

Brexit, Devolution and the Changing Union: 2018

A pamphlet of short articles by Lord David Owen, Gwynoro Jones, Lord Elystan Morgan and Glyndwr Cennydd Jones



'There is an absolute need for a UK -wide Constitutional Convention, with the involvement of all political parties and elements of British society, to discuss the future of the Union, particularly in the context of Brexit...'



By the authors of the booklet 'Towards Federalism and Beyond...' which explores the future of the UK Union generally and Wales's status within it specifically

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With an afterword by Martin Shipton

**Towards
Federalism
and
Beyond...**

A collection of essays by Lord David Owen, Gwynoro Jones, Lord Elystan Morgan and Glyndwr Cennydd Jones



With a preface by Martin Shipton

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Lord David Owen, Gwynoro Jones, Lord Elystan Morgan and Glyndwr Cennydd Jones discuss the need for a formal constitutional debate to run alongside the EU withdrawal discussions...

Opening, **Lord Elystan Morgan** states: 'Despite the devolution of the last two decades, the UK today remains one of the most concentrated systems of parliamentary government in the democratic world. There is a desperate need for a UK-wide constitutional convention, with involvement of all political parties and elements of British society to discuss the future of the Union, particularly in the context of Brexit.'

Lord David Owen elaborates: 'In light of the Brexit vote, Theresa May has convened talks involving the leaders of the devolved administrations. The Prime Minister could call together this same forum to start an initial dialogue on the UK constitution, confirming terms of reference, participants and timelines for reporting back from a convention.'

Gwynoro Jones asks: 'At the heart of this debate is the question of what will Labour do? Any major constitutional reform cannot happen without its serious involvement and active participation.'

Lord David Owen responds: 'If the Prime Minister does not embrace an all-party convention then the Labour Party and SNP should forge an initial agreement, with the aim of building a cross-party approach capable of involving others. While it would be unfortunate not to have the assistance of Whitehall, the effects of this can be negated by use of academics, thereby ensuring the quality of discussions.'

Gwynoro Jones declares: 'The EU (Withdrawal) Bill, unless radically amended, will have significant implications for the current devolution settlement. An area of particular concern to Belfast, Cardiff and Edinburgh is what will happen to those powers and responsibilities now delegated from Brussels, through Westminster, to the devolved administrations on matters such as agriculture and rural affairs? Will they be taken back up the chain

to London in time, thus completely undermining the arrangements in place?'

Lord Elystan Morgan asserts: 'I am rapidly coming to the conclusion that Wales is being short changed in regards to devolution. This assertion firstly rests on the willingness of Her Majesty's Government to contemplate nearly 200 reservations in the Wales Act 2017, most of which are so trivial as to give the lie to any sincerity concerning a reserved constitution. Secondly, is the willingness to pretend that a long-term settlement on the division of authority between Westminster and Cardiff could even be contemplated, whilst the very substantial proportion of that authority was not in the gift of the UK Government, but was ensconced in Brussels.'

'The Secretary of State for Scotland, David Mundell MP has announced that the UK government will publish changes to clause 11 of the EU (Withdrawal) Bill affecting Scotland when the measure reaches the House of Lords, indicating that in some areas common frameworks will be established. Such an approach must inevitably be mirrored in Wales.'

Lord David Owen recalls: 'I have previously proposed that an all-party convention should be held on the establishment of a Federal UK Council, modelled on the German Bundesrat. Running our exit from the EU in tandem with the creation of a federal UK is both feasible and proper. Postponing this discussion risks missing a moment in history when the British people are well aware that our unity is in jeopardy and yet most want it to be maintained.'

Glyndwr Cennydd Jones reinforces: 'The *UK's Changing Union* report (Cardiff University's Wales Governance Centre and Institute of Welsh Affairs: 2015) indeed proposes a union state not a unitary state which: 'consists of four national entities sharing sovereignty...and freely assenting to cooperate in a Union for their common good.' This signals the end of devolution and a move to a more overtly federal or quasi-federal framework.'

Lord David Owen explains: 'A Federal UK Council could involve not only Scotland, Wales and Northern Ireland but also London and the new city regions with constitutional powers. Provision could also be made separately for those who live in areas covered by county councils and unitary authorities. No doubt some of these may wish to develop a regional identity which could lead to separate representation.'

Glyndwr Cennydd Jones highlights: 'Professor Jim Gallagher goes further, stating: 'people often talk about federalism as if it were a solution for the UK. In truth the UK is already moving beyond it, to a more confederal solution.' Reflecting on his *Britain after Brexit* report (2016), Gallagher envisages: 'a confederation of nations of radically different sizes, sharing things that matter hugely, like economic management, access to welfare services and defence.'

Glyndwr clarifies: '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. Agreed practices and rules are confirmed through a written constitution with compliance enforced by a Supreme Court. In contrast, a confederation is a union of sovereign member nations that for reasons of efficiency and common security assign a portfolio of functions and powers by treaty to a central body.'

Gwynoro Jones affirms: 'With the Brexit result, I am convinced that the future lies in a self-governing Wales within a federal UK, but I also increasingly accept that an argument can be made for going further. Wales is near to bottom of the league on several UK socio-economic indicators.'

Glyndwr Cennydd Jones maintains: 'The constitutional choice may not be purely binary in nature. Professor John Kincaid, in his article on *Confederal Federalism* (Western European Politics, 1999) explains: 'what seems to have developed in the EU is...a confederal order of government that operates in a significantly federal mode within its spheres of competence.' Member nations have delegated, in effect, parts of their sovereignty over time to central bodies which agree laws on their behalf.'

'Potential collective functions might encompass to varying degrees: the armed and security forces; border, diplomatic and international affairs; cross-recognition of legal jurisdictions; currency and monetary policies; a single market; any shared public services; and select taxation, as appropriate.'

Gwynoro Jones insists: 'In the modern financial, service and technological age, as opposed to the era of heavy industries and large scale manufacturing, the question of a country's size is no longer a deciding factor in terms of deliberating governance models. Indeed, seven member countries of the EU have populations either smaller or similar to that of Wales.'

'For decades, too many politicians have argued that Wales cannot afford to have greater powers, markedly because it would run a significant budget deficit, but so does the UK with a deficit of some £50 billion annually, carrying a debt of £1.83 trillion. Indeed, a proportion of the £14 billion claimed to be Wales's presently projected deficit is our share of the money spent on large UK projects such as HS2 and defence (e.g. Trident). What is more, revealingly, only about 50 of the world's 235 nation-states actually run a budget surplus.'

Lord Elystan Morgan concludes: 'Casting aside the limitations of devolution, it is now highly necessary that we should raise our expectations to be worthy of our position as a mature national entity. As the Brexit date of 29th March 2019 approaches, there is a clear need for a formal constitutional debate to run alongside the EU withdrawal discussions.'

Lord David Owen, Gwynoro Jones, Lord Elystan Morgan and Glyndwr Cennydd Jones are the authors of the booklet 'Towards Federalism and Beyond...' which explores the future of the UK Union generally and Wales's status within it specifically, including a preface written by Martin Shipton. The booklet was released in September 2017 to coincide with the 20th anniversary of the vote to establish the National Assembly of Wales.

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The Devolution Deficit by Lord Elystan Morgan

The EU withdrawal negotiations will impact greatly on the Wales Act 2017.

When the question of deciding what powers Wales should have in the devolution settlement was deliberated, the mother parliament in Westminster did not hold a mass of those powers relevant to the situation. That authority was absent from 1st January 1973, ever since the European Communities Act 1972 came into force which ruled in effect to a considerable swathe of competences across the UK. Since a significant proportion of the concerned powers have resided in Brussels now for many years, there is a real risk that these will be repatriated upon Brexit neither to Wales nor to Scotland, but to Westminster.

The short-sightedness of Her Majesty's Government to observe nearly 200 reservations in the Wales Act 2017, many of which are trivial in nature, gives the lie to any sincerity regarding the desire to apply an enlightened approach towards devolution and a reserved constitution. To pretend that a lasting and long-term settlement on the division of powers between Westminster and the National Assembly of Wales could be contemplated, whilst the substantial proportion of that authority was not even in the gift of the UK government to consider, but ensconced in Brussels, elicits serious doubts about the depth of political trust remaining between Cardiff and London.

The UK remains one of the most concentrated systems of parliamentary government in the democratic world, despite the devolution of the last two decades. The temptation of power hoarding by Whitehall departments during the Brexit negotiations must be withstood. The history of identifying reservations in devolved legislation is littered with instances of centrally pursued self interest impacting clumsily on relationships between different levels of government.

The more one examines devolution, the more I feel that we must now thrust ourselves through the cocoon enveloping us. Devolution is a series of gifts from a superior sovereign authority to an inferior body. In relation to Wales, however, there is a wider issue of home rule. Once one concedes the moral and constitutional right of a nation

community to home rule, then it cannot just be *given* anything. All that can be done is to withhold powers and that is the vital acid test facing us.

At very least, amendments to the EU (Withdrawal) Bill under consideration must unambiguously take account of the real concerns broached by the ministers of Scotland and Wales, particularly in relation to clause 11. To quote Professor Richard Rawlings from his report *Brexit and Territorial Constitutions* (Constitution Society, October 2017), proposed amendments to the Bill should safeguard: 'no diversion of devolved competence to London; UK ministers unable unilaterally to change the two devolution settlements; and UK ministers unable unilaterally to make provision within Scottish or Welsh ministers' executive competence.'

It is clear that there is a desire on the part of Her Majesty's Government to mollify the devolved Scottish Parliament in order to obtain a legislative consent motion. If this is to be done in relation to Scotland, it would, in practice, be impossible for the same attitude not to prevail in relation to Wales.

We would do well to remember that Wales is a substantial net beneficiary of EU funding through Common Agricultural Policy and EU Structural payments. As we move towards 29th March 2019, the economy will inevitably become increasingly vulnerable. A successful Brexit settlement cannot be constructed by the UK government alone, demanding a partnership approach in negotiations with the devolved administrations. The Secretary of State's confirmation that legislative consent of these legislatures will be sought for the Repeal Bill is welcome. The constitutional and political consequences of not doing so would indeed be serious and damaging for future relations.

In this context, the Sewel Convention has some part to play, particularly as the UK is not underpinned by a written constitution assigning powers evidently to different tiers of government. Sewel presumes that Westminster should not legislate on devolved matters without consent, as argued by Scotland and Wales in the Supreme Court last year on the not so insignificant matter of triggering Article 50. Unnervingly, the then Court ruled the Convention as political, not justiciable, but its reassuring principle endures.

With the ongoing devolution deficit and Brexit negotiations, there is an absolute need for a UK - wide Constitutional Convention, involving all political parties and elements of British society, to discuss the future of the Union.



A Federal Framework by Lord David Owen

In the aftermath of the EU referendum result it is both logical and appropriate for the political parties to seek to unite the UK. In a pamphlet published during November 2016 I proposed that, to this end, an all-party convention should be held on the establishment of a Federal UK Council, modelled on the German Bundesrat.

A strictly limited approach to a federal UK was put forward before Brexit during March 2016, just as the referendum was getting underway, by the All Party Parliamentary Group on Reform, Decentralisation and Devolution. The Group's report entitled *Devolution and the Union* recommended that the 'UK government embarks upon a nation-wide, citizen based conversation to include the electorate in matters relating to our constitutional identity.'

However, a *conversation* does not have the sense of momentum that Brexit has engendered. Running in tandem our exit from the EU with the creation of a Federal UK Council is now both feasible and proper. Different people and different issues are involved in the two negotiations, but they fit together. Postponing a Federal UK Council would risk missing a moment in history when the British people are well aware that our unity is at risk and yet most want it to be maintained. The term federalism is derived from the Latin word *foedus*, which can be translated as alliance or treaty.

In light of the Brexit vote, Theresa May has convened talks involving the leaders of the devolved administrations. The Prime Minister could call together this same forum to start an initial dialogue on a Federal UK Council, encompassing the confirmation of terms of reference, the participants and the timing for reporting back from such discussions. There are complex questions about what constitutes federal legislation and the nature of mediation procedures between a Federal UK Council and the House of Commons, all the much better agreed under a government-led convention.

If the Prime Minister herself does not embrace an all-party convention then the Labour Party and the SNP should forge an initial agreement, with the aim of building a cross-party convention capable of

involving others. While it would be unfortunate not to have the assistance of Whitehall, the effects of this can be negated by the use of academics, thereby ensuring the quality of the convention.

Constitutionally indifferent approaches to considering new institutional structures for a post-Brexit world must be avoided, particularly when discussing multilateral forms of intergovernmental relations and market strategies for trade. The emerging institutional gap in the UK's territorial constitution is evident, impacting on the capability to deliver key practical and political objectives. Westminster and the devolved administrations must work collaboratively to develop the necessary frameworks for ensuring consistency in areas of common interest and joint policy. New arrangements and bodies will be required, leading to a radical redistribution of legislative and governmental powers across the isles, in time, and demanding a reshaping of the UK territorial constitution made fit for purpose to the changed context.

These developments present an ideal opportunity for bringing together both nationalists and unionists in Scotland, strategically offering a constitutionally federal compromise in advancement towards a nationally empowered and shared future. This poses a less divisive option than a second zero-sum referendum on independence. Further, the reallocation of powers is likely to re-energise the Stormont parliament in Northern Ireland, and avoid the promulgation of the view expressed by the First Minister of Wales, Carwyn Jones, that the Brexit process risks formalising 'land grabs' by the UK government, destabilising devolution.

The establishment of a federal union would promote a real partnership of equals across the constituent nations, each of which would increasingly be at ease with themselves, individually and collectively, whilst acting in a framework of mutual respect and unanimity.

Those of us who supported Brexit were doing so as part of a much wider agenda of restoring our very democracy which had been distorted by the false claim of post-modernism that the days of the nation-state were over. Far from being over, national identity, whether it be Scottish, Welsh, Irish or English deserves to be treasured as a binding force, not a divisive one. It all depends on whether we can find the correct balance.



A Constitutional Continuum by Glyndwr Cennydd Jones

The UK is governed as a unitary state comprising England, Northern Ireland, Scotland and Wales, all of which are intrinsically linked culturally and historically in modern times through shared industrial, political and international experiences. Devolution, as introduced in the late-1990s, aimed to address a measure of perceptible disenchantment across the isles due to unease with over-centralisation whilst retaining sovereignty in the hands of the Westminster parliament.

The extent of divergence in today's UK is highlighted by the four nations' differentiated politics, apprehensions about the Brexit negotiations, uncertainties regarding the post-EU Northern Ireland border, debates concerning a second Scottish independence referendum, and broad unease with the Wales Act 2017. The Devolution and Future of the Union report (Constitution Unit: 2015), explains that: 'the UK is hardly unique in facing challenges to its structure and integrity...though it is unique in seeking to do so without a formal written constitution.' The report explores three models of increasing devolution as possible solutions.

Recently, many academics and politicians have asserted that the UK should: 'use the repatriation of powers from the EU to establish a new federal state of equals.' Lord David Owen advocates a federal structure based on the German model, whilst the *UK's Changing Union* report (Wales Governance Centre: 2015) proposes a union state not a unitary state which: 'consists of four national entities sharing sovereignty...and freely assenting to cooperate in a Union for their common good.' This signals the end of devolution and a move to a more overtly federal or quasi-federal framework.

Professor Jim Gallagher goes further: 'people often talk about federalism as if it were a solution. In truth the UK is already moving beyond it to a more confederal solution.' Reflecting on his *Britain after Brexit* report (2016), Gallagher envisages: 'a confederation of nations of radically different sizes, sharing things that matter hugely, like economic management, welfare services and defence.'

Subtler constitutional models may even interest. Professor John Kincaid, in his article on *Confederal*

Federalism (Western European Politics, 1999), explains: 'what seems to have developed in the EU is...a confederal order of government that operates in a significantly federal mode within its spheres of competence.' Member nations have delegated, in effect, parts of their sovereignty over time to central bodies which agree laws on their behalf.

The ongoing Brexit process, by nature, involves a strong steer towards centralisation in favour of Westminster. This is due to the parliament's twin role in expediting the UK government and that for England. In time, currently observed EU-centred regulation must be replaced to advance the development of an isle-wide framework structured to facilitate a single market, conformity with international rules, negotiation of trade accords, use of shared resources and safeguarding of rights. However, as emphasised by Professor Richard Rawlings in his report *Brexit and Territorial Constitutions* (Constitution Society, October 2017): 'the tendency to sequencing—the temptation to treat the devolutionary aspects as if they were some kind of second front best frozen while supranational negotiations proceed, rather than to take them forward in tandem in a spirit of cooperation—must be firmly resisted.'

The assorted devolution arrangements have progressed incrementally and asymmetrically since 1997. During this time, the EU has been part of the fabric which holds the UK together. The pre-eminence of EU law, and its interpretation by the EU Court of Justice, has safeguarded the consistency of legal and regulatory norms across copious fields, including devolved areas. The UK internal market has been sustained by the conventions of the EU internal market. Therefore, Brexit presents a risk that these interrelated competences may become increasingly unsound if not addressed by a new constitutional framework.

With many powers returning from Brussels, some should fittingly default to the devolved nations, with other responsibilities demanding consideration alongside much needed wider reform. An enlightened constitutional approach could envisage these very same institutions empowered directly to cooperate with European bodies on matters such as health, research funding, universities, justice and policing.

To paraphrase Bernard of Chartres 'We stand on the shoulders of giants.' Let us make sure that future generations of people can say that of themselves in relation to our efforts in creating a modern Union fit for purpose in the 21st Century.'



Independently minded by Gwynoro Jones

Brexit and the EU (Withdrawal) Bill, unless radically amended, will have significant implications for the devolution settlement. An area of particular concern to the institutions in Belfast, Cardiff and Edinburgh is what will happen to those powers and responsibilities now entrusted from Brussels, through Westminster, to the devolved administrations. Will they be taken back up the chain to London thus undermining the arrangements in place?

The EU (Withdrawal) Bill's devolution clauses are substantial. Seemingly, they describe an interim process, but when reviewed alongside the considerable powers given to UK ministers generally, the passages cause discomfort, if not alarm, in Scotland, Wales and Northern Ireland. We should not be surprised when Carwyn Jones, First Minister of Wales, describes the process as a potential 'fundamental assault on devolution.'

As asserted by Professor Richard Rawlings in his report *Brexit and Territorial Constitutions* (Constitution Society, October 2017): 'The Brexit process constitutes a thoroughgoing test of the UK's territorial constitution. The question is sharply posed. How from the standpoint of an enlightened and prudent Union policy, one which puts a premium on effective and collaborative working of state and sub-state political institutions and on mutual respect, should UK ministers now address the subject-matter of devolution, intergovernmental relations and common frameworks?'

Fundamental reform is essential in ensuring a greater formal role for the devolved administrations within UK decision-making post-Brexit, analogous to that offered by federal systems of governance. However, an argument can be made for going further towards a confederal model.

Out of 235 countries in the world, some 130 of them have populations of around 7 million and under. Of these countries, 100 have fewer than 4 million people and the vast majority are smaller than Wales. Further, 11 of the countries of the 27 in the EU have populations of approximately 5 million or less. 7 of the 11 have fewer people than Wales. In the modern financial, service and technological age,

as opposed to the era of heavy industries and large scale manufacturing, the question of a country's size is no longer a deciding factor in terms of deliberating governance models.

For decades, too many politicians have argued that Wales is either too small or cannot afford to go it alone, markedly because the country would run a sizeable budget deficit. But so does the UK, with a deficit of some £50 billion a year, carrying a debt of £1.83 trillion. Indeed, a proportion of the £14 billion claimed to be Wales's presently projected deficit is our share of the money spent on large UK projects such as HS2 and defence (e.g. Trident). What more, revealingly, only about 50 of the world's 235 nation-states actually run a budget surplus.

The economy of Wales is decidedly reliant on membership of the EU single market, especially the agricultural and manufacturing sectors. Two-thirds of Welsh exports (£15 billion) and over 30% (£1.8 billion) of our services are sent to Europe. The single market has been a key driver of foreign investment for decades. There is a real risk that the concerns of Wales—because of its comparatively smaller dimensions and the fact it does not present such multifaceted constitutional and political challenges to Westminster as by Scotland and Northern Ireland, and, unlike those two nations, voted in favour of leaving the EU—may be neglected during the ongoing negotiations.

Although I am fundamentally opposed to Brexit, a sensible compromise could strategically entail the UK remaining in the Single Market and Customs Union or at the very least rejoining the European Free Trade Area, mitigating many of the economic dangers that face us. This concession would demand assenting to some EU membership requirements, without receiving the corresponding benefits, but likely leading to rejection by many on the basis of the referendum result. However, the electorate was not responding to any specific proposals in June 2016. I argue that the devolved institutions truly representative of the pro-EU populations of Scotland and Northern Ireland should now be empowered constitutionally to pursue their own aims and priorities within a new isle-wide framework, permitting them to develop closer EU relationships than possibly sought by England, and extending to Wales, if so desired.

Now is the time to examine in all seriousness the future structure and governance of the four nations of the UK Union, recognising that this would inevitably involve the establishment of an English Parliament. The time has arrived to act...

Brexit, Devolution and the Changing Union: 2018

Afterword by Martin Shipton, Political Author and Chief Reporter for Media Wales

Nearly 20 years have passed since the creation of devolved institutions in Scotland, Wales and Northern Ireland. There are similarities in how the experience of devolution has affected all three countries (and in this context Northern Ireland, like the other two, should be regarded as a country). But there have also been differences.

Each of the countries has developed a new political culture of its own, with features that distinguish it from the others, and also from Westminster. From a constitutional perspective, there have been different emphases too.

In Northern Ireland, a tailor-made system based on checks and balances derived from the Good Friday Agreement has been implemented. While success has been intermittent in terms of how the Northern Ireland Assembly has functioned, disputes have played out in the political arena rather than through armed conflict.

In Scotland, the rise of the SNP from a level where it achieved less support proportionally in 1999 than Plaid Cymru has seen the possibility of independence dominate constitutional debate.

In Wales, however, partly because of the shortcomings of the original devolution settlement and partly because of the lack of significant support for independence, the focus has been on the gradual accretion of extra powers.

Although there has been progress, there remains considerable reluctance at Westminster to let Wales gain some of the central powers that are taken for granted in Scotland and Northern Ireland: control over the police and judicial system, for example. The list of powers reserved to Westminster includes many which are trivial from a constitutional point of view, and seem only to be present to let Wales know where control really resides.

The result of the June 2016 referendum on EU membership has created a new political challenge for the devolved institutions that risks robbing them of powers that in some instances have been hard won. The UK Government's attempt to intercept powers from the EU at the point of Brexit that in the normal course of events would come straight to Scotland and Wales illustrates that pre-devolution thinking remains dominant.

In defending its position, the Westminster administration has spoken of the need to ensure frictionless borders within what it describes as the "UK Single Market". It seems oblivious to the irony that it has chosen a course that will remove the UK from the European Single Market, creating impediments that will damage our ability to interact commercially with the world's largest trading bloc that happens to be on our doorstep.

Westminster may be right in suggesting there should be a common regulatory regime for agriculture in the four UK countries after Brexit. But so far it has shown no acceptance of the fact that any such regime should be developed between four equal partners rather than imposed on the other three by the largest.

The UK Government's approach to Brexit negotiations with the EU has been characterised by a lack of engagement with political reality, overlaid by a mentality of seeking to have one's cake and eat it and of playing to the gallery of extreme anti-EU ideologues that have been allowed to exert disproportionate influence within the Conservative Party.

Such an approach, when replicated domestically, poses a huge threat to devolution, as well, of course, to the economic well-being of the UK as a whole. It demonstrates perfectly why the kind of constitutional debate advocated in this pamphlet is so vital.