



Assembly to Senedd
The Convention and the Move Towards
Legislative Powers

 **DISCUSSION PAPER**

John Osmond

£10

January 2008

ISBN 978 1 904773 30 6



Sefydliad Materion Cymreig
Institute of Welsh Affairs

The Institute of Welsh Affairs exists to promote quality research and informed debate affecting the cultural, social, political and economic well-being of Wales. IWA is an independent organisation owing no allegiance to any political or economic interest group. Our only interest is in seeing Wales flourish as a country in which to work and live. We are funded by a range of organisations and individuals. For more information about the Institute, its publications, and how to join, either as an individual or corporate supporter, contact:

IWA - Institute of Welsh Affairs
1 – 3 Museum Place
Cardiff
CF10 3BD

Tel 029 2066 6606
Fax 029 2022 1482
Email wales@iwa.org.uk
Web www.iwa.org.uk

The Author



John Osmond is Director of the Institute of Welsh Affairs. He has published widely on Welsh politics, culture and devolution. Related publications, all available from the IWA, include *Welsh Politics Come of Age: Responses to the Richard Commission* (2005), *Time to Deliver: The Third Term and Beyond – Policy Options for Wales* (2006), *Building the Nation: Creating 'Internal Political Solidarity' – the 1979, 1997 and 2011 Referendums in Wales* (2007), and *Crossing the Rubicon: Coalition Politics Welsh Style* (2007).

See the IWA's website for further details: www.iwa.org.uk

Cover Photo

The Richard Rogers National Assembly building in Cardiff Bay, pictured at night.

CONTENTS

1. Welsh Law.....	1
2. The Case for Legislative Powers	3
3. The 'Internal Dynamic' of The 2006 Wales Act	5
4. Shortcomings of the 2006 Wales Act	8
5. The Convention	10
6. The UK 'Pandora's Box'.....	13
7. A Welsh Jurisdiction.....	15
8. Public Opinion.....	16

1. Welsh Law

“The new Government of Wales Act 2006 shakes the historic relationship between England and Wales to its roots ... The new legal situation in Wales means that we can now talk of the Welsh Statute Book, Welsh Law, and of redeveloping a body of laws which link us historically with the laws of the princes – the Law of Hywel – one of Welsh culture’s most splendid creations, a powerful symbol of our unity and identity, as powerful indeed as the Welsh language itself.”

Lord Dafydd Elis-Thomas, Presiding Officer, National Assembly
Dod a'r Swyddfa Gartref / Bringing the [Home] Office Home
Address at the National Eisteddfod, 2007

“While it is at present too early to hail the emergence of a Welsh jurisdiction there can be little doubt that the seeds of such a jurisdiction are planted, germination is taking place and they will develop ... As Legal Wales advances the panorama widens; changes which even eight or ten years ago were little more than pipe dreams are now upon us.”

Sir Roderick Evans, Presiding Judge, Wales Circuit
Legal Wales – The Way Ahead
Annual lecture, Law Society in Wales, 2006

As these quotations illustrate, in recent years it has become more and more common to speak in terms of Welsh law, of ‘legal Wales’, and even of a Welsh jurisdiction. This last would involve Wales developing an increasingly distinctive law and legal system, separate from England, along the lines of both Scotland and Northern Ireland. So, for example, Carwyn Jones, the Counsel General in the Welsh Cabinet, has declared that once the National Assembly acquires primary lawmaking powers, a logical consequence will be for Wales to have its own legal jurisdiction. As he said:

“If you’ve got two parliaments that have primary powers, I think it makes it very difficult to have one jurisdiction. I’m not aware of anywhere in the world where you have that.”¹

It is difficult to exaggerate how extraordinary, and how essentially novel, such statements are for Welsh political life. As Sir Roderick Evans says in the quotation above, a short time ago such ideas were a “pipe-dream”. That they are now seriously being discussed is a testimony to the speed, and indeed the acceleration of the devolution process.

¹ Western Mail, 14 September 2007.

Wales ceased being a distinctive jurisdiction with its own laws and legal system so long ago – under the baleful influence of Henry VIII with the Acts of Union in 1536 and 1543 – that notions of Welsh law and a distinctive legal personality are in an important sense alien to the Welsh political mind, even faintly exotic. Indeed, this may be even more the case for the English since if Wales were to develop its own jurisdiction, then the legal construct ‘England and Wales’ would cease to exist. For the first time in more than four centuries, the English would then have to think in terms of just England when legislating. The implications for entrenching and extending the devolution process are obvious.

In this discussion it is important to bear in mind that there is a long historical basis for Welsh law. As the Presiding Officer has said, it goes back to pre-medieval times, to the age of the princes, a lineage that has recently been traced by the Assembly Government’s Legislative Counsel, Professor Thomas Glyn Watkin.² However, the 21st Century basis for the development of a distinctive legal system is the 1998 and 2006 Wales Acts that have established the present National Assembly. As Professor Watkin puts it:

“They are the most important statutory enactments relating to Wales since the sixteenth century Acts of Union, which interestingly were also two statutes passed within a decade of each other. Those Acts required that English be the official language of the annexed territories. The Government of Wales Acts provide that the Assembly must treat Welsh and English on equal terms, and that legislation produced by the Assembly must ordinarily be in both languages.”³

He adds that Wales is now locked into three legal systems. It has some laws which are peculiarly its own, made by the National Assembly under its current limited powers. It remains part of the England and Wales jurisdiction for most legal purposes. And it is also part of the legal framework determined by the European Union for a growing number of important matters, from commerce to the environment. The future of ‘legal Wales’ will depend on development and change in the relative importance of these three environments.

It was noteworthy, for instance, that the earlier quotation from Carwyn Jones, the Counsel General, assumes that the National Assembly will acquire greater primary powers. That now seems inevitable. Indeed, the process by which it will occur has been laid down, first by the 2006 Wales Act, and later by the July 2007 *One Wales* agreement that established the present coalition government between Labour and Plaid Cymru. The Act provides for a referendum on primary powers, so long as two-thirds of the 60 members of the Assembly vote for one. With 41 Assembly Members, the Labour and Plaid Cymru coalition government can provide this two-thirds majority. Meanwhile, the *One Wales* agreement sets out a timetable for the referendum to be held at or before the next Assembly election in May 2011.

² Thomas Glyn Watkin, *The Legal History of Wales*, University of Wales Press, 2007. Formerly head of the Law School at Bangor University, Professor Watkin became First Welsh Legislative Counsel to the Assembly Government in April 2007.

³ *Ibid*, p. 201.

2. The Case for Legislative Powers

The case for primary legislative powers was made by the cross-party Commission, chaired by the Labour Peer Lord Richard, which reported in the Spring of 2004. At the start of the Commission's work, in 2002, Lord Richard said he had been sceptical that any change was needed so soon after the Assembly had been established. However, by the end he said the weight of the evidence had influenced him to change his mind. He described the Assembly's powers, procedures and relationship with Westminster at that time as "grotesque" and "a lawyer's nightmare."⁴ As important as the strength of the Commission's arguments was the fact that it achieved a consensus among all the four parties in making them. First Minister Rhodri Morgan underlined the significance at the time. As he said:

"All of us involved in political life in Wales know just how contentious the remit provided to the Commission was capable of becoming."⁵

It is important to appreciate that underlying the practical arguments the Commission considered was its assessment of the interests of Wales as a nation. This should come as no surprise since this has been a consistent theme in the development of Welsh institutions for more than a century. As long ago as 1892 the jurist, historian and Liberal MP for Aberdeen South, James Bryce, declared in the House of Commons:

"Now I am not going to argue the question whether Wales is a nation, but I will say that there are present in Wales – and no man with open eyes can deny it – conditions and circumstances which make it so unlike England that it ought to be dealt with differently from England ... I say no man can go into Wales without feeling, not only in the language, but also in the character of the people, and in their societal and economical conditions, that there are many facts which suggest independent legislation for them ... I think the only effect of the continued denial of the claims of the people of Wales for legislation, which they desire to have, will be to intensify what you call the separatist and distinct feelings, and to strengthen the cry for Home Rule."⁶

Another instance was the creation of the Welsh Office in 1964. In the words of James Griffiths, the first Secretary of State for Wales, his post had been

⁴ Speech at the IWA's 'Responding to Richard' conference, Cardiff, 23 April 2004. For a full account of the Richard Commission see John Osmond (Ed.) *Welsh Politics Come of Age*, IWA, 2005.

⁵ *Assembly Record*, 31 March 2004.

⁶ Debate on the Disestablishment of the Church of England in Wales: Hansard, 23 February 1892. Bryce was responding to an assertion from the Conservative Solicitor General, Sir Edward Clarke (Plymouth), that there was a "craze of separatism, which has attacked the minority in the House, and which would set up again barriers and fences between the families of our people that have almost been erased and trodden down by the friendly footsteps of many generations."

created primarily out of a “recognition of our nationhood”.⁷ A decade later the Royal Commission on the Constitution considered the same argument in the following terms:

“Generalisations about a people are difficult to make and usually unsatisfactory, but it seems true that as one moves eastward and southward through Wales, the ‘Welshness’ of the people, though it undergoes subtle changes, persists. Despite divisions and gradations, there remains a strong sense of Welsh identity, a different way of looking at things and a distinct feeling that the needs and interests of the people in Wales must be considered separately from those of people elsewhere in the United Kingdom.”⁸

The Richard Commission also acknowledged the centrality of the nationality of Wales when it considered the arguments for giving the National Assembly primary legislative powers. A key moment was when it engaged with arguments put by the Secretary of State for Wales, Peter Hain. As things stood at that point, the Assembly Government had to argue its case for legislation it wished to be enacted at Westminster in competition with Whitehall departments. Each year the Assembly Government made bids for around five or six separate Welsh Bills, and sometimes attempted to insert Welsh clauses into English Bills going through Westminster. The Richard Commission concluded that the Assembly Government’s success rate had been limited, with many of its proposals having little chance of getting into the legislative programme. This was because they were a low policy priority for the UK Government. Nevertheless, it quoted Peter Hain, in the evidence he gave the Commission as rejecting this criticism:

“There are lots of frustrated Secretaries of State around the Cabinet table who cannot get their Bills in the Queen’s Speech. There is always a big negotiation ... as to what goes in and what there is legislative time for and so far we have a pretty good track record of Welsh legislation, Welsh-only legislation and Welsh clauses in legislation ... It does not follow that because you cannot get everything tomorrow, the fundamental settlement has to be altered in a substantial fashion.”⁹

The Commission disputed this with a restrained single sentence, but nonetheless one that went to the crux of the argument. This took a completely different perspective on the nature of the National Assembly from Peter Hain. As the Commission declared, Hain’s outlook:

“... views the Assembly as the counterpart of an individual UK Department, rather than the democratically elected body for the whole of Wales with responsibility for a broad range of policy matters.”¹⁰

⁷ Speaking in the Welsh Grand Committee, Hansard, 16 December 1964.

⁸ Report of the Royal Commission on the Constitution 1969-1973, Cmnd. 5460, para 130.

⁹ Richard Commission report, Chapter 7, paragraph 57.

¹⁰ *Ibid.*, paragraph 58.

3. The ‘Internal Dynamic’ of the 2006 Wales Act

The Richard Commission made three main recommendations as shown in Figure 1.

Figure 1: Main recommendations of the Richard Commission

- Transformation of the National Assembly into a fully-fledged legislature with primary powers in all matters not explicitly reserved to Westminster.
- An increase in the Assembly’s membership from 60 to 80 to strengthen its capacity.
- The current ‘additional member’ system of elections to be replaced by the single transferable vote for electing all Assembly members.

None of these recommendations was accepted by the Labour Party. Moving directly to full legislative powers was a step too far, and certainly too soon, for a majority of the 29 Welsh Labour MPs at Westminster. They were fearful that this would inevitably result in a reduction of their number as has happened in Scotland. Increasing the number of Assembly Members would raise the same issue. Moreover, it would also raise the method of their election, with extending the reach of proportional representation also anathema to a majority of Labour MPs at Westminster.

Instead, the Wales 2006 Act offered a more circuitous, described by some commentators as ingenious, route to conferring greater powers. First, and this time following a Richard Commission recommendation, it abolished the previous corporate structure of the National Assembly. Instead, the executive was separated from the legislature, with the Welsh Assembly Government becoming formally accountable to the Assembly. Secondly, it allowed the Assembly to make laws, in subject areas approved by the Westminster Parliament. Known as ‘Measures’, these will be confined to ‘matters’ within the 20 policy fields set out in Schedule 5 to the Act, listed in Figure 2. In this terminology,

- a ‘field’ is a broad subject area, for example highways and transport; and
- a ‘matter’ is a specific defined policy area within a field.

New fields can be added to the Assembly’s legislative responsibilities by an Order in Council at Westminster, so long as the Assembly Government is already carrying out executive functions in the field. The Westminster Government has to agree, where necessary, to devolve additional executive

functions to the Welsh Assembly Government before such an Order in Council can be laid.

Figure 2: Policy ‘fields’ devolved to the National Assembly - those highlighted have been added since the 1998 Wales Act

<ol style="list-style-type: none"> 1. agriculture, fisheries, forestry and rural development 2. housing 3. ancient monuments and historic buildings 4. local government 5. culture 6. National Assembly for Wales 7. economic development 8. public administration 9. education and training 	<ol style="list-style-type: none"> 10. social welfare 11. environment 12. sport and recreation 13. fire and rescue services and promotion of fire safety 14. tourism 15. food 16. town and country planning 17. health and social services 18. water and flood defence 19. highways and transport 20. Welsh language
---	---

The Assembly Government, Assembly Members, or an Assembly Committee can now initiate action to provide the Assembly with additional primary legislative powers by seeking a ‘Legislative Competence Order’ to add a new matter to any of these 20 fields. Such Orders have to be approved by the Westminster Parliament, following a short debate. In implementing the Legislative Competence Order the Assembly can then pass Measures. In this process a Measure can do one of two things:

- (i) Amend, repeal or extend the provisions of an existing Act of Parliament in their application to Wales.
- (ii) Make entirely new provisions in relation to Wales.

By making Measures unique to Wales, the Assembly will effectively be embarking upon the task of creating a book of law of its own for the first time since the Laws of Hywel Dda were codified between 880 and 950. This is what the Presiding Officer was referring to when he declared that the 2006 Act would “shake the historic relationship between England and Wales to its roots”.

Figure 3 provides examples of new powers are currently being proposed. Although early examples, they indicate the potential for Welsh law to develop in quite radical directions.

Figure 3: Examples of new powers being sought by the Assembly

- Proposed Legislative Competence orders relating to additional learning needs and to domiciliary care are under public consideration.
- The Assembly Government is negotiating with Whitehall departments on Legislative Competence Orders that would confer law-making powers relating to environmental protection, vulnerable children, and suspending people's right-to-buy their own council houses.
- Jonathan Morgan, Conservative Chair of the Health Committee, has laid plans to devolve law-making powers in the area of mental health.
- The first Assembly Measure, on redress in the NHS, proposes wider powers for Wales than England, for example extending to General Practice.
- There is a commitment in the *One Wales* coalition agreement between Labour and Plaid Cymru to explore devolution of the criminal justice system. As the agreement states: "We will consider the evidence for the devolution of the criminal justice system within the contexts of (a) devolution of funding and (b) moves towards the establishment of a single administration of justice in Wales."

As already stated, the 2006 Act goes further by setting out the conditions for a referendum that would trigger the devolution of full legislative powers. Taking all this together the Presiding Officer has concluded that an "internal dynamic" for changing the Welsh constitution is built into the 2006 Act:

"The situation in which we find ourselves today is that political and constitutional development is leading towards judicial change... The Government of Wales Act allows for the creation of new legislation for policy areas for which the Assembly is responsible. Section 95 of the Act allows the Government or members of the Assembly to propose changes in responsibility for policies, even if they do not come under the scope of the Government of Wales at the time. That is the internal dynamic of our constitution, and of course part of this is the referendum dynamic under Part 4 of the 2006 Act."¹¹

¹¹ Lord Dafydd Elis-Thomas *op cit.*

4. Shortcomings of the 2006 Wales Act

While the 2006 Act undoubtedly represents a step forward in the powers of the Assembly, it is closer to a crab-like sideways movement rather than the step-change recommended by the Richard Commission. It replicates the first 1998 Act in adding to the complexity of the Assembly's procedures rather than promoting it as an authentic legislature. The Assembly will have to engage in highly complex procedures with Westminster, procedures that are likely to be little understood by those directly involved, let alone the wider electorate. Two aspects stand out:

- The scheme is a complicated and unpredictable process for transferring legislative powers, rather than constituting a clearly understood settlement of devolved authority.
- Successful legislation for Wales will be dependent upon the cooperation and goodwill of Whitehall and Westminster.

An early indication of where a potential clash of powers could occur was the proposal in a Planning Bill in July 2007 to create an Infrastructure Planning Commission covering England and Wales, but not Scotland or Northern Ireland, to oversee major projects and speed up the planning process. This would cover such developments as major power stations over 50MW onshore and over 100MW offshore, gas installations such as the liquefied natural gas terminal at Milford Haven and the pipeline constructed from there to England, and the proposed Severn Barrage.

In 2003 the Assembly Government called for planning powers for large energy projects to be devolved, a demand it reiterated in its formal response to the White Paper that preceded the Bill. However, in his annual address to the National Assembly at the end of November 2007, Welsh Secretary Peter Hain made it clear that "there is no prospect of that being achieved in the near future".¹²

It is hard not to draw the conclusion that where there are major strategic projects that might affect English interests the UK Government is extremely reluctant to devolve power to Wales. This will surely be a recipe for future conflict. It is noteworthy, too, that as a result of the 2006 Act Wales now has eleven potential sources of its law, as shown in Figure 4, a situation hardly conducive to clarity and transparency in Welsh law making.

In short, while the 2006 Act moved things along, it was in essence yet again the outcome of an internal Labour Party compromise. The Order in Council procedure, enabling the Assembly to undertake primary legislation so long as

¹² Western Mail 3 December 2007.

Westminster approves, was a clever device to enhance the Assembly's powers without the need to disturb the surface pattern of Labour's representation at Westminster. But it was just that: a device, rather than a clear-cut durable settlement.

Figure 4: Sources of law relating to Wales

1. Acts of Parliament applying to England and Wales as a single jurisdiction.
2. Wales-only Acts of Parliament.
3. Provisions in Acts of Parliament that apply to Wales, including framework powers.
4. Orders in Council approved by Parliament, including Legislative Competence Orders.
5. Measures made by the Assembly modifying or supplementing existing legislation (including Acts of Parliament) or making new provision.
6. Subordinate legislation made by Welsh Ministers implementing Community law under Designation Orders made under the European Communities Act 1972, s.2(2).
7. Subordinate legislation made by Whitehall for England and Wales as a single jurisdiction.
8. Subordinate legislation made by Whitehall specifically for Wales.
9. Subordinate legislation made by the Assembly under Acts of Parliament or, exceptionally, under Whitehall subordinate legislation, prior to 2007.
10. Subordinate legislation made by the Assembly Government (or jointly with Whitehall) under provisions of Acts of Parliament.
11. Subordinate legislation made by the Assembly Government under powers delegated by Assembly Measures.

5. The Convention

Of course, as has been emphasised the 2006 Act contains clauses enabling a referendum to achieve primary powers, though leaving that to some unspecified future date. And therein lies the role and importance of the Convention, now being established as a result of the *One Wales* coalition agreement between Labour and Plaid Cymru.

Figure 5 sets out the terms of the agreement reached in July 2007 for establishing the Convention.

Figure 5: Terms of the *One Wales* commitment to the all-Wales Convention

Assembly Powers

There will be a joint commitment to use the Government of Wales Act 2006 provisions to the full under Part III and to proceed to a successful outcome of a referendum for full law-making powers under Part IV as soon as practicable, at or before the end of the Assembly term.

Both parties agree in good faith to campaign for a successful outcome to such a referendum. The preparations for securing such a successful outcome will begin immediately. We will set up an all-Wales Convention within six months and a group of MPs and AMs from both parties will be commissioned to set the terms of reference and membership of the Convention based on wide representation from civic society. Both parties will then take account of the success of the bedding down of the use of the new legislative powers already available and, by monitoring the state of public opinion, will need to assess the levels of support for full law-making powers necessary to trigger the referendum.

Chaired by Sir Emyr Jones Parry, recently retired as British Ambassador to the United Nations, an Establishing Committee was appointed in November 2007, made up of AMs and MPs drawn equally from Labour and Plaid Cymru, with one former Plaid MP and AM, Cynog Dafis (see Figure 6). This Committee has the task of establishing the Convention's terms of reference.

The idea of the Convention, which emerged towards the end of two months of negotiations between the parties, was a complete innovation. It was not mentioned in any of the manifestos in the May 2007 election, and was not considered as part of the earlier so-called 'Rainbow' agreement between Plaid Cymru, the Conservatives and the Liberal Democrats. In this respect it is important to note that the idea came from the Labour side. Certainly, it has the effect of diminishing the prospect of a Labour backbench revolt at Westminster since it has the effect of locking MPs into the referendum process at an early stage.

Figure 6: All-Wales Convention Establishing Committee

Chair: Sir Emyr Jones Parry

Members:

Labour

- Lynne Neagle AM, Torfaen
- Christine Chapman AM, Cynon Valley
- Jeff Cuthbert AM, Caerphilly
- Alun Davies AM, Mid and West Wales

- Nia Griffith MP, Llanelli
- Nick Ainger MP, Carmarthen West and South Pembrokeshire
- Jessica Morden MP, Newport East
- Ian Lucas MP, Wrexham

Plaid Cymru

- Helen Mary Jones AM, Llanelli
- Alun Ffred Jones AM, Arfon
- Dai Lloyd AM, South West Wales
- Nerys Evans AM, Mid and West Wales

- Elfyn Llwyd MP, Meirionnydd Nant Conwy
- Hywel Williams MP, Caernarfon
- Adam Price MP, Carmarthen East and Dinefwr
- Cynog Dafis, former MP for Ceredigion and AM for Mid and West Wales

Jane Hutt, who negotiated the *One Wales* agreement with Plaid Cymru, said the Convention was an indication of the seriousness with which the Labour side took the referendum commitment. As she put it:

“The Convention is a very good example of what can emerge from the dynamics of political negotiations over a short period. It reflects the reality that we need a route map to take us from here towards securing a positive result in a referendum. It was an indication of our desire to make the commitment work in practical terms rather than setting it out as part of a wish list. There is no point our going into a referendum unless we know we’re going to win it. The Convention idea is a clear indication that *One Wales* is a serious document.”¹³

However, it is fair to say that at the start there was a good deal of questioning about the purpose and precise role of the Convention. After all, the Richard Commission had only recently performed the role of defining a consensus around what should be the next constitutional step for Wales. Perhaps the main impact of the Convention will be to ensure that the political debate maintains momentum. According to Sir Emyr Jones Parry the Convention has three objectives:

¹³ Quoted in John Osmond, *Crossing the Rubicon: Coalition Politics Welsh Style*, IWA, August 2007, page 51.

“First is to sensitise Wales in general more about what the Assembly does, its powers, and what its powers could be. Secondly, is to go through the issues which lead to whether or not full legislative powers should be taken. Thirdly, if there is to be a referendum, the Convention’s report will be a quarry of information.”¹⁴

What this description failed to pin down was the extent to which the Convention would return to the Richard Commission agenda. That is to say, would it open up the two key areas on which the *One Wales* agreement is silent: the number of AMs and the method of their election? There is no doubt that Sir Emyr himself is persuaded of the need to do so. In a note he sent to the members of the Establishing Committee shortly before its first meeting in Westminster at the end of December 2007, he drew attention to the need to explore capacity issues around the Assembly’s current operation and the implications of moving towards full legislative powers. He also said the Convention should take account of the inter-relationship between the numbers of AMs and MPs and the implications for voting methods.

This defines the difficult terrain in drawing up the terms of reference. The Establishing Committee is likely to take up much of the first half of 2008 on this task with the Convention taking shape by June. It is envisaged that it will propose, and perhaps nominate, a Steering Group of 12 to 15 people who, working under Sir Emyr’s chairmanship, will provide as it were an executive arm. In turn, the Steering Group will be advised by a wider network made up of panels representing sectoral interest groups, such as the health service, farmers, teachers, small businesses and so on. In addition there may be a randomly selected ‘citizen’s jury’ along the lines of the BBC Wales 60 group that paralleled the membership of the National Assembly in the run-up to the 2007 election.

¹⁴ *Western Mail*, 24 November 2007.

6. The UK 'Pandora's Box'

As well as taking into account Welsh circumstances the Convention will be obliged to respond to constitutional developments in the rest of Britain. Indeed, there may be something of a paradox that the next move towards full legislative powers may well be driven more by events in Scotland and England than any wish of the people of Wales expressed in a referendum.

The first driver of change is likely to be the new SNP Scottish Government which published a White Paper in August 2007 charting a course towards an independence referendum. Of course, the SNP is leading a minority Government, so there is little immediate likelihood of it finding a majority in the Scottish Parliament for a referendum. It is noteworthy, too, that SNP leader and First Minister Alex Salmond has said it will take a decade for his country to become independent, suggesting 2017 as the date.¹⁵

One senses therefore, that the White Paper was more about extending the Scottish Parliament's powers than making the case for independence. And, indeed, it identifies the following, reserved areas that arguably could be devolved: fiscal and economic policy; trade and industry, including employment; social security and pensions; energy; transport; equal opportunities; broadcasting; and other social policy issues such as abortion and the misuse of drugs.

The SNP should be able to call in support from the Liberal Democrats on this agenda. In 2006, for example, the Steel Commission, under the Scottish Parliament's former Presiding Officer Lord Steel, made comprehensive recommendations for giving the Scottish Parliament revenue raising powers. As the SNP White Paper comments, this would move the United Kingdom constitutional in a federal direction.¹⁶

The Liberal Democrats may well be in a strong position to influence events if next UK general election results in a coalition between them and Labour. There are many possible permutations. But a potential scenario is if Labour could find itself with a majority of seats in the UK as a whole, but not within England. It might then need a coalition with the Liberal Democrats to fend off the Conservative argument for "English votes for English laws".

The Conservatives are considering proposals that would mean that only MPs representing constituencies in England would be allowed to legislate on English matters. Drawn up by former Minister Sir Malcolm Rifkind they would entail an English Grand Committee voting on areas such as education and health. These proposals are currently being considered by party leader David Cameron's Democracy Taskforce, led by former Chancellor Kenneth Clarke, which is due to report during 2008. There is no doubt that David Cameron

¹⁵ The Scotsman, 14 November 2007.

¹⁶ *Choosing Scotland's Future – A National Conversation*, page 6

himself is committed to the idea. In July 2007 he told the *Western Mail* he would implement “English votes for English laws” if he won the next general election:

“It’s relatively straightforward to look at a piece of legislation and ask if it only affects English constituencies, or which bits of it only affects English constituencies. What Ken Clarke’s task force will do is look at the right way to deliver this policy.”¹⁷

Labour has seized on this commitment as a threat to the integrity of the UK. In a pamphlet published at Labour’s October 2007 conference, First Minister Rhodri Morgan and Secretary of State Peter Hain devoted an eight-page section to attacking “English votes for English laws”:

“The result would be Scottish, Welsh and Northern Irish legislatures, an English Parliament, and essentially an overarching federal Parliament in charge of national [*sic*] issues such as defence and the economy. What would happen when a government had a parliamentary majority including Scotland and Wales but not in England? A UK Government which could not carry English legislation could not effectively govern since without a majority in the House Prime Ministers may well be forced into unstable, minority coalitions dependent on where their majority was held. This would profoundly alter the whole basis of our constitution, potentially sidelining Welsh and Scots from being able to influence the composition of the Government whilst at the same time leaving what would be tantamount to an ‘English Government’ without a majority across the whole House ... Playing to the populist gallery of English nationalism opens up a constitutional Pandora’s Box.”¹⁸

¹⁷ *Western Mail*, 20 July 2007.

¹⁸ Peter Hain and Rhodri Morgan, *Wales United: Partnership for Progress*, Bevan Foundation, October 2007.

7. A Welsh Jurisdiction

Meanwhile, there is a creeping incrementalism about the legislative changes taking place in Wales. In a speech to the Law Society in September 2007 Carwyn Jones, the Counsel General said the 2006 Wales Act meant it was inevitable there would be greater divergence between the law in Wales and England:

“If the Welsh electorate in a referendum were to sanction the coming into force of Part 4 of the 2006 Act, allowing the Assembly to exercise primary legislative powers, then the scope for divergence would increase materially again. In a situation where the Assembly is able to exercise primary legislative powers, I think it is inevitable that the question will surface as to whether it is sustainable for the single jurisdiction of England and Wales to be retained. It is a question which neither the Welsh Assembly Government, nor the Legal Community in Wales can shy away from. The debate on the matter will have to take place.”¹⁹

What would the creation of a Welsh jurisdiction involve? The Wales Circuit’s Presiding Judge, Sir Roderick Evans, has outlined five key requirements (see Figure 7).²⁰

Figure 7: Requirements for a Welsh jurisdiction

- Repatriation to Wales of law-making functions.
- Development in Wales of a system for the administration of justice in all its forms, designed to serve the social and economic needs of Wales and its people.
- Development of institutions and professional bodies which will provide a proper career structure for those who want to follow a career in Wales in law.
- Making the law and legal services readily accessible to the people of Wales.
- Development of a system which can accommodate the use of either the English or the Welsh language with equal ease so that in the administration of justice the Welsh and English languages really are treated on the basis of equality.

A glance at these requirements reveals how far reaching the changes to Welsh political culture would be. The coming of full legislative powers to the National Assembly will not merely create a more fully-fledged institution along parliamentary lines; just as important it will create a bulwark for national identity.

¹⁹ Carwyn Jones, Speech to the Law Society’s Legal Wales Symposium, Cardiff, 21 September 2007.

²⁰ Sir Roderick Evans, *Legal Wales – the Way Ahead*, Law Society Annual lecture, 2006.

8. Public Opinion

To what extent is public opinion keeping up with this agenda? After all, the 1997 referendum that established the Assembly was only narrowly won, by less than one per cent— 6,721 out of the 1,112,117 votes cast. This was hardly a ringing endorsement. Nonetheless, it was a major change since the previous referendum in 1979 when there was a four-to-one majority against the Assembly proposed at that time.

In fact, the result represented a remarkable 30 per cent swing in votes for the Yes side. And since the 1997 opinion has swung emphatically in favour of establishing a Scottish-style Parliament with law-making powers, as measured by regular surveys (see Figure 8). The change has been so graphic that it is hard not to trace it to the experience of the referendum itself.

Figure 8: Constitutional preferences in Wales 1997-2007

	1997	1999	2001	2003	2006	2007
Independence	14	10	12	14	12	12
Parliament	20	30	39	38	42	44
Assembly	27	35	26	27	25	28
No elected body	40	25	24	21	21	16

Source: Institute of Welsh Politics, Aberystwyth University, ESRC-funded survey: sample of 900 respondents from all 40 constituencies

In the years leading up to the referendum, polling (by BBC Wales and others) showed a consistent 40 per cent of the electorate that were against change. The remaining 60 per cent were split between about 25 per cent that supported Labour's Assembly proposals, 25 per cent that favoured a Scottish-style Parliament, with the remaining 10 per cent or so opting for independence.

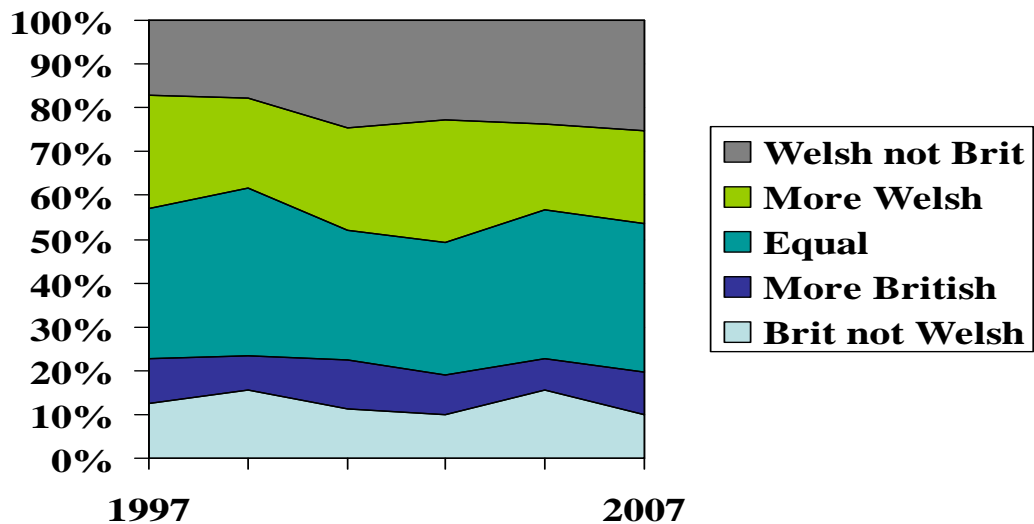
Following the 1997 referendum this pattern shifted fundamentally and has been shifting ever since. According to the latest survey, carried out in the wake of the May 2007 Assembly election, only 16 per cent are opposed to some degree of democratic self-government for Wales. Twenty eight per cent support the current Assembly, and 12 per cent support independence. The important statistic, however, is that 44 per cent now favour moving ahead to achieve a Scottish-style parliament.

Figure 8 shows how this new realignment has solidified following the 1997 referendum. The change is sufficient for Professor Richard Wyn Jones, Director of the Institute of Welsh Politics which has carried out the surveys, to judge that there is now "a settled will" in favour of the National Assembly acquiring full legislative powers.

Drilling down into the statistics it is possible to discover more detailed changes in attitudes, in particular amongst those who were opposed to the Assembly in 1997. This can be demonstrated by relating these changes to perceptions of national identity and to the geographical location of respondents within Wales.

Figure 9 shows the changing proportions, between 1997 and 2007, of various groups by identity allegiance between feelings of Welshness and Britishness within Wales. This is calibrated on the so-called Moreno scale of five categories - those regarding themselves as Welsh not British, more Welsh than British, equally Welsh and British, more British than Welsh, and finally British rather than Welsh.²¹ It can be seen that over the decade there have been relatively little change in the proportions, except perhaps for a slight increase in those regarding themselves as Welsh not British.

Figure 9: National Identity, 1997-2007

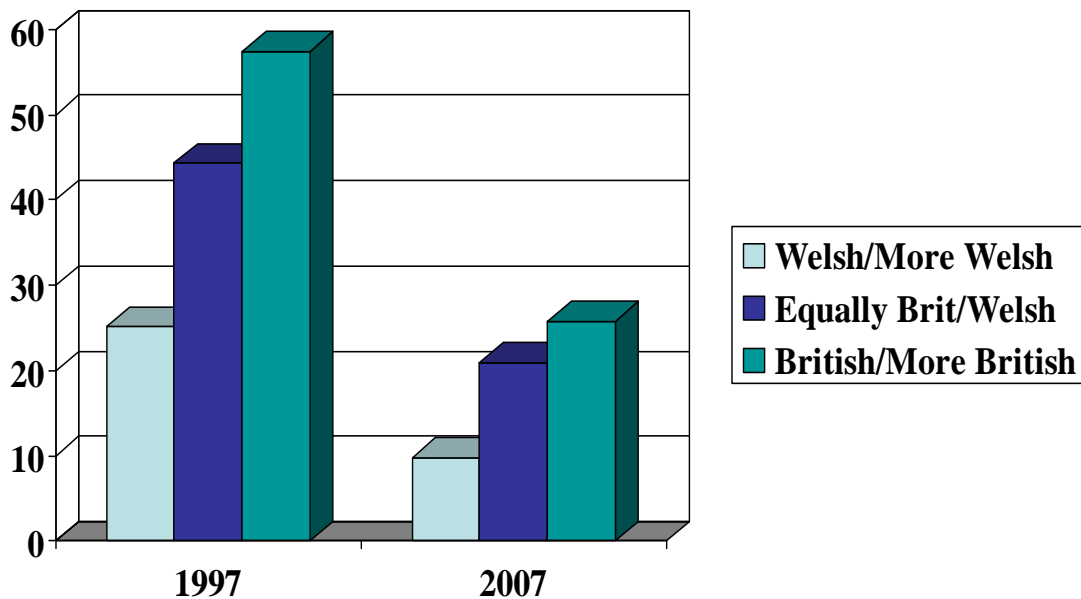


However, when these identity variations are related to those who were opposed to devolution in the 1997 referendum, it can be seen that there has been a significant shift in the intervening ten years - see Figure 10. In 1997, of those opposed to the Assembly a significantly high proportion were among those who identified themselves as either British and not Welsh, or more British than Welsh.

By 2007, although these categories still formed the largest element still opposed to the Assembly, they had decreased markedly in comparison with the other two categories shown in Figure 10.

²¹ The categorisation follows that laid down by the Catalan political scientist L. Moreno in ‘Scotland and Catalonia: The Path to Home Rule’ in D. McCrone and A. Brown (Eds.), *The Scottish Government Yearbook*, Unit for the Study of the Government of Scotland, University of Edinburgh, 1988.

Figure 10: Opposition to devolution by national identity



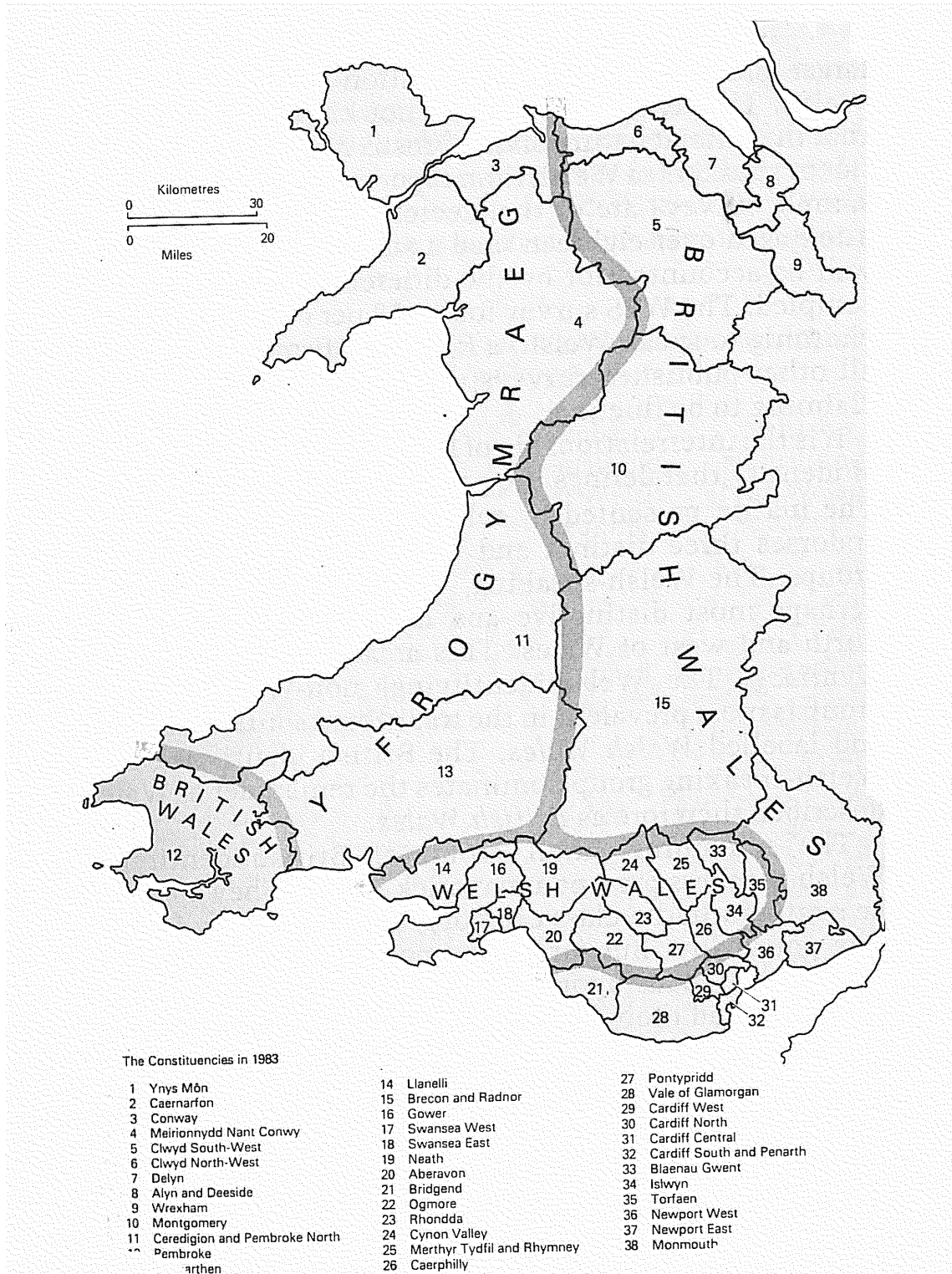
A comparable shift took place when degrees of opposition to the Assembly are assessed according to the regions of Wales. In the early 1980s the results of the 1979 Welsh Election Study produced what became known as the Three-Wales Model - see Figure 11.

This divided Wales into three distinct political areas based on responses to two survey questions: “Do you normally consider yourself to be Welsh, British, English or something else?” and “Do you speak Welsh?” A geographical mapping of responses to these questions produced the three areas.

The first area, which the researchers called *Y Fro Gymraeg*, covers the north-west and west-central heartland. Here Plaid Cymru sets the political agenda and, if not winning all the electoral contests, largely determines which party does. The second area was the Valleys, defined by the south Wales coalfield. This is Labour’s electoral heartland, from which it spread out to dominate Welsh politics for much of the 20th Century. The third area, described by the researchers in 1979 as *British Wales* was the indistinct remainder of the country: the south-eastern and north-eastern coastal belts, Pembrokeshire, and the regions of mid Wales bordering England.

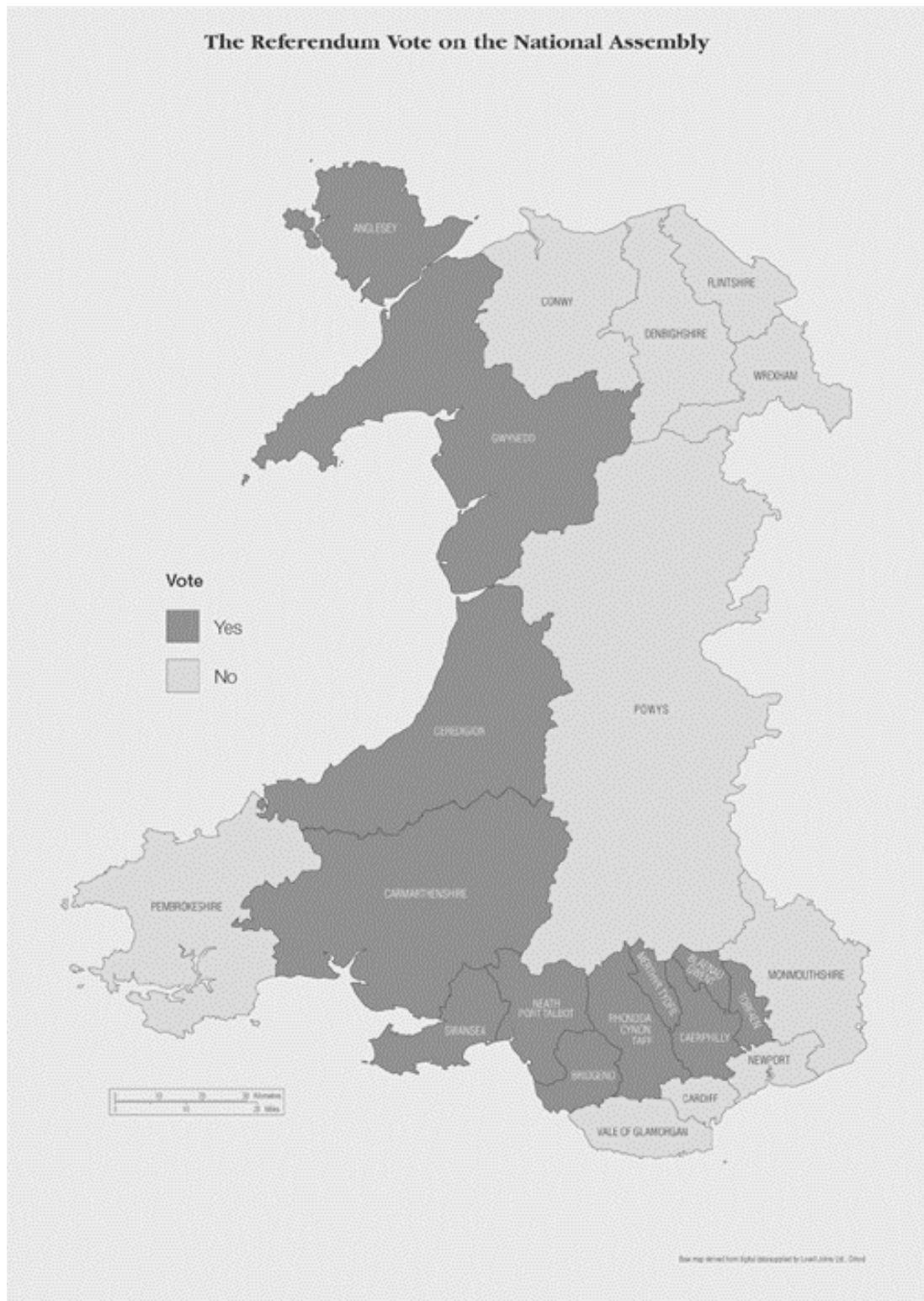
Mapping the 1997 referendum results by plurality in the 22 Welsh counties draws a striking resemblance to the ‘Three Wales Model’, with the Yes-voting counties corresponding broadly to *Y Fro Gymraeg* combined with *Welsh Wales* – see Figure 12.

Figure 11: The 'Three Wales Model'



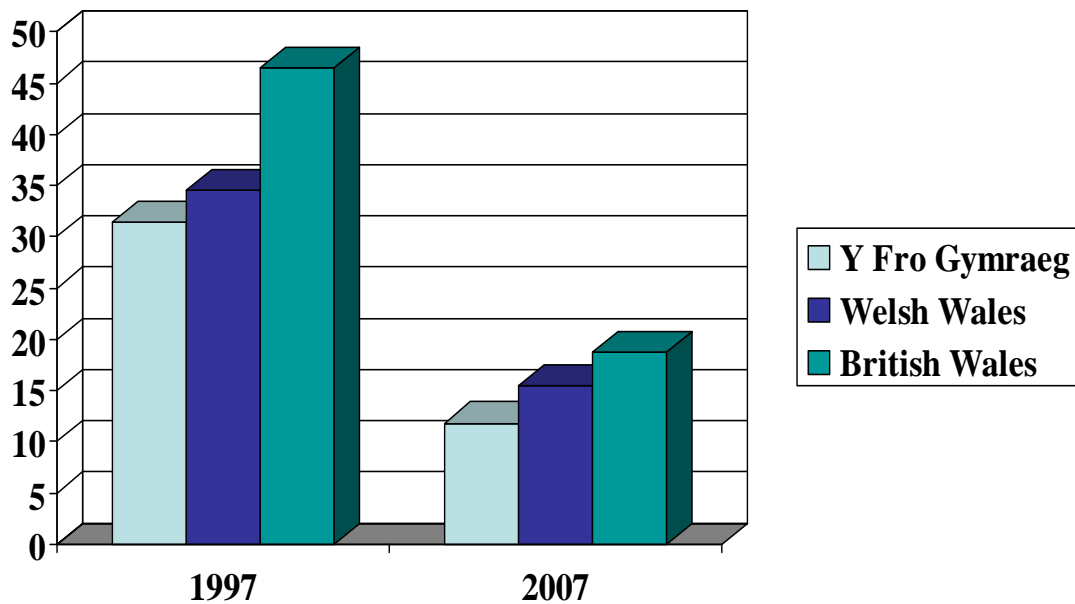
Source: Denis Balsom, 'The Three-Wales Model' in J. Osmond (Ed.), *The National Question Again*, Gomer, 1985.

Figure 12: Yes and No voting counties in the 1997 referendum



In any event, in the 1997 referendum the largest proportion of those voting against the Assembly were to be found in British Wales, as shown in Figure 13. However, Figure 10 also shows that by 2007 the numbers from British Wales now opposed to devolution had shrunk considerably, so much so that there was relatively little difference to the numbers now opposing devolution across the geographical political divide within Wales.

Figure 13: Opposition to Devolution in “Three Wales Model” Regions



A further indication of the underlying support for the devolution process is the contrast between attitudes to the Westminster and Cardiff governments.

Figure 14: ‘Most influence over Governing Wales’

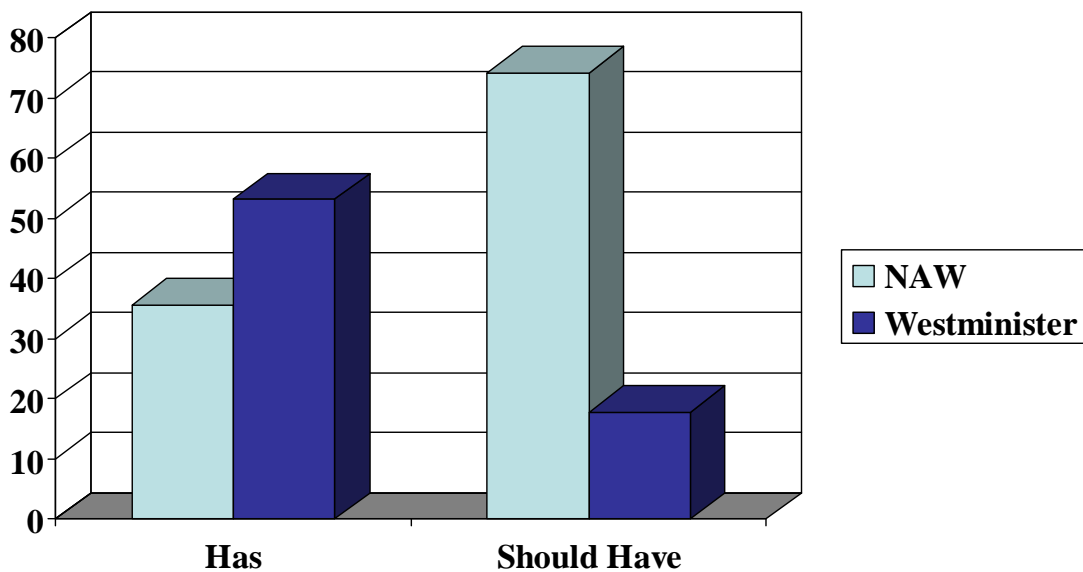


Figure 14 shows the graphic difference in assessment between which of them has, as opposed to should have, most influence on the way Wales is governed. While just over half believe Westminster has most influence in practice, fewer than 20 per cent think it should have. On the other hand more than 70 per cent believe the Assembly Government should have most influence.

These findings are highly significant since they suggest that a political unity around devolution is developing in what once was a highly fractured country so far as attitudes to Welsh political aspirations are concerned. Certainly, it supports the view that there is now a 'settled will' on moving towards greater powers for the National Assembly. Of course, whether these findings will be easily translated into an affirmative vote in the forthcoming referendum on extending the Assembly's legislative powers is another matter. Perhaps the most that can be extrapolated is that such a referendum is winnable.