

CONSTITUTIONAL RELATIONSHIPS AND SOVEREIGNTY IN THESE ISLES

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This summary paper explores constitutional models of reform for the UK generally, and Wales specifically.

1. INTRODUCTION

Summarising the nature of today's United Kingdom (UK), the introduction to the report *Devolution and the Future of the Union* (Constitution Unit, University College London 2015) explains that the 'economic union provides the UK with a single market, a single currency and a strong central fiscal regime. The social union provides the social solidarity which binds the UK together, by redistributing revenue, and pooling and sharing risk through welfare benefits and pensions. In the political union, every part of the UK is represented through the Westminster Parliament, which manages the economic and social unions, and as the sovereign parliament can itself reshape the political union.' However, the report goes on to highlight that 'Whitehall lacks capacity to think about the Union because it has relegated it to issues of devolution on the fringes.'

Devolution, as a governance model, leaves Westminster's parliamentary sovereignty technically intact, hence its acceptance by most UK politicians. Its various manifestations have progressed incrementally and asymmetrically in the last two decades. During this time, the EU has been part of the fabric that holds the UK together. The pre-eminence of EU law, and its interpretation by the EU Court of Justice, has safeguarded legal and regulatory norms across copious fields, including the devolved areas. The UK internal market has been sustained by the conventions of the EU internal market. Brexit risks these interrelated competences becoming increasingly unsound, yet the ongoing withdrawal process involves a strong steer towards centralisation in favour of Westminster, due to parliament's twin role in expediting the UK government and that for England.

To protect the UK's unity post-Brexit, the Welsh Government has suggested federalism as a way forward, mirroring unionist views in Scotland. Federalism, whilst admittedly delivering more powers to Wales, offers only restricted opportunities for expanding Scottish autonomy beyond the status quo, and does little to tackle the UK's future relationship with the EU in a way that is satisfactory to the Scottish Government. Federalism would likely deliver reform of the Barnett formula, as desired by the Welsh Government, but would impact negatively on the Scottish block grant, strengthening the attraction of a second independence referendum. Some politicians may even consider it intolerable to restructure the UK along federal principles, seeking rather to expand Westminster's reach through Brexit. This would cast an ever longer shadow over the devolution settlements as the UK economy adapts to functioning separately from the EU. Repatriation to Westminster of EU competences in fields otherwise devolved could also hasten calls for Scottish secession.

With many today asserting a multicultural Welsh, Scottish, Northern Irish, or English character along with a form of dual nationality which embraces a British personality, it is reasonable to reconsider the nature of Westminster's parliamentary sovereignty. The pressing issue of our time relates to whether sovereignty, as currently understood, should be shared across these five territorially defined identities (including that of Britain) in a traditional federal arrangement, or instead assigned individually to the four nations – Wales, Scotland, Northern Ireland, and England – which in turn could lease parts of their sovereign authority to common central institutions of a fundamentally British composition, and/or European.

2. A SUMMARY OF OPTIONS AND AREAS FOR FURTHER CONSIDERATION

The most effective modern constitutions articulate the essential framework of governance and are open to modifications in time, such as the pooling of sovereignty in supra-national bodies. The following pages summarise the various applications of a partially sovereign and sovereign Wales in relation to a selection of potential isle-wide and European structures, with further detailed consideration required of the below:

- Internal workings of Wales as a nation state
- Institutional relationships within constitutional frameworks
- Allocation of powers, rights and laws
- Fiscal decentralisation and economic performance
- Societal impacts.

2.1 DEVOLUTION. *A sovereign Westminster leasing, in effect, some sovereign authority to the devolved institutions.*

It was Ron Davies, former Secretary of State for Wales, who said before the dawn of the Welsh Assembly in 1999 that 'devolution is a process not an event.' Since then, Wales experienced executive devolution with secondary law-making powers from 1999 to 2007, executive devolution with enhanced secondary powers between 2007 and 2011, legislative devolution under a conferred powers model from 2011 to 2018, and legislative devolution under a reserved powers model from 2018 onwards. During this period there have also been three Scotland Acts, each augmenting powers north of the border. Nevertheless, England continues to be omitted from the devolution reforms without its own discrete national parliament.

Today, Wales and Scotland hold legislative competence over all matters not explicitly reserved to Westminster, which implies a form of federalism, but without the usual sharing of sovereignty across parliaments. The statutes founding the devolved institutions are analogous to the constitutions regulating federal systems, both providing for and limiting powers of the legislatures and administrations, and dividing responsibilities between the territories and centre. Established by approval through referendums, the parliaments in Cardiff, Edinburgh and Belfast hold a measure of political entrenchment which has legal foundation in the Wales Act 2017, Scotland Act 2016 and Northern Ireland Act 1998, confirming devolution as a permanent component of the UK constitution, and detailing that the UK government will not normally introduce bills in Westminster to legislate on devolved spheres of competence. Still, Brexit challenges this.

More broadly, as highlighted by Dr Andrew Blick in his article *A United Kingdom Federation: The Prospects* (Federal Union 2018), the Human Rights Act 1998 partly reflects the Bill of Rights existing in most federal systems, while the UK Supreme Court operates several roles associated with a similarly titled body in a federal jurisdiction. The Joint Ministerial Committee, though found wanting in its application, somewhat replicates a federal mechanism for states to participate in important central decision-making. Despite this constitutional scaffold, the Welsh Assembly remains an institution lacking true influence and power. The customary argument that parliamentary sovereignty should rest solely at Westminster stands challenged.

2.2 FEDERALISM: *A partially sovereign Wales sharing sovereignty within a UK Federation.*

In a federation, sovereignty is shared between central and constituent nation governments. Each level has clearly articulated functions, with some powers pooled between them, but none has absolute authority over the others. An individual is a citizen of the central overarching structure *and* the constituent nation within which they reside, participating democratically in electing representatives to the legislative parliaments at both levels of government, with a party political system usually operating across the whole. Central institutions are in place to implement many taxes. Examples of federations include Germany and the USA.

Agreed practices and rules are confirmed through a written constitution, which articulates the division of responsibilities between the federal and constituent nation tiers. It identifies those powers assigned to the centre which may typically cover: the armed and security forces; border, diplomatic and international affairs; shared public services; cross-recognition of legal jurisdictions; currency and monetary policies; a single market, and select taxation. The remainder rests with the constituent nations. The constitution also apportions powers across two chambers of a central parliament. Representation of the nations in the second chamber is desirable, allowing a firm place for them to consider laws on behalf of the whole federation, with decisions such as joining or leaving international bodies, and constitutional changes made subject to its approval. The constitution and charter of rights, to which public institutions must abide, are enforced by a Supreme Court.

A federation sets out to provide constitutional clarity and stability across the constituent nations, with shared mechanisms in place for advancing joint interests and resolving disputes. It also capitalises on potential for realising some economies of scale in delivering centrally held functions, allowing for a proportional redistribution of the joint prosperity generated by the federal capital to the constituent nations. However, in the UK context, questions remain on how England, with 85% of the total population, could be integrated successfully into a federation without causing disputes between both UK and English tiers, and also whether the intended benefits of various functions being exercised closer to the people could be realised in such a large unit. England's regions may well be the only practical option for inclusion in a UK-wide federal system.

2.3 CONFEDERALISM: *A sovereign Wales pooling a few key functions within a British Confederation.*

A confederation is a union of sovereign member nations that for reasons of efficiency and common security have assigned a limited portfolio of functions and powers to a central body. Confederations are typically established by treaty, in contrast to a federal constitution, addressing crucially shared interests such as internal trade, currencies, defence, and foreign relations. Individuals elect representatives to take part in central decision-making processes more in the nature of trustees acting on behalf of their member nation's interests. National parliaments, not individuals, are formally represented in central institutions with people relating to their member nation, initially, and to the confederation next. Collective budgetary funds are raised annually through each member nation's contributions of a defined proportion of their Gross Domestic Product (GDP). The nations operate distinct tax regimes and are free to act unilaterally in all areas, unless centrally assigned. The Benelux Union has developed along these kinds of lines.

In the UK context, a confederal treaty enables Westminster to continue as the parliament of England, with a Confederal Assembly established to deliver a limited range of central powers. Each member nation adopts its own institutions within a broad constitutional framework—ensuring fundamental rights and protecting the integrity of political processes—whilst encountering the advantages and disadvantages of running a sovereign state within what is best summed up as a loose alliance. A treaty on issues of shared concern aims to mitigate any risks and costs associated with fragmenting previously held joint functions, noting that competitive considerations between member nations in a confederation complicate relationships inevitably.

Two of the more pressing challenges of adopting a pure confederal model concern the matters of large-scale economic management and currency controls. Since the central body is relatively weak, decisions made by a Confederal Assembly require subsequent implementation by individual member nations to take effect. These pronouncements are therefore not laws acting directly upon members, but instead have more the character of agreements between nations, which are always open to challenge and review, creating uncertainty in collective, strategic aims. However, the attraction of a confederation comprising member nations of radically different sizes is driven by a view that the UK already has more diversity than is often found in federations.

2.4 CONFEDERAL FEDERALISM: *A sovereign Wales leasing some sovereign authority to a League or Union.*

Professor John Kincaid, in his article *Confederal Federalism and Citizen Representation in the EU* (Western European Politics, Volume 22: 1999), highlights 'a confederal order of government operating in a significantly federal mode within its spheres of competence.' EU nations have delegated parts of their sovereignty over time to central bodies which agree laws on their behalf, as illustrated by existence of a common currency.

What might such a constitutional model look like in the UK? A League or Union of the Isles proposes a confederation of Wales, Scotland, Northern Ireland, and England, with aspects of federal-type control built into key policy portfolios to reflect the principles of equality and solidarity amid member nations. The Head of the Confederation continues to be Her Majesty and successors. Each nation holds all powers and rights which are not by treaty, or constitution, delegated to joint institutions, operating distinct legal jurisdictions.

A Council of the Isles acts with mechanisms in place to address the asymmetry between population sizes of member nations, specifically through the composition and distribution of seats. Members of the Council are typically elected for a four-year period by the electors of each nation, through the party political list approach of proportional representation, convening annually for a fixed time unless urgent business is demanded. The Council assumes its own standing orders, confirming a Presiding Officer and Executive whose Prime Minister and Ministers are responsible for enacting legislative power throughout the isles on matters involving defence, foreign affairs, internal trade, currency, large-scale economic factors, and home affairs.

Each Bill considered by the Council is circulated to the National Parliaments of Wales, Scotland, Northern Ireland, and England, in advance of final reading, with member nations empowered to make objections or suggest amendments before voting. On passing, the Head of the Confederation confirms the Bill as an Act of the Council of the Isles. The ultimate authority on the legitimacy of any law and treaty remains with the Supreme Court.

A Congress of Member Nations (comprising the Council's Prime Minister and Minister for Home Affairs, and the First Minister of each member nation), convenes regularly to discuss more general considerations which demand a degree of cooperation and harmonisation of laws across borders, over and above the key functions enacted in Council. These include: postal, telephonic and internet communications; railways, roads and associated licensing; airports, ports and traffic controls; coastguard and navigational services; energy, water and related infrastructure; income and corporation taxes; rates of sales, weights and measures; copyrights, patents and trademarks; scientific and technological research; broadcasting; meteorological forecasting; environmental protection; civil defence; emergencies, and the prevention of terrorism and serious crime.

The Congress, with support of the Council, also holds controls for confirming contractual-type arrangements for supplying any public services to member nations, if requested. To cover the common functions and agreements in place, the Council levies charges upon each member nation according to a defined proportion of their GDP annually relative to that of the confederation as a whole. These monies are paid into a consolidated fund from which the interest on the UK public debt continues as a standing charge. The League or Union aims to promote an equalisation of service provisions across the isles, operating formal instruments for resolving disagreements. National Parliaments are discouraged from misusing any advantages they possess in areas of potential contention including, for example, the economy of England, the oil of Scotland, and the water of Wales. Some central responsibility is also assigned for pensions and what were previously termed National Insurance Contributions (appropriately renamed), mitigating elements of financial risk. Further, federal-type mechanisms may be introduced to support fiscal decentralisation.

The National Parliament of each member nation sits as the sovereign, legislative and representative body of its people, enacting powers and laws on every issue that is not identified as the Council's sole competence. A Government with executive powers is appointed from the nation's parliamentary members, comprising a First Minister and other ministerial positions as required to oversee the various offices. The superior judges are nominated on the advice of an independent authority. Nations further sub-divide their lands through Acts of National Parliament, defining the composition and responsibilities of local or regional authorities.

2.5 INDEPENDENCE: *A sovereign Wales leasing some sovereign authority to the European Union, or standing alone.*

Wales acting as a sovereign nation within the European Union (EU) is, in principle, a workable model. However, a practical difficulty rests with Wales's largest trading partner England and its uncertain relationship with the EU. A form of isle-wide constitutional framework is required to facilitate the necessary economic, political and social understandings, or at least an Atlantic Union, of EU nations, comprising treaties between Wales, Scotland, Northern Ireland, and the Republic of Ireland. In June 2016, the Welsh public effectively voted against EU membership, creating some doubt about the likely political traction of a future sovereign Wales joining Europe, but there are indications the mood may be changing, if only steadily.

Hypothetically, an autonomous Wales could be underpinned internally by five regional authorities partially mirroring the geographical composition of present regional seats for Assembly elections, and constituted by the amalgamation of enclosed principal areas or unitary authorities for local government, and restructuring of other relevant bodies. These may cover: the health boards; police, fire and rescue authorities; and consortia for education, social services, transport, and trunk roads. Enacting Welsh government policy, such authorities would promote economies of scale; clarity in directing long-term planning and delivery; accountability for achieving shared outcomes across geographical areas; improved governance, and increased capacity.

The potential for Wales to act unilaterally outside any European or isles-wide agreements is limited in the era of enhanced cross-border cooperation, which demands some pooling of sovereignty within supra-national frameworks. It has been suggested that Wales's operational interactions with England could be addressed through a bilateral treaty of sorts, but this approach is likely to prove unsustainable, with uncertainty over collective aims resulting in a drift of capital and employment prospects towards the larger neighbour to the east. The challenge is highlighted in the report *A Constitutional Crossroads: Ways Forward for the UK* (Bingham Centre for the Rule of Law 2015) stating that the 'border between England and Wales is crossed about 130,000 times each day' and that '48% of the Welsh population lives within 25 miles of the border with England.'

3. FISCAL DECENTRALISATION

The publication *Federal Britain, The Case for Decentralisation* (Institute of Economic Affairs 2015) explains that ‘fiscal decentralisation is associated with higher national income, better school performance, and higher levels of investment. In particular, the decentralisation of revenue-raising powers has a stronger effect on performance than the decentralisation of spending. The evidence suggests that increasing the local share of taxation from 5% to 20%—still low by G7 standards—could raise GDP per capita by 6%. With especially low levels of revenue decentralisation, and as a large country, the UK is in a particularly good position to gain from transferring powers and revenue-raising.’ Indeed, fundamental and structural changes of this nature, and more, are needed to support growth in Wales going forward, as illustrated by the recent report *Government Expenditure and Revenue Wales* (Cardiff University 2019).

Protection of the isle-wide economic union, which works to address opportunities, risks and threats collectively over time, is as important as supporting the political and social aspects underpinning the relationships between nations. A robust system of fiscal decentralisation might not immediately include allocation to the national governments of responsibility for setting taxes on capital, retail sales and excise duties, whereas those on corporations, income, payroll and property are suited. Sharing the income tax base is an obvious approach. However, as explored by David Melding AM in his book *The Reformed Union: The UK as a Federation* (Institute of Welsh Affairs 2013), the large-scale economic implications of national governments having the comprehensive powers to vary differently the higher and lower rates through a ‘tax on base’ model must be considered carefully. This is because income tax is a major source of receipts which varies in yield during the economic cycle, demanding some provision of borrowing powers to the nations for dealing with fluctuations in revenue. Intergovernmental relationships within a federation or confederation could be seriously strained by any debt crises caused through injudicious borrowing—notably if accompanied by creditors expecting, whether rightly or wrongly, bailouts from central bodies. Until new fiscal arrangements are embedded, access to global markets by national governments should be discouraged for a period, with an isle-wide body established to act as a facilitator of lending for capital programmes of a substantial nature.

The decentralisation of wide-ranging tax raising powers clearly diminishes the need for distributing large block grants from the centre. However, special care should be taken to create a system which is stable, compensating for any uneven distribution of prosperity through appropriate equalisation grants. To this effect, a shared fund could be established into which wealthier nations contribute and less affluent ones draw. The substantial tax payments made by Wales to the Treasury during its natural resource boon over a century ago, which significantly supported Britain’s economic development, more than justify the transfers assigned by the Exchequer to the nation today in aid of equalisation. These could be described as an insurance payout of sorts, based on historical premiums paid. Such recognition of significant contributions made over time in sustaining shared aims, past and present, might even help untangle ongoing discussions regarding the future ownership of offshore resources, responsibility for which could continue to rest centrally initially, whilst onshore resources should be allocated to the national governments. Barnett looms large in this debate, leading to calls for a revised needs-based formula with equalisation grant-levels fixed through formal constitutional mechanisms, allowing national governments some predictability in planning and delivery.

An alternative approach to equalisation is for fiscal policy to be increasingly shaped by a design whereby the majority of tax revenues are retained by the national governments, which in turn would transfer resources centrally to support joint isle-wide functions, and economic stability across the internal market to ensure that public goods and services are funded at similar levels. This makes the costs and benefits of the system transparent, but may be a step too far to begin with, as reducing the level of inequality between the territories of a newly formed federation or confederation must be a strategic priority. In the medium to long term, much depends on how the Welsh, Scottish, and Northern Irish governments respond to improved fiscal empowerment, particularly in terms of reducing budget deficits, and/or increasing revenues. With these issues in mind, the report *UK’s Changing Union, Towards a New Union* (Wales Governance Centre, Cardiff University 2015) advocates a ‘system for determining the fair distribution and redistribution of financial resources on a clear statutory basis...designed to be equitable between all parties on the basis of examination of needs, and with no expectation that transfers would be continued when needs had been met satisfactorily.’

4. ISLAND IDENTITIES

Most states are synthetic constructs and subject to change. That said, unitary states face ongoing challenges in acknowledging the partial autonomy and diversity of their constituent nations, especially in cultivating and sustaining a sense of allegiance and belonging to the larger political body. The fact that 45% of Scottish voters would have preferred to end the Union in 2014 might suggest a lessening in appeal of the British identity, despite a majority of the electorate in Scotland being opposed to independence. However, as explained by Tom Devine in his book *Independence or Union* (Penguin Press 2016), some pause is required before jumping to this conclusion as the dual identity of the Scottish people within the UK has complex roots and meanings. The same is true of the population in Wales. Moreover, feeling British, whether wholly or partly, may not necessarily denote that a person is committed to supporting political unionism. It could also be based on a pride in past achievements and a continuing awareness of the cultural and social connections forged between the populations of these isles during many centuries. Interestingly, the recognition of multiple identities, highlighted in recent decades by the European dimension of UK politics has created a genuine paradox for some—in that if it is possible to be Welsh or Scottish and European, is it therefore not possible to be Welsh or Scottish and British too? Admittedly, the situation in Northern Ireland is more complicated.

Britishness as a concept is much older than the UK and it is unrealistic to argue that the Welsh or Scottish people, in notional independent territories, would start considering the English as fellow Europeans instead of fellow British. British ideals and values are partly forged by geographic, historic, and cultural influences, which usefully bridge the demands of world interdependence and the desire for increased autonomy in the nations. The challenge is to capture these principles in a new constitutional framework which strengthens arrangements for self-government—through emphasising common respect for human dignity, freedom, democracy, equality, and rule of law—within an isle-wide civic societal structure typified by pluralism, non-discrimination, tolerance, justice, and solidarity. Who knows, this approach could provide some fresh constitutive stories for a new kind of partnership across these isles—one which draws on past and present experiences and narratives in forming an underlying bedrock for the future?

5. CONSTITUTIONS AND CONCLUSIONS

It is now widely conceded that the devolution measures of the 1990s were insufficiently thought out and the UK requires new provisions for governance. In today's world, nearly two hundred states are underpinned by written constitutions. Surprisingly, the UK is not, but ironically it has involved itself in drafting constitutions for countless others during the last century. The fact that written constitutions make the machinery of government more accessible and transparent is one of the most persuasive arguments for their application. The most successful constitutions articulate the basic framework of governance and are open to alterations when needed, such as the pooling of sovereignty in international treaties and bodies. They also balance essential principles with current and developing demands which may necessitate an authority or responsibility of government to be reassigned from one level to another. Creating such a written framework could prove invaluable across the political spectrum, with some finding reassurance in attempting to articulate the more distinctive elements of the UK's practices in a codified constitution, and with others seeking to cement the sovereignty position of the four nations in relation to a common British civic structure.

David Melding AM in his essay *Unionism and Nationalism in Welsh Political Life* (2019) emphasises that unionists and nationalists 'will always have to strike some bargain to manage and utilise the forces created by the geography, culture, and economic needs of the British Isles. Whether that now requires a formal, political union is open to question. For if Brexiteers can be European without remaining in the EU, then nationalists can acknowledge Britishness without remaining in the UK.' In February 2017, an event on Brexit, Federalism, and Scottish Independence at the Constitution Unit, University College London stressed the importance of finding a way out of the 'intractable, binary divisions that are fracturing the UK, and its constituent nations.' There is a 'need to shift away from a winner-takes-all mentality and to focus instead on healing divides through strategic compromise. A federal or confederal solution that works for the overwhelming majority, rather than a marginal one, seems to be an effective way to achieve this. It is up to the UK government and its constituent nations to gather the will to work for such a compromise.' The real business of the UK has only just begun...