

Devolution in Wales: From Assembly to Parliament

On 6 May 2020, the National Assembly for Wales (hereafter “the Assembly”) will officially be renamed, adopting the new title of Senedd Cymru / Welsh Parliament. The change comes as a result of section 9 of the Wales Act 2017, amending the Government of Wales Act 2006 (hereafter “GOWA”) to include the new section 111A which transfers to the Assembly the power to legislate on matters relating to its electoral and operational arrangements.

The new powers transferred under the 2017 Act were in keeping with recommendations made in Part II of the Silk Commission Report (R.53) and included in the St. David’s Day Agreement, as well as also reflecting some similar provisions implemented in Scotland under the Scotland Act 2016. Under section 111A Government of Wales Act GOWA, the Assembly may now, by way of a two-thirds supermajority, pass legislation on protected subject-matter relating to the name, franchise or operation of the Assembly.

The first attempt at legislation under the new powers took form in the Senedd and Elections (Wales) Bill which was introduced into the Assembly in February 2019. After a number of passionate debates in the Assembly, the Bill met the supermajority requirement in a vote on 27 November 2019, receiving royal assent on 15 January 2020. The terms of the new Senedd and Elections (Wales) Act 2020 see Wales become the second part of the UK, after Scotland, to extend the franchise to 16 and 17 year olds in devolved elections. Further, as already noted, the Act also changes the name of the legislature in Wales, a change which the explanatory memorandum details was designed ‘to better reflect the evolution of its constitutional status, to the national parliament that it is today’. Developing this final point, we turn now to evaluate the constitutional position of Wales within the territorial constitution.

Devolution in Wales: A Process, Not an Event

It is now a well-practiced adage that devolution is a ‘process, not an event’. Nowhere has this reality been reflected more than in Wales. Over the past two decades, Westminster has enacted two Government of Wales Acts (1998 and 2006) and two Wales Acts (2014 and 2017). In addition, there have also been multiple reports on devolution in Wales, including the Richard Commission (2002-2004), the Holtham Commission (2008-2010) and the Silk Commission Part I and Part II (2011-2014). The result has seen devolution in Wales transition from a conferred powers model with initially only minor secondary legislative authority, through to a reserved powers model with full primary law-making powers.

Despite changes that have deepened devolution in Wales, the level of legislative competence currently enjoyed by the Assembly remains below that of Scotland or Northern Ireland. In particular, the existence of separate legal systems in Scotland and Northern Ireland provides for a much broader range of legislative competence in private law and criminal law matters than is currently enjoyed in Wales. Moreover, the devolution settlement in Wales has so far also failed to receive tax and spending powers equal to that of Scotland.

In part, the asymmetrical spread of competences across the three devolution settlements reflects the *ad hoc* system of devolution in the UK, which has tended to favour political pragmatism and tailored bilateral arrangements over a holistic approach to devolution across the UK. The consequence for Wales has been a more limited form of devolution than seen in Scotland or Northern Ireland, though consistently above the absence of legislative devolution in England.

The historic relationship with England has also constrained the scope of devolution in Wales. More than Scotland or Northern Ireland, the history of Wales is closely linked to England in terms of its economic development, local governance, education and healthcare systems. Moreover, since the sixteenth century, the legal system in Wales has been joined to England in the shared England and Wales jurisdiction.

Addressing this last point, the recent report by the Thomas Commission on Justice in Wales recommended the ending of the single England and Wales legal jurisdiction and the devolution of powers on policing, prisons and the judicial system. Formally, the UK Government's response has been to not support the devolution of justice powers to Wales. Responding to the report, the Under-Secretary of State for Justice, Chris Philip, offered the conclusion that the high number of matters reserved to the UK Government under the Wales Act 2017 precludes the need for a devolution of justice matters. Indeed, the opinion offered by Philip was that the devolution of justice powers would exacerbate the "jagged edge" between UK and Welsh competences (for further detail on the "jagged edge" of devolution in Wales, see the reports by the Thomas Commission and the Wales Governance Centre. A useful discussion is also undertaken in a previous blog by Daniel Wincott).

Wales Act 2017

The most recent Westminster legislation to alter the devolution settlement in Wales came through the Wales Act 2017. Under the Act, the system of devolution in Wales moved from a conferred to a reserved powers model, with the Assembly also receiving additional competences, including on financial matters. However, while offering an important milestone in the devolution process in Wales, commentary on the Act has tended to focus on criticism of the potential restrictions imposed by the long list of reserved powers included under the new GOWA Schedule 7A. The contested shortcomings may be summarised under two headings.

First, the number of matters detailed as reserved to Westminster under Schedule 7A raises procedural questions on the logic underpinning its enactment. In the UK Government's white paper to the draft Wales Bill, the move to a reserved powers model was justified as resetting devolution in Wales to provide *clarity* and *consistency* on the scope and operation of the Assembly. A significant influence in the calls for clarity and coherence was to reduce the confusion surrounding the scope of devolved competence associated with the old section 108 GOWA, thus reducing the need for references to be made to the UK Supreme Court.

Under the reserved powers model now in place, Schedule 7A lists nearly two hundred matters as reserved to Westminster. The new section 108A then details that a legislative provision falls outside of the competence of the Assembly should it 'relate to' a reserved matter. This creates a number of unknowns. On the one hand, the high number of reserved matters risks limiting the scope of legislative competence. As the Supreme Court established in *Agricultural Sector (Wales) Bill*, under the conferred powers model an Act of the Assembly would fall within legislative competence if it 'fairly and realistically' related to a devolved matter, even if parts of the provision related to a subject that had not been devolved (a so-called 'silent' subject). Under the new reserved powers model in Wales, this expansive elasticity in the legislative competence of the Assembly risks being lost, and the scope of silent subjects being significantly reduced by the number of subjects listed as explicitly reserved. An example being the previous silent subject of employment relations which has now been reserved, with the only exception being provisions relating to the subject matter of the Agricultural Sector (Wales) Act 2014.

On the other hand, the new principle under section 108A(2) that provisions relating to matters listed in Schedule 7A fall outside of legislative competence risks narrowing the scope of legislative competence further, following the standard established by Lord Hope in *Imperial Tobacco* – i.e. that there is not an automatic presumption of legislative competence. Consideration of these points does little to increase the clarity or coherence of legislative competence in Wales. While reference to the Supreme Court has not yet been made on the legislative competence of the Assembly under the new reserved powers model, it appears to only be a matter of time.

Second, the Act has also proved problematic in highlighting the continuation of the more limited scope of devolution in Wales in comparison to Scotland or Northern Ireland. Recognition of this point was noted by the House of Lords Constitution Committee in its report on the then draft Wales Bill, a report which echoed points previously made by the Welsh Assembly Constitutional and Legislative Affairs Committee (now the Legislation, Justice and Constitution Committee). More recently, in its 2019 white paper, *Reforming our Union*, the Welsh Government raised an important consideration on the wider constitutional reasoning underpinning the allocation of devolved competences:

The arguments for recognition of the subsidiarity principle is not of course to seek identical settlements for each of Wales, Scotland and Northern Ireland, but it does require that differences between the settlements should be capable of rational justification.

Investigating this point from a UK-wide perspective, the 2018 report by the House of Commons Public Administration and Constitutional Affairs Committee, *Devolution and Exiting the EU*, offered a similar reasoning on the need for justification and accountability of the UK Government on the asymmetrical model of devolution in the UK.

Finally, there also exists a wider normative point on the apparently competing mind-sets between the UK and Welsh administrations in their understanding of the purpose and direction of devolution. It is apparent from the number of matters reserved under the 2017 Act that the UK Government has not subscribed to the arguments made by the Welsh Government on the need for clarity and a model of devolution rooted in the principles of subsidiarity. Moreover, the two administrations have also recently experienced a number of constitutional flash points in relation to the interpretation and operation of the Sewel Convention in the Brexit process, a matter which has not been discussed in this short blog but which continues to factor heavily in the politics of devolution.

Conclusion

Historically, the unique complexity and limited scope of devolution in Wales was in part answered by the lower levels of popular support or politicised civil society to justify further devolution. The upcoming change of name of the Assembly captures that Wales has evolved significantly as a devolved polity since then and now occupies a permanent and important position in the UK territorial constitution.

The prospect of additional transfers of competences to Wales is an issue that the newly named Senedd will likely be keen to address. In recent months, calls for further devolution have been made consistently, as well as the publication of the report by the Thomas Commission calling for the devolution of justice powers, these include calls for full powers over rail transportation and a Welsh Assembly consultation on broadcasting powers. While the current

UK Government seems to have little appetite to transfer additional powers to Wales, the notion of devolution as a process looks set to continue over the coming years.

Dr Gareth Evans is a Lecturer in Law at Swansea University.

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