



THE LEARNED SOCIETY OF WALES CYMDEITHAS DDYSGEDIG CYMRU

CELEBRATING SCHOLARSHIP AND SERVING THE NATION
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The lecture offered a personal reflection by the President of the Society on the present UK constitutional challenges, and implications the forthcoming EU referendum and Wales. In his talk Sir Emyr argues for a new federal structure including a written constitution that preserves the unity of the United Kingdom, while better reflecting the distribution of powers and different responsibilities of Westminster and the UK devolved legislatures.

WHITHER A BRITISH CONSTITUTION

Thank you Chair. I'm not sure if I'm more intimidated facing this audience tonight than I was fifty years ago attending my first Physics lecture in this very place. Looking at the serried ranks of fellow students and wondering would I be one of the 80% who would make it to the second year. A lot has changed in Higher Education since then.

This evening I want to offer a personal reflection on the present constitutional arrangements drawing on our history, to consider some of the challenges which the United Kingdom faces, including the forthcoming referendum on the European Union, and to test our current arrangements against the conventional concept of federalism. I will then, probably unwisely, speculate on what the future may hold for the constitutional dispositions in the United Kingdom and indeed the unity of the State itself.

Let me start with a brief history of which the British are naturally proud. We have just celebrated the 800th anniversary of Magna Carta. Our parliamentary tradition goes back many centuries. Indeed Winston Churchill in 1940, addressing the Icelandic Parliament, the Althing, which was established in 930, began his speech with the words 'I bring you greetings from the mother of parliaments – to the grandmother of parliaments'.

Yet today's United Kingdom only came into existence in 1921 with the partition of Ireland and the creation of the Irish Free State. The title confuses – the United Kingdom of Great Britain and Northern Ireland. Great Britain is composed of England, Scotland and Wales. The adjective is British. The United Kingdom is composed of four constituent nations – that's why we had four teams competing to reach the Euro football finals. A Welshman, I was the British Ambassador representing the United Kingdom of Great Britain and Northern Ireland. Little wonder that foreigners are confused.

England has the central place in UK history. Its unity, size, population and military supremacy guaranteed this position. Wales became attached to England, effectively by military conquest, through Acts of Union in 1536 and 1543. It was assimilated into the English legal, economic and political system. Nonetheless its own distinctive identity was protected and preserved by geography and a mix of language, non conformist Christianity, and social class cleavage. It was this combination of the spiritual, cultural, and the resilience of the Welsh language, rather than the political, which maintained essential Welshness.

Scotland has a proud and independent history, often in competition or conflict with England. After all, the Roman Emperor Hadrian built his wall to keep the Scots out of England. Its origin as a separate Scottish state goes back at least to the fourteenth century. In 1603 James VI of Scotland became James I of England (note - not popularly described as of England and Wales). This was followed in 1707 by a voluntary merger of the English and Scottish Parliaments which led to the Union of Great Britain – 3 nations, England, Scotland, and Wales. Scotland thereafter retained the distinctiveness of its legal and educational systems, entrenched its Presbyterian national church, and practiced significant administrative autonomy.

Like Wales, Ireland was subject to military conquest. Its parliament was abolished following the defeat of the first nationalist uprising in 1798. Three years later the United Kingdom of Great Britain and Ireland came into being, and endured until 1921. Then today's Ireland was created and the six counties of the north became the Northern Ireland of today's United Kingdom.

The people of the United Kingdom are bound together by a shared identity, by that history, by culture, citizenship, values and family ties. Common political and constitutional principles and our institutions became the basis for our hard earned liberties. Democracy, the rule of law, and the independence of the judiciary ensured respect for rights. The economic union brought prosperity. We now share a welfare state which was designed on the basis of territorial equity. The United Kingdom is the State recognised internationally and perceived by most as successful. Globalisation and external challenges are in my view better faced together.

We have no written codified constitution, a characteristic shared only with New Zealand and Israel. Our constitutional arrangements have evolved. Gradual change has been the order of the day. Organic change with continuity has guided developments. Or as some would say, we have muddled through with no clear blueprint or strategy. Instead, the British have reacted pragmatically to events and to political pressures, with the occasional Commission or Report which was seldom implemented coherently.

By 1997, the Conservatives had been in government for 18 years. Governance was showing signs of wear and tear. Pressures included major structural changes in the British economy, a natural reaction to long time government by one party, a resurgence of nationalism in Wales and Scotland, and increasing political and economic integration in the European Union.

These were powerful drivers for devolution. The state was facing changing political pressure for more local autonomy while wishing to retain its essential powers. European regionalisation was developing and encouraging regional linkages. The nations of the UK needed Whitehall less, were looking more to Brussels and increasingly working directly with the European Commission. For its part, the EU was receptive to regions and a stronger role for them. Subsidiarity was becoming widely popular.

So Tony Blair and New Labour had a great opportunity in Spring 1997, not just to exploit the tradition of cyclical change in government in Westminster, but to respond positively to these pressures. Crucially, Blair presented his party as the moderniser, committed to transforming the UK for the 21st century. Elected on 1 May 1997, New Labour unleashed a series of constitutional changes unparalleled in the rest of the 20th century.

Within 2 years these had included:

- the Human Rights Act enshrining in UK law the European Convention on Human Rights,
- a Freedom of Information Act was in place,
- Scotland had a Parliament, Wales a National Assembly, Northern Ireland its Assembly restored, London an elected Mayor, and proportional representation had been used in UK elections.

Devolution was intended to bring government closer to the people, to recognise local circumstances and differences within the Kingdom, and to permit policies and decisions which better reflected that variety and diversity. It was designed to allow policy divergence between different parts of the state. It was also meant to be about modernisation, improving governance within the UK by encouraging a closer relation between the governed and the governing, and providing better access to politicians. It was not intended to create a federal structure. Instead this was novel, pragmatic change ending with different arrangements in each of the four nations – the so called asymmetric outcome. Virtue was made of difference without in my view sufficient emphasis on coherence, or consideration of the consequences for the nation state, the United Kingdom.

The choice for Scotland was characteristic of federal dispositions. To give Scotland precise powers and competences and retain all other powers for Westminster. Or to retain certain powers for the centre and devolve all other competences to Scotland. Blair's government chose the latter option, the so called 'reserved powers' model. London was to reserve control of the UK constitution; foreign, security, and defence issues; border controls; fiscal and monetary policy; nuclear safety; abortion and genetics. On the other hand, everything else was to be devolved to Scotland. The subjects to be controlled by the Scottish Parliament through primary law making powers would therefore include transport, education, health, economic development, planning, energy, criminal law, environment and agriculture.

In a referendum in September 1997, in a 60% turnout, 74% of the Scottish people voted in favour of a Parliament of 129 members. The Scotland Act 1998 implemented devolution in Scotland, and the number of Westminster MPs from Scotland was reduced from 72 to 59.

How different was the situation with regard to Wales. The British Government proposed that a National Assembly for Wales would be created with 60 members. It would have no primary law making powers, but would only assume the responsibilities which Westminster had up to then delegated to the Secretary of State for Wales. There were to be no Welsh ministers as such but a cabinet style committee of the Assembly would act as an executive. This, the so called 'conferred' powers model was but a pale shadow of what was on offer for Scotland. Perhaps in part because of this, 50.3% of the Welsh people in a 50% turnout supported the proposal.

Of course there were reasons for this distinction. Scotland had had a long experience of separateness. On the other hand Wales had shown much less interest in political devolution. An earlier referendum in 1979 on the principle had been defeated 3:1. The Labour Party, dominant in Wales, had long been divided on the issue. Perhaps more telling was the popularity of Scottish nationalism and deeply felt resentment there of Westminster after 18 years of Tory government. Stripped of the intellectual rhetoric, many of the supporters of devolution to Scotland saw it as the means of checking nationalism and preserving the unity of the United Kingdom.

Northern Ireland was a case apart. Thanks to the efforts of John Major and then Tony Blair to find a peaceful way forward and an end to 30 years of violent troubles, new constitutional arrangements were put in place with the help of the Irish Government.

England showed no appetite for having a devolved legislature. Instead English devolution was addressed as a regional or city issue. London and a number of other cities, now have elected mayors following the positive outcome of referenda. The north east of England resoundingly voted against a regional assembly, having no wish for another tier of government.

Devolution since 1999 has become largely an accepted part of the political landscape. Further devolution has continued apace. More substantial fiscal devolution is being finalised for Scotland. In Wales, the Government of Wales Act 2006 created ministers answerable to the National Assembly, and led eventually to the Assembly having primary law making powers in 20 designated areas. The last Government of Wales Act 2014 implemented some of the recommendations of the Silk Commission.

In 2015 the British Government tabled a Bill intended to clarify and simplify law making in Wales. While it contained a number of positive features, many felt that it raised broad constitutional concerns. It would not have made processes clearer and more accessible to the public, and in particular it did not provide that the National Assembly should be free to legislate in all non reserved areas. The Secretary of State's

response to the consultations shows that the Government has listened, and I think a delay in the process is a good thing. We've had enough piece meal decisions. We would all benefit from a strategic coherent approach based on clear principles with full consideration of the consequences for Wales and the United Kingdom.

Devolution has been enacted and defined by the British Parliament, the inevitable consequence of our constitutional arrangements. The sovereignty of the United Kingdom is vested in the British Parliament and in the Monarchy. Any devolution or change in the exercise of that sovereignty must be for Parliament to decide. So the terms of the devolving of powers to Scotland, Wales and Ireland do not result from the detailed provisions of a written constitution. Devolution is a consequence of Acts of the British Parliament, which can be changed, and at least theoretically, even abolished by Westminster.

External affairs were reserved for the centre. However the devolved administrations naturally look abroad. Attracting inward investment is a natural and competing interest. European Union business is a focus of attention. And there were good reasons for this. The disbursement of EU funds is a key interest to the nations of the UK. Over 2014 - 2020 Wales will receive £1.8 billion from the EU Structural Funds. If the Council of Ministers is discussing draft legislation on matters which have been devolved, say to Scotland, then Scotland will insist on some say in what the UK Representative should be arguing for. After all, once adopted in Brussels, implementation of that directive in Scotland, is for the Scottish Parliament, but it is the British Government which is accountable to Brussels for the implementation of the directive. It is the United Kingdom which is the member state of the EU. It is the British Government therefore which is responsible to the European Commission for ensuring that the obligations of EU membership are met throughout the territory of the UK. There is much scope for confusion and conflict in the handling of these issues, and arrangements have been put in place to smoothen decision taking.

England may have chosen to reject devolution in its territory, but evidence suggests a sense of real grievance among the people of England, sparked by the perception that Scotland enjoys advantages in governing arrangements, particularly in regard to public spending. England is seen as materially disadvantaged relative to other parts of the UK. Moreover law making for England had not changed since 1998. This is exemplified in the 'West Lothian Question' which raises the situation that MPs outside England can vote on laws applying only in England while MPs from England are unable to vote on laws applying in Scotland which has devolved responsibility for that policy area. The political response was for the House of Commons to agree that MPs with constituencies in England (or England and Wales) would have a veto on legislation only affecting England (or England and Wales) on matters devolved elsewhere. These rules were applied for the first time on a Housing and Planning Bill in January of this year. A similar motivation underlies the Chancellor's shrewd proposals to devolve more economic powers to local authorities to create the so called northern powerhouse.

So much for the descriptions. I'd like to explore a few definitions.

The basic foundation of international relations is the nation state. The members of the United Nations are sovereign states. So what is sovereignty. It is autonomy, independence, liberty, self determination, the authority of a state to govern itself, free from external control or interference. It's a rallying cry for most countries. Don't interfere with me, whatever I'm doing because I'm exerting my sovereignty on my territory and against everyone else if need be. The strident voices who want to recover British sovereignty have an instant appeal - a return to an independent country. Its advocates don't seem to have realised that the divine sovereignty of the absolute monarch has long gone. Instead today nation states enjoy sovereignty which has been curbed by individual choice and by external events. Let me give some examples to illustrate the point.

- The British Government's first responsibility is to protect its citizens. So should it be free to do so without interference from Brussels. Well no. In 1949 Britain signed the North Atlantic Treaty which provided the bedrock of collective defence and assumes that an attack on one is an attack on all, necessitating a collective response. Losses of sovereignty don't get much bigger than that.
- the European Convention on Human Rights, largely written by British lawyers, came into force in 1953, and has done much to protect and promote rights across the continent. We signed up to the Convention, as we have willingly done for scores of other conventions, to accept its provisions on the basis that we supported them and saw the benefit of other countries being similarly constrained. But if the UK now wants to be able to pick and choose which aspects it wishes to accept, why on earth do we imagine that other countries won't follow our example.
- when the Security Council of the United Nations passes certain Chapter VII resolutions, its provisions are binding on 193 countries, including the UK, regardless of the existing laws in those countries.

Let me turn to the involuntary limitations on national sovereignty

- the British economy was buffeted by the 2008 global financial storm with limited options available to the government to mitigate the consequences,
- when the market decides to attack a currency, few governments are in a position to withstand the pressures, either up or down,
- few foresaw 18 months ago that the price of oil today would be some 60% less with all its implications, good and not so good.

We all, have to live with the consequences of events. Similarly the big issues facing governments are global, be it terrorism, climate change, security, epidemics of disease, poverty, sustainability, energy

security, food and water security. Having the unfettered freedom to face up alone to any one of these issues is in my view a dangerous illusion. Each challenge requires that governments work cooperatively to produce the best possible and effective response.

That's the basic reason why Member states of the EU, give up to or share some of their sovereignty with the EU when they agree that action is best taken at the EU level. Working in the EU and with others, we can better tackle those challenges. We act at the EU level primarily for economic and foreign policy reasons. The Single Market offers real gain to British exporters of goods and services. Tariffs are relatively less important than non tariff barriers, those phytosanitary regulations or standards which must be met before you export to or provide services in a market. Having one EU standard for a vehicle means that once it is produced to that standard, it can be sold without impediment in 27 other countries to the huge advantage of British manufactured cars. But I hear you say 'I want the right to veto EU laws'; and when France rejects that law to protect its car industry from British imports, you understand the advantage of the single market to the UK. If the UK wants a veto, how can any other member state be denied its right to the veto, and if each has it, then the Single Market is no more.

But doesn't EU foreign and defence policy cooperation strike at the heart of an independent Britain according to its critics? I don't think so. Responding to external threats on our own in an uncertain, increasingly insecure world would be a luxury, and it wouldn't make us safer. Just as NATO defended us against the Soviet threat, so the European Union contributes to our overall security, if security is defined as physical, economic, energy, environmental, food and much more. That is what we gain from the European Union. Outside it we would be diminished, with less influence to meet global challenges, or capacity to determine how the EU should act or what rules should be put in place.

Just as more is being done at the European level, so individual regions want to express themselves and bring decision making closer to people. The EU has established free movement of goods, capital, people and services between the member states. Yet in the United Kingdom we are introducing different policies in each of the constituent nations, which in a small way, distort these freedoms. Examples include university tuition fees, different policies on nuclear energy or GM foods. There is merit in exploring different policy options in the nations. But in general there is insufficient exchange of information, informed consultations, and willingness to learn from other nations, perhaps exacerbated by the fact that today different political parties are in power in Westminster, Belfast, Cardiff and Edinburgh.

There are natural and inevitable consequences of devolving powers so that decisions can be taken to meet needs at a sub state level. It does mean that particular sensitivity should, for example, apply to decisions affecting people living on the borders of the nations or wishing to move freely across those borders. It means trying to identify and then address unintended consequences of decisions, be they in London or by the devolved administrations.

Devolution in practice has meant a redefinition of what is the law in Wales as the National Assembly legislates and Westminster passes Acts intended to apply in Wales and dealing with devolved and non-devolved matters. Little wonder that the person on the Swansea bus is confused. Some already argue that there should be a separate legal jurisdiction for Wales, with a separate system to administer justice and a separate judiciary. This would have practical and economic consequences. But to the contrary it is not realistic either to state that, despite devolution, there must be one unified jurisdiction of England and Wales and to make that a cardinal principle which then determines policy outcomes. The concept of a distinct but not separate legal jurisdiction reflects better what is happening and would simplify the application to Wales of the 'reserved powers' model of Scotland which I consider to be both desirable and inevitable.

As devolution continues to evolve, more a process than a clearly defined fixed outcome, is the United Kingdom on the way to becoming a federal state?

Before trying to answer that question, it will be helpful to seek to define federalism. Successive British Governments have reacted strongly to any suggestion that the concept was appropriate in the EU. That was fear of a super EU State. Yet on the continent, federalism owes more to the concept that decisions should be taken the right level, rather than creating a United States of Europe.

What are the characteristics of federal states? It's the sharing of powers between a central authority and individual regions in a defined manner. The central/federal authority usually retains the key and commonly needed responsibilities – defence, foreign affairs, monetary policy - which also tend to have a shared external representation. Component regions then each have precise competences with supreme authorities in each region which have legislative and executive jurisdiction within these competences. The delineation of responsibilities is fixed, and usually set out in a written constitution, changes to which can only be made with the agreement of all the parties. There are binding regulatory arrangements, often a supreme court, for arbitrating disputes or determining who has the right to pass laws if uncertainties arise between the different levels. How to resolve the interpretation of existing distribution of powers is a matter of law, not of politics.

Against this definition the United Kingdom already shows some of the aspects of a federal state. There are different competences shared in a more or less defined way but lacking consistency and clarity. The Courts can already rule whether devolved legislatures are acting outside their permitted competence. Nearly twenty years on, devolution is widely supported in the three nations. National self confidence has grown. Devolved powers stem from Acts of Parliament and are not set out in a formal constitution. In theory, Westminster could legislate to scrap the Scottish Parliament or the National Assembly, but return to the 1997 unitary state is politically unthinkable. Devolved legislatures are firmly established as part of the UK constitutional landscape, in what might be loosely described as de facto or quasi federal

arrangements. While Westminster remains theoretically supreme and retains the ability to legislate in devolved areas, it has accepted that it would only do so with the prior consent of the legislatures themselves.

There are many arguments against a formal federal structure for the United Kingdom. A federal approach would require constitutional arrangements to have primacy, and such 'higher law' could not be amendable by Westminster alone. Yet the British tradition, as I said at the beginning, has been anchored on the supremacy of Parliament. Political and cultural tendencies in Britain have not favoured federalism. We have always acted ad hoc through informal responses to problems. Whitehall, perhaps increasingly wary in today's world of seeing more power move away from the centre, would probably be opposed. And as in the earlier devolution debates, many would argue that federalism was the ultimate slippery slope which would precipitate the dismemberment of the United Kingdom.

This is a traditional Westminster focussed approach. But arrangements have moved on. Devolution is established. Westminster's role in practice is limited to deciding what further powers should be transferred away from London. Proposals for Wales and Scotland are on the table. Legislatures in Wales and Scotland came into being as a result of approval in referenda. The people of Wales voted for devolution and again for additional powers in 2011. As a minimum this affords the National Assembly a degree of democratic legitimacy. I think it's fair to argue that Parliament's sovereignty in relation to devolution is no longer absolute. It is constrained by politics and by the democratically expressed views of the nations. Indeed this has been recognised in judgements of the Supreme Court.

A stronger case against a federal Britain is that England has no interest in such a structure. Its preponderant size would anyway be a major obstacle, carrying the principle of asymmetry too far! There is little pressure in England for its own legislature.

Yet the United Kingdom's status is under threat as seldom before. Firstly our continued membership of the European Union will be determined by a referendum on 23 June. The external world is increasingly uncertain and insecure. If we look to the neighbourhood of the European Union, problems abound. North Africa is beset with challenges, Libya, Iraq, and Syria are ongoing crises. Turkey is receiving millions of migrants intent on entering the European Union. Putin and a resurgent Russia are confronting us. I haven't mentioned North Korea, economic slowdown in China, global economic stagnation. For me this is the worst moment to decide to go it alone into some uncertain future. Of course the EU itself faces many challenges, both internal and external. But we'll be better placed confronting all those challenges together. As Churchill put it 'There's only one thing worse than negotiating with your Allies, and that's having no Allies with whom to negotiate.' A positive yes is the best way to help ensure our prosperity, security and influence, with a commitment to outward looking, cooperative and engaged policies. This for me should be an enduring part of our constitutional arrangements, better protecting our interests and

preserving the unity of the United Kingdom, while sufficiently and proportionately meeting nationalist aspirations.

Secondly there is a fundamental challenge to our form of politics. We need to restore people's faith in politics. It is the essence of how societies co exist, allocate resources, and ensure their prosperity and security. The present disillusionment with the body politic is dangerous.

Thirdly there is need for a new settlement with England, to recognise and deal with the sense of grievance which is stimulating intolerance and extremism. As a minimum, England a very centralised country, needs to find a means of redistributing power from London which meets the particular aspirations of the English.

Fourthly human rights are an essential element of Britishness. They are embedded in our political and legal structures, and in public opinion. They have long been an exemplar to other countries and organisations. A proposed Bill of Rights, which would replicate only some of the provisions of the European Convention on Human Rights and make judgements of the ECHR advisory only, would necessitate a renegotiation of British membership of the Council of Europe. Not only would this undermine human rights in other countries but it would have domestic consequences in the United Kingdom. The Belfast agreement, crucial to ending the troubles, provides that Northern Ireland enjoys certain right, supplementary to those in the ECHR. Nor would Scotland and Wales relish the imposition of a British Bill to replace the European arrangements.

Lastly, the unity of the United Kingdom depends on each of the nations being content with the powers which it enjoys, and in agreement with the decision on continued membership of the European Union. An overall vote to leave, with the opposite vote within one nation, say Scotland, would be a destructive test of the unity of the United Kingdom. If we overcome that test, future arrangements must not be so fissile as to make dismemberment of the State inevitable.

The present arrangements are quasi federal, and there seems to me an increasingly strong argument for going the whole hog to a federal structure. This would better reflect the actual distribution of powers and set out clearly the different responsibilities of Westminster and the devolved legislatures. In doing so we would put a limit on devolution and ensure the powers and continued existence of the federal state.

Because of the risks, I hope we can regain our faith in the United Kingdom and appreciate anew the benefits which it gives us all. We need a far more rational and considered view of our inchoate constitutional structures. That may well entail a formal form of federalism which can meet the aspirations of each of the nations. I don't think we should be shy about setting the arrangements on paper. Our ad hoc traditional and evolving arrangement have served us well, but there is a strong case for a written constitution if it can better meet the interests of all our citizens. In framing the detail let's be careful that

we don't discard provisions which have not only benefitted us, but helped encourage the rule of law and the protection of rights in many other countries.

Many have argued that it is time for a Constitutional Conference to take a long hard look at what form of arrangements would best meet the aspirations of the British people. For me, this should be based on the unity of the United Kingdom state, which despite many challenges, has served our interests well, and stands comparison with any others. But the evidence suggests that its time for a serious review and an end to muddling through.

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