bill 2016**

### *Reset*

Introduced in July 2016, the Wales Bill could hardly fail to be a marked improvement. The broad policy lines were retained but some of the most contentious features were removed or softened. The general restrictions on legislative competence saw necessity-testing partially substituted. There was some pruning of reservations, with the scrapping of a few and the thinning of some. A start was also made on rendering the system of ministerial consents tolerably comprehensible. With more involvement by the UK Cabinet Office, the Welsh Government was belatedly permitted to engage not only with the Wales Office but also with the key front-line UK Government Departments.

Now contained in the statute, the reworked model of legislative competence represents a more targeted approach to ‘protection’ of the single legal jurisdiction,<sup>74</sup> though one which could still easily generate further referrals to the Supreme Court. In a significant exception to the general prohibition on devolved legislation modifying the private law, Assembly legislation may do so for a purpose that does not relate to a reserved matter. Permitting substantial elements of legislative enforcement, the Assembly may provide for offences in relation to non-reserved matters, while being prohibited from legislating on core categories such as offences against the person triable only on indictment, as well as on fundamental conceptual elements such as criminal responsibility and capacity. Turning the argument round, the retention of necessity-testing for ‘the law on reserved matters’ is liable to cause headaches in Cardiff Bay in view of the stretched statutory as well as common law coverage in the Welsh context. The legislative text as a whole is less clunky, but it is still clunky.

In so proceeding the UK Government rejected much by way of compromise as regards a ‘distinct’ jurisdiction. On the basis it was said, first, that ministers could see little to distinguish from a separate jurisdiction; and second, a tellingly Anglo-centric visualisation of only Cardiff Bay and not Westminster driving divergence, of the small quantum of Assembly

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<sup>70</sup> Explanatory Summary to Draft Government and Laws in Wales Bill (GLWB), p. 4.

<sup>71</sup> GLWB, Part 5.

<sup>72</sup> GLWB, clauses 38, 46-47, and Schedule 7 Part 2.

<sup>73</sup> The shadow draft Bill was subsequently included in Labour’s 2017 UK General Election manifesto.

<sup>74</sup> WA 2017, Schedule 2 inserting new Schedule 7B to GOWA 2006, paras. 1-4.

law compared to the body of law common to England and Wales.<sup>75</sup> Instead, in maintaining the proverbial ‘red line’ of a single legal jurisdiction, there would be a minimal statutory response in light of the calls to the contrary: formal recognition of the obvious practical reality that ‘the law that applies in Wales includes a body of Welsh law made by the Assembly and the Welsh Ministers’. Even this comes with a statutory, explanatory guard. As tortuously expressed in the Explanatory Notes, ‘the purpose of making this declaratory statement does not in any way affect the devolution boundary and in particular the fact that the single legal jurisdiction is a reserved matter’.<sup>76</sup> The MoJ was still dissatisfied however. If the Assembly was to be freer from necessity-testing, then a procedural check would be imposed on Cardiff Bay: the statutory requirement that standing orders require published ‘justice impact assessments’ of legislative proposals.<sup>77</sup> Evidencing the failure to establish a properly co-operative inter-governmental relationship, and indeed a certain lack of trust in the devolved institutions, this is a petty provision squarely at odds with the proper constitutional acceptance of internal institutional autonomy elsewhere in the legislation.

The issue of roll-back naturally commands attention. Giving this an ideological flavour is the reservation on employment and industrial relations; wide-ranging in character and accompanied, in a nod to the Supreme Court, with an exception for the agricultural sector.<sup>78</sup> It would be resolutely defended against opposition attack during the Lords’ consideration of the Bill.<sup>79</sup> For their part, Welsh Labour ministers have proceeded with targeted legislation on trade unions and public services designed to amend recent UK legislation otherwise applicable in Wales.<sup>80</sup> On the basis that is of the conferred powers model and ‘silent subjects’, including through transitional arrangements. Whether on the basis of the new reserved powers model there is a counter-strike from the new minority Conservative Government at Westminster remains to be seen.

### *Procedure and substance*

To put it charitably, scrutiny in the House of Commons of this major Constitutional Bill was muted. A salutary reminder of the potential downside to pre-legislative scrutiny, ministers were not averse to pleading the fact of multiple discussions of the draft Bill as justification for driving forward even on the basis of a new and untested model of legislative competence. Framed then by strict timetabling arrangements, matters were compounded by the internal strife seemingly consuming Her Majesty’s Official Opposition.<sup>81</sup> But attention is also drawn to significant structural constraints; the devolved government as lobbyist not participant in the formal making of devolved legislation. Hence, the local production of draft amendments and briefing notes distributed round the various Westminster party representatives as and when there was no intergovernmental agreement. Echoing the St David’s Day process, there was no guarantee even that Labour colleagues would acquiesce. The ministerial monopoly on moving financial resolutions gives the extra twist. As regards scope of possible amendments, officials in the devolved government were unable to do what they routinely do in-house.

At one with the constitutional maturation of the sub-state polity, a superior form of scrutiny is seen in Cardiff Bay. Building on experience with the draft Bill, this is collective advocacy

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<sup>75</sup> Wales Office, *Government Response to Welsh Affairs Committee Report on the draft Wales Bill* ((June 2016), para. 11.

<sup>76</sup> WA 2017, s. 1; Explanatory Notes to WA 2017, para. 21.

<sup>77</sup> WA 2017, s. 11.

<sup>78</sup> WA 2017, Schedule 1 inserting new Schedule 7A to GOWA 2006, para. 141.

<sup>79</sup> An opposition amendment fell on a tied vote: *Hansard*, HL Vol. 777, cols. 1864-1919 (January 10, 2017).

<sup>80</sup> Trade Union Act 2016; Trade Union (Wales) Act 2017.

<sup>81</sup> See *Hansard*, HC Vol. 614, cols. 633-734 (September 12, 2016).

taken to new heights, with CLAC actively marshalling detailed suggestions for amendment from multiple local sources in the face of ‘a complex and inaccessible piece of constitutional law that will not deliver the lasting, durable settlement that people in Wales had expected’.<sup>82</sup> A small but significant development in inter-parliamentary co-operation, a generally neglected subject in the UK’s territorial constitution, the next step was meeting with the House of Lords Constitution Committee. Referencing their own concern for principle, the peers’ report on the Bill largely rehearses the basic lines of criticism elaborated in the Assembly.<sup>83</sup> From the viewpoint of Cardiff Bay, the potential for co-option or surrogate voice is well-shown.

The House of Lords debates underscore the lack of a principles-based constitutional approach in Whitehall. It is the standard fare of a concessions strategy by business managers, bitty in nature and occasionally publicity-seeking,<sup>84</sup> coupled with much unfinished business from the draft Bill in the form of technical amendment. Conversely, Cardiff Bay is repeatedly treated less favourably than might reasonably have been expected. As with no devolution of air passenger duty, a tax clearly relevant to economic development; or regulation of the sale and supply of alcohol, significant for public health policy; or, the domestic equivalent of a treaty port provision, control of the major harbour.<sup>85</sup> All matters devolved in Scotland.

Among the changes made, the Welsh Government invested considerable political capital in a set of amendments on water-related functions.<sup>86</sup> A subject with special resonance in Wales not only because of the major river catchments shared with England, but also historically and politically in view of the drowning of Welsh land and community for English convenience.<sup>87</sup> The devolved legislative competence is aligned with the border and an intergovernmental agreement in the form of a ‘water protocol’ against adverse serious impact from action or inaction on either side is set to replace the one-sided hierarchy of UK (English) ministerial powers of intervention. Buttressing this is provision on the concurrent and joint exercise of relevant powers by UK and Welsh ministers and reciprocal cross-border duties to have regard to the interests of consumers. A framework which itself provides a litmus test of constructive and equitable shared rule or defensiveness and suspicion.

The general question of UK ministerial powers in the Welsh context saw much to-ing and fro-ing between officials through the course of the legislative proceedings.<sup>88</sup> Promoting alignment between devolved legislative and executive competence by reading across the general transfer in the original Scottish model of existing Minister of the Crown functions, an obvious and sensible constitutional way forward, proved too much for Whitehall to swallow.<sup>89</sup> Echoing instead the original Welsh scheme of executive devolution, transfer of functions order is the preferred Whitehall method in dealing with particular sets of powers.<sup>90</sup> More encouragingly for Cardiff Bay, a lengthy schedule of shared powers – UK executive functions exercisable concurrently or jointly with Welsh ministers – was gradually elaborated.<sup>91</sup> The proposed arrangements in relation to UK ministerial consent for Assembly legislative changes to UK/GB/England and Wales public bodies, as for example when Cardiff

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<sup>82</sup> CLAC, *Report on the UK Government’s Wales Bill* (October 2016), para. 11.

<sup>83</sup> Constitution Committee, *Wales Bill*, HL 59 (2016-17).

<sup>84</sup> As with the devolution of teachers’ pay and conditions: Wales Office press release, November 4, 2016.

<sup>85</sup> WA 2017, s. 32 and Schedule 1 inserting new Schedule 7A to GOWA 2006, paras. 15, 58, 121.

<sup>86</sup> WA 2017, ss 48-52.

<sup>87</sup> J. Davies, *A History of Wales* (London: Allen Lane, 1993), chapter 10 (‘Tryweryn’).

<sup>88</sup> Extending to the classic issue of ‘Henry VIII clause’ power to make consequential provision: WA 2017, s. 69.

<sup>89</sup> Scotland Act 1998, s. 53; WA 2017, s. 19.

<sup>90</sup> *Hansard*, HL Vol. 777, cols. 1931-1938 (January 10, 2017).

<sup>91</sup> WA 2017, s. 21 and Schedule 4 inserting new Schedule 3A to GOWA 2006.

Bay wishes to enhance or join-up distributed governance functions inside the small polity, have also been improved upon by some clarification and expansion of the local legislative space.<sup>92</sup> In particular, through the concept of a ‘devolved Welsh authority’ whose functions are wholly or mainly functions that do not relate to reserved matters, which thereby avoids UK-level consent requirements; and then by the specification, whether or not they meet the general conditions, of some 70 public bodies as devolved Welsh authorities.<sup>93</sup> The alternative approach propounded in the ‘shadow’ draft Bill of extensively listing reserved authorities<sup>94</sup> would have been more in tune however with the general constitutional model.

On the initiative first of the Welsh Government and then of the Lord Chief Justice, another set of amendments gives some tangible expression to the demand for a more cohesive development of the justice function inside Wales.<sup>95</sup> In view of the continuing legislative competence to create them, an element of internal hierarchical structure is thus brought to an otherwise heterogeneous group of devolved bodies through formal establishment of the post of ‘President of Welsh Tribunals’. Naturally, a key function is the issuing of practice and procedural directions, coupled with training, advisory and representational responsibilities. Further reflecting the lively debate in Wales around the operationalisation of administrative justice in small country governance,<sup>96</sup> provision is also made for cross-deployment including with the courts and tribunals of England and Wales, and for consideration of innovative approaches to dispute resolution. As a senior judicial figure the President of Welsh Tribunals is not a devolved Welsh authority. Conversely, the very fact of creating a distinctively Welsh judicial office at this level is pregnant with possibility.

UK ministers refused to take the further step of establishing a statutory standing commission on justice in Wales, whether focussed generally in terms of policy development and implementation, or further tasked with keeping the issue of moving to a ‘distinct’ or ‘separate’ jurisdiction under review. As regards institutional recognition of the reality of Welsh law, it is the case instead of a ‘Justice in Wales Working Group’ of officials led from the MoJ. Though the terms of reference were potentially wide-ranging, a most limited - informal - public consultation confirmed the fact of an essentially nuts and bolts exercise geared to ensuring that Assembly laws are administratively catered for in the England and Wales justice system.<sup>97</sup> Pressed in the House of Lords, the minister indicated that a permanent non-statutory committee would follow, chaired by a UK Cabinet Office official:<sup>98</sup> an executive formula which the Lord Chief Justice subsequently dismissed as constitutionally illiterate.<sup>99</sup>

Whitehall’s approach may again prove counter-productive. In the subsequent Assembly debate on legislative consent, the First Minister stressed the need for a justice system ‘fit for the new devolution settlement’ and signalled another application of the Welsh template of independent commission. Chaired by Lord Thomas of Cwmgiedd following his retirement as Lord Chief Justice, the Commission on Justice in Wales was duly announced by the Welsh

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<sup>92</sup> WA 2017, Schedule 2 inserting new Schedule 7B to GOWA 2006, paras. 8-12.

<sup>93</sup> WA 2017, s. 4 and Schedule 3 inserting new Schedule 9A to GOWA 2006.

<sup>94</sup> GLWB, Schedule 8, para. 7.

<sup>95</sup> WA 2017, Part 3 and Schedule 5; Welsh Government, *Review of Devolved Tribunals Operating in Wales* (2014).

<sup>96</sup> Committee for Administrative Justice and Tribunals, Wales, *Administrative Justice: A Cornerstone of Social Justice in Wales* (2016); S. Nason (ed.), *Administrative Justice in Wales and Comparative Perspectives* (Cardiff: University of Wales Press, 2017).

<sup>97</sup> MoJ, *Justice in Wales Working Group – Terms of Reference* (May 2016).

<sup>98</sup> *Hansard*, HL Vol.777, cols. 1264-1277 (December 14, 2016) (Lord Bourne).

<sup>99</sup> Lord Thomas of Cwmgiedd, oral evidence to Constitution Committee, March 22, 2017.

Government in September 2017. Couched in terms of a distinct system, the terms of reference are wide-ranging.<sup>100</sup>

### **Legislative consent**

The question cast a long shadow: would there be sufficient to persuade Cardiff Bay? The Bill, it was agreed, would only proceed to Third Reading in the House of Lords following a successful legislative consent motion as provided for in Assembly Standing Orders.<sup>101</sup> Constitutionally-speaking, this reflects and reinforces the later precedents, locally the Wales Act 2014, whereby the sub-state procedure covers additions and diminutions of devolved competence as well as substantive legislation in devolved policy areas. In the form of a political check operating in the face of Westminster's general competence, it stands too as a valuable source of leverage for the sub-state polity in intergovernmental negotiations.

### *Fiscal framework*

Significant in themselves, developments in the fiscal constitution are seen here greasing the wheels of legislative consent. Following in the footsteps of the Scottish development the Wales Act 2014 stood for a new era of tax devolution, so heralding - in the realm of land and property law<sup>102</sup> - the first specifically Welsh taxes for many centuries. Further legislative reform in this area, for which read removing the referendum lock on partial income tax powers despite a Conservative Party manifesto commitment to retain it,<sup>103</sup> effectively meant revisiting Wales' wider fiscal framework. Reflecting much by way of economic and social disadvantage, as with relatively low levels of taxpayer income in UK terms, Wales has been heavily dependent on block grant from HM Treasury via the well-known and locally much-criticised Barnett formula.<sup>104</sup> Following on from the St David's Day process, the Conservative Government's 2015 spending review protected against excessive convergence through the temporary expedient of a funding 'floor' for Wales set at 115% of comparable spending per head in England.<sup>105</sup> Grounding another key part of the political choreography, conditions then were ripe for intergovernmental negotiations over a revamped fiscal framework to move centre-stage as the Wales Bill 2016 entered its later stages. In the words of the new Secretary of State Alun Cairns, the Welsh Government would have 'ultimately' and 'understandably' rejected the Bill unless 'it was associated with an appropriate and fair funding settlement'.<sup>106</sup> Conversely, Whitehall was not about to decouple the offers of new legislative and fiscal frameworks.

The Agreement on a new fiscal framework was announced in December 2016, following several months of high-level intergovernmental conversations under the aegis of the Joint Exchequer Committee (Wales).<sup>107</sup> Once again, the work of independent commissions provided convenient reference points, updated by academic analysis feeding into the Welsh Government's negotiating stance.<sup>108</sup> The earlier, fraught process of establishing a new fiscal

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<sup>100</sup> *Record of Proceedings*, January 17, 2017; Welsh Government, press release, September 18, 2017.

<sup>101</sup> *Hansard*, HL Vol.777, col. 1263 (December 14, 2016) (Lord Bourne); Assembly Standing Order 29.

<sup>102</sup> Landfills Disposals Tax Bill 2016; Land Transaction Tax and Anti-avoidance of Devolved Taxes Bill 2016.

<sup>103</sup> Conservative Party, *2015 election manifesto*, p. 70.

<sup>104</sup> G. Holtham (Chair), *Final Report of the Independent Commission on Funding and Finance for Wales* (2010).

<sup>105</sup> HM Government, *Spending Review and Autumn Statement 2015*, Cm 9162, para. 1.233.

<sup>106</sup> *Hansard*, HC Vol. 620, col. 205 (January 24, 2017).

<sup>107</sup> HM Government and Welsh Government, *Agreement on the Welsh Government's Fiscal Framework* (2016).

<sup>108</sup> E. Poole, G. Ifan and D. Phillips, *Barnett Squeezed?* (WGC and Institute for Fiscal Studies, 2016).

framework for Scotland naturally provided much food for thought.<sup>109</sup> In pan-UK terms, the resulting deal is notably asymmetric. Bound up with the fateful vow to the Scottish people to retain Barnett, it is very much a case of working creatively with and around the formula to produce a fiscal framework tailored to Wales' challenging economic situation. Emphasis is rightly placed on the importance of stable and sustainable arrangements. Predictably coupled with the not insignificant caveat that funding arrangements for 'areas... currently within EU competence' are outside the scope of the Agreement.<sup>110</sup>

At the heart of the Agreement is a redesigned 'funding floor' that should more than offset predicted losses for Wales associated with the form of block grant adjustment after tax devolution. Designed to curtail the pressure for convergence with the wealthier neighbour, a new needs-based factor in Barnett ensures that relative funding in Wales remains above 115% of the level in England. Conversely, the block grant adjustment is linked to the relative performance of Welsh tax revenues, which does import an element of population-related revenue risk for the Welsh Government. In the context of a current Welsh Government budget of £15 billion, the deal is projected to yield a useful marginal gain for Wales: an additional £600 million over the first decade of the Agreement.<sup>111</sup> Of particular note against a backdrop of UK public expenditure restraint is the doubling to £1 billion of the Welsh Government's capital borrowing limit, an item duly appearing in the statute alongside repeal of the income tax referendum requirement.<sup>112</sup>

Demonstrating how far matters have advanced from the original model of executive devolution, roughly a fifth of the Welsh Government's budget will soon be derived from its own tax revenues. Constitutionally-speaking, the development works to cement the position of Wales as a mature sub-state polity, representing a valuable if still limited step forward in the causes of political responsibility and democratic accountability.

### *In the shadow of Brexit*

Odd as this may sound, it can plausibly be argued that the passing of the new Welsh devolution legislation is one of the first main constitutional consequences of the Brexit process. Certainly, the closing proceedings on this Constitutional Bill were compressed. Facing almost certain defeat in *Miller and Dos Santos*<sup>113</sup> on the need for a 'trigger Bill' to authorise the leaving negotiations, UK Government business managers were naturally concerned to clear the decks at Westminster, such that proceedings on the Welsh legislation, all the way to 'ping-pong', were scheduled for completion on the same day as the impending Supreme Court judgement. A case in which the Counsel General for Wales had intervened against the UK Government, arguing - in line with Welsh Government constitutional thinking - that the important dialogical properties of Sewel should not be sidestepped by use of royal prerogative. Undercutting the legislative scrutiny, the sudden rush meant that CLAC could not report to the Assembly on the supplementary legislative consent memorandum tabled in view of the UK Government's later amendments.<sup>114</sup> And while Brexit matters clearly

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<sup>109</sup> HM Government and Scottish Government, *Agreement on the Scottish Government's Fiscal Framework* (2016).

<sup>110</sup> *Agreement on the Welsh Government's Fiscal Framework*, paras. 2, 16-17.

<sup>111</sup> E. Poole, G. Ifan and D. Phillips, *Fair Funding for Taxing Times?* (WGC and Institute for Fiscal Studies, 2017).

<sup>112</sup> WA 2017, ss. 17-18.

<sup>113</sup> *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2017] UKSC 5. Promptly followed by the European Union (Notification of Withdrawal) Act 2017.

<sup>114</sup> See CLAC, *Report on Legislative Consent Memorandum to the Wales Bill* (December 13, 2016); Welsh Government, *Revised Supplementary Legislative Consent Memorandum* (January 16, 2016).



weighed heavily in the final decision, the key Assembly debate on whether or not to give legislative consent inevitably involved much political and legal uncertainty - more or less informed guesswork - about them.

Enough has been said to suggest that the Assembly vote (38/17) giving legislative consent<sup>115</sup> was not a foregone conclusion. Reflecting anxious deliberations inside the Welsh Government, the ruling Labour group had in deciding to support the Bill to give very careful consideration to the whole package of legislative content and fiscal promise. According to the First Minister, it was ‘a long, detailed and finely balanced debate’. Amid much emphasis on the element of ‘roll-back’, but with the numbers also making it a politically palatable and risk-free option, the Plaid Cymru (Welsh Nationalist) group chose to vote the other way, so formally opposing a Welsh devolution statute for the first time. Whereas the Conservatives naturally applauded the efforts of the UK Government, the UKIP group took the opportunity to oppose by reason of repeal of the tax referendum lock. The drastic - blunt - nature of Sewel at the point of political veto is made very apparent here.

A complicating factor for the Welsh Government was the different risks associated with the two now competing constitutional models. While the conferred powers arrangement offered structured access to all those ‘silent subjects’, the continuing full force of the *Agricultural Sector* case could not simply be assumed; the more so in view of the topsy-turvy nature of the Supreme Court’s devolution jurisprudence.<sup>116</sup> Then again, with the newly-created tests of legislative competence and sprawling list of reserved powers, there were all those possible enervating effects for public business and policy ambition. Welsh ministers, after all, had already faced sharp legal attack from private interests<sup>117</sup> as well as from UK ministers. More generally, might not a new Wales Act work to set matters in stone, not least as regards the single legal jurisdiction of England and Wales? Testimony to the underlying concern, there is huge emphasis in the Assembly debate on the so-called devolution ‘settlement’ as a work in progress.

In the event, the Assembly proceedings confirm the twin pulls of greater institutional autonomy and devolved competence to refashion Welsh representative democracy, as well as the hard political calculation of no better offer in prospect from the then dominant Conservative interest in Westminster, immersed in any case in all things Brexit. The fiscal Agreement had removed an obstacle, with the First Minister describing it as ‘neutral’ or ‘slightly positive’. Notably, however, ‘the implications of Brexit’ were voiced as a chief concern. In this regard, the Prime Minister’s public promise<sup>118</sup> that ‘no decisions currently taken by the devolved administrations will be removed from them’ was a starter, but only a starter. The First Minister emphasised the need to align the Welsh constitutional position with Scotland and Northern Ireland ‘in advance of the next, probably, 10 years of debate’; and hence the significance of Sewel being ‘enshrined in law’ since ‘this obviously carries more weight’. A week later, the Supreme Court in *Miller and Dos Santos* ruled that, even as grounded in the Scotland Act 2016 (and now the Wales Act 2017), Sewel is judicially off-limits.

Projecting ahead to the distribution of internal competences post-Brexit, areas for possible sub-state agendas of policy change and/or alignment with EU law such as agriculture and

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<sup>115</sup> *Record of Proceedings*, January 17, 2017.

<sup>116</sup> *A Constitutional Crossroads*, Appendix.

<sup>117</sup> *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales* [2015] UKSC 3.

<sup>118</sup> Made earlier that day: Lancaster House speech, January 17, 2017.

fisheries, and economic development and the environment, were already provided for in the conferred powers scheme.<sup>119</sup> Viewed in formal legal terms, the potential Brexit-type advantages to Cardiff Bay of moving to a reserved powers model could thus be described as limited. But with the Welsh Government championing free and unfettered access to the EU single market as the first priority,<sup>120</sup> and with tussles with Whitehall over the development of ‘the UK single market’ already in prospect, a related set of strategic considerations pointed in favour of the new scheme on offer. Surfacing repeatedly in the Assembly debate in the context of concerns about (something called) ‘hard Brexit’ is a new variation of an old theme in Welsh devolution, the demand for stronger constitutional defences against a Conservative government in London. From this standpoint, the default position with reserved powers of distribution to the sub-state level might prove a valuable political - constitutional - resource. Then, as indicated by the First Minister, there is the familiar Welsh stratagem of political leverage via interaction with Scotland. In this context, despite, or perhaps aided by, the overarching threat for the UK of, sooner or later, a second Scottish independence referendum.<sup>121</sup>

In the light of Wales’ double constitutional transition, the speculative element in all this at the moment of choice of devolutionary vehicle in Cardiff Bay is worth re-emphasising. High-level intergovernmental discussions around Brexit may have intensified, but the UK Government’s White Paper on basic policy aims was only published two weeks later.<sup>122</sup> Followed some two months later by the Prime Minister’s letter triggering negotiations and, presaging the European Union (Withdrawal) Bill, a second White Paper talking of intensive discussions with the devolved administrations in the context of the UK statutory holding pattern and the expectation of a significant increase in their respective decision-making powers.<sup>123</sup> The sudden calling of the June 2017 UK General Election, and the replacement of a majority Conservative Government with a minority one, lay firmly in the future.

### **Conclusion: Wales Act 2017**

With commencement of the reserved powers model expected in April 2018, the next main phase of Wales’ constitutional journey is immediately in prospect. The very facts of enhanced powers on tax and economic development and electoral arrangements, and of greater institutional autonomy and recognition, should give Welsh devolution a qualitatively different constitutional feel. In this regard, the dynamics of interplay and influence across the UK’s territorial constitution may be considered helpful features. Attention has also been drawn to the creative workings of dual democratic scrutiny, an aspect later pursued in Cardiff Bay by means of best practice principles for inter-institutional working on constitutional legislation.<sup>124</sup>

There remains however the inconvenient truth of the Wales Act 2017 as a lost opportunity in the quest for a stable, secure and intelligible devolution settlement. To this effect, the power-

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<sup>119</sup> GOWA 2006, Schedule 7, Part 1. See further, for parallel analysis in terms of the Scottish model of reserved powers, A. Page, *The implications of EU withdrawal for the devolution settlement* (Scottish Parliament, 2016).

<sup>120</sup> *Securing Wales’ Future*. See also National Assembly External Affairs and Additional Legislation Committee, *Implications for Wales of Leaving the European Union* (January 2017).

<sup>121</sup> Cooperation between the Scottish and Welsh Governments in constitutional politics has subsequently emerged as an important new dynamic in the Brexit context.

<sup>122</sup> Department for Exiting the European Union, *The United Kingdom’s exit from and new partnership with the European Union* (2017), Cm. 9417.

<sup>123</sup> Prime Minister’s letter to President of the European Council Donald Tusk, March 29, 2017, p. 3; *Legislating for the United Kingdom’s withdrawal from the European Union*, paras. 4.4.-4.5.

<sup>124</sup> CLAC inquiry, *A stronger voice for Wales* (2017).

hoarding culture of individual Whitehall Departments is a key element, one which sees evidence-based appeals to constitutional principles blunted by institutional politics. A striking feature here is what does not appear: namely, a preparedness to download non-core UK functions in view of the huge new demands on central government associated with Brexit. To the contrary, the Welsh Government would soon become embroiled in combatting centralisation in the context of the European Union (Withdrawal) Bill.<sup>125</sup>

Long experience teaches that legislative process and product can be seriously flawed. The making of the Wales Act 2017 demonstrates this in abundance, a matter thrown into sharp relief by the principled prequel. Yes, delivering a reserved powers model against the backdrop of the old 'England Wales' paradigm was bound to be very challenging; and yes, the legislative 'pause' in particular proved beneficial. But from the perspective of an enlightened and prudent unionist policy, one which puts a premium on state and sub-state political institutions pursuing self-rule and shared rule effectively and collaboratively in the interests of the people they serve, there is simply too much in the statute which grates, distorts and disappoints. If the Wales Act 2017 is the best that Whitehall and Westminster can do with some twenty years' experience of devolution legislation, then all the more reason to fear for the integrity of the United Kingdom.

The saga reflects and reinforces the sense of competing mind-sets in the only two officially pro-UK governments. Within the confines of Parliamentary Sovereignty, Wales is put on a par with Scotland as regards the permanent status of the devolved institutions. Shared belief in Welsh constitutional tenets of subsidiarity, mutual respect and parity of esteem finds little tangible expression however. Given all the calls for improvement, a major source of frustration is the workings of intergovernmental relations; or, more accurately, the lack of them at the vital early stages. Bystander status for the Welsh Government in the St David's Day process, the secretive political veto game which itself made it difficult if not impossible for officials to produce a coherent constitutional scheme, hardly helped.

There remains much to play for in terms of jurisdiction as well as the broader justice function in Wales. The double dynamic of Welsh law and EVEL will continue however to underwrite demands for more fundamental structural and institutional change, very likely beyond the spurned compromise of a 'distinct' jurisdiction. Given the failed attempt at 'general protection' of the single legal jurisdiction of England and Wales in the draft Bill, the MoJ is itself authority for saying that the Wales Act 2017 carries the seeds of its own destruction. In the long view, the prioritisation of responsible and responsive political institutions denoted by the reduction of necessity-testing may well appear a watershed moment in the legal history of Wales.

There are powerful echoes of previous attempts at a so-called devolution 'settlement' for Wales. Temporary constitutional arrangement piled on temporary constitutional arrangement. The policy potentials of small country governance undercut by excessive fragmentation of powers. An overarching failure of constitutional vision in Whitehall illustrated in an overly backwards-looking approach to the construction of devolved competence. Bit by bit a reasonable and realistic form of representative government is built at sub-state level but in unnecessarily laborious fashion and often, as further shown in relation to the Wales Act 2017, through the necessarily creative work of local actors. Adapting a famous phrase, devolution is once again seen as a series of processes not an event.

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<sup>125</sup> Together with the Scottish Government: First Ministers of Scotland and Wales, joint statement, July 13, 2017.

The multiple peculiarities of the affair cannot be glossed over however. The ripples of the Scottish independence referendum; the contrasting constitutional motivations in London and Cardiff Bay; the bizarre nature of the St David's Day process as an instrument of constitutional design; the new lows represented by the Whitehall mechanics of trawling and reverse engineering; the element of roll-back and the constitutional perversity of the original necessity tests; the chutzpah of the shadow draft Bill and the unorthodox dynamics of the legislative scrutiny; and ultimately, in a period of territorial constitutional crisis for the UK, constitution-making in the dark with an unfolding Brexit process that will itself see major revision of the devolutionary arrangements. We may speak of the strange reconstitution of Wales.