



DG Undeb Sy'n Newid UK's Changing Union

Federalism, devolution and the breach of British sovereignty

**Background paper for the Changing Union Forum
Federal Future for the UK: 21-22 September 2012**

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“Federalism revolutionises the whole constitution of the United Kingdom; by undermining the parliamentary sovereignty, it deprives English institutions of their elasticity, their strength, and their life; it weakens the Executive at home, and lessens the power of the country to resist foreign attack. The revolution which works these changes holds out no hope for conciliation with Ireland. An attempt, in short, to impose on England and Scotland a constitution which they do not want, and which is quite unsuited to historical traditions and to the genius of Great Britain, offers to Ireland a constitution which Ireland is certain to dislike, which has none of the real or imaginary charms of independence, and ensures none of the solid benefits to be hoped for from a genuine union with England.”

A.V. Dicey, ‘Home Rule from an English Point of View’, *Contemporary Review*, July 1882.

“Let us suppose that more powers are devolved to the Holyrood parliament, that the national assembly in Cardiff Bay is transformed into a parliament, and that the parliament at Westminster adopts English votes on English laws. Would what we then have still be a union state or would it be a federation in the making?”

Christopher G. A. Bryant, ‘Reconfiguring Britain: The 2010 O’Donnell Lecture’, *Contemporary Wales*, 2011.

The notion that a federal solution might be found to the constitutional predicaments of the United Kingdom is only now being thought of as a serious proposition by mainstream politicians and commentators. However, that is more a reflection on the nature of Britain than federalism as a constitutional option.

Hitherto, while far from the agenda at home, British governments of all hues have been willing, and sometimes eager, to promote a federal answer to their constitutional problems abroad. In the 19th Century federalism proved a profitable way for the UK to invent new

national identities for its imperial possessions in Canada, in 1867, and Australia, in 1900, and was also considered for South Africa. However, there was less success in the utilisation of federalism as an answer to Britain's problems of decolonisation in the mid 20th Century. The Central African Federation of Nyasaland, Northern and Southern Rhodesia was created in 1953 but dissolved 1963. The Caribbean Federation lasted just four years between 1958 and 1962. The Federation of the Arab Emirates of the South survived a little more, between 1959 and 1967. The Malaysian Federation of Malaya, Singapore, Sarawak, North Borneo and Brunei only lived for three years, between 1962 and 1965. On the other hand the Nigerian Federation, founded in 1960, has lasted as a constitutional framework, but with mixed political outcomes.¹

It can be seen, therefore, that for several centuries British statecraft has often deployed a federal response to problems with its colonial possessions overseas. Yet it has been decidedly resistant to such a prospect at home. The reason is encapsulated in the above quotation from A.V. Dicey, whose *Law of the Constitution* (1885) became, in effect, a part of the uncodified British constitution. At this constitution's heart was the notion of an undivided sovereignty resting pure and undefiled with the Crown in Parliament. As Dicey put it, the sovereignty of Parliament was "from a legal point of view the dominant characteristic of our political institutions".² It went to the heart of the identity of England as a Parliamentary nation. And it is notable in the quotation at the head of this paper, that Dicey elides the United Kingdom with England in the opening sentence. What he is really talking about in his defence of sovereignty is England, not the United Kingdom.

Of course, an essential feature of federal constitutions is that sovereignty is divided between different legislatures within a state. Federalism for the United Kingdom, even if it entailed separate legislatures beyond England's borders, for Ireland or Scotland say, would mean Parliament being forced to share its sovereignty. This was simply unacceptable.

At the end of the 20th Century the revolution that Dicey so feared took place. Certainly, in his 2009 survey of what he calls 'the new British constitution' Vernon Bogdanor finds the cumulative impact of the changes to be revolutionary:

"The constitutional reforms of the years since 1997 cannot be understood in evolutionary terms. They represent nothing less than a revolution in our constitutional affairs, a radical discontinuity from what has happened before."³

The 1998 Acts that established the Scottish Parliament and National Assembly for Wales, together with the new Northern Ireland Assembly that was first elected that year under the terms of the Good Friday Agreement, effectively breached British sovereignty. It was a de facto rather than de jure breach to be sure, but a breach nonetheless. In the case of Northern Ireland, the preamble to the Good Friday Agreement saw Britain formally relinquishing its sovereignty by declaring that it was a matter for the people to determine, if necessary in some future referendum. If only by implication, the British preference would be, sooner or later (and, sadly, probably later) for Northern Ireland to link its jurisdiction with its neighbour to the south.

¹ An account of these episodes in Britain's decolonisation can be found in John Kendle, *Federal Britain – A History*, Routledge, 1997.

² A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan, 1959 (10th edition).

³ Vernon Bogdanor, *The New British Constitution*, Hart Publishing, 2009, page 276.

In the case of Scotland and Wales, in strictly legal terms, “power devolved is power retained”, to use Enoch Powell’s memorable phrase.⁴ But could the Westminster Parliament ever abolish the Parliament in Scotland or the Assembly in Wales, in the way that the Thatcher government so casually dismissed the Greater London Council in the 1980s? Certainly, in the case of Scotland that would immediately prompt secession. Creating representative institutions on national foundations is quite a different matter from organising or reorganising local government.

What precise constitutional arrangement are we left with as a result of the changes that have taken place over the past 15 years? In his 2010 O’Donnell Lecture Christopher Bryant, Emeritus Professor of Sociology at the University of Salford, judged that “Britain today is an asymmetrical union state on the threshold of a quasi-federation”, adding:

“A quasi-federation is what in practice I think we are heading towards, but without articulating it as such. It would be a typical British compromise consistent with the make-it-up-as-you-go-along character of Britain’s unwritten constitution.”

The asymmetry of this emerging ‘quasi-federation’ is matched by the reactions to it amongst the political classes within the four constituent territories of the United Kingdom. All are strikingly different. It is fair to say that the dominant response within England has been to simply ignore what has taken place. A major reason – and, indeed, why the changes have bedded down so relatively easily – is that England has largely remained unaffected by devolution. On the whole, Westminster politics and the Whitehall administration have continued as though nothing has happened. This is because the devolved institutions simply took over an existing structure and array of functions that had already been decentralised to respective Secretaries of State and administrative offices many decades before democratic devolution took place. Indeed, it can be argued that Whitehall and Westminster are less bothered by the Celtic fringe today than they were before the devolution process started at the turn of the century.

The response in Scotland has been to constantly seek ways to widen the breach in British sovereignty that occurred in 1998. Additional fiscal powers, giving the Scottish Parliament control of 35 per cent of income tax, were ceded by the 2012 Scotland Act following the Calman Commission recommendations. And, of course, in the wake of the election of a majority SNP government in 2010, we now await the outcome of the independence referendum in autumn 2014. Whether that succeeds or not, and the outcome remains uncertain despite the opinion polls at their highest finding less than 40 per cent in favour, Scotland seems likely to move towards greater fiscal autonomy. The various permutations being considered have been termed ‘devo-max’, ‘devo-plus’ and ‘independence-lite’ amongst other short-hand descriptions for the, as yet, hazily understood divisions between Scotland and the rest of Britain over income and expenditure. Nevertheless, whatever the outcome, devolution would then have a far greater political impact on England than has happened so far. At that point it can be expected that the English political system would demand a constitutional adjustment to keep the devolution process at the arm’s length to which it has grown to be accustomed. What we are then likely to see would be an adjustment to procedures within the Westminster Parliament to allow separate ‘English votes on English laws’. Though this would avoid unwanted upheaval of creating a separate English parliament, with hundreds more politicians and civil servants, it would still have a profound impact – as we shall see.

⁴ Enoch Powell, speech at Llwynypia, Rhondda, May 1974.

In Northern Ireland a major, perhaps the major response to the constitutional revolution, is alarm at the backwash events in Scotland may throw at the delicate balance of political forces in Stormont. Attention to the potential dangers was drawn by John Cushnahan, a former leader of the Alliance Party in Northern Ireland, speaking at the conference to launch the Changing Union project at the end of March 2012:

“My fear is that the commencement of the debate on Scottish Independence will cause collateral damage in Northern Ireland because it is likely to lead to the ‘de-mothballing’ of the constitutional issues and result in them being centre stage once again in Northern Ireland politics.”

One sign that this would be likely to happen was the statement put out by Sinn Fein President Gerry Adams on 10 March 2012 in which he called for the holding of a border poll in Northern Ireland. Cushnahan said such a poll would be extremely divisive:

“It would raise unnecessary fears and create considerable political tension which would stretch right into the heart of the Power Sharing Executive itself. Ministers who now work together for the common good would find themselves on opposite sides of a bitter and fractious constitutional debate - a debate, moreover, that few in the Irish Republic would relish.”⁵

In Wales there is concern that the country is being sidelined in a debate that inevitably tends to focus on an axis between Edinburgh and London, and also at the lack of an all-British dimension to the possibilities being discussed. In turn this has prompted suggestions by a number of leading figures that a federal approach might provide an answer. Most notably First Minister Carwyn Jones, again speaking at the launch conference of the Changing Union project, called for a UK Constitutional Convention to produce a written constitution suitable for the 21st century that might include a House of Lords to act as a territorial chamber:

“We are on the brink of huge constitutional change in the UK. There is a strong case for reforming our central institutions to reflect the emerging reality of a looser UK. We should be moving forward as a Union to a constitution that reflects the 21st not the 19th Century. We must consider the prospect of a written constitution which in part would define the relationship between the devolved administrations and UK Institutions. The UK has changed beyond recognition over the past 15 years and it is time that our constitution recognised this.”

He said the future of the UK should be considered in the round and not nation by nation in a piecemeal fashion, as had been the case hitherto. At the same time he acknowledged that the agenda was being driven by Scotland

“If the people of Scotland vote in favour of independence the shape and constitutional make-up of the UK will be dramatically changed. Equally, if the vote is against independence there is still the prospect of substantive constitutional change in one part of the UK that potentially will impact on all other parts of the Union. We need to start discussing the future of the UK before the Scots go to the polls. We need a comprehensive look at what kind of UK we want to have.”

⁵ Conference report, *Wales in a changing union*, www.ClickonWales.org, 31 March 2012.

A written constitution was needed to entrench the position of the National Assembly to safeguard it from arbitrary abolition by Westminster. Under a written constitution, too, the House of Lords could be reformed so that it became, in effect, a federal upper chamber with equal representation for each of the four nations of the UK. As he put it, “An arrangement like that could help bind together the nations of the UK.”

A more forceful case for a federal solution, but equally aimed at holding together the British Union, has been made in a series of interventions by the Conservative AM and Deputy Presiding Officer in the National Assembly, David Melding. In his book *Will Britain Survive Beyond 2020?* he states:

“For Britishness to remain coherent it must now accommodate the explicit political character of Wales, Scotland, Northern Ireland and perhaps sooner than we think, England. A great but dormant truth is reasserting itself. The Home Nations are sovereign entities. At the moment they choose to be part of the British state. Long may it continue. But let no one be fooled that this allegiance is inevitable. Britain might not survive beyond 2020. The best way to preserve Britain as a multinational state is to accept that the UK can no longer be based on tacit consent but requires a new settlement. That settlement will need to be federal in character so that the sovereignties of the Home Nations and the UK state can be recognised in their respective jurisdictions.”⁶

But how realistic would be the kind of British federation that Melding espouses? The most obvious among many difficulties is the sheer size of England, which contains more than 80 per cent of the population of the UK, in relation to the other three components. There is no federal system in the world where such an imbalance exists. The nearest equivalent is Canada where 35 per cent of the population live in Ontario, but that is not close. In general, federal systems where the largest unit dominates do not survive. Examples include the USSR which was dominated by Russia; Czechoslovakia which was dominated by the Czechs; and Yugoslavia which was dominated by the Serbs. As long ago as 1973 the Commission on the Constitution, the Kilbrandon Commission, summed up the case against an English Parliament within a British federal system in what seem irrefutable terms:

“A federation consisting of four units – England, Scotland, Wales and Northern Ireland – would be so unbalanced as to be unworkable. It would be dominated by the overwhelming political importance and wealth of England. The English Parliament would rival the United Kingdom federal Parliament; and in the federal Parliament itself the representation of England could hardly be scaled down in such a way as to enable it to be outvoted by Scotland, Wales and Northern Ireland, together representing less than one-fifth of the population. A United Kingdom federation of four countries, with a federal Parliament and provincial Parliaments in the four national capitals, is therefore not a realistic proposition.”⁷

The only way a truly federal system for the United Kingdom could be made to work would

⁶ David Melding, *Will Britain Survive Beyond 2020?*, Institute of Welsh Affairs, 2009, page 4. He is currently publishing an online ‘e-book’, *The Reformed Union: a British federation*, on the IWA’s online news site www.ClickonWales.org

⁷ Royal Commission on the Constitution, Cmnd. 5460, HMSO 1973, Para. 531.

be if England were broken down into its component regions – between six and ten – and these be given legislative bodies on a par with Scotland, Wales and Northern Ireland. In this way there might be different laws in Manchester, Newcastle and Birmingham as there are in New York, Connecticut and New Jersey. This is not a new idea. A century ago, in September 1912, at a time when federalism was being debated in the context of Irish Home Rule, Winston Churchill suggested that a workable federal system could only be established in the UK if England was divided into self-governing areas.

“I am not in the least disturbed by the prospect of seeing erected in this country 10 or 12 separate legislative bodies for discharging the functions entrusted to them by the Imperial Parliament. The United States conducts its business through a great number of Parliaments and Germany has not merely Parliaments and States gathered and grouped together within the German Empire but has separate kingdoms and principalities and armies woven together in a strong federation of the whole. In the colonies, Canada, South Africa and Australia have found this federal system the only way in which you can reconcile the general interest of an organized State with the special and particular development of each part and portion of it.”⁸

Churchill’s ideas were greeted with little enthusiasm at the time. For instance, the *Spectator* magazine complained that the idea that England should be broken up in this way lacked dignity:

“Most of us Englishmen, though we do not often talk about it, are proud not of Great Britain only, or of the United Kingdom only, or only of the British Empire, but proud also of England, and the idea of breaking up our country into seven or eight provinces, with separate parliaments and separate governments of their own, is utterly repugnant to our national pride.”⁹

There is little evidence of any change in such attitudes in the century that has passed since these sentiments were expressed. Certainly, England is a highly regionalised country in terms of accents and dialects and artistic expression (is there an English novel save one that is regionally based?), but these sensibilities have hardly any political expression. Outside Cornwall, such movements as exist that campaign for regional representation remain stubbornly at the margins of the political process. In 2004, a proposal for a relatively weak North East England elected Assembly – with far fewer powers than proposed for Wales in 1997 – was overwhelmingly rejected: 78 per cent voted NO against 22 per cent Yes on a 48 per cent turn-out. In fact, what was proposed was essentially a reorganization of local government. If elected Assemblies, even with only executive powers as characterised the National Assembly for Wales at the start, were to spread across England then it would mean the end of many of the great departments of state within Whitehall - education, health, environment, transport and agriculture among them. Just to raise such a prospect is to question its likelihood.

A fall-back position for those who wish to provide greater representation for England, without going to the lengths of either breaking up the country into provinces or creating an English Parliament sitting in York or Winchester, is the notion of ‘English votes for English laws’. This is supported by the Conservative Party and formed part of its election manifestoes in 2001, 2005, and 2010. The idea is currently being examined by the McKay

⁸ Winston Churchill, speech at Dundee, reported in *The Times*, 13 September 2012.

⁹ ‘Mr Churchill’s Latest Escapade’, *The Spectator*, 21 September 1912: quoted in John Kendle op.cit., page 71.

Commission on the consequences of devolution for the House of Commons, as one answer to the so-called West Lothian Question.¹⁰ The Conservative proposal, recommended by a Democracy Task Force chaired by Kenneth Clarke in 2008, is for ‘English’ Bills to be voted on only by English MPs at committee and report stages in the House of Commons, with a convention that any decisions come to there will not be overturned by final Third reading votes.

On the face of it this sounds an eminently sensible compromise for reconciling English interests at Westminster with the often divergent priorities being allowed for the Scots, Welsh and Northern Irish in their separate domestic legislatures. However, there are many difficulties with the proposal. One is defining what is a purely ‘English’ legislative proposal, when so many Bills coming before Parliament have clauses which affect different parts of the UK. That might be overcome. But under current funding arrangements via the Barnett formula, any proposal for England with spending implications has a knock-on impact on the budgets of the devolved administrations, so they have a direct interest.

Perhaps more seriously, whenever a government depended on Scottish and Welsh MPs for its majority – as happened in 1964 and 1974, for instance – the House of Commons would become bifurcated. That is to say, in such circumstances there would be a UK majority (presumably Labour) for such matters as foreign affairs, defence, economic policy and social security, but another, English, majority for domestic matters such as health and education. In effect there would be two administrations for England, one for matters that were not devolved to the Celtic periphery, and another for domestic issues. How could Cabinet responsibility and a coherent government programme be carried forward in such circumstances? All these difficulties have been rehearsed by Vernon Bogdanor, Research Professor at the Institute of Contemporary British History, King’s College, London, in his submission to the McKay Commission. As he concludes:

“The proposal for ‘English votes for English laws’ would yield in practice an English Parliament, a parliament for English domestic affairs, within the United Kingdom Parliament at Westminster. Its logic would seem to require the creation of a separate English Parliament, but there is neither the political will to create such a Parliament, nor would it be easy to govern such an unbalanced quasi-federation, as the United Kingdom would then have become. There is in fact no way within the Westminster structure of ensuring that English MPs have ‘a decisive say on laws that affect only England’, without, in effect, if not in form, creating a separate English parliament.”¹¹

Nevertheless, despite all these caveats, it does seem that the United Kingdom constitution is moving in a direction where the majority component will demand that its interests are reflected in new arrangements at Westminster that allow greater expression of English sovereignty. For this reason, short of independence for Scotland, a confederation might begin to look attractive than a federation. This would not entail the major changes to English arrangements of the kind that a federal constitution would require – for example, a federal upper chamber or a federal supreme court to adjudicate disputes between jurisdictions. England would continue to run its affairs as it liked, probably much as it does at the moment. However, Scotland, Wales and Northern Ireland would be allowed to

¹⁰ Named after the former MP for West Lothian, Tam Dalyell, who raised it during the devolution debates in the 1970s, this asks whether it is right that MPs from areas where there is legislative devolution should be able to vote at Westminster on English domestic legislation, such as, for example, education and health, which are the responsibility of devolved bodies in non-English parts of the UK.

¹¹ Vernon Bogdanor, Evidence to the McKay Commission, www.tmc.independent.gov.uk

develop their structures in a much more autonomous and differentiated way.

Confederalism would be a logical consequence of the devolution process already underway, which is that sovereignty in the United Kingdom now rests, not with the Crown in Parliament, but with its respective peoples – the Welsh, Scottish, English, and Northern Irish. They may join together in a confederal arrangement, but this entails powers, functions and money being handed up to the confederal level in an agreed way, and with the caveat that they can always be withheld or withdrawn. A federation works in the opposite direction. It starts from the position that sovereignty lies at the centre, at the level of the state – in this case Britain and the capital London - with powers, functions and money handed down in ways decided by the centre.

It remains the case, however, that there are difficulties with every constitutional answer that has been proposed for the United Kingdom. There are no perfect solutions. Confederalism may seem to offer a way forward with the least disturbance to current arrangements within England. In particular, it would require few changes to the operation of the Westminster Parliament in the way that federalism, for example, would demand a reformed federal upper chamber. On the other hand, confederalism would present profound challenges for some parts of the United Kingdom which would need substantial continued fiscal transfers, especially Wales and Northern Ireland.

And, of course, ultimately neither a federal solution, nor (probably) a confederal one, would satisfy Scottish or Welsh nationalist aspirations. This is because these seek international representation, at a minimum within the EU. Yet for a nation to be represented within the EU it has to be independent. Flanders is without doubt the most devolved, regionalised, or federated country within a EU member state. But it simply has no voice in the EU institutions. The position in Belgium is that all three jurisdictions – Flanders, Wallonia, and Brussels - have to agree on a common position for Belgium within the Council of Ministers. If they don't agree then Belgium simply fails to have a position, which is increasingly the case.

Can it be imagined that a similar restriction could be applied to the representation of a British federation or even confederation within the EU? That is to say, could a situation be envisaged where Wales, Scotland and England (and perhaps Northern Ireland) would all have to agree before a position was adopted in the Council of Ministers? Even more improbably, could Scotland or Wales have a veto on a British federation declaring war (which they would certainly have wished for in relation to the Iraq adventure, for instance)? To ask this question seems to provide the answer.

The forgoing suggests a large agenda for the first Changing Union Forum to address. As an opener for discussion, a number of questions are set out below, predicated on two scenarios following the Scottish independence referendum in autumn 2014.

Scenario 1: Scotland votes for independence

1. Scottish First Minister Alex Salmond is already hedging his bets on the monarchy, the currency and in some respects on the armed forces. What would be the formal nature of any link between Scotland and RUK? How far would this be this from confederation?

2. What might the consequences of Scottish secession be for (i) England; (ii) Wales; and (iii) Northern Ireland? For England would some of the sting be taken out of the 'English votes for English laws' argument? Could England continue to live with representation by Welsh and Northern Irish MPs in the House of Commons when both jurisdictions continued to diverge with their own legislation? For Wales, what new fiscal arrangements could be devised to tackle its ongoing heavy financial deficit? The same question would apply to Northern Ireland with the added insecurity of Scottish independence re-opening the border debate.
3. With Scotland departing or departed, would new fiscal arrangements for the RUK, such as reform of the Barnett Formula, become easier, or more likely?
4. What would the implications be for the representation of the RUK in the European Union and for the representation of Scotland in the EU? What influence would the RUK continue to wield at the UN?
5. What would be the implications for the future operation of the BBC?
6. What might be the psychological consequences for England of Scottish secession?

Scenario 2: Scotland stays in the union

1. Does the asymmetry of the UK mean that any notion of a neat, symmetrical solution – whether federal or confederal – is a mirage? Is it more likely that, for the foreseeable future, the UK will end up with an asymmetrical solution, like Spain? Do Spain's asymmetrical arrangements give us any useful pointers? Could this kind of asymmetry accommodate English regionalism?
2. The asymmetry of the UK is not just an asymmetry of size. There is an asymmetry of aspiration and interest across the four countries. Realistically, how far could a UK Constitutional Convention, as suggested by Carwyn Jones, reconcile these differences?
3. We are also dealing with two levels of asymmetry – (i) between England and the rest; and (ii) between Scotland, on the one hand, and Wales and Northern Ireland on the other. What are the implications of the second of these?
4. If we end up with an asymmetrical solution, what would be the key legal, fiscal, political differences that would remain?
5. Quasi-federation may be more suited "to the historical traditions and genius of Great Britain", to quote A.V. Dicey, once more. But wouldn't its 'fuzziness' encourage civil service obstructionism?
6. Some might think a confederal solution is less achievable than a federal solution. How might a confederal solution work in practice? What would be the nature of the confederal level – administratively and politically? How would the confederal entity be peopled?
7. That apart, how would we get there? Who would argue for the confederal idea? Who

would vote for it? What happens if one of the four countries does not buy into it? Would the English have a veto? Is a confederal solution any less problematical than a federal solution? Presumably it would threaten the notion of any automatic fiscal transfers more thoroughly even than federation. This would be a huge issue for Wales and Northern Ireland.

8. England remains a problem in reach of a place where it can feel comfortable within the present asymmetrical devolution settlement that would be likely to continue for a long time to come. Have we yet explored the full range of options that the Mackay Commission are likely to consider?