

Wales Matters Series

Whither Wales? Routes to a stable and enhanced authority for Welsh devolution

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In a little over 11 years, we will mark the 500th anniversary of the Anglo Welsh Union of 1536. Even as a unionist I hesitate to use the word celebrate because we seem to be living in an age of disunion. Scottish independence is still an open question; Brexit ended the UK's membership of the EU; NATO- arguably the most powerful Treaty entered into by free states- is under threat as the USA doubts the value of the Atlantic alliance; and the very coherence of statehood itself is threatened by the digital revolution and the emergence of multi-national monopolies intent on exercising political power. These geo-political disruptions have come at a time when the Union of the United Kingdom of Great Britain and Northern Ireland is already under severe strain. The tercentenary of the 1707 Act of Union passed with little ceremony despite the then PM Gordon Brown urging us to value our shared British identity. 2007 is more readily remembered for the arrival of a SNP minority government. Those who had predicted that devolution would "kill nationalism stone dead" were entirely mistaken. While alas few outside Wales ever consider the significance of the 1536 Union, it was a

notable act of state building in a process that eventually led to a full union between Great Britain and Ireland. That union started to unravel just before World War One when some unionists threatened to prevent Irish Home Rule to the point of civil war. The diehards only succeeded in making southern Ireland's secession inevitable. The lesson is surely clear, without adaptation and timely reform the Union is unlikely to survive.

The Tudor union was deeply embedded in a wider international disruption- the Reformation- and so too are our present constitutional deliberations influenced by profound international forces. When Plaid Cymru was founded nearly a 100 years ago the League of Nations had about 50 members. Today the UN has nearly 200 member states and most of this expansion came with the decolonisation of Europe's empires after World War Two. The collapse of the Soviet Union added to this process of decolonisation and state building on a more national basis. Where should we place Wales in these transformative times for state formation? Are our citizens likely to remain content with domestic autonomy within the UK? Would Scottish independence push Wales to contemplate statehood? Or would Scotland's secession leave the original Tudor union as the last remnant of the once United Kingdom? We do have a valuable constitutional report to guide the national conversation that has undoubtedly started in Wales. The Independent

Commission on the Constitutional Future of Wales wisely chose not to recommend a specific path for Wales' constitutional development, but it does ask us to consider three options:

- Enhanced Devolution;
- Federalism, and
- Independence.

The Report, which notably was unanimous, built on the strong work of other commissions which have looked at the Welsh constitution. Lord Richard, Gerry Holtham, and Paul Silk and their respective commissioners did some heavy lifting, and it was no surprise to me that Rowan Williams and Laura McAllister as the joint Chairs of the Independent Commission were able to produce a report of real value.

While the IC does not recommend one particular option, I think it fair to say that most of the commissioners favoured enhanced devolution. And there is no doubt in my mind that the form the commissioners think enhanced devolution could take would amount to a substantial improvement in the constitutional design of devolution. Let me consider the main points of such a scheme.

Firstly more effective intergovernmental relations between the UKG and the devolved governments. This would allow the political culture of

devolution to strengthen as the various governments co-operate, share information, and consider those political and policy issues that impact on them all in a significant way. The main vehicle for such work to date has been the Joint Ministerial Committee which has not been an obvious success although it was strengthened somewhat in 2022. The surest way to give intergovernmental relations real clout would be to have a capable and independent secretariat to operate the system and for the heads of government to agree workplans and the agenda for meetings. If the meetings are neither regular nor frequent- a real failure of the JMC system- then there is little hope of impact.

Secondly, by placing the Sewel convention on a statutory basis devolution would have firmer constitutional safeguards. The Sewel convention requires the consent of the devolved parliaments before any Westminster legislation can (normally) extend over devolved matters. To go further than the IC for a moment, some have argued for the devolved institutions to be protected from dissolution by Westminster- a power at the heart of its parliamentary supremacy. This could be achieved by requiring such an Act of dissolution to undergo a special legislative process. While this would have symbolic significance certainly, I frankly doubt that any special legislative process could be effective in the extreme circumstances that would make dissolution in any way a practical proposition.

Thirdly, an independent process to determine devolved funding would ensure that UKG is no longer judge and jury on the allocation of the Block Grant. This would be a far-reaching reform given the level of control the Treasury has had to date on grant allocations, and it would give devolution some fiscal strength. However, only by increasing the proportion of tax revenue raised by the devolved institutions could significant dependence on the UK Treasury be avoided.

Reform of the House of Lords is the fourth item I want to mention as a means to enhance devolution. It offers the opportunity to make representation of the Home Nations one of the key functions of Westminster's second chamber. A reformed House of Lords could also be given the primary responsibility for the oversight of an enhanced devolution settlement. Finally the scope of Welsh devolution could be extended and the IC highlights Justice and Policing as such policy areas that might be devolved. Lord Thomas, a former Lord Chief Justice of Wales and England, recommended the devolution of Justice to Wales in 2019. On policing, it is fair to say that few decentralised constitutions anywhere in the world reserve this power to the centre.

While such a set of well designed reforms would enhance the authority of Welsh devolution, the programme is not straightforward and its implementation would carry considerable political costs. Recall how

Tony Blair's government did its constitutional heavy lifting early in its first term. There is no sign of such urgency from Keir Starmer. Gordon Brown's report on the UK's future covered similar ground to the IC, but it has only received a polite response from the Labour government. For instance, Brown recommended that the House of Lords be made a chamber for the nations and regions and that it have a role in "safeguarding the UK constitution". The Labour government has responded with a Bill to remove the remaining hereditary peers from the Lords. As small beer goes this is barely alcoholic! Of course, the Conservatives did nothing in their 14 years of office to use House of Lords reform to strengthen the UK's constitution. All too often House of Lords reform is dismissed as the obsession of geeks and constitutional anoraks. It is an easy insult to obscure the dereliction involved in such a complacent attitude. Why is Westminster's second chamber not viewed instead as an important resource that could bring added stability to the constitution? It is as if unionists have no fear of the Union's political death- and this despite 45% support for Scottish independence in the 2014 referendum! Arthur Balfour called the Edwardian House of Lords the guard dog of the constitution. To which Lloyd George replied it is no mastiff, it's Mr Balfour's poodle! Alas too many unionists are content to leave the Lords a poodle.

One has to conclude that enhanced devolution is not an easy way to

balance the British constitution. Too many unionists are reluctant to contemplate further constitutional change and they view the devolution reforms of the late 1990s as a political disruption that led directly to the Scottish independence referendum in 2014. Having just survived that near death experience why risk further reforms they wonder? What I think such an attitude overlooks is how the original design flaws of devolution have made it a volatile process rather than a settled event. This is because England was left entirely in the old, centralised constitution while Scotland got devolved institutions with a range of powers that if anything took it beyond federalism. This is why devolution has been such a bumpy ride for those who hoped it would be a lasting settlement. Its volatility also increases the cost of constitutional inaction. There are some committed unionists who are aware of the danger, such as those in the group led by Lord Salisbury that have called for a new Act of Union to better balance the British constitution and head off future calls for Scottish independence.

The IC states that “the current devolution settlement is vulnerable and unstable” and “without urgent action there will be no viable settlement to protect”. Here the fear is not that devolution will run away towards independence as in Scotland but that Welsh devolution could be hedged in and contract. While a policy of “muscular unionism” might be imaginable regarding Wales, it seems a dangerous strategy to contain

Scottish autonomy as it would probably just increase support for independence. The IC fears are then perhaps a little overwrought unless a UKG could pursue radically different devolution policies in Wales and Scotland. However, the IC's point that constitutional inaction is itself a choice is well made. Unfortunately for Wales there is one area where lassitude seems chronic and that is on reform of the Block Grant.

Replacing the Barnett formula with a needs-based system under the control of an independent grants commission would have significant fiscal disadvantages for Scotland. Even if the adoption of a needs-based formula were flattened out over many years, it would still receive a hostile reaction in Scotland, and this makes change highly unlikely.

Although it clearly uses federal mechanisms, enhanced devolution falls short of a federal settlement because it only elliptically addresses the position of England in the Union. Nevertheless, enhanced devolution does not appear markedly easier to implement. At the moment it is only the Welsh Government that is behind such a constitutional programme. The Scottish Government is indifferent at best, and the recent change of UKG has not so far altered the mood in Whitehall. While some creative constitutional thinking has emerged from Wales, as the IC report demonstrates, there is no denying the isolated position Wales occupies in the Union.

Surely, then, federalism is an even more remote prospect for the Union. Federalism is given polite if light consideration by the IC as one of the UK's options for constitutional development. This is at least a lot better than the treatment meted out to federalism in the Kilbrandon Report which provided the theoretical underpinning for the devolution proposals of the 1970s. Of federalism Kilbrandon said "the UK has for centuries been governed in a spirit of unity and co-operation and even if this unity is now being questioned it would hardly be satisfactory to adopt a legalistic system intended for a much earlier stage of constitutional development". The IC does not dismiss federalism in such crushing terms and indeed sees federalism as "a middle way between some form of continuing union and full independence" but the commissioners also note "There is currently little appetite for this in England, and it runs counter to the aspirations of the Scottish Government". It is fair for critics to say that a federal settlement would have to address the constitutional position of England in the Union: but is this not the key advantage of federalism? There is no prospect of stability and balance in our present constitutional arrangements because they are partly but radically devolved and partly but highly centralised. England remains in the pre-devolved unitary state with weak local but strong central government. True, metro mayors in England are bringing

back a tincture of municipal autonomy and even a hint of regional government, but Whitehall looms heavy and ominous over the whole structure.

The most repeated assumption made by those unwilling to consider federalism for the UK is that England undivided would be too big for such a federation and there is no appetite in England for division and regional government. To challenge this assumption, it is better to start from the first principle of federalism: the division of sovereignty into spheres. In the case of a Union of member nations this enables central government to operate while protecting domestic autonomy for each nation. What would this mean for England? It requires the recognition of the sovereign right of the English people to determine their own domestic institutions. They could choose to establish an English parliament but there seems little indication of any such desire at present. While an English parliament would potentially threaten the authority of the UKG it needs to be noted that such a demand for English national autonomy could emerge now in our devolved constitution as well as under federalism. Thankfully this seems an unlikely choice for the English people because they see Westminster as the focus of their political identity and the size of the English electorate ensures that only rarely can they be outvoted in Westminster on matters of English national interest (PR would of course make such an eventuality

impossible). This is not an abstract point. Westminster is already England's legislature with a large proportion of UKG Bills being for England alone. A more likely development in time is surely the growth of regional government in England which could lead to the great cities and their hinterlands acquiring legislative as well as further executive powers. Let's also remember that rather perversely the most devolved part of highly centralised England is London. Might the London Assembly one day acquire legislative powers, a demand the metro mayors may choose to follow in a process of gradual regionalisation? Much is made of England's love of central administration and the unity it brings, but this assertion survives little scrutiny. Up until the 1940s it was municipal government that did most to extend the reach of the state in the service of its citizens.

It is one thing to have asymmetry in a devolved constitution but is it not inimical to the more systematic structures of federalism? Only if we take the USA as federalism's classic model. In fact, when we look at federalism in general rather than US federalism in particular we see that asymmetry is actually the norm. The distinguished constitutional theorist Stephen Tierney has observed that "Since the federal polity is designed to accommodate territorial pluralism in all its shapes and sizes, it needs to respond to such a variegated social map by recognising any deep differences among the territories in terms of history, population,

geographical size and, accordingly relative levels of citizen attachment to the state-national project". Asymmetry made the unitary- or if we prefer union- state possible from the beginning of its formation. Wales was left culturally autonomous by the Tudor union's recognition that linguistic assimilation was impossible- hence the Welsh Bible became one of the great achievements of the Reformation. Scotland had its own legislative process embedded in Westminster and its own legal and education system and even its own established church (massive domestic autonomy in the 18th century). Ireland had its own executive after the 1801 Union- although highly controlled by Whitehall. In other words the British constitution has always had to deal with asymmetry!

Perhaps an even bigger block to a UK federation than asymmetry is the reluctance of many unionists to diminish Westminster's parliamentary supremacy. Power devolved is power retained as the refrain goes. Federalism would certainly snatch away this constitutional comfort blanket. However, by acknowledging the right of Scotland and Northern Ireland to secede from the Union have we not already divided sovereignty in the most emphatic way? Surely the most sovereign act any people can perform is to decide on the form of their political association? Although devolution was designed to avoid the granting of national autonomy being seen as a division of sovereignty, the Scottish parliament was a mightily powerful body from the start. This made the

elections to the Scottish parliament highly significant political events. Once the SNP won a majority of the seats in 2011 a referendum on independence was the only viable response in the view of the UKG. If the Scottish people had the right to decide on independence in 2014, how can it be denied them in the future? Despite dividing sovereignty, most federal states do not recognise the right of a member to secede. In this respect the UK seems to have travelled well past federalism and made the Union a radically voluntary one. Surely it is time to give this condition serious thought, not least how to conduct an independence referendum as part of an extended political process that gives all the citizens of the state- not just those in the nation seeking to secede- some participation.

I hope this review of federalism convinces you that some federal mechanisms already operate in the British constitution and that some aspects of devolution have not fallen short of federalism but pushed us beyond it. While I understand the reluctance of the IC to seriously treat federalism as a practical proposition for the UK, it was a mistake or at least a missed opportunity. Our political history indeed offers some interesting precedents. Parliamentary federalism was largely invented in Whitehall in the second half of the 19th century for application in Canada and a little later in Australia. It endures to this day in both countries despite the fissiparous nature of their vast territories. With some creative

thought parliamentary federalism could surely be adapted for the Union. It would recognise the reality of the Home Nations' sovereignty over their domestic affairs, bring reform at long last to the House of Lords, and construct some guardrails to guide a voluntary Union with an active right of secession. Finally, is such a scheme not close to what the people of Scotland thought they were offered in the last week of the independence referendum campaign when Britain's party leaders made their pledge to strengthen Scotland's voice in the Union? Next time- and believe me there will be a next time- unionists had better formalise their offer for a reformed Union well in advance of any independence campaign.

We now come to independence as a constitutional option for Wales. The IC notes that "this is by far the most uncertain option... most commentators agree that in the short to medium term Wales could be significantly worse off". It is not my intention here to weigh the economic and social pros and cons of Welsh statehood. Simply put a people of 3 million with an ancient national identity and heritage could form a state. Rather it is the impact that Welsh or Scottish independence would have on the international community that ought to receive most attention. But let us first observe that as Scotland's membership of the Union is not a settled question unionists should not dismiss Welsh -and of course English -independence as a vanishingly unlikely prospect. Already public

support for Welsh independence has reached the levels seen in Scotland at the time of the Edinburgh agreement of 2012. Should Scotland leave the Union support for independence is likely to grow further making a referendum on Wales' membership of the Union, or what's left of it, inevitable. Unionists would face the challenging question: how can Welsh autonomy be protected in such circumstances? Some no doubt would be reluctant to follow Scotland's example on the grounds that Scotland was reasserting its statehood rather than affirming it for the first time. Wales' historical experience points instead to a political partnership with England, many unionists would argue. Yet happenstance played a huge role in European state formation and not least in Wales. It would have taken only a slight variation to have made the political independence of Wales possible in the later medieval period. As it was the Welsh princes had no other power, they could ally with to offset the dominant presence of England. Glyndwr tried of course but his initial success took advantage of English disunity in the wake of Henry IV's usurpation of the throne. Even popes tended to leave the realm of England alone lest it become a continental power challenging the temporal authority of the Papacy. The great nationalist historian John Davies got it right when he said only a realm of England's unusual power and unity could have annexed Wales, and then only when led by a king of utterly exceptional ability like Edward I. Davies also noted the that

cost of the conquest was so vast that it materially helped Scotland preserve its political independence. In any event attempting to deny independence on historical grounds had little success in the 20th century as many nations established their statehood.

While many nations did achieve statehood as the European empires collapsed at home and abroad during the course of the 20th century it is not the case that most nations did so. Multi-national states remain the norm, and the world would look a lot different if the territories of Canada, China, Indonesia, India, and Nigeria for instance were constituted on the principle that nations and states should be co-terminous. I mention this because the most disappointing aspect of the Scottish referendum campaign and indeed reports like that of the IC is their insular nature. The Scottish electorate in 2014 was voting not only on Scottish independence but also on the future of the Union. The impact that the dissolution of the Union would have had on Wales and Northern Ireland received scant attention. No deeper was the consideration given to what impact Scottish independence would have had on an international order made up largely of multi-national states. Even when considered the debate focused on whether an independent Scotland would automatically become a member of the EU or what role might she play in NATO. If Scottish nationalists can be criticised for their insularity, unionists were no better. It is ironic that many unionists soon ditched the

guarantee of EU membership as one of the main justifications for Scotland remaining in the UK. During the Brexit campaign quite how ditching European unionism helped British unionism was not explained, and the Brexit result immediately provided the SNP with an argument for a second independence referendum.

The indifference of many nationalists and unionists to the international dimension did not mean that the rest of the world shared this insouciance, very far from it. In Spain for instance the independence campaign was followed with a mix of fascination and fear. Other states wondered whether the collapse of one of the world's oldest multi-national states would have extensive ramifications for international order. What would a world composed of many, many more nation-states look like? Would national communities across the globe take inspiration from the dissolution of the UK and urge the same fate for their multi-national states? These factors are what political philosophers rather quaintly call "demonstration effects" but they are little considered in Britain to this very day. I think it fair to say that Scottish secession would have had a greater impact on the international community than Brexit. While Brexit did not start a process of wider secession, at least it has not done so yet, Angela Merkel has stated that Brexit "changed the EU in the view of the world; we were weakened".

At this point I am tempted to give a robust unionist defence of multi-

national states, but I said earlier I would not examine the pros and cons of Welsh independence. Instead, I will conclude with this reflection on the obligations both unionists and nationalists have to the international community. Scottish independence is an open question, and Welsh independence is a possibility in the sense that we can reasonably envisage scenarios in which it might happen. Whatever position we take it is surely incumbent on us to have a less insular debate on the constitutional future of the UK. If unionists really do believe that multinational states can offer something uniquely valuable by combining national autonomy with wider co-operation at the state and international level, then the work to construct a reformed Union is urgent. The old Union has gone, but a new Union has not yet emerged. Unless it does unionism would have failed and the people of Scotland and Wales are likely to give independence even more credence. Nationalists must likewise move beyond their ideological redoubt and think more about the international community and the sort of state order they envisage for it. Could Scottish and Welsh independence really be seen as exceptional and therefore not likely to impact the international community? If not, thought should be given to how independence might still be combined with a level of British governance, perhaps on a confederal basis. Rather than simply seeking to dissolve one of the world's most successful multinational states, the independence quest needs to also offer some vision

for what comes next in a world where state formation alters radically.

Finally, nationalists and unionists need to agree a special constitutional process to determine any coherent demands for independence. The Scottish referendum was not such a process as it relied on the routine political mechanism of a single vote requiring only a simple majority. Nor did it allow for the citizens of the other Home Nations to participate in some way despite their constitutional future being profoundly affected by the decision of the Scottish people. A better balance was struck in the judgement made by the Supreme Court of Canada in 1998 on the question of a Quebec secession: it held that Quebec had a conditional right to seek secession but there had to be first a negotiation with all parts of the state to examine the full constitutional consequences of Quebec's independence not least on the other members of the union. Failure to negotiate in good faith would undermine international confidence in the outcome. The Brexit referendum notably repeated the shortcomings of the Scottish independence referendum. Both referendums were conducted according to the rules set by the UKG (although in the Scottish case with the SNP's agreement). When we face the second referendum on Scottish independence- or who knows the first on Welsh or even English independence- only a full and extended constitutional process can hope to respect the interests of all citizens living in the UK and at least give

some consideration to the billions of people living in multi-national states all over the world.

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