



**Address given by Lord Dafydd Elis-Thomas, Presiding Officer, National Assembly for Wales, to the IWA, on the occasion of the launch of the book *Inclusive Government and Party Management*, 6<sup>th</sup> March 2001**

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**Reviewing A Democratic Body**

It is a pleasure to speak at the launch of this volume commenting on the work of committees in the National Assembly in the first year of their operation. I am grateful to the Welsh Governance Centre, the Constitution Unit, IWA and their funders for providing us with this critical commentary which is such an important part of becoming an 'education and participating democracy' (*The Long Revolution*, Raymond Williams).

The publication is timely as the Assembly itself (of which more later) is undertaking its review of Assembly Procedures that includes not only its activity in plenary session, its internal structure, its relationship with outside bodies but also the work of committees.

As Chair of the Review Group I can assure you that we will take this study as serious evidence and I will say to the authors of this study what I have said to others who have produced evidence for us namely that I gave you an undertaking that all points made will be considered in deliberative session of the Review Group, and responded to. It is not that we will of necessity take on all recommendations, clearly, as that will be a matter of consensus at deliberation within the Group, but a critical analysis is invaluable.

I am often asked why so early into our operation The Assembly should be reviewing its procedures.

The first reason is that for us, the democratically elected Members who constitute the Assembly, this is not a review, but a first view. Unlike Houses of the Westminster Parliament, or even Scotland, through its pre-legislative constitutional convention, we were not responsible for drafting our constitution. We are creatures of a particular Act of Parliament. (Or really as I have already demonstrated on another occasion like this, of two Acts of Parliament, since the 1978 Act is clearly a progenitor of the 1998 Act). Our Standing Orders and procedures were the creation of a National Assembly Advisory Group, and a Standing Orders Commission, reporting to the then Secretaries of State. Democratic scrutiny of our structures was undertaken, first by that blunt instrument of direct democracy, the referendum, which brought us into being, and then by Committees of the whole House of the two Houses at Westminster Parliament. A scrutiny in which as a participant I can label as clearly inadequate to the task. So this Review is the first opportunity we have, as an Assembly to look at our activities.

The second reason is the obvious evidence of dissatisfaction about the National Assembly's performance as a body.

I think it is very important for us to explore the nature of this dissatisfaction, so that we can address it. During 27 years in both Houses of the Westminster Parliament there was not a sitting week during which I did not experience frustration and dissatisfaction about the procedures of the UK Parliament, from the daily irritation of wasting 15 minutes every time we vote, to the inability of Committees, whether Select or Standing, to influence policy or amend legislation. Yet serious discussion of the profound weaknesses of the United Kingdom Parliament as a democratic body is very rarely seen or heard, except at meetings of Charter 88 or the Study of Parliament Group,

where officials of Parliament are much more critical of its structures, than most of the Members. Parliament is rarely labelled as a democratic failure.

This is not the case with the European Parliament, or the other institutions of the European Union. It is open house, particularly in the United Kingdom media, for criticisms of European Institutions. Can it be that one reason for this criticism, apart from the Anglophone nationalism being stirred up by the UK media, is the newness of the institutions themselves.

Philippe de Schoutheete argues in *L'Europe pur Tous* that national institutions (i.e. Member State institutions) derive from their past to profound and established legitimacy that is usually uncontested. Then he argues

‘for the European institutions, the situation is entirely different. Their legitimacy is almost confused with efficiency. It is based on results. (Those results are hardly negligible regarding peace, prosperity, security, and involvement in planetary decisions). But the results need only dwindle in one sector or another for the legitimacy of the entire venture to be brought into question’.

And Jean and Andre Sellier argue in their *Atlas De L'Europe Occidentale* that the legitimacy of national institutions was not acquired from the outset.

‘The truth is that the states were constructed little by little, or in fits and starts, in a contingent manner, before they gain the (more or less enthusiastic, support of their nationals)’.

But as in the case of the institutions of the European Union ‘above’ Member State structure so to were the devolved structure ‘below’ ... Schoutheete again:

‘it will certainly take time for the European Institutions to attain the same degree of legitimacy as the national institutions in the hearts of their citizens’.

Maybe I have the translation wrong there. The European Institutions certainly have legitimacy as they are established by Treaties, just as the National Assembly for Wales is legitimately established by the Government of Wales Act, though one could argue that in the drafting of primary legislation at Westminster its legitimate interests are not generally recognised! The issue is not really one of legitimacy it is one of legitimation and popular democratic legitimation at that. In the celebrative phrase of Jorgen Habermas the National Assembly for Wales certainly faces a ‘legitimation crisis’.

Whether that crisis is entirely of its own making as an institution is another issue. To follow the communication sociologists of the last quarter of the last century further on this theme we must ask to what extent is it the lack of a Wales public space that ‘symbolic space’ for full discussion and debate, which contributes to the apparent weakness of our democratic institutions. This is despite the efforts of the Institute of Welsh Affairs, which more perhaps than any other single institution apart from *The Western Mail* and *Good Morning Wales*, has sought to contribute to the making of that ‘symbolic space’.

The construction of the new Assembly building, which I was delighted to symbolically inaugurate along with the Finance Minister, Edwina Hart on St David's Day will provide a material focus as the Assembly's contribution to new symbolic space in Wales.

Reviewing the operation of an organisation therefore should be seen as a strength not a weakness. It is negative management culture in the private corporate sector as well as the public one that resists reviewing its operations for fear of change. Openly

reviewing its procedures at this stage gives the interested public the opportunity to contribute to further dynamic in change.

The Assembly Review of Procedure has its clear parameters inscribed within the existing constitution, in the Government of Wales Act. This is not a limitation to the review. For two reasons. The Welsh Administration, the Partnership Government, has already announced its intention to establish a broader review, and this and its timing were confirmed today in Question Time by the First Minister. Such a political decision is obviously a matter for them, and not for me as Presiding Officer. However I do hope that review will include independent constitutional experts with experience of devolved bodies including Commonwealth jurisdictions, as well as experts in public law from the judiciary, and a high flying corporate management consultant.

My second reason for not regretting the present Review does not go outside the inscription of the Government of Wales Act, is that Act itself a very productive text, which we have not yet used to the full. Whereas I have come across plenty of occasions where content of primary legislation, and in particular transfer orders, may have caused difficulties or uncertainty for the Assembly in plenary session, in committee, to take formal decisions, I have not at any time felt constrained by the Act itself in the conduct of Assembly Business . Members, individually and collectively, have been able to express a view on ‘matters affecting Wales’.

My concern as Presiding Officer is not with what the Assembly has been saying or deciding. My concern is **how** it is saying it. I am well aware that the form cannot be separated neatly from the content entirely, in any human cultural action, which must include a constitutional body. However in approaching the issue from the point of view of form, of **how** we do things, or try to do them, this may help to illuminate important facets of the content, of the outcome of the work of the organisation itself. It may also help to refocus the debate **from** the question of legal powers, to the issue

of political and constitutional **competence**, where in my view, the argument really should take place.

Powers as codified in legal text is one thing, democratic output is another. With the increasing growth of interdependence among different levels of governments, then in the words of De Schoutheete 'powers is no longer defined mainly in terms of control and domination but in terms of influence and access to the ... decision-making level'.

If this is true of interState relations it is even more relevant to the relations between devolved bodies.

But this debate about powers and competencies between democratically elected bodies is not unique to Wales. How could it be? The building blocks of democratically elected bodies are more or less the same within the Commonwealth tradition derived from Westminster and the mainland European and United States traditions except that the same building blocks are put together in a different configuration. It is a good benchmarking exercise for the development of the Assembly to compare and contrast its mode of operation with the devolved bodies in the United Kingdom.

The Scottish Parliament, the Northern Ireland Assembly, and the Greater London Assembly all differ in their competencies, and structures. What they all have in common is a clear and intelligible separation of powers between the Legislature and the Executive, or between representation for scrutiny, and the Mayoral or Ministerial Executive.

Benchmarking must not only be with UK devolved bodies. Marking can also be with both Houses of the Westminster Parliament, for example in the scrutiny of subordinate legislation, and the work of Select Committees in the House of Lords, though I can't readily think of what might function as a quality benchmark for the House of Commons!

A better exercise however may be in benchmarking with devolved bodies in the Commonwealth tradition. It was worth studying the paper on ‘The Evolution of the Office of the Assembly’ produced by the Ontario Legislative Library. It charts the development of a democratic body in Ontario. It was the Commission under the chairmanship of Dalton Camp appointed in 1972 by the Progressive Conservative Government which reviewed the operation and effectiveness of the Ontario Legislature. In its second report in December 1973 the Commission suggested

‘that the administration of a legislative assembly had not developed along lines consistent with the ideals of parliamentary democracy’.

The result of this was the creation of the ‘Office of the Assembly’ ... as the study argues:

‘as is fitting in the system of responsible government whereby the Executive is accountable to the legislature, the Office of the Assembly is separate and distinct from the Government of Ontario’.

The Camp Commission argued that the independence of the Legislature from the Executive would be incomplete as long as the Government physically controlled the Precincts of the Legislature. Those of you who know the geography of the Government and Legislative Assembly buildings in Ontario will know that it is the Speaker who controls the tunnel connecting the shared Whitney block to the Legislative Building.

In the provision of legal services, although the Chief Legislative Counsel and his other staff are employees of the Administrative Attorney General and not of the Office of the Assembly, the Standing Orders of the Legislature in Ontario requires them to

provide confidential assistance to Members, primarily in a drafting of private members bills and to the committees of the Assembly.

Readers of the regular IWA reports on the work of the National Assembly, as well as of the volume we are launching today, will be well aware of the equivalent issues in Cardiff Bay, to those I have cited in Ontario.

As I have emphasised, my concern as Presiding Officer, and that of my Deputy, is not with the '**what**' of policy but the '**how**' procedure. I am of course well aware of the inter-relation between them, and more importantly the confusion between them that an unclarified relationship between and executive and legislative operation of an organisation propagates.

I will now ask the question **how** are we getting on with developing the work of a democratic body, bearing in mind that it is the continuing performance of a government body as a democratic body, of the political interaction of its procedures, which creates the dynamic of the body itself. Democracy as representation is not just a legal literary text, it is performance art. How has that performance been? I can only tell you what it was like for me.

The Assembly is ahead in the art of communication. It is still the most highly developed electronic democracy in the world.

It has begun to develop the separation of powers described as being essential for 'responsible government'.

It has provided opportunities for representation on immediate raising of issues relating to the crises that have affected Welsh electors from steel to foot and mouth.

It has created a space to celebrate its own new constitutional culture in ‘the Assembly at the Pierhead’. In the Pierhead it has refurbished and opened for public access a temple of 19<sup>th</sup> century capitalism. It has begun the construction of the 21<sup>st</sup> century concept building of transparent fully accessible democracy. At Crickhowell House it has a very flexible back office, with four flagpoles, one for each level of governance in which we are placed, and great Channel views..

It has provided a new media focus for political debate from its 4<sup>th</sup> floor media centre studios to its digital coverage.

It has welcomed representatives from parliamentary bodies throughout the world, and has established a close working relationship with UK parliamentarians in the Lower and Upper chambers particularly through the relationships with the Welsh Select Committee and with the Committee on Delegated Legislation in the House of Lords.

It has provided day to day scrutiny in Committee and in Plenary of policy proposals and has itself through the Committee process generated ELWA, and Culture in Common, and has articulated the continuing argument over the objectives and targets of NEDS.

It is involved directly in international bodies and in particular the Commonwealth Parliamentary Association and the British and Irish Parliamentary Body.

It has recruited the Clerk of the Foreign Affairs Committee of the House of Commons to be its Clerk of the Assembly, a better trained Parliamentary Clerk I certainly could not imagine.

It has conducted its business bilingually with equality for the Welsh and English languages. Whereas political and cultural debate about languages and identity has raged outside the Assembly and has been promoted actively by BBC2's promotion of

linguicism, rows about language have been totally absent from the floor of the Assembly. All parties have actively participated in the one to one language tuition which is provided, particularly in sound bites!

If these are some of the answers to the questions how the Assembly has done things, how about its partner organisations?

I will depart from my impartial position by making one more plea as a UK parliamentarian, as well as an AM.

What we do is still inscribed within the precedent set by the first Transfer of Functions Order. No Act of the Westminster Parliament gives a general competence for the National Assembly to make policy decisions. It is indeed possible as David Lambert the legal adviser of the Presiding Officer, and Wales's leading public lawyer, has emphasised on a number of occasions, to give such a competence to the Assembly, under Section 34 of the Government of Wales Act that is by reference to the subject matter of the Act. But no Act so far has given general competence to the Assembly in its subject matter. Some Acts, such as the Local Government Act 1999 have given powers to be exercisable in Wales not by the Assembly but by the Secretary of State. Other powers deriving from European Community Legislation give more limited powers to the Assembly as compared to those given to Ministers of central Government in that same instrument (the EC Designation Number 3 Order 1999). As I argued previously a year ago a few blocks away the Assembly needs far wider subordinate legislative powers in order to have a proper policy development role. This could be achieved by giving wider, rather than narrower powers to the Assembly in specific Acts, as compared with those given to UK Ministers as regards England. Such changes only require a well-drafted Wales clause to new legislation as it emerges from the Whitehall/Westminster machine. The Assembly could also be given the power to amend existing relevant legislation which is set out in the Transfer Orders where currently only some powers in clauses are transferred.

The argument proposed against this is that it is not appropriate in Parliamentary terms in Westminster to give the National Assembly Henry VIII powers, as wide Ministerial powers in Bills are known. However for those who have a knowledge of late medieval Welsh history it would seem to me to be very appropriate taking into account the Tudor legislation of 1532-1538, to confer Henry VIII powers on the National Assembly for Wales, as a final recompense for the Acts of union!

I would also re-iterate the request made by parliamentary colleague that there should be a clearer way of informing Members of both Houses as to the agreed wishes of the National Assembly. While there is obviously a continuing intergovernmental dialogue between the Cabinet of the Government of Wales and the Secretary of State and the Wales Office, such a dialogue does not extend to the two Parliamentary bodies. This despite the fact that both Houses at Westminster are responsible for the primary legislation affecting Wales, and subordinate legislation inscribed by legislation at Westminster is enacted in Cardiff Bay, as it was this very afternoon by that younger and more gender-representative democratic body.