

Y Pwyllgor Cydraddoldeb, Llywodraeth Leol a Chymunedau  
Equality, Local Government and Communities Committee  
ELGC(5)-12-17 Papur 3 / Paper 3



BRITISH  
ACADEMY

*for the humanities and social sciences*

# Human Rights from the Perspective of Devolution in Wales

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## About the author

Thomas Glyn Watkin was, prior to his retirement in 2010, First Welsh Legislative Counsel to the Welsh Assembly Government, with responsibility for delivering the Welsh Government's legislative programme. Before that, he had been Professor of Law and founding Head of Bangor Law School (2004–2007) and Professor of Law at Cardiff Law School (2001–2004), where he had taught successively as a Lecturer, Senior Lecturer and Reader since 1975. He combined his academic work with being Legal Assistant to the Governing Body of the Church in Wales (1981–1998), responsible for drafting the Church's bilingual legislation. Since his retirement, he has been an honorary professor at both Bangor and Cardiff Law Schools, and has frequently contributed oral and written evidence to the National Assembly for Wales and other bodies on constitutional issues affecting Welsh devolution. He is a Fellow of the Learned Society of Wales, a member of the Law Commission of England and Wales' Welsh Advisory Committee, Literary Director of the Welsh Legal History Society and an elected council member of the Selden Society. During 2016, he has been elected an ordinary academic bencher of the Middle Temple, where he was called to the bar in 1976 after having read Law at Pembroke College, Oxford. He is also a non-stipendiary priest in the Church in Wales.

## Introduction

The British Academy Policy Report, *Human Rights and the UK Constitution*, published in September 2012 [hereinafter referred to as ‘the Report’], noted that ‘any attempt to de-incorporate the Convention rights from UK law’ would occasion serious legal complications given that the competence of the devolved legislatures serving those parts of the UK required them all to comply with the Convention rights. The Report traced this requirement with regard to the Welsh Assembly to the Government of Wales Act 1998.<sup>1</sup> This paper demonstrates that, since 1998, the Convention has become deeply embedded in a distinct governance structure which it would not be possible for a mere UK-wide statute to alter without considerable attention to the detail of the Welsh government system.

The argument progresses first by showing that Welsh devolution is not simply a set of statutory provisions which a UK statute could alter easily. Rather it has been an unfolding process with far-ranging constitutional implications. Secondly, deeply embedded within the attribution of competences to the Welsh Assembly and Government lies the European Convention as a governing standard. This leads, thirdly, to a very different balance of powers between the legislature and the judiciary in Wales, compared with that of the UK as a whole or England-only acts made by the Westminster Parliament, and it encourages, fourthly, a different culture of justification for legislative acts. Fifthly, a significant difference between the UK Parliament and the Welsh Assembly is that the electoral system does not typically produce a dominant executive, so controls are exercised within the legislature and legislation is not simply the implementation of the will of a dominant executive, but often a more democratically crafted compromise. Sixth, though it is clear that subordinate legislation made by the Welsh Government may be subject to ordinary principles of judicial review as well as review for compatibility with the Convention, it is unclear whether the same is true for legislative acts of the Assembly and this needs to be considered when introducing “British rights”. Finally, any new arrangement needs to take account of the way in which the European Convention is not only part of Welsh law by virtue of the Human Rights Act, but also by the operation (for the moment at least) of EU law and of other international obligations of the UK. The Welsh situation requires extensive dialogue and not just unilateral action by the UK legislature.

# 1. Welsh devolution – “a process not an event”

The Welsh devolution settlement has undergone repeated revisions in the first two decades of its existence. The European Convention is an essential reference point in defining the scope of the powers of the Welsh National Assembly. To alter the Human Rights Act or to add a British Bill of Rights would have a significant effect on the acquired rights of that Assembly.

## The Welsh Assembly and its Powers

The Government of Wales Act 1998 has been followed by a Government of Wales Act 2006 and a Wales Act 2014. The 1998 Act created a National Assembly for Wales as a body corporate with both executive and subordinate law-making functions. Functions were not transferred from Westminster en bloc but virtually individually by a series of Transfer of Functions Orders. This model of devolution continued until 2007, during which time further functions were given to the Assembly. The Government of Wales Act 2006 ended the existence of the Assembly as a body corporate. Instead, the National Assembly became a legislature for Wales, and the Welsh Assembly Government was officially created, with Welsh Ministers, accountable to the Assembly, becoming responsible for the performance of the executive and subordinate law-making functions which the Assembly had previously undertaken in succession to the Secretary of State.<sup>2</sup>

Under the model of devolution which is currently in operation in Wales, the Assembly is able to legislate in relation to Wales by means of Assembly Acts, the provisions of which must, to be within competence, relate to one or more of the subjects listed under the twenty-one headings in Part 1 of Schedule 7 of the 2006 Act. Twenty of those headings, each fully populated with subjects, had been present in the Act since it was passed; the twenty-first – heading 16A Taxation – was added by the Wales Act 2014.

The competence of the Assembly to legislate in relation to those subjects is limited by the existence of certain exceptions, also to be found in Part 1 of Schedule 7, although Assembly Acts may always provide for the enforcement or appropriate implementation of provisions which are within competence. Provisions may not however breach any of the General Restrictions set out in Parts 2 and 3 of the Schedule, nor may the Assembly enact provisions which are contrary to European Union law or which are incompatible with the Convention rights incorporated into UK domestic law by the Human Rights Act 1998.<sup>3</sup> These limitations have applied since 1999, and also limit the subordinate law-making powers of the Welsh Ministers.<sup>4</sup>

## 2. The Consequences of Incompatibility with the Convention Rights

The Report in several places refers to the model of human rights protection which is afforded by the 1998 Act within the UK. It notes that while “In many states... written constitutions give the courts the power to overturn legislation which is deemed to violate basic rights... the UK has not followed this approach”.<sup>5</sup> Instead, the 1998 Act represents a ‘compromise’ by which executive acts which violate Convention rights may be invalidated and parliamentary legislation ‘as far as possible’ interpreted so as to be compatible with those rights, but “the courts have no power to overturn Acts of Parliament... [but] only issue a non-binding ‘declaration of incompatibility’”.<sup>6</sup> British judges, it is stated, “have no power to strike down decisions of the legislature”.<sup>7</sup>

While this is true with regard to UK parliamentary legislation, the same is not the case with the enactments of the devolved legislatures. If it is found by the Supreme Court that the provisions of a bill which has been passed by the Assembly would be outside the Assembly’s legislative competence, the Supreme Court can prevent it from proceeding for Royal Assent, and even when an Assembly bill has received Royal Assent and become an Act, it is still possible for its provisions to be challenged before the courts as being outside of competence and for the courts to invalidate the provisions in question.<sup>8</sup> Incompatibility with the Convention rights is one way in which Assembly Act provisions might be held to be outside of competence and struck down by the courts, although the courts are required to interpret provisions as narrowly as is necessary to avoid such an outcome if such an approach is possible.<sup>9</sup> Provisions of a bill may be referred to the Supreme Court for consideration prior to Royal Assent by either the UK Attorney General or the Welsh Government’s Counsel General, but after Royal Assent any person who is a party to proceedings before a UK court or tribunal may raise a question of legislative competence which will fall to be determined as a devolution issue in accordance with Schedule 9 to the 2006 Act. The adjudication of such an issue could lead to the striking down of Assembly Act provisions.<sup>10</sup>

To date, only one Assembly bill has been found to contain provisions which were beyond the Assembly’s legislative competence with the result that it was prevented from obtaining Royal Assent. This was the Recovery of Costs of Asbestos-Related Diseases (Wales) Bill, a private member’s bill passed by the Assembly and referred to the Supreme Court by the Counsel General for Wales.

The bill sought to allow Welsh Ministers to recover the costs incurred by the Welsh NHS in treating asbestos-related diseases from the employers of victims or even directly from the employers' insurers. The Supreme Court's verdict in this case [hereinafter referred to as the Asbestos Diseases case]<sup>11</sup> will be discussed further below, as it connects with another issue raised in the Report, raising as it did issues of the compatibility of Welsh legislation with the European Convention on Human Rights.

### 3. The Balance of Power between the Courts and the Legislature

The Report admits that there can be considerable disagreement as to what amounts to a breach of a person's human rights. It recognizes that such disagreements can be particularly acute with regard to 'qualified rights', and concludes that, "As a result, elected politicians are usually given the authority to decide how individual rights should be balanced against the public interest".<sup>12</sup> Again, it states that "the political realm is generally recognized to be the appropriate forum for resolving most disputed issues relating to questions of justice, fairness and rights".<sup>13</sup> Indeed, the Report connects the primacy given to representative government under the UK's unwritten constitutional system, a primacy based on the view that "Parliament represents the voters", with the inability of British judges to strike down the decisions of the legislature.<sup>14</sup>

But, as has been noted, this inability to strike down the legislation of the voters' representatives does not extend to the devolved legislatures, including the National Assembly for Wales. Provisions which are outside of competence can be struck down by the courts, including those which are beyond competence because of incompatibility with Convention rights. However, with qualified rights, the question arises of who is to be the final arbiter of whether the public interest warrants interference with a protected right and the extent to which interference is warranted. As the Report states: "getting the balance right between respecting the decisions of elected politicians and protecting individual rights is difficult".<sup>15</sup>



This difficulty manifested itself in the decision referred to, the Asbestos Diseases case, and divided the Supreme Court. As already mentioned the issue was whether the provision in the bill which allowed the Welsh Ministers to recover the cost of treatment given to a victim of an asbestos-related disease by the Welsh NHS from the insurers of the victim's employers at the time of the injury, when the injury might have occurred before the passing of the Act, was incompatible with the insurers right to peaceful enjoyment of their possessions under Article 1 of Protocol 1 [hereinafter 'A1P1'] of the ECHR. A1P1 states:

- Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
- The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Lord Mance, delivering the judgment of the majority of the court, stated that:

- The general principles according to which a court will review legislation for compliance with the Convention rights ... are
  - (i) whether there is a legitimate aim which could justify a restriction of the relevant protected right,
  - (ii) whether the measure adopted is rationally connected to that aim,
  - (iii) whether the aim could have been achieved by a less intrusive measure and
  - (iv) whether, on a fair balance, the benefits of achieving the aim... outweigh the disbenefits resulting from the restriction of the relevant protected right.<sup>16</sup>

While he was prepared to accept that at the first stage, and possibly at the second and third stages as well, the court would respect the legislature's judgement unless it was manifestly without reasonable foundation, he was not prepared to accept that this was the case at the fourth stage. Instead, he stated that:

- the approach in Strasbourg to at least the fourth stage involves asking simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved. The court will in this context weigh the benefits of the measure in terms of the aim being promoted against the disbenefits to other interests. Significant respect may be due to the legislature's decision, as one aspect of the margin of appreciation, but the hurdle to intervention will not be expressed at the high level of "manifest unreasonableness".<sup>17</sup>

## 4. A Culture of Justification

The Report acknowledged that such powers of the courts to protect individual rights "could be viewed as strengthening democracy" in that it "helps to create a 'culture of justification'".<sup>18</sup> The Assembly's Standing Orders require that every bill, upon introduction, be accompanied by an Explanatory Memorandum which must set out alternative methods of achieving the bill's purposes which have been considered, together with the reasons for having decided upon the proposed method.<sup>19</sup> Lord Mance regarded it as open to the court to examine the quality of the Assembly's decision making with regard to achieving a fair balance between the public interest being promoted and the protection of the rights in question. He said:

- if, at the fourth stage when the court is considering whether a measure strikes a fair balance, weight attaches to the legislative choice, then the extent to which the legislature has as the primary decision maker been in or put in a position to evaluate the various interests may affect the weight attaching to its assessment: ...<sup>20</sup>

He asserted that it should be open to the courts to use admissible background material to make that assessment.

Lord Thomas of Cwmgiedd, the Lord Chief Justice, delivering the judgment of the minority, disagreed with the majority's view that "weight" attached to the legislative choice; the minority view was that "great weight" should be given to it, a point emphasized on several occasions in the course of that dissenting judgment.<sup>21</sup>

Such an examination of decision making within the legislature – while consonant with the concept of "politico-legal justification" identified in the Report, "whereby governments can be required to justify their actions and how they impact upon the individual rights of persons subject to their jurisdiction" – could be viewed as contrary to article 9 of the Bill of Rights preventing the courts from impeaching or questioning speeches, debates and proceedings in Parliament. Recognizing this possibility, Lord Mance stated that:

- Perhaps in the light of article 9 there is a relevant distinction between cases concerning primary legislation by the United Kingdom Parliament and other legislative and executive decisions.<sup>22</sup>

The minority failed to discern any logical distinction between the Westminster parliament and the devolved legislatures in this regard.<sup>23</sup> The majority approach also results in a further, considerable difference between England-only legislation made by the UK Parliament and laws made by the devolved legislatures. There is a greater duty of justification in the Welsh legislative process and any change in the framework of constitutional rights in the UK would require changes in practice to that process of justification.

## 5. Combatting Executive Control of Law-Making

A typical justification for a Bill of Rights is to control executive dominance of the legislature.<sup>24</sup> Referring to the United Kingdom, the Report states that “the executive is often in a position to dictate how Parliament and public bodies in general choose to give effect to individual rights”.<sup>25</sup> It attributes this to the UK being “a majoritarian political system” and considers it to be potentially detrimental to the interests of minorities and other disadvantaged groups.<sup>26</sup>

Ironically, given the majority view in the Asbestos Diseases case, such executive dominance has not in practice been the case with devolved government in Wales. Since the Assembly was established in 1999, no single party has ever been able to form a government with a comfortable, overall working majority. The only governments to have had such a majority have been coalitions in two of the assemblies, while in the others, the majority party has had to govern by consensus with others on a confidence and supply basis.<sup>27</sup> As a result of the electoral system which returns forty of the sixty Assembly Members by the first-past-the-post system while the remaining twenty are elected by a method of proportional representation, the executive in Wales is not able to dominate the Welsh Assembly in the manner that a UK government with a working majority can dominate the Westminster parliament, or at least the House of Commons. It is therefore ironic that it is the quality of the highly consensual primary law-making of the Welsh Assembly that is apparently open to question in the courts, and it is significant in this regard also that the Recovery of Costs of Asbestos-Related Diseases (Wales) Bill was not a government bill but one proposed by a backbench Assembly Member, albeit a member of the party in government.

## 6. Judicial Review

The Report notes that “the Act requires the courts to invalidate acts of the executive which violate Convention rights”,<sup>28</sup> and thus subordinate legislation made by the Welsh Ministers is subject to the possibility of being struck down for incompatibility. The 2006 Act expressly states that:

- The Welsh Ministers have no power –
  - (a) to make, confirm or approve any subordinate legislation, or
  - (b) to do any other act, so far as the subordinate legislation or act is incompatible with any of the Convention rights.<sup>29</sup>

Persons who would qualify as victims for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights, as well as the law officers, may bring proceedings in domestic courts and tribunals on the basis that acts of the Welsh Ministers are incompatible with Convention rights.<sup>30</sup> Such a challenge would constitute a devolution issue under Schedule 9 to the 2006 Act and would fall to be heard and determined according to the procedures set out in that Schedule, including the possibility that the relevant law officers could have the issue referred directly to the Supreme Court. The question of whether a failure to act by the Welsh Ministers is incompatible with the Convention rights is also a devolution issue.

Subordinate legislation made by the Welsh Ministers is also susceptible to judicial review in the same manner as other acts of the executive in the United Kingdom.

The question of whether Welsh Assembly legislation is capable of being challenged by judicial review other than on the basis of competence has not arisen before the courts in the manner in which the matter was raised concerning the legislation of the Scottish Parliament in *AXA General Insurance Ltd. v Lord Advocate*,<sup>31</sup> but it is generally agreed that what was said in that case concerning devolved legislation in Scotland is equally the case with regard to devolved legislation in Wales. This was specifically contemplated by the judgments. Lord Hope said that he was “conscious of the implications of what the court decides in this case for the other devolved legislatures”,<sup>32</sup> and Lord Reed commented that the question of whether legislation of the Scottish Parliament “is susceptible to review by the courts under the common law as an irrational exercise of legislative authority... could in principle arise in relation to any legislation enacted by any of the devolved legislatures” and was therefore of clear constitutional importance.<sup>33</sup>

Addressing the question, Lord Reed believed that in so far as the powers of the Scottish Parliament, within the limits of its competence, were plenary, and did not have to be exercised for any specific purpose or with regard to any specific considerations, that grounds of review developed for administrative bodies with limited powers for identifiable purposes were not appropriate.<sup>34</sup> There remained however in his view the question of “whether the court possesses the power to intervene, in exceptional circumstances, on grounds other than those specified [regarding competence]... as, for example, if it were shown that legislation offended against fundamental rights or the rule of law”.<sup>35</sup> He concluded that:

- Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law.<sup>36</sup>

In the later *Asbestos Diseases* case, Lord Mance agreed that “If a devolved Parliament or Assembly were ever to enact such a measure, I would have thought it capable of challenge, if not under the Human Rights Convention, then as offending against fundamental rights or the rule of law, at the very core of which are principles of equality of treatment”.<sup>37</sup>

Lord Hope, in *AXA*, thought that in the case of “a government which enjoys a large majority”:

- It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.<sup>38</sup>

However, Acts of the Scottish Parliament were “not subject to judicial review at common law on the grounds of irrationality, unreasonableness or arbitrariness”. This, he said: “is not needed, as there is already a statutory limit on the Parliament’s legislative competence if a provision is incompatible with any of the Convention rights”. He thought that it would be “quite wrong for the judges to substitute their views on these issues for the considered judgment of a democratically elected legislature unless authorised to do so, as in the case of the Convention rights, by the constitutional framework laid down by the United Kingdom Parliament”.<sup>39</sup>

Lord Hope specifically related the absence of a power to review devolved primary legislation to the protection already in place through the Convention rights. It begs the question therefore of what the position would be with regard to such review by the courts if the Convention rights ceased to be part of the domestic law of the United Kingdom.

## 7. European Union law and Convention Rights

The current position is that to be within competence, Assembly Acts must not be incompatible with EU law.<sup>40</sup> As already indicated, if they are so incompatible they can be invalidated by the courts. The Report notes that “the Convention rights form part of the ‘general principles’ of EU law, which member states are obliged to respect when they give effect to EU legislation... [so that] they would still be potentially applicable by UK courts whenever EU law was in play”.<sup>41</sup> It is questionable therefore whether ‘de-incorporating’ the Convention rights would of itself be sufficient to free the Assembly from having to legislate compatibly with the Convention rights in order to be within competence. The situation, in this regard, will of course be different when the UK leaves the European Union and the requirement of compatibility with EU law ceases to apply, although the question of how the UK’s commitment to the ECHR would affect devolved legislation remains to be considered.<sup>42</sup>

The Welsh Ministers can also be designated as the appropriate authority to implement EU law under section 2(2) of the European Communities Act 1972.<sup>43</sup> To the extent therefore that the Welsh Ministers law making is in pursuance of such a designation, they continue to be required to respect the Convention rights as part of EU law’s general principles. This would remain the case even if the Convention rights ceased to be part of UK domestic law, for as long as EU law continued to apply in the UK.

As things stand at present, the failure of the Welsh Ministers to implement their obligations regarding EU law would also constitute devolution issues under Schedule 9 to the 2006 Act.

## 8. Other International Obligations and Convention Rights

The Report notes that “any attempt to ‘de-incorporate’ Convention rights in UK law and break the link with Strasbourg... may be incompatible with the UK’s international commitments” and that “any amendment or repeal of the HRA which de-incorporated Convention rights would... appear to be contrary to the UK’s international commitments”.<sup>44</sup>

Although, other than with regard to EU law, compatibility with the UK’s international commitments is not an issue which goes to the competence of the Welsh Assembly to legislate, it does constitute a ground upon which the Secretary of State may intervene to prevent a bill passed by the Assembly from receiving Royal Assent. If the Secretary of State has reasonable grounds to believe that an Assembly bill contains provisions which would be incompatible with international obligations, he or she may make an order prohibiting the bill from being submitted for Royal Assent. The Order, stating the reasons for its making, must be laid as a statutory instrument before both Houses of Parliament and is subject to annulment by either House, but otherwise takes effect. Ordinarily, such an order must be made within four weeks of the bill being passed by the Assembly.<sup>45</sup>

Should the Convention rights be de-incorporated in UK domestic law and incompatibility cease to be a specific ground for challenging Assembly legislation on the grounds of competence, intervention by the Secretary of State would remain as a mechanism for achieving compliance with the European Convention. However, such intervention prior to Royal Assent depends on the exercise of a discretion by the Secretary of State. There is no legal duty to intervene, and accountability for failure or refusal to exercise the discretion is political rather than legal. The citizen would therefore have lost the opportunity which currently exists of recourse before the UK’s domestic courts. Questions would therefore need to be answered as to whether and how the citizen could proceed if prejudiced by Assembly legislation in circumstances previously covered by the requirement of compatibility with the Convention rights.



## Conclusion

Any new scheme of rights needs to pay attention to the specific character of the devolution settlement that has emerged over the last 18 years. As the Report puts it, it is a question of how to get “the balance right between respecting the decisions of elected politicians and protecting rights”.<sup>46</sup> The Report considered that recalibrating the existing balance between the British tradition of parliamentary democracy and protecting individual rights might not only be difficult and thankless, but also unnecessary. It regarded the current state of UK human rights law to be “both principled and workable as long as Parliament, the executive and the courts continue to engage constructively with one another”.<sup>47</sup>

Such constructive engagement has not been a widely recognized feature of the working of the Welsh devolution settlement at least as regards the engagement, or lack of it, between successive UK governments of various political colours and the Welsh Government. In 2014, the Silk Commission, in considering intergovernmental relations, concluded that “While there are many examples of good practice, there is scope for improvement”, and made “a number of recommendations to enhance the existing mechanisms for improving relations between the two Governments, based on mutual respect and parity of esteem”.<sup>48</sup> Subsequently, in the words of a report by an independent review group, the history of the Draft Wales Bill 2015, “sadly illustrates... [that] the precepts of cooperation, communication and consultation which officially frame intergovernmental relations across the UK need to be taken seriously”.<sup>49</sup> There is little if anything therefore either in the history or in the present condition of the Welsh devolution settlement to suggest that the Report’s conclusion that recalibrating the defensible balance between respect for democracy and the need to protect individual rights exhibited by the current state of human rights law in the UK would be anything other than difficult.

# Endnotes

1. The Report, p. 44.
2. The Welsh Assembly Government was officially renamed the Welsh Government by the Wales Act 2014, s. 4.
3. GoWA 2006, s. 108.
4. GoWA 2006, s. 81(1), discussed below.
5. The Report, Executive Summary ¶ 6; p. 16.
6. The Report, p. 37.
7. The Report, p. 48.
8. GoWA 2006, ss. 112, 149; and Schedule 9.
9. GoWA 2006, s. 154.
10. In passing, it is worth noting that while Wales-only legislation passed by the Assembly is similar in this regard to the enactments of the other devolved legislatures, it is unlike legislation passed for England only under the procedure adopted to secure 'English Votes for English Laws' by the House of Commons, which enjoys the same immunity from being invalidated as the legislation of the UK parliament generally.
11. [2015] UKSC 3.
12. The Report, Executive Summary ¶ 3.
13. The Report, p. 15.
14. The Report, p. 48.
15. The Report, Executive Summary ¶ 16.
16. [2015] UKSC 3, at ¶45.
17. *Ibid.*, ¶46, ¶48.
18. The Report, p. 24.
19. Standing Orders of the National Assembly for Wales (September 2016), SO 26.6 (iii).
20. [2015] UKSC 3, at ¶156.
21. *Ibid.*, ¶114, ¶118, ¶124.
22. *Ibid.*
23. *Ibid.*, ¶122.
24. See Lord Hailsham, 'Elective Dictatorship', The Richard Dimbleby Lecture, The Listener, 21 October 1976, p. 496.
25. The Report, p. 16.
26. The Report, Executive Summary ¶ 4.
27. Labour and the Liberal Democrats shared power in the First Assembly (1999–2003), while Labour and Plaid Cymru formed the 'One Wales Coalition' in the Third Assembly (2007–2011). Labour governed alone without an overall majority in the Second (2003–2007) and Fourth Assemblies (2011–2016). (Assembly terms were extended to five years after the advent of fixed-term parliaments at Westminster to avoid elections to both being held in the same year). In the Fifth Assembly, elected in May 2016, Labour with 29 of the 60 seats is currently governing with the support of the sole Liberal Democrat AM, who has been included in the Welsh Cabinet.
28. The Report, p. 37.
29. GoWA 2006, s. 81(1).
30. GoWA 2006, s. 81(2), (3).
31. [2011] UKSC 46.
32. *Ibid.*, at ¶43.
33. *Ibid.*, at ¶99.
34. *Ibid.*, at ¶147.
35. *Ibid.*, at ¶149.
36. *Ibid.*, at ¶153.
37. [2015] UKSC, at ¶97.
38. [2011] UKSC, at ¶51.
39. *Ibid.*, at ¶52.
40. GoWA 2006, s. 108(6)(c).
41. The Report, p. 41.
42. See further below.
43. GoWA 2006, s. 59.
44. The Report, Executive Summary, ¶ 14, and p. 41; Tobias Lock, Human Rights Reform and the UK's International Human Rights Obligations, The British Academy.
45. GoWA 2006, s. 114. The four-week window for intervention opens afresh if the provisions of a bill have been referred to the Supreme Court and been held to be within competence.
46. The Report, p. 48.
47. *Ibid.*
48. See Empowerment and Responsibility: Legislative Powers to Strengthen Wales, the second report of the Commission on Devolution in Wales, March 2014: 5.8.1; 5.8.2.
49. See Challenge and Opportunity: the Draft Wales Bill 2015, the report of an independent review group organized by the Wales Governance Centre, Cardiff University, and the Constitution Unit, University College London, February 2016: 9.2. (The author of this paper was a member of the review group). That Draft Wales Bill was subsequently withdrawn by the UK Government, and a considerably-altered Wales Bill introduced in June 2016. This bill, which proposes the replacement of the conferred powers model of devolution for Wales with a reserved powers model, is currently before Parliament, but it makes no change to the requirement that Assembly legislation to be within competence must be compatible with the Convention rights and – despite the result of the referendum on EU membership – EU law.



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