

Old Wine in New Bottles?

Relations between London and Cardiff after the Government of Wales Act 2006

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Summary of Key Points

- The Government of Wales Act 2006 is a major step in Wales's constitutional development. Its provisions for extending the National Assembly's legislative powers are likely to have a considerable impact. However, it is hard to say exactly what effect they will have, as the arrangements for extending these powers remain open-ended.
- The process that produced the 2006 Act was profoundly different to processes of constitutional change in federal or regionalised European states. This confirms the differences between UK and such systems.
- The way separation of the Welsh Assembly Government (WAG) and the National Assembly for Wales has been achieved will reinforce executive dominance of intergovernmental relations.
- The Act's mechanisms for conferring legislative powers on the National Assembly by orders in council and Westminster legislation are complicated. There are concerns about how conferrals of powers by each route will work, and whether there will be different approaches to scrutiny depending on the route used. Amending the National Assembly's powers by Westminster primary legislation will mean that the Westminster agenda continues to drive developments in Welsh devolution.
- If Parliament were to seek to use approval of orders in council as a means of shaping or controlling Assembly policy, that would be constitutionally undesirable and possibly dangerous. It will be difficult for Parliament to draw a line between maintaining a proper control of legislative powers conferred on the Assembly, and improper attempts to determine Assembly or Assembly Government policy.
- The instability and political difficulties created by these steps mean that it is desirable that stages 1 and 2 are genuinely transitional, and that the move toward an Assembly with primary legislative powers be a rapid one.
- The Secretary of State will play a key role in making decisions about grants of powers and any move to primary powers. It will be a challenge for him or her to distinguish between the role of constitutional guardian and party-political concerns.
- In the longer term, it may be in the interests of a UK Government of a different political make-up to the Assembly Government to prefer a rapid move to primary powers. That will be particularly the case if a Conservative government at Westminster faces one dominated by Labour or Plaid Cymru in Cardiff Bay. This would minimise possible administrative, political and constitutional objections to its policies from Wales.
- More broadly, the Act and the arrangements it creates will not affect the key characteristics of intergovernmental relations in the UK – bilateral relations, asymmetry, informality, and the dominance of the UK Government. Nor does the Act touch on financial matters, which are likely to be a significant source of tension in the future.

Introduction

The Government of Wales Act 2006 is a major development in devolution for Wales.¹ The quarter-way-house of devolution to a National Assembly incorporating both deliberative and executive functions, but with very limited legislative powers dependent on specific grants of power by Westminster, is to be swept away. In its place there is to be a deliberative and legislative National Assembly, and a separate executive accountable to the Assembly. The Assembly will acquire its own ‘enhanced’ legislative functions, and the executive ones it already has will mostly transfer to the Welsh Assembly Government. In the fullness of time, and depending on whether such a proposal attracts public support in a referendum, the Assembly may acquire ‘primary’ legislative powers in a wide range of domestic areas, for matters like health, education, local government, culture and the Welsh language. All this marks significant changes in Welsh devolution since 1998, when the referendum to establish the National Assembly squeaked through only by a whisker. It reflects not just developments in Wales’s perception of itself, and in Wales’s ‘interim constitution’. It also responds to the many problems posed by that very limited measure of devolution – defects that are evident to anyone involved in government in Wales, and highlighted notably in the report of the Richard Commission in 2004.²

This paper will examine the implications of the 2006 Act for intergovernmental relations between Wales and the UK institutions in London. Its main concern is with relations between executives, but it also considers aspects of relations between elected legislatures (and between the legislature of one level of government and the executive of the other) to the extent that these are necessary to understand how executives will deal with each other. It attempts to identify the main sources of tension in those relations, with a particular focus on legislative and constitutional issues. It is not, therefore, an attempt at a more general analysis of the 2006 Act.³ Predicting the future of Wales-UK relations is of course a risky undertaking. The 2006 Act may not be used in the way one expects, and unintended consequences are one of the few constants in an uncertain world. Nonetheless, one can try to anticipate the key issues and factors in such relations, on the basis of what we already know about the UK’s present system of intergovernmental relations and what is evident from the face of the Act. Such extrapolations may well prove to be wrong in detail, but at least these may stimulate debate about the experience of Welsh devolution.

From the Richard Commission to the Government of Wales Act 2006

Identifying the origins of the 2006 Act is a complicated task. On one level, it is worth asking why – only eight years after the Government of Wales Act 1998 established devolution – it was necessary to try again. Two aspects of the design of the 1998 Act seem (at least with hindsight) deeply flawed, and led to such a prompt re-visiting of the basis of Welsh devolution. One was endogenous: the model of ‘inclusive politics’ underpinning the 1998 Act, with a single body corporate dealing with executive, legislative, deliberative and scrutiny functions, proved deeply flawed. Whatever its other attractions or merits, it was impossible to make work (certainly in the absence of its principal begetter, Ron Davies, from frontline politics). The confusion of roles made it hard both for the executive to govern, and opposition parties in the National Assembly to oppose. Consequently, it was in the interests of all parties in the Assembly to unpick the

¹ This paper was finalised in January 2007, after the Government of Wales Act 2006 had received royal assent, but before the new standing orders for the Assembly had been drafted or made.

² Commission on the Powers and Electoral Arrangements of the National Assembly for Wales, *Report of the Richard Commission* (Cardiff: National Assembly for Wales, 2004).

³ See A. Trench ‘The Government of Wales Act 2006: the next steps in devolution for Wales’ *Public Law* (winter, 2006), pp. 687-696.

relationship between the Assembly's parliamentary and executive sides. This process has been under way almost since the outset and certainly since 2000, with the increasing separation of parliamentary functions organised through the Office of the Presiding Officer (later called the Presiding Office, and then the Assembly Parliamentary Service), as well as the development of the role of the Cabinet and later separation of the Welsh Assembly Government.⁴ The other problem was exogenous. The complicated means by which the Assembly acquired executive and legislative powers, and the problems of intergovernmental bargaining and variations in powers which it produced, both made for an unwieldy form of government.⁵ Given that many commentators from outside Wales had regarded the Welsh devolution arrangements as inherently hugely unstable from the outset, it is perhaps remarkable that change took as long as it did, not that it happened so quickly.⁶

The more immediate cause of the 2006 Act was the Richard Commission's report, published in April 2004. The establishment of the Richard Commission itself was a condition of the partnership agreement between Labour and the Liberal Democrats from October 2000. As is well known, the Richard report recommended a move toward the 'Scottish model' of devolution, with a separation between the elected Assembly and the executive, and a move to 'full legislative powers' by 2011. However, the 2006 Act (and the white paper *Better Governance for Wales*⁷ that preceded it) do not deliver what the Richard Commission recommended except in the broadest of senses.⁸ This is not all that significant in itself, and it is common for attempts to think about constitutional problems (whether in the UK or elsewhere) to produce a result that is a long way from the starting point. That is especially the case with intergovernmental negotiations, which require each party to compromise with the others involved.

What is distinctive about the post-Richard Commission process is the extent to which it does not resemble the course of most intergovernmental negotiations abroad. Comparative experience would lead one to expect that the Richard report would lead to a major inter-governmental negotiation (probably the most important one for any part of the UK since 1999) between a Wales hungry for greater powers and insisting on implementation of the report in full, on the one hand, and a UK Government reluctant to cede powers on the other. Such a pattern has been followed in a number of states with national minorities, such as Canada or Spain.⁹ Instead, what followed was very British: deliberation mostly within the Labour Party, publication of a white paper when Peter Hain had made up his mind, followed by Parliamentary scrutiny, publication of

⁴ See J. Osmond, 'In Search of Stability: Coalition politics in the second year of the National Assembly for Wales' in A. Trench (ed) *The State of the Nations 2001: the second year of devolution in the United Kingdom* (Exeter: Imprint Academic, 2001) and J. Osmond, 'From Corporate Body to Virtual Parliament: The metamorphosis of the National Assembly for Wales' in R. Hazell (ed) *The State of the Nations 2003: the third year of devolution in the United Kingdom* (Exeter: Imprint Academic, 2003).

⁵ See House of Commons Welsh Affairs Committee, *The Primary Legislative Process as It Affects Wales*, Session 2002-03 4th Report, HC 73 (London: The Stationery Office, 2003); Report of the Richard Commission, chaps. 7 and 8; K Patchett, 'Principle or Pragmatism: Legislation for Wales by Westminster and Whitehall' in R. Hazell and R. Rawlings (eds) *Devolution, Law Making and the Constitution* (Exeter: Imprint Academic, 2005).

⁶ See for example N. Burrows, *Devolution* (London: Sweet & Maxwell, 2000), pp. 185-7; R. Hazell and B O'Leary 'A Rolling Programme of Devolution: Slippery Slope or Safeguard of the Union?' in R. Hazell (ed.) *Constitutional Futures: A History of the Next Ten Years* (Oxford: Oxford University Press, 1999), pp. 34-6.

⁷ Wales Office, *Better Governance for Wales*, Cm 6582 (London: The Stationery Office, 2005).

⁸ For discussions of this process, see R Rawlings, 'Hastening Slowly? The next phase of Welsh devolution' [2005] *Public Law* (winter), pp. 824-52; R. Rawlings, *Say Not the Struggle Naught Availeth: The Richard Commission and After* (Aberystwyth: Centre of Welsh Legal Studies, 2004); and T. Jones and J. Williams 'The Legislative Future of Wales' *Modern Law Review* (2005) vol. 68(4), pp. 642-653.

⁹ For discussion of such dynamics, see V. Wright, 'Intergovernmental relations and regional government in Europe: a sceptical view' in P. Le Galès and C. Lequesne *Regions in Europe* (London: Routledge, 1998). For classic Canadian accounts, see R. Simeon *Federal-Provincial Diplomacy: the making of recent policy in Canada* 2nd edition (Toronto, Ont: Toronto University Press, 2006) and P.H. Russell, *Constitutional Odyssey: Can Canadians become a sovereign people?* 3rd edition (Toronto University of Toronto Press, 2005).

a bill and the quick and orderly passage of that bill with very few amendments. While Parliamentary scrutiny of both the white paper and the proposals was careful and thorough, involving three Westminster committees (the Constitution Committee and Delegated Powers and Regulatory Reform Committee in the Lords and the Welsh Affairs Committee in the Commons), it was based on only a limited range of evidence. This came from the Assembly itself, the Welsh Assembly Government and the Secretary of State. Similarly, the examination of the white paper and bill by ad hoc committees of the National Assembly was largely confined to ‘insider’ interests. There was no attempt to obtain evidence from academic experts or other groups by the London-based bodies, and only a limited attempt (perhaps constrained by time as much as any other factor) to do by the Assembly. These reports also had only the most modest effect on the final form of legislation, resulting in no significant amendments to the Government’s proposals between publication of the white paper and royal assent for the Act. One can also therefore conclude that the formal procedure and the real one had relatively little to do with each other.

The process that followed the Richard Commission report had three chief characteristics. First, it was dominated by Labour Party concerns, and those of other parties (and people belonging to none) have played a limited role in it. At the same time, there has been relatively little effort in practice to take into consideration other parties or interests, in contrast with the 1997 referendum campaign.¹⁰ This is most notably the case for the Act’s changes to the electoral system, and the ban on persons standing as candidates for both a constituency and a regional list seat in the Assembly, but reflects itself in other areas as well (such as the requirement for two-thirds majorities in the Assembly to call a referendum or to change standing orders).

Second, this process has not taken place between governments or in public, but behind the scenes and often (it would appear) in Labour Party forums. In particular, the outlines of the 2005 white paper and 2006 Act were set out in a policy document adopted by a Labour special conference in September 2004 (and subsequently incorporated into Labour’s 2005 UK general election manifesto).

Third, the key decisions were taken in London, not Wales. Probably more important than consideration by Assembly and parliamentary committees was the extensive liaison between Peter Hain and Rhodri Morgan, and between officials in the Welsh Assembly Government and the Wales Office (although Lord Elis-Thomas played a role too, especially in the later stages of the bill). WAG officials took the lead on many technical aspects of the Act, and Assembly Government officials were seconded to the Wales Office to provide much of the bill team.

However, the most important decisions were taken by the Secretary of State, Peter Hain. He was not so much a party to intergovernmental negotiations, or advocate in the UK Government (whether for the Richard report recommendations, a position of the Assembly as a whole or the Assembly Government), as the sole arbiter of what should and should not happen. While Hain’s discussions and consultations with other actors may have influenced his own position, in the final analysis he appears to have been judge, jury and advocate at the same time.

These were departures from common practice in other federal or regionalised systems. The importance of party ties, the dominance of one level of government over the other, the absence of negotiation and the obscurity and lack of transparency in the process are all distinctive. Moreover, in each of these respects, what has happened in Wales is a marked departure from what happened regarding devolution to Scotland in the 1990s, when a multi-party Scottish

¹⁰ See J. B. Jones and D. Balsom (eds), *The Road to the National Assembly for Wales* (Cardiff: University of Wales Press, 2000), particularly chap. 4. There have been suggestions of greater contact with other parties: see ‘We weren’t sure if there was light at the end of the tunnel’ *Western Mail* 25 July 2006, p.5, but if so such contacts were limited, low-key and took place behind the scenes.

Constitutional Convention sat in Edinburgh and reached conclusions about the framework of Scottish devolution that were subsequently largely followed by the Labour government after the 1997 election.

This process indicates not just the distinctive nature of devolution in the United Kingdom. It also illustrates the extent to which Whitehall and Westminster continue to dominate the politics of the UK as a whole. In particular, it emphasises the extent to which the autonomy of the devolved territories is contingent on the UK level's assent, whether tacitly or explicitly.¹¹ But it also fits more generally the pattern of what we know about how intergovernmental relations work in the devolved UK.¹²

While the 2006 Act increases the scope of Wales's autonomy and the power of the Wales's devolved institutions, the UK Government will remain highly important in Wales as well. The Act ensures that the UK Government serves as the constitutional gatekeeper, and will continue to do so. The UK Government will remain a major governmental player in its own right, responsible for just over half of identifiable public spending in Wales.¹³ Given England's proximity to Wales and the degree to which devolved and non-devolved functions overlap and intertwine with one another, the UK Government will also remain a major source of policy debate and policy initiatives, influencing the policy options available to the devolved Welsh institutions as well as the (UK) media debate. None of these factors will be fundamentally changed by the new arrangements of the 2006 Act, even as the Act restructures the relationship between the National Assembly and its executive and creates a path for acquiring legislative powers.

The new Assembly and executive

One of the most important changes in the 2006 Act is to restructure the Assembly. The single body corporate will be abolished and replaced by an elected Assembly with deliberative, legislative and scrutiny functions, and a Welsh Assembly Government responsible for executive functions, notably developing and implementing policy. This change marks a significant departure from the 'inclusive' model of devolved government set out in the 1997 white paper and 1998 Act, but has attracted support from all parts of the political spectrum.

However, its consequences are not altogether clear. It is questionable whether the new Assembly will have very much to do until significant legislative powers are conferred on it, as most of its present functions are to be conferred on the new Assembly Government (including much of its existing legislative role), and the extent to which it takes on an active scrutiny role will depend partly on formal provisions in its new standing orders and partly on political willingness to do so after the 2007 elections.

¹¹ The issue of 'contingent autonomy' is discussed in A. Trench (ed), *Devolution and Power in the United Kingdom* (Manchester: Manchester University Press, forthcoming 2007), particularly chap. 12.

¹² For discussions of intergovernmental relations in the UK as they presently work, see House of Lords Select Committee on the Constitution, Session 2002-03 2nd Report, *Devolution: Inter-Institutional Relations in the United Kingdom*, HL 28 (London: The Stationery Office, 2003), A. Trench *Devolution and Power in the United Kingdom* op cit, and (with a focus on Wales) R. Rawlings, *Delineating Wales: Constitutional, legal and administrative aspects of national devolution* (Cardiff: University of Wales Press, 2003), especially chaps 9, 12 and 13.

¹³ According to 2003-04 data, the Assembly is responsible for 48.4 per cent of identifiable public spending in Wales and the UK Government for the balance of 51.6 per cent. This excludes non-identifiable public spending on matters such as defence, international aid and other international functions. See table 5.1 in A. Trench, 'The Politics of Devolution Finance and the Power of the Treasury' in A. Trench (ed), *Devolution and Power in the United Kingdom* op cit.

Moreover, the Assembly will lose the control it presently enjoys because the executive's powers are delegated by the Assembly to the First Minister and thence to other ministers, and some of the other key mechanisms for ensuring that the Assembly is involved in political measures by the executive are also lacking under the new arrangements. One is the removal of ministers from Assembly subject committees (although that is intended to improve scrutiny). Another is the new requirement that, to remove the First Minister, a replacement must be nominated and secure the support of a majority in the Assembly. A no-confidence motion can paralyse government and trigger a crisis, but not directly remove him or her.¹⁴ This mechanism resembles the 'constructive vote of no confidence' used in Germany, and will prevent the sort of parliamentary manoeuvrings that led to Alun Michael's downfall in 2000.¹⁵

This change will have significant implications for relations with Whitehall. Intergovernmental relations in the UK are already largely a matter for executives. While parliaments are perhaps more engaged and interested than in many federal systems, they remain secondary actors.¹⁶ The 2006 Act will enable the Assembly Government, once appointed, to act with relatively little restraint. Even a minority government will have considerable power, and it may well be hard for the Assembly to press a reluctant Assembly Government to take on more legislative powers, or to give it clear instructions about how to pursue its dealings with the UK Government. The Assembly will be able symbolically to indicate its views and when appropriate its displeasure, but its only real weapon will be the vote of no-confidence – and for that to work effectively, there will need to be an alternative government waiting in the wings.

Legislation at Stages 1 and 2

The white paper *Better Governance for Wales* set out three stages for the increasing powers of the National Assembly.

- The first stage would involve the increased use of framework legislation at Westminster to extend the powers conferred on the Assembly.
- The second (set out in Part 3 of the 2006 Act) would see the transfer of legislative powers relating to specific 'matters' in a variety of 'fields' to the Assembly, by means of orders in council made by the UK Government and approved by the UK Parliament (and the Assembly). These 'fields' largely correspond to the areas in which the Assembly presently has functions – with the addition of the National Assembly itself and public administration in Wales. Legislation made at this stage will be known as 'Assembly Measures', and require approval by the Queen in Council.
- The third stage would be to confer legislative powers regarding those fields on the National Assembly, and is set out in Part 4 of the Act. (This resembles the Richard Commission's recommendation that the Assembly should have 'full legislative powers'.) Legislation made at this stage would be known as 'Assembly Acts', and receive royal assent like Acts of the Scottish Parliament or Northern Ireland Assembly.

Stage 1 does not need legislative authority, and is already under way. Stage 2 comes into effect between royal assent to the 2006 Act and the election of a new First Minister after the May 2007 elections, and stage 3 will start after a referendum at a date yet to be fixed. When stage 3 starts and the Assembly gets 'primary' legislative powers, the power to make orders in council at stage 2 will expire.

¹⁴ See sections 46-48 of the Act.

¹⁵ See A. Thomas and M. Laffin, 'The First Welsh Constitutional Crisis: The Alun Michael resignation', *Public Policy and Administration*, vol 16:1 (2001), pp. 18-31.

¹⁶ See A. Trench, 'Washing Dirty Linen in Private: The Processes of Intergovernmental Relations and the Resolution of Disputes' in Trench *Devolution and Power in the United Kingdom* op cit.

At first, it appeared that the three stages would overlap. That no longer is the case. Stage 1 – the ‘wider and more permissive powers’ promised in the white paper – were a feature of legislation in the 2005-6 Parliamentary session. This approach was set out in detail in the November 2005 revision of Devolution Guidance Note 9 on *Post-Devolution Primary Legislation affecting Wales*, issued by the Department for Constitutional Affairs, which provided that all bills should confer general powers on the Assembly to act in the areas that are the subject of the bill.¹⁷ However, bills introduced in the 2006-7 Parliamentary session show a different approach, with an eye to the new legislative functions of the National Assembly after May 2007. Instead of conferring framework executive powers, several Westminster bills have instead conferred legislative powers by adding new ‘fields’ to matters in Schedule 5 to the 2006 Act. Thus, the Further Education and Training bill gives the Assembly extensive powers regarding post-16 education (outside universities and other institutions of higher education), and vocational training, while the Local Government and Public Involvement in Health bill gives it powers over a wide range of local government’s activities. The approach may be followed in other bills in the 2006-7 session that have not been published yet, and the intention is apparently to take a similar approach in future sessions as well. But it was not foreshadowed in *Better Governance for Wales* or Parliamentary deliberations on the bill. The implication that orders in council would be the main mechanism for giving legislative powers to the National Assembly, shared by many in the wake the publication of the white paper and the Government of Wales bill, is therefore turning out to be incorrect.

This approach to conferring powers on the Assembly raises a number of issues. It means that, by the summer (or at the latest the autumn) of 2007 the Assembly will already have considerable legislative powers, even before it has sought powers by an order in council. It probably also means that the Assembly will acquire legislative powers much more quickly than expected. If each Westminster bill affecting a field where the Assembly Government has executive functions includes provisions conferring legislative powers in the matters dealt with in the bill on the Assembly, many more powers will transfer than if the initiative lies solely with the Assembly. But this also means that the scope of devolved powers depends as much on the Westminster policy agenda as on Welsh requests for powers. There are attractions in Whitehall for doing this – it means that issues of devolution for Wales play little part in preparing legislation, with the Assembly satisfied by getting powers and the UK department satisfied by no longer having to deal with the political or administrative complexities of legislating for Wales as well as England. Accelerating the rate at which the Assembly acquires legislative powers, when many are not in areas of priority concern to the Assembly, will also speed up issues about application of the Sewel convention (discussed in more detail below). There are technical issues too – what happens to the framework powers conferred in 2006, which presumably (like other executive powers) will pass to WAG, not the National Assembly, in May 2007?¹⁸ As there presumably will be a further revision of Devolution Guidance Note 9, what exactly will that provide, and how will UK departments in fact approach bills dealing with devolved fields or matters? What about cases where the UK Government decides that the powers to be conferred in Wales should be only executive and not legislative (as has happened with the current Mental Health bill) – on what basis are such decisions made, and what role does the Assembly (rather than WAG) play in them?

Orders in council will work somewhat differently, because here the devolved institutions will take the initiative. But it will be for the Assembly Government to seek powers by an order in council (although the Assembly must approve the resolution seeking an order to extend its powers), and

¹⁷ Devolution Guidance Note 9 is available at <http://www.dca.gov.uk/constitution/devolution/guidance.htm>

¹⁸ These are the NHS Redress Act and the Education and Inspections Act. The Commissioner for Older People (Wales) Act 2006 also includes a number of framework provisions. See generally M. Navarro ‘The Legislative Process’ in R. Wyn Jones and R. Scully (eds), *Wales Devolution Monitoring Report* May 2006 (London: The Constitution Unit, 2006); available at <http://www.ucl.ac.uk/constitution-unit/research/devolution/devo-monitoring-programme.html>

that request must then be approved by both the Secretary of State and by both Houses of Parliament. This process is also likely to involve extensive pre-legislative scrutiny of the Assembly Government's proposals, at Westminster as well as by the Assembly. An extension of powers can be blocked if the Secretary of State disapproves of it, or if either the Commons or the Lords do so. Lord Richard has characterised this mechanism as 'complicated, novel and interesting', and expressed concerns about the scope for political friction it creates particularly at the pre-legislative stage.¹⁹ Parliament therefore plays an important role in how orders in council are handled, and assumptions about what Parliament may (or may not) do will also condition behaviour within government about the scope and handling of such orders.

In this context, it is worth looking at how Parliament is likely to approach orders in council. The most obvious ground for challenging an order in council in the Lords would be because it constitutes an excessive delegation of legislative powers – a common issue when ministers seek generous powers to make secondary legislation. However, this appears unlikely to materialise, and during its consideration of the bill the Constitution Committee expressly acknowledged that 'the delegation of legislative powers to an elected body is indeed very different from delegating them to Ministers'.²⁰ Yet, the political dynamics of the relationship between the Assembly and the Commons are rather different. During Commons consideration of the Act, a number of MPs indicated their desire to scrutinise orders in council closely, and both the Secretary of State for Wales and the Assembly Government appeared to accept this approach. The indication is therefore that a resolution seeking powers will be sent to Westminster with a draft Assembly Measure attached to it, and that Parliamentary consideration of whether powers should be conferred on the Assembly (at pre-legislative as well as legislative stages) will be influenced by the contents of the draft Measure – even though, once conferred, the powers would not be subject to further Westminster control.²¹ The Welsh Affairs Committee recommended that orders in council be considered on the floor of the House, not in the Welsh Grand Committee (as would happen under the present Commons standing orders).²² In late 2006 it decided to look into the matter in more detail, took evidence in December 2006, and a report was expected in February or March 2007

To what degree MPs will seek to control Assembly policy by controlling the powers conferred on the Assembly is impossible to answer. Suggestions made by both Rhodri Morgan and Lord Elis-Thomas that Parliament should not seek to obstruct Assembly requests for legislation (at least, those giving effect to commitments in Assembly election manifestos) have been rejected by Peter Hain, who appears to regard it as proper for Parliament to reject proposals which are 'frivolous' or 'against the principles of social justice and democracy'.²³ This suggests Westminster will actively police the powers conferred on the Assembly, only confer powers where the Assembly makes a case that is convincing in policy as well as constitutional terms, and reject orders or bids for orders where these are contrary to the dominant views at Westminster. Such a development might well be ominous for Welsh autonomy, or for the idea of a National Assembly developing its powers and its self-confidence step by step. It depends heavily on co-operation between

¹⁹ Lord Richard, speech to Institute of Welsh Politics conference on 'The Future of Welsh Politics', Cardiff, 20 September 2006.

²⁰ House of Lords Select Committee on the Constitution *Government of Wales Bill: Report with Evidence* HL Paper 142 Session 2005-06, 8th Report (London: The Stationery Office, 2006), para. 45. See also House of Lords Select Committee on Delegated Powers and Regulatory Reform *Seventeenth Report* Session 2005-06 HL Paper 160 (London: The Stationery Office, 2006), para. 26.

²¹ For examples, see Appendix 3 to Select Committee on the Constitution *Government of Wales Bill: Report with Evidence* op cit.

²² Welsh Affairs Committee *Government White Paper: Better Governance for Wales* op cit, para. 120.

²³ See 'Assembly laws shouldn't be blocked by MPs', *Western Mail*, 18 October 2006 (Elis-Thomas); P. Hain's comments, made to the Welsh Affairs Committee at Westminster, are reported in 'AMs' new power still shrouded in mist', *Western Mail*, 28 October 2006.

Cardiff Bay and Westminster; as Lord Richard says, this is ‘a mechanism which with good will could work ... [but] which with ill will can fairly easily be frustrated’.²⁴ Certainly, it will be difficult for Parliament to distinguish between maintaining proper constitutional control of the powers conferred on the Assembly, and more questionable attempts to control or influence its policies – but the Act will require Parliament to make that distinction.

The assumption that MPs will use orders in council to intervene in devolved matters may be wrong, and in practice MPs’ interests may well move to other matters. One parallel is the use of orders in council to adjust the list of ‘reserved matters’ under Schedule 5 to the Scotland Act 1998, and so transfer matters to the Scottish Parliament and Executive.²⁵ While such orders have largely related to technical matters and have a low political profile, Scottish MPs have shown little eagerness to involve themselves in their complexities.²⁶ These are regarded largely as technical matters, but similar principles have applied in more contentious circumstances too. In particular, there is the example of what happens with Wales-only bills, and Wales-only provisions in England and Wales bills. Welsh MPs have been only weakly represented on the standing committees of such bills (which scrutinise them in detail), and have not taken a prominent part in deliberations on them even when there have been opportunities to do so.²⁷ They would appear to have regarded this sort of detailed legislative scrutiny as a low priority. (Some officials go so far as to suggest privately that this enables Welsh provisions to escape the sort of scrutiny that might otherwise hinder the passage of such measures.) But this itself raises a concern – what happens if orders in council are closely scrutinised, but amendments of Schedule 5 by Westminster bills is not? It would clearly be an anomaly if powers conferred by orders in council attracted detailed (and perhaps politicised) scrutiny, while those conferred in Westminster Acts simply slipped under MPs’ radar. Similar approaches need to exist to deal with the issue, whichever route of conferring powers is taken, to avoid differences in the way Westminster treats them – which in turn would lead to odd arrangements, such as attempts to get bills to incorporate legislative powers desired by WAG, to avoid possible problems if it sought an order in council instead.

Any problems that do arise may get worse if Labour’s dominance of the MPs elected from Wales continues, but Labour loses control of the Assembly after the 2007 election. A coalition of the opposition parties seeking increases in powers from a Labour-dominated Westminster is even more likely to turn into an opportunity for argument about the Assembly’s policy and politics as well as about issues of whether particular powers should be devolved.

However this relationship plays out, issues of constitutional principle and political practice will become entangled. Party political concerns will be enmeshed with territorial and intergovernmental ones in such an argument, and issues of constitutional principle are likely to be overwhelmed. It is hard to see how that will improve the quality of government in Wales.

Regardless of the interplay of political and constitutional issues, the present problems relating to legislation are unlikely to be resolved during stage 1 or stage 2. The present ‘jagged edge’ or ‘jigsaw’ pattern of executive powers will remain, and to that will be added an ever-changing patchwork of legislative powers conferred by Westminster Act or added by orders in council. Nothing in the way these proposals are being implemented will remedy the long-standing

²⁴ Lord Richard, speech to Institute of Welsh Politics conference on ‘The Future of Welsh Politics’, Cardiff, 20 September 2006.

²⁵ About a dozen such orders are made each year, under various powers in the Scotland Act 1998. While these involve much intergovernmental negotiation between the UK Government and Scottish Executive, Parliamentary interest in them has been limited and on a number of occasions there has been no debate on them at all.

²⁶ In other words, Scottish MPs have accepted the reduced role, and reduced numbers, that devolution implies, but which Welsh MPs seem to fear.

²⁷ See R. Hazell, ‘Westminster as a Three-in-One Legislature of the UK and its Devolved Territories’ in Hazell and Rawlings (eds) *Devolution, Law Making and the Constitution* op cit.

problem of a high degree of variation in the powers conferred on the Assembly will continue.²⁸ Indeed, there will be no fewer than nine ways of conferring powers on the Assembly.²⁹ This is likely to worsen the existing difficulties in ascertaining what powers the Assembly has -- especially if stage 2 should last for an extended period.

The powers of the Secretary of State and the Wales Office

One other curiosity of the 2006 Act is the extensive powers it gives to the Secretary of State. He (or she) remains the godfather of devolved Welsh government, whether or not s/he has a firm political base of his own in Wales. The Secretary of State will fix dates for general elections to the Assembly (a power of the Presiding Officer under the Scotland Act 1998, which the 2006 Act parallels in many other respects). The Secretary of State will make the standing orders of the new Assembly (a much-criticised provision), though s/he will be advised in doing so by the Assembly, and the Assembly will only be able to change them where it can muster a two-thirds majority.³⁰ He or she retains his/her right to 'participate' (attend and speak, but not vote) in the Assembly, to receive all plenary papers of the Assembly, as well as his/her right to attend meetings of Assembly committees. S/he also potentially has the right to allow other ministers or even officials to attend such meetings on his or her behalf.³¹ Most important of all, s/he will decide whether to act on Assembly Government requests for legislative powers through orders in council, and whether or not there should be a referendum for bringing into force the Assembly's legislative powers that constitute stage 3 of the devolutionary process.

The Secretary of State's powers do not stop there. He or she has a major role regarding legislation enacted by the Assembly, whether at stage 2 or at stage 3. There are various constraints on what such legislation may say or do, to ensure that they remain within the bounds of the devolution settlement. As well as being within the powers conferred on the Assembly, Assembly legislation must not have an 'adverse impact' on non-devolved matters, or on the operation of the law in England, or be incompatible with the UK's international obligations or interests of defence or national security, and the Secretary of State can stop such legislation from receiving approval by the Privy Council or royal assent.³² These powers may appear more threatening at first blush than they actually are; similar provisions appear in the Scotland Act 1998 and Northern Ireland Act 1998, and have never yet been used to interrupt the progress of a bill. To police these constraints, the UK Government (through the Attorney General) can intervene to stop passage of the draft measure or bill and to refer it to the Judicial Committee of the Privy Council (or UK Supreme Court when that is established) if there is a reason to believe it exceeds the Assembly's powers. There are also powers (under ss. 99 and 112) that enable the Attorney General to scrutinise bills to ensure that they comply with the limits on devolved competence. These also resemble ones in the Scotland and Northern Ireland Acts, which similarly have never been used. Despite their lack of use, such powers have an important influence behind the scenes, and lead to detailed discussions between civil servants about the scope of particular bills or clauses and whether the devolved legislature is able to enact them, which often have resulted in changes to proposed devolved legislation

²⁸ See K Patchett, 'Principle or Pragmatism: Legislation for Wales by Westminster and Whitehall' in R. Hazell and R. Rawlings (eds), *Devolution, Law Making and the Constitution* (Exeter: Imprint Academic, 2005), especially pp. 137-146.

²⁹ See K Patchett, 'Developing Principles for Primary Legislation for Wales', written evidence submitted by the Institute of Welsh Affairs, in National Assembly for Wales Committee on the Better Governance for Wales White Paper *Report on the Better Governance for Wales White Paper* (Cardiff: National Assembly for Wales, 2005), pp. 96-101 at p. 98.

³⁰ See section 31.

³¹ See section 32. Exercise of this does depend on what the Assembly's standing orders provide.

³² See section 101 (Assembly Measures) and section 104 (Assembly Acts).

However, there is one significant difference between the Scotland and Northern Ireland legislation and that for Wales. That is the provision enabling the Secretary of State to intervene if s/he considers that a clause ‘might have a serious adverse impact on water resources in England, water supply in England or the quality of water in England’.³³ This of course reflects geographical factors absent for Scotland and Northern Ireland – physical proximity to England, and the fact that a number of reservoirs and water catchment areas supplying England are located in Wales. The possible impact of such a clause is very wide, given the extensive water supplies to England that come from Wales and the increasing demands for water in England (especially with population growth and declining rainfall in south-eastern England). As a generous level of rainfall is likely to be seen as more and more of a natural resource for Wales, this may become a source of tension in the years to come.

The Secretary of State will therefore be a gatekeeper for the use of Wales’s devolved powers and any increase in them, and also an important actor in how Wales uses them. At least while Labour remains in office in London, the Secretary of State is likely also to be a prominent figure in Welsh politics and perhaps to see him or herself as leader of Welsh Labour MPs at Westminster. As both a party-political figure and the head of the Wales Office, s/he will have much influence over Welsh government behind the scenes. To date, however, Secretaries of State have made only rare and reluctant appearances in the Assembly, normally only for the annual debate on the UK Government’s legislative programme. It is therefore perhaps better to view the Secretary of State as a *deus ex machina* in Welsh politics rather than a direct presence in the Assembly. The question, however, is how long s/he should retain such a role. For Scotland, the Secretary of State is an important link between the Scottish and UK Governments but has a very limited formal role. As framed, the 2006 Act gives him these powers indefinitely. To the extent such powers are justifiable, it is as a reflection of the transitional nature of Welsh devolution so far, and of the continuing close relationship between the devolved institutions and Whitehall. Why they should therefore persist after primary legislative powers are conferred is unclear.

The place of the Wales Office is more immediately palpable, and unlikely to diminish. The Office does more than merely support the Secretary of State, but has a very substantial workload of its own, as intermediary between the Assembly Government and Whitehall departments, and as Whitehall’s source of expert advice on Welsh devolution. While much goes on directly and bilaterally between Whitehall officials in ‘line’ departments and their counterparts in the Assembly Government, there is a substantial volume of work (often arising from Westminster legislation) that needs the Wales Office’s advice and assistance. The importance of constitutional issues since 1999 and particularly since 2004 has reinforced this. The 2006 Act means those constitutional issues remain high on the agenda. With the added work arising from orders in council, and the need to scrutinise Assembly legislation to ensure it is within devolved competence as well, the Wales Office’s role will become larger than ever – and given its modest size (it has only two lawyers, for example) it can also be expected to grow quite significantly, even if it should be nominally subsumed into some broader ‘ministry of devolution’.

The transition to Stage 3

The transition to stage 3 will depend heavily on decisions taken by the Secretary of State. The first set of decisions relates to how stage 2 works in practice, something which it is impossible to foretell at this point. One possibility is that orders in council will be used only slowly and to a limited degree. In that case, those favouring devolution will have little option other than to seek an early referendum. The alternative is that there will be such extensive grants of legislative

³³ See section 101 (1) (b) and section 114 (1) (b).

powers to the Assembly that it has largely the same powers that stage 3 would grant, but without a referendum. One unusual feature of the Act is that it is simply impossible to say. At some point, however, the issue of a referendum will arise – if only to maintain the legitimacy of the National Assembly rather than to extend its powers.

While the Assembly may ask the Secretary of State to hold a referendum, that decision will require not just the support of a majority of AMs but also has to be initiated by the Assembly Government, not a backbencher. The Secretary of State not only has to decide whether to call a referendum, but also the important issue of what the wording of the referendum question should be (something criticised by the Commons Welsh Affairs Committee and both the Constitution Committee and Delegated Powers and Regulatory Reform Committee in the Lords).³⁴ Two significant powers are therefore left in the hands of the UK Government, enabling the UK Government to make key decisions about Wales's constitutional future. Given the way political and constitutional issues intertwine in the devolution arrangements, it would be absurd not to expect party-political considerations not to play a major part in how those decisions are made.

Legislation at Stage 3

Stage 3 resembles the Richard Commission recommendation that devolution to Wales follow the legislative model as applied to Scotland, by conferring what the UK Government calls 'primary legislative powers'.³⁵ It does not exactly follow the Richard recommendation; there is a significant difference between the approach of the Scotland Act 1998 and that taken in the white paper and the 2006 Act, as the National Assembly gets the power to legislate only for certain defined functions, not (as in Scotland) for all matters except those reserved to the UK Parliament.³⁶ This is largely due to the difficulties of devolving powers for a wide range of substantive matters, while retaining a single legal system and jurisdiction for both England and Wales. Even at stage 3, the Assembly will remain closely tied to Westminster. Westminster expressly retains formal power to legislate for all matters concerning Wales (s. 107(5)). *Better Governance for Wales* noted that the transfer of legislative powers 'would not necessarily mean that Assembly would become the principal law maker for Wales'.³⁷ It envisages a continuing major role for Westminster even regarding devolved matters, through motions at Cardiff Bay permitting Westminster to legislate for them (often known as 'Sewel motions' in relation to Scotland, although the term 'legislative consent motions' has recently been adopted).³⁸

Certainly, Sewel motions have been widely used in Scotland. There were 39 motions for 38 Westminster bills in the Scottish Parliament's first session (1999-2003), while Holyrood passed 62

³⁴ Welsh Affairs Committee *Government White Paper: Better Governance for Wales* op cit, para. 136; Select Committee on the Constitution *Government of Wales Bill: Report with Evidence*, op cit, para. 36; House of Lords Select Committee on Delegated Powers and Regulatory Reform, *Seventeenth Report* op cit, para. 37.

³⁵ There remains a legal issue as to whether legislation made by the devolved legislatures, under authority of the UK Parliament at Westminster, is indeed *primary* legislation, or merely a species of delegated legislation. See B. Winetrobe, 'Scottish devolved legislation and the courts' [2002] *Public Law* pp. 31-8.

³⁶ The former conferred legislative powers for all matters save those that were expressly reserved to the UK Parliament. The latter confers only legislative powers relating to specified functions such as health or education. Whether this will make any practical difference it is hard to say. There are strong legal and technical reasons for this approach, however, rooted in the need for the substantive law of England and Wales to be the same. See Welsh Affairs Committee *Government White Paper: Better Governance for Wales* op cit, written evidence submitted by the Secretary of State for Wales and the First Minister, Ev 57-62, particularly Annex 2 at Ev 61-2.

³⁷ *Better Governance for Wales*, para. 3.28.

³⁸ The convention is formally set out in the *Memorandum of Understanding and supplementary agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee*, Cm 5240 (London: The Stationery Office, 2001), para 14.

Acts during that time.³⁹ There were 31 further motions between June 2003 and November 2006, and 42 Holyrood Acts, although a comparison over three and a half years rather than a four-year Parliamentary session is inexact, given the nature of the legislative process at Holyrood. It is wrong to pay too much attention to these motions as such, as they are only one of a number of techniques used to deal with the existence of different parliaments with different priorities and procedures, and different governments. In other cases, powers have been transferred to the Scottish Parliament to enable it to act (usually by secondary legislation made under the Scotland Act), or Westminster legislation has been framed so as to allow Scotland to act in its own way at a different time. What the number of legislative consent motions tells us is that the issue of which Parliament should legislate for devolved matters is a complex one, even when there was an expectation that devolved matters would cease to be dealt with at Westminster after devolution.

The wide use of such motions can, however, be regarded as reflecting the ongoing dominance of the legislative agenda at Westminster, and of the UK Government's policy agenda. Scotland's choice has been whether to legislate itself (in the same form and with the same approach as Westminster, or differently); to take time to consider whether and how to legislate; or to sign up to the Westminster bill. Not legislating at all has seldom been an option, although this possibility would appear to be a natural part of devolution, with Scotland responding to Scottish needs which might not be the same as English ones. At least from London, the expectation is strongly that once an issue has come onto the agenda, a devolved response is needed, although it accepts that that response may differ from the UK Government's one. In many cases, UK Government departments have encouraged the Scottish Executive to follow the same approach, and if possible through the same bill, to ensure consistency of approach across Great Britain, or to ensure that equivalent or similar provisions come into effect at the same time. A notable example is the Proceeds of Crime Act 2002 – a large Act extending across all parts of the UK, providing for similar rules (though implemented in different ways), and empowering the civil courts to confiscate property acquired with funds from suspected criminal activities. Even when Whitehall has little direct concern in shaping the Scottish agenda, its plans can have a major impact; when fur farming was banned in England and Wales (by the Fur Farming (Prohibition) Act 2000), Scotland and Northern Ireland had to follow suit with their own legislation, even though neither territory had any fur farms at the time, to ensure that farms from England and Wales did not relocate there. Yet there is scope for broad variation in how Westminster legislates; the sort of detailed provisions that have generally been used for Scotland are not the only option, and the use of Westminster legislation to extend the Assembly's legislative powers by amending Schedule 5 may provide a more appropriate solution.

For Wales, these sorts of considerations may be reinforced by practical factors, such as the Assembly's capacity to develop its own policies on a particular matter, or how devolved functions relate to non-devolved ones. In some ways, the Assembly's legislative powers will be secondary in importance to the impact of the existence of these powers on intergovernmental negotiations – Whitehall will have to take Wales more seriously, knowing that Wales can take its own approach if Wales has not been consulted properly and the UK approach does not suit Wales's needs.

³⁹ See B. Winetrobe, 'A Partnership of the Parliaments? Scottish Law Making under the Sewel Convention at Westminster and Holyrood', in Hazell and Rawlings (eds.), *Devolution, Law Making and the Constitution* op cit. See also A. Page and A. Batey, 'Scotland's other Parliament: Westminster legislation about devolved matters in Scotland since devolution' [2002] *Public Law* pp. 501-23, for discussion of why Sewel motions are used, and Scottish Parliament Procedures Committee Report *The Sewel Convention* 7th Report, 2005 (Session 2), SP Paper 428 PR/S2/05/R7, available at <http://www.scottish.parliament.uk/business/committees/procedures/reports2005.htm>

Life beyond legislation

This paper has so far concentrated on issues arising from legislation, and related and largely bureaucratic processes. So far, it has said nothing about the broader framework of devolution or of intergovernmental relations.

It is hard to see how these relations will change as a result of the 2006 Act. The key features of the present system – asymmetry, the entanglement of governments and their functions, and dominance by the Labour Party and the consensual climate that engenders – will not be affected by the Act. Asymmetry remains built in to the devolution arrangements, and will persist even after stage 3 is reached. That in turn leads to heavily bilateral relations, because matters that concern one devolved government do not concern the others, or concern them in different ways. The entanglement of governments means that much goes on behind the scenes to ensure that policy-making can proceed despite the many overlaps between devolved and UK functions. While the 2006 Act will change many detailed features of intergovernmental relations, it will not change this overall pattern. The consequences of this – informal intergovernmental relations, with relatively few meetings of ministers of any sort and minimal use of the Joint Ministerial Committee particularly in its ‘plenary’ form – will also be unchanged. The close entanglement which has been the foundation of Assembly-UK relations to date has depended on Labour dominance of government at both levels to work, and the Act appears to rely on this entanglement continuing at least for some time. In this respect, the Act reflects its origins in a carefully-crafted set of internal Labour Party compromises, which have taken that Labour dominance as a given.

However, Labour’s electoral dominance may come to an end after the 2007 devolved elections or the 2009 UK ones (who knows?). Such a change would certainly have a significant effect as governments try to work out how to govern when they cannot automatically count on each other’s ‘goodwill’. The present pattern will have to change if, or when, Labour loses an election. That will clearly have an impact on UK intergovernmental relations generally; such relations will become more politically charged, less relaxed and more formal, although they would probably remain predominantly bilateral. (That will only change if the UK Government finds it desirable, for practical or symbolic reasons, to ‘manage the Union’ more actively, something that has been lacking from much of the rhetoric about ‘Britishness’ from Gordon Brown and other UK politicians.) If this change means Labour retains office in London but is in opposition in Cardiff, Welsh MPs (predominantly Labour) can be expected to be wary of further transfers of powers to the Assembly. This will be driven by concerns about undermining the party’s powerbase if the (non-Labour) Assembly becomes stronger, and a worry that their own seats may be threatened (either at the polls or by a reduction in the number of Welsh MPs) in the longer term. The logic is rather different if the division is between a Labour-dominated government in Cardiff and a Tory one in Whitehall. In that case, the ability of each government to obstruct the other is considerable, because of the degree of entanglement. Added to this is the presence of a significant contingent of Welsh Labour MPs who can at least make a noise in the Commons and so draw attention to Wales’s opposition to UK policies. One solution in these circumstances would be to increase Wales’s autonomy by extending the fields in which the Assembly has legislative functions, or by moving quickly to a referendum to bring in the ‘Assembly Act’ provisions. This will have its attractions for both sides, as it will reduce the extent to which ‘unpleasant’ English developments affect Wales, while freeing the UK Government from the distractions and nuisances of dealing with Wales’s particular concerns (and reducing embarrassing opposition in London). The flexibility in the Act would facilitate this, by enabling orders in council to be used to transfer extensive powers to the Assembly, or for there to be a referendum to bring in the legislative provisions in Part 4. Similar logic may apply if there are non-Labour

governments in both Cardiff and London as well, as such a government in Wales will be dominated by Plaid Cymru and its generally left-wing positions.

Most important, nothing in the 2006 Act has touched on the most difficult of all intergovernmental issues: finance. In a Welsh context, finance will be contentious because the budget is the main way the Assembly can rein in the Assembly Government or shape its priorities. Disputes over the 2005 and 2006 budgets, with the opposition parties combining to defeat some of the Assembly Government's proposals (following Labour's minority), illustrate the point. They are also likely to be contentious because of the total amount of funding, and well-known problems with the Barnett formula, and in finding match-funding for the EU Convergence Fund monies that will replace Objective 1 from 2007.⁴⁰ Debates are already underway in Scotland about fiscal autonomy and what is (inaccurately) called 'fiscal federalism'.⁴¹ Shortly after the May 2007 devolved elections, the UK Government will announce the outcome of its Comprehensive Spending Review, which is likely to have significant implications for the new devolved governments. Regardless of whether the Review alters the Barnett formula, sooner or later complicated financial issues – about the principles of allocating finance, of how needs should be considered in that allocation, and of the extent to which devolved governments should raise their own revenue -- will need to be resolved.

Conclusion

The 2006 Act marks a major step forward in Wales's constitutional development, and a demonstration of a remarkable degree of constitutional ingenuity and imagination.⁴² However, its impact on relations between Wales and the UK institutions is unlikely to be transformative. It will alter the immediate matters at issue in such relations – what needs to be discussed, and what solutions are available to those problems – but not the structure of relations as a whole. That is dependent on factors beyond the scope of the Act, which will change more slowly if at all. While the Act may change the attitudes of the National Assembly and the Assembly Government, that will not affect the structural factors that underpin the present situation.

Moreover, the Act will not change the ongoing importance of constitutional matters in relations between Cardiff and London. This will manifest itself in two ways. First, each piece of UK legislation will still raise the issue of how it should apply to Wales – what powers the National Assembly and Welsh Assembly Government should get, in what form, and subject to what sorts of constraints. Before devolution in 1999, Ron Davies famously suggested that the pattern would be one of incremental additions to the Assembly's powers, with 'every bill a devolution bill'. That will remain the case. While the Welsh institutions will be more able to shape the agenda than they have been hitherto, London will continue to be in the driving seat, and the issue of how Wales is treated will need to be dealt with frequently.

Second, it is hard to see how the implementation of the 'Assembly Act' provisions would mark the end of Wales's constitutional development. Ministers have suggested that this is long-term settlement, intended to resolve the issue of Wales's constitutional status for a generation or even more.⁴³ Broader issues may come to prominence, notably the transfer of functions presently

⁴⁰ See I. McLean, 'The Purse Strings Tighten', in J. Osmond (ed.), *Second Term Challenge: Can the Welsh Assembly Government hold its course?* (Cardiff: Institute of Welsh Affairs 2003), pp. 82-98.

⁴¹ See e.g. J. Gallagher and D. Hinze *Financing Options for Devolved Government in the UK* (Glasgow: School of Law, University of Glasgow, 2006); available from: http://www.gla.ac.uk/Acad/PolEcon/pdf05/2005_24.pdf

⁴² Cf Rawlings, 'Hastening Slowly' op cit, at p. 824.

⁴³ See e.g. Peter Hain in the Commons second reading debate; HC Deb, 9 January 2006, col. 45, or Lord Evans of Temple Guiting in the Lords second reading debate: HL Deb, 22 March 2006, col. 266.

retained by the UK level (policing is the most notable example, and sometimes raised in private). This could be accomplished within the framework of the 2006 Act. Other changes, notably judicial devolution, could not and would need fresh Westminster legislation.⁴⁴ Apart from this, it will leave significant items of unfinished business on the table, which will need to be tackled sooner or later. One is the question of the size of the National Assembly and the number of AMs. Keeping the number at 60 (and not even providing a mechanism for increasing it to 80, the number many regard as necessary for it to function properly) simply means that size will remain an issue. Another is the role of the Secretary of State, and his continuing direct involvement in the Assembly. Such involvement is understandable while the Assembly remains tied to, and dependent upon, the UK Government and Parliament. If achieving 'primary legislative powers' were genuinely to mark an end to this transitional phase, that role should develop into the much more indirect one the Secretary of State for Scotland has.

The 2006 Act will change how Wales relates to the United Kingdom in a broad sense, and how day-to-day interactions work in a narrower one. The subject-matter of those relations will change somewhat, but not as much as some might expect. The framework of relations may change, but the substance of those relations and the overall structure in which they sit will remain the same. At most, it will be a case of old wine in new bottles. In many respects, however, even the bottles will be very similar to ones with which we are already familiar.

⁴⁴ See T. Jones and J. Williams 'Wales as a Jurisdiction' [2004] *Public Law* pp. 78-101.