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Y Pwyllgor Materion Cyfansoddiadol a
Deddfwriaethol
Y newid yng nghyfansoddiad Cymru

National Assembly for Wales
Constitutional and Legislative Affairs
Committee
Wales' changing constitution

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Tystiolaeth gan Arglwydd Dr Andrew
Blick

Evidence from Dr Andrew Blick

This inquiry by the Constitutional and Legislative Affairs Committee ('the Committee') is extremely timely. I have held back my brief written submission – sent in advance of my participation in a session with the Committee on 14 October – so that it can best reflect the most recent developments in the political and constitutional affairs of the UK and its component elements.

My principal expertise lies in the assessment of the key features of the UK constitution, the interaction between them, the form they take, and how they are changing, from an historical and contemporary perspective. Taking into account current circumstances, and what they suggest about how the fundamental arrangements of the UK political system might be developing, I make some observations and recommendations regarding possible reforms, how they might be attained, and the part that Wales and its governmental institutions could play in promoting them. In this sense I address the part of the Committee call for evidence that refers to:

- 'any other matters relating to the UK's constitutional arrangements post Brexit including constitutional reform.'

Even before the present UK Prime Minister took office, it was becoming apparent that the existing means of managing the UK constitution – chiefly conventions and Acts of Parliament – were far from satisfactory from the point of view of the devolved legislatures and executives, both in the specific context of Brexit and generally. The Joint Ministerial Committee has failed to provide an adequate means of engaging them in the formulation of policy that is of great significance to them. Furthermore the UK government and Parliament have proved willing to press ahead with passing a major Act of Parliament, notwithstanding the express denial of consent to it by a devolved legislature (the *European Union (Withdrawal) Act 2018*). Moreover, it appears the UK Supreme Court, while it may be disposed to protect the position of the Westminster Parliament with respect to encroachments from the UK executive, has not proved as assertive on behalf of the devolved institutions.

These revelations are ominous. Regardless of the precise way in which the Brexit episode plays out over coming months and years, it has helped to reveal the vulnerability of the devolved components of the UK system. If the UK does not leave the EU, and if a UK government takes office that is more committed to respecting the delicate territorial balance of the UK, the weaknesses highlighted

in the period since 23 June 2016 will need attention. But another – certainly equally plausible – scenario is one in which the UK leaves the EU, with or without a deal. In this circumstance, the UK might find itself under a government, with a majority in the House of Commons, that makes a positive virtue of disregard for constitutional norms and restrictions on its freedom of manoeuvre. It would place a premium on securing trade agreements with various economies around the world. In such a circumstance, UK ministers would presumably attach little importance to the priorities of the Welsh legislature and government, or their counterparts at devolved level, as regards the contents of those deals. That UK government might seek to force through the legislative consequential of such agreements, whether they fell within devolved spheres of operation or not. Little help in this regard would be on offer from the existing convention and statute-based UK constitutional system. We should also recognise that a UK government of the type envisaged here might develop policy agendas in other areas – such as the legal status of the European Convention on Human Rights – that were problematic from a devolved perspective. Once again, constitutional safeguards against such interventions might prove weak.

I have long argued – including in my work for the Federal Trust for Education and Research – in favour of the introduction of a fully federal system for the UK, in which the respective rights of the ‘federal’ and ‘state’ tiers of governance are set out in a written constitution. Under such a system, in the case of disputes, the courts would be required to recognise the entrenched status of what are now the ‘devolved’ institutions, interpreting and applying a text that took precedence over all other players in the system, including the UK executive and legislature. Even an Act of Parliament could no longer unilaterally alter the constitutional framework. Changes to the written constitution would require adherence to an heightened amendment procedure, probably involving agreement from all or at least a majority of the components of the federation. A federal system would not only protect the spheres of operation of the devolved or ‘state’ tier. It would provide the territorial systems of the UK with a clearly defined and judicially enforceable role in the making of decisions that effected the UK as a whole, such as major constitutional changes or entry into international agreements. This principle could be achieved through a federal chamber of the UK Parliament, or federal council of some kind.

A federal constitution could therefore ensure that policies were developed and decisions were taken in a more consensual way, and territories were not simply presented with outcomes to be implemented (or resisted). A UK government planning to hold a referendum, for instance, would require approval from the states, before it could do so. It would also know that it would be likely that it could only implement that referendum result with the consent of the states (depending on the precise subject matter of the referendum). When devising mandates for trade negotiations, it would need to take into account that any agreement reached would require support from the states. Their priorities would necessarily be taken seriously from the outset.

I recognise that this arrangement raises many complicated details requiring attention, but that it is not appropriate to discuss them in full here. One particularly complex issue would be the place for England within this arrangement. I am clear that England could not form a single unit within a UK federation. I note that a process of limited devolution to newly-created directly-elected mayors of combined local authorities (and to Cornwall as a unitary council) has been underway in the UK since the middle of the present decade (and that it has not required approval via referendums). Whatever the merits or deficiencies of this particular model, it may have marked the instigation of a set of regional entities that could form part of a UK federation at some point in the future. But difficulties in handling the position of England within a federation should not be sufficient reason for denying the other components of the UK a proper place within the governance of the UK. It is for England to find a way of incorporating itself into the federation, rather than allowing its anomalous position to deprive the other parts of the UK of a proper constitutional place within it.

Though events may be making the case for a federal UK, achieving this outcome while an administration holds office at UK level that is hostile to the values it would embody would clearly be a difficult task. This dilemma presents some opportunities. Wales could, if it wished, take a lead. Continuing to engage with the UK government in the hope of securing concessions and better treatment does not seem a worthwhile course of action. Lessons could be drawn from the brief period during which the Welsh and Scottish executives cooperated in resisting the initial proposals for inclusion in what became the *European Union (Withdrawal) Act 2018*. This kind of joint action has more political traction than any one institution acting alone. Admittedly, the objectives of the Scottish government may differ from those of the Welsh. However, it is worth seeking to establish common cause if possible. Moreover, Wales could seek to become a convenor for the many points of democratic legitimacy across the UK – such as the English directly elected mayors – who may be opposed to various aspects of the current stance of the UK government.

A convention of such bodies to agree a set of principles and objectives might be able to achieve significant impact. To hold it in Cardiff, or indeed some other part of Wales, would seem entirely suitable. Having agreed a basic programme, a next logical step would be for a group of randomly chosen members of the public to take a view on it, and other issues it might wish to consider. I understand such a body has been used recently in Wales, along with many other parts of the UK and around the world. I am currently engaged in a pilot project, supported by the Joseph Rowntree Charitable Trust, the Joseph Rowntree Reform Trust, and the Open Society Foundation, to design a ‘Citizens’ Convention on UK Democracy’.¹

¹ Interim report, *Citizens’ Convention on UK Democracy: A User’s Manual*, available here: < <https://www.kcl.ac.uk/political-economy/assets/uk-citizens-convention-v6-fa-lrs.pdf> >, last accessed 2 October 2019.

The project has been endorsed by senior MPs from four parliamentary parties (and one who no longer has a party): Caroline Lucas, Vince Cable, Tom Watson, David Davies and Dominic Grieve. A firm political initiative, that Wales might seek to instigate, could ensure that the design work was put into practice. While it would be empowered to reach its own conclusions, it might be a means of finally taking steps towards a federal UK.