Chapter Twelve: Wales and a British Union

Many proposals made by governments in Westminster in the light of devolution have been ad hoc and ill thought out. The English Votes for English Laws idea, rushed into being in the wake of the Scottish referendum, was thrown out six years later by another government of the same political persuasion. Proposals for an English Parliament remain undeveloped. The idea of dividing England up into regional groupings has proceeded by trial and error, rejected in the case of a North-East Assembly, embraced more warmly in some of the areas covered by the so-called 'metro mayors.'[1] The House of Lords, which might be turned into a second chamber providing representation for regions and nations inside the United Kingdom rather in the manner of the German *Bundesrat*, remains unreformed and entirely unelected.

However, there have been some suggestions for constitutional reform in the UK that have been much more clearly thought-out than the piecemeal proposals outlined by Westminster governments so far. Among the most significant is one from the Welsh *Senedd* which appeared in a document originally published in 2019 and entitled *Reforming our Union: Shared Governance in the UK*.[2] The last chapter considered the history of Wales as a nation and then the history of devolution within Wales. This chapter connects that background with the fact that some of the most interesting proposals for constitutional reform in the UK have emerged from Wales.

Because Wales voted narrowly in favour of Brexit, there isn't the same feeling that the country has been pushed out of the EU against its will which understandably embitters some of the Scots and Northern Irish. It is also not dominated by a nationalist party in the way Scotland is. The Labour Party tends to

1 See Bogdanor, *Beyond Brexit*, pp. 204–206.

2 See https://gov.wales/reforming-our-union-shared-governance-in-the-uk-2nd-edition. The document was first published in 2019 and then updated in 2021.

be the most popular party (as the 2021 elections proved, in which Labour took half of the *Senedd* seats). An overwhelming majority of Welsh voters remain Unionist. This has enabled Wales to concentrate more on how to foster Welsh interests inside the British Union than on how to leave that Union. Keating is surely right to suggest that the Welsh Labour government 'is perhaps the only unambiguously pro-devolution government in the United Kingdom and has sought to move towards a form of cooperative federalism in which Wales would be recognised as a full partner in union.'[3] Indeed, other Welsh politicians before Mark Drakeford, the current first minister of Wales, have made similar proposals, including Carwyn Jones, his predecessor as first minister from 2009–2018, who after frequent clashes with the austerity policies of the Liberal Democrat-Conservative coalition between 2010 and 2015 felt that sufficient economic support for Wales could only come through a 'renewed union.'[4]

However, knowing how to foster those interests effectively has proved far from easy. It should be clear from the discussion of rail transport in the previous chapter that the devolution of powers is a difficult process, however well-intentioned both sides might be. Brexit, however, has complicated the process further. Several important economic areas, such as agriculture and fisheries, were devolved in the original agreements made when the UK was not expected to be leaving the EU. Such devolution was more apparent than real because the binding rules of the EU single market effectively meant that decisions in these areas were taken in Brussels, not in London or Cardiff. Post-Brexit, however, these rules no longer apply. The Westminster government is keen to maintain the integrity of a UK single market in order to be able to negotiate the much-vaunted new trade deals that Brexit is supposed to facilitate. It is disinclined to compromise that integrity by repatriating too many powers to Scotland, Wales and Northern Ireland.[5] It therefore feels compelled to exercise some sort of

3 Keating, *State and Nation*, p. 51.

4 See Jones, Carwyn. *Our Future Union-A Perspective from Wales* written in 2014 https://www.instituteforgovernment.org.uk/events/keynote-speech-rt-hon-carwyn-jones-am-minister-wales-our-future-union---perspective-wales/ and the Welsh government's report of 2017 entitled 'Brexit and Devolution' https://gov.wales/sites/default/files/2017-06/170615-brexit%20and%20devolution%20(en).pdf

5 See Bogdanor, *Beyond Brexit*, p.213-214. He concludes on p. 214 by quoting the words of the European Union Select Committee of the House of Lords that the European Union was 'in effect, part of the glue holding the United Kingdom together since 1997.' 'That glue is now becoming unstuck,' Bogdanor concludes.

control over decisions that it has theoretically entrusted to the devolved bodies. For this reason, it can easily seem as though the government would like the devolution process to go backwards after Brexit, with attempts being made to repatriate powers to Westminster.

When the *Senedd* published a second version of its proposals for a reformed constitution in June 2021, it came after the Internal Market Act of 2020. This Act quoted the 'Sewel convention,' which determined that Parliament will not 'normally' legislate for Wales, Scotland or Northern Ireland with regard to devolved matters without the consent of the relevant devolved legislature.[6] The Sewel convention allowed for a different approach to devolved matters if the situation was not 'normal' – and Brexit, it was argued by Westminster in 2020, had hardly produced a 'normal' situation. But who was to decide this? Who was to say what was or was not a 'normal' situation? An outbreak of war? A pandemic? Leaving the European Union? Since it was for the UK government and Parliament alone to decide what circumstances were 'abnormal', the government could proceed with the UK Internal Market Act in 2020, despite overwhelming opposition and the withholding of Legislative Consent by both the *Senedd* and Scottish Parliament. It was not even possible for the Supreme Court to judge whether this interpretation of 'normality' was appropriate. It seemed clear that the 'Sewel convention' was simply a vehicle for trying to reconcile Westminster supremacy with devolved powers and if necessary use the former to override the latter. It was a process described by Michael Foley as an unwritten understanding, something that (in words quoted by Keating) should 'remain understood as long as they remain sufficiently obscure to allow them to retain an approximate appearance of clarity and coherence while… accommodating several potentially conflicting and quite unresolved points of issue.'[7] In other words, one might think, deliberately obfuscating, burying problems in verbiage much as the banks did when their financial malpractices were threatened with discovery shortly before the financial crisis of 2008. As for joint working between all the nations, that would be kept to a minimum. Time and time again the UK government showed that it was prepared to give powers away but could not handle the idea of sharing power, rather like the sort of passive-aggressive introvert who is willing to delegate but baulks at teamwork.

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6 See the summary of discussions in Parliament at https://publications.parliament.uk/pa/ld5802/ldselect/ldconst/142/14207.htm

7 Foley, *The Silence of Constitutions*, p. 38, quoted in Keating *State and Nation*, p. 64.

Unsurprisingly, the Welsh *Senedd* saw the Internal Market Act less as a 'four nation approach' than one of 'aggressive unilateralism.' Hence the new version of its proposals in the summer of 2021, followed by an announcement in October 2021 that it was setting up an 'independent constitutional commission', following a promise made by the Labour Party in the elections for the *Senedd* in May 2021.[8]

Westminster's reaction had undermined a degree of sympathy for its position where the Internal Market Act was concerned, even on the part of the devolved nations. They themselves recognised that matters concerning agriculture and fisheries had been devolved in theory, but in practice were decided in Brussels as part of the Common Agricultural Policy and Common Fisheries Policy. When these matters were repatriated after Brexit, they should strictly speaking have been returned to the devolved nations under the devolution settlement. But it made sense to avoid having four different agricultural and fisheries policies in the UK, particularly when there were trade deals in the making. In such circumstances the best way forward was certainly to adopt some joint approach whereby trade deals could still be made by the UK, but in such a manner that (because some ingredients of those deals were in devolved areas) they were arrived at by joint decision-making. And that was precisely what the Westminster government appeared loathe to allow.

The issues raised by the Internal Market Act of 2020 show that the problems raised by devolution are not simply a matter of how much legislation should be 'passed down' from Westminster to the devolved bodies. They are also a matter of how decisions might be reached jointly by all the parties involved – in other words how the Westminster Parliament could work with the devolved bodies (perhaps including an English Parliament or representatives of the English regions) on matters where they need to work *together.* This is an absolutely central point, which is constantly overlooked. Discussions of devolution, including so-called 'devo-max', focus on how many (or how many more) competences should be handed down to the devolved nations, rather as if it was similar to a discussion of how much responsibility should be accorded to municipal (local) government. But what is absolutely essential for successful devolution is a mechanism whereby all the nations could work together in areas where it made sense for them to work jointly rather than separately. It is precisely this that

8 Mark Drakeford, Labour leader of the Welsh *Senedd,* describes the proposals in such terms in his Foreword to the second edition of 'Reforming Our Union: Shared Governance in the UK,' which was produced in June 2021.

the Westminster Parliament is loathe to recognise, because it pushes towards a system of shared sovereignty.

Furthermore, there needs to be a mechanism – most appropriately a legal mechanism – whereby judgments can be made about when there has been a breach of any constitutional arrangements decided upon. For instance, it might be agreed that a trade deal would be negotiated at the Westminster level but would require confirmation by each of the devolved governments. There is a precedent for this in the European Union. When the EU reached a trade agreement with Canada, it needed to be ratified by all EU governments, but in the case of Belgium ratification was delayed on account of objections from Wallonia, a region of Belgium. Under the Belgian system, ratification must be agreed by the regional parliaments as well as by the federal government. The trade deal with Canada was certainly delayed while Wallonia hesitated before giving its consent, but eventually ratification went through, and the deal proceeded. There was criticism about 'delay' and (that inevitable buzzword) 'inefficiency', but it could also be argued that it was worthwhile to secure consent at the sub-nation state level.[9] Could the same be done by the UK?

In order to take this further, the present chapter will examine the *Senedd* proposals in a little more detail. What constitutional reforms does it have in mind to prevent what the devolved nations see as the cavalier disregard for their concerns shown, for instance, in the case of the Internal Market Act?

Parliament and the Courts

The previous section outlined an alternative approach to devolution. Instead of asking what powers need to be handed down, as if the question was simply one of who owns what, one could ask what powers could be shared by everyone (i.e., by the four nations). This is a key issue, since devolution and even secession need not mean a willingness to share sovereignty. It may simply mean trying to preserve the sovereignty of parliament while reducing the area it covers (from mother country and dominions to mother country, then a reduced

9 Though the headlines at the time were of a deal in 'crisis' and EU leaders 'humiliated', it was only a short delay and it is notable that Wallonia was able to use its power to effect significant concessions before the final deal was signed. See https://www.france24.com/en/20161027-belgians-eu-canada-trade-deal-controversial-reach-agreement

mother country). I have already suggested that this may explain why some conservative commentators are in favour of an independent Scotland. It is an altogether less 'shocking' prospect than a sovereignty-sharing system which might be seen as sharing power with Scots in a wide range of policy areas!

The introduction to *Reforming our Union* describes the 'Whitehall perspective' as one that assumes…

> the default is centralisation of political authority within the UK. But that is the wrong starting point. We should instead start from a presumption of subsidiarity and sovereignty shared within the UK. Then we can focus on how to make the Union work effectively, to join its constituent parts in a shared enterprise of governing the UK.

In other words, the Welsh proposals focus on the fact that it is better to think of the UK as a joint project with shared governance than to think in terms of a centralised government handing down larger and larger morsels from the top table:

> Whatever its historical origins, the United Kingdom is best seen now as a voluntary association of nations taking the form of a multi-national state.

The report continued by affirming that:

> Wales is committed to this association, which must be based on the recognition of popular sovereignty in each part of the UK; Parliamentary sovereignty as traditionally understood no longer provides a sound foundation for this evolving constitution.

The talk of 'sovereignty in each part of the UK' is fascinating, since it is precisely the sharing of sovereignty that lay at the heart of Monnet's proposals for the Coal and Steel Community and later for the EEC/EU.

The document continues by reaffirming that:

> the traditional doctrine of the sovereignty of Parliament no longer provides a firm foundation for the constitution of the UK. It needs to be adjusted to take account of the realities of devolution, just as it was adjusted to take account of the UK's membership of the European Union.

Hence the Welsh proposals expressly link the structure of devolution within the UK to the structure of pooled sovereignty within the EU.[10]

What is this 'traditional doctrine' that needs to be adjusted to take account of the realities of devolution? It was the traditional position that the UK, insofar as it has a constitution, has one that is based upon the sovereignty of Parliament, so that it might be summed up as 'what the King enacts in Parliament is Law.' It is on this basis that the United Kingdom does not have a written constitution, since whatever was written could be changed at will if Parliament sought to do so. The document suggests that parliamentary sovereignty has to give way before what it calls '*the recognition of popular sovereignty in each part of the UK*.'

What is not generally recognised is the fact that Parliamentary sovereignty has *already* given way, when the UK joined the EEC in 1973. That is why the Welsh document connects EU membership with what it calls 'the realities of devolution.' The UK's membership of the European Union meant that European Law must override national law when the two were in conflict. Hence the oft-quoted *Factortame* case where UK legislation concerning fishing rights was disapplied because it clashed with European Law.[11] The Westminster Parliament accepted that its legislation might be disapplied if there was a conflict with European Law. The question therefore becomes one of whether a conflict with laws in Wales, Scotland or Northern Ireland might lead to a similar requirement to disapply Westminster legislation, in this case based on a judgment of the UK Supreme Court.

Based on the hope that this might be so, the *Senedd* document supports a proposal of the Constitution Reform Group that a new Act of Union bill should make clear that 'the peoples of (the constituent nations and parts of the UK) have chosen… to continue to pool their sovereignty for specific purposes.'[12] The pooling of sovereignty, which was effectively rejected when the UK voted to leave the European Union, would return via the effort to maintain a British Union against a growing desire of some of its constituent parts to leave.

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10 See p. 3 of the document 'Reforming Our Union' 2nd edition, June 2021 https://www.gov.wales/sites/default/files/publications/2021-06/reforming-our-union-shared-governance-in-the-uk-june-2021-0.pdf

11 See Bogdanor, *Beyond Brexit*, pp. 72–73.

12 https://www.constitutionreformgroup.co.uk/the-herald-new-act-of-union-bill-published/

Joining the EU meant that the UK was required to implement EU Law in the areas to which it applied. This gave a crucial role to the courts in determining whether EU Law had been infringed. The European Court of Justice in Luxemburg issued binding regulations and directives, but national courts also had a crucial role in determining whether directives had been correctly transposed into national legislation and were being adhered to. That role is lost if the UK is to revert after Brexit to the principle that 'what the King enacts in Parliament is law', for there will be nothing left for the courts to determine. However, if the post-Brexit devolution settlement were to follow the guidelines given by the Welsh proposals, it will require the involvement of the courts. Where they once determined whether European Law required that an Act of Parliament should be disapplied, they will now have to determine whether an act of the UK Parliament should be disapplied, for instance if it infringes upon the powers of the devolved governments.

What the *Senedd* report proposes may lead to protests that the courts are 'interfering' in the political process and putting themselves against the people. But 'interference is a loaded description. What is being argued is that there should be a sharing (or separation) of powers at the institutional level, where the courts are given a role that is not unusual in other countries such as the United States of America. Such 'interference' is perfectly acceptable in countries where the judicial review of primary legislation is a part of the constitution. Hence it was possible for the Supreme Court in the USA to determine whether aspects of the so-called 'Obamacare' health reforms were unconstitutional. But since the UK had no history of the judicial review of primary legislation outside the period when it was part of the EEC/EU, such an approach is seen as something threatening and unusual.

It should be clear that the Welsh proposals could not take effect without the involvement of a judicial body like the Supreme Court. It needs to be remembered that when the devolved bodies were first created, it was recognised that there might be disputes on whether the devolved bodies were acting within their competences. These would be referred to the Judicial Committee of the Privy Council, and then from 2009 to the new Supreme Court of the United Kingdom. Though 'bringing in the judges' is a system often presented as 'foreign' to the UK's constitutional arrangements, it is difficult to see how it can be avoided in the context of devolution.

But it is also clear that the courts would merely be acquiring once more the sort of powers which they had when the UK was a member of the EU. In the past they determined whether European Law had been properly applied in a

member state, a responsibility which might require them to demand an Act of Parliament be disapplied. In a similar manner, under a Constitution of the UK, the courts should have the power to determine whether an act of the UK Parliament should be disapplied, for instance if it infringes upon the powers of the devolved governments. The judicial review of primary legislation could therefore be introduced into the UK.

Would this compromise the nature of the UK as a democracy? That depends on whether people would find it more acceptable for elected politicians to decide whether their rights were under threat than for judges to do so. Bogdanor recalls Lord Hailsham's description of the UK system, in his Dimbleby lecture of 1976, as an 'elected dictatorship'.[13] Yes, parliament was elected, but once elected it appeared to wield supreme power – and there was no other body which could threaten its supremacy – not the courts abroad, like the European Court of Justice, and not the courts at home, even the Supreme Court. Bogdanor noted how unusual it was, after the UK withdrew from the European Union and therefore also from the Charter of Fundamental Rights, for a country to move away from a system where the courts were able to judge whether human rights had been infringed to one where Parliament alone could decide. Under the present First Past the Post system a party can win an absolute majority in Parliament with as little as 35% of the vote. Why is it more democratic to say that 326 people, representing little more than a third of the votes in an election, must be treated as if all their decisions are binding and any legal ruling about what they have decided is 'interference'? If a party with extreme views wins power, there is nothing to stop it enacting whatever it likes. There will be no court with the power to disapply legislation that might be passed by that body. It is not reassuring that this was the route by which Hitler rose to power in Germany.

The emphasis in the *Senedd* report is upon the fact that the Supreme Court should have in its membership individuals identified with every part of the UK.[14] It is right to insist that the nations are all represented in the Court, but the more important point concerns what the Supreme Court will do. It should be made clear that the Court will have a crucial role in resolving disputes between the member nations and providing a legal framework within which they must work.

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13 Bogdanor, *Beyond Brexit*, pp. 260–261.

14 See proposition 19 of the document 'Reforming Our Union', on p. 25.

Nearly a decade ago a commission under Sir William McKay reported to the Liberal Democrat-Conservative Coalition government in 2013 on the consequences of devolution for the House of Commons. Part of his report was devoted to explaining why a 'federal' system for the UK wouldn't work. One may note the Commission's comment that:

> Any federal system requires a delineation of competences, which are usually arbitrated by a supreme court that would be able to overrule the UK parliament, as well as binding the devolved institutions. This would be a radical departure from UK constitutional practice.[15]

The McKay report was right in the first sentence above. If there are to be several parliaments in England, Wales, Scotland and Northern Ireland, as well as a 'federal' Parliament in Westminster, then a judicial body which can determine whether decisions by any one of these is *ultra vires* would be unavoidable. As McKay puts it, there must be a body to determine the 'delineation of competences.' Otherwise, we return to the situation outlined earlier, where the Westminster Parliament decided arbitrarily in passing the Internal Market Act that the situation was not 'normal' enough for the agreed form of devolution to apply. But the second sentence, describing the use of a supreme court as 'a radical departure from UK constitutional practice,' is certainly open to question. It shows that the authors of the report were oblivious to the fact that membership of the EU was just such a radical departure because it involved the willingness to be bound by decisions of the European Court of Justice. It would not be a radical departure from UK constitutional practice at all if the power of the courts, surrendered when the UK left the EU, should now be reintroduced in order to provide the cornerstone of the UK Union.

The House of Lords

An obvious part of any constitutional settlement would be a reform of the House of Lords. The *Senedd* document suggests:

> A reformed Upper House of Parliament should be constituted, with a membership which takes proper account of the multi-national character of the

15 It can be downloaded and read from the House of Commons Library at https://researchbriefings.files.parliament.uk/documents/SN06821/SN06821.pdf

> Union, rather than (as the House of Commons is) being based very largely on population. This Upper House should have explicit responsibility for ensuring that the constitutional position of the devolved institutions is properly taken into account in UK parliamentary legislation.[16]

There is a precedent for this. The German Basic Law confers on the *Bundesrat* (its second chamber or Upper House) distinctive responsibilities and powers in respect of Bills impacting on the constitutional position of the *Länder* (the German regions).[17]

The *Senedd* document points out that this would chime in with the particular responsibility which the House of Lords has claimed for itself in respect of UK constitutional issues. It suggests that…

> This tradition could be built upon if a reformed Upper House was given explicit responsibility for ensuring that the interests of the devolved territories and their institutions are protected and properly respected in UK parliamentary legislation.

It is noteworthy how difficult it has been to find a role for the House of Lords in recent decades, despite the fact that as an unelected body it is obviously in need of reform and remains a constant reminder of the democratic deficit at the heart of the UK political system. The problem has been that were it to receive added legitimacy it would threaten the powers of the House of Commons. For this reason, efforts to reform it have often produced an unholy alliance of right-wing and left-wing MPs determined to prevent any change. The right-wingers have a traditionalist preference for the status quo; the left-wingers fear that the lower house would find it necessary to share power with a reformed upper house.[18] The *Senedd* proposals, making the Upper House the protector of the

16 See proposition 7 of the document on p. 14.

17 See https://www.bundesrat.de/EN/funktionen-en/aufgaben-en/aufgaben-en-node.html for an account (in English) of the powers of the *Bundesrat*. Section 3, 'Decisions on Consent Bills', outlines policy areas where the *Bundesrat* has veto power over bills. These include bills affecting the budgetary revenue and administrative responsibilities of the regions. Clearly the Constitutional Court will have a key role in deciding whether a particular bill can be vetoed or not.

18 It is difficult to disagree with Gavin Esler's comment that the House of Lords, still unelected despite all the attempts to 'modernise' it, is 'symbolic of the constipation of British governance'. See *How Britain Ends*, p. 293 and the whole chapter 'Muddle England', pp. 261–307.

rights of the devolved territories, would provide a way of giving it a valid role in government without appearing to duplicate the role of the House of Commons.

The subsidiarity principle

The document speaks in favour of the principle of subsidiarity. It says that…

> The subsidiarity principle requires that legislative and governmental responsibilities should be allocated to the most local level at which they can be performed efficiently and effectively.

This is the principle of subsidiarity that was argued for so strongly by the UK while it was in the EU, insisting that certain things decided in Brussels could more efficiently be decided by the individual member states. First outlined in the Treaty of Maastricht in 1993, it was strengthened by the Treaty of Lisbon, which emphasised that member states could examine proposed EU legislation in their own national parliaments and determine whether it was something best decided upon at the national rather than European level. With the usual EU fondness for complexity there was talk of holding up a 'yellow' and even (if enough supported it) an 'orange' card to proposed legislation (though not a red one).[19] But subsidiarity, championed at the EU level by the UK, can also be made to apply at the national level when championed by Wales or Scotland or any of the other devolved bodies. This is unsurprising, since the question is one of multi-level governance, or the appropriate level for making decisions, will apply whether at the European or the national level. Is the UK willing to see the principle it supported so strongly within the European Union apply within a UK Union? Irrespective of the weight of various yellow, orange or red cards, there is the question of who acts as referee. Once again, it is clearly impossible to make the system work without bringing in the courts.

19 See the useful glossary to Cini, ed., *European Union Politics*, 5th edition, p. 413 (orange card) and 419 (yellow card). More instructive, perhaps, would be to reflect on the psychological implications of the Commission's determination to wrap complex measures in a veil of 'popular' language. Compare the idea of a 'six-pack' to describe measures to manage eurozone countries in debt.

Other proposals: Council of Ministers and Constitutional Convention

The Welsh proposals call for 'a decision-making UK Council of Ministers' with an independent secretariat, 'with arrangements analogous to those from which the British Irish Council benefits.' The British/Irish Council, as we have seen, was created under the Belfast Agreement to promote 'the harmonious and mutually beneficial development of the totality of relationships among the people of these islands.'[20] The Welsh proposals show that the power-sharing agreements developed in Ireland, both in the North and (potentially) on both sides of the border, can serve as the springboard for a wider settlement in the Isles as a whole..

Finally, the proposals note that 'citizens across the UK should also have an organised ability to contribute' and call for a constitutional convention. This is a proposal that has come from several quarters, for instance in an address by former Prime Minister Gordon Brown to the Fabian Society in 2016 on constitutional reform.[21] Similar calls for a citizens' convention are made within the EU, which has been holding a *Conference on the Future of Europe*.[22] They raise the question of alternatives to the familiar forms of representative democracy through citizens' assemblies and 'deliberative mini-publics'. A later chapter considers a form of direct democracy within the EU that could also apply within the UK.

Reception

As we have seen from mentioning the McKay Commission, others have a very different idea of the constitutional issues flowing from devolution to those of the Welsh *Senedd*. In November 2019, Lord Dunlop produced a 'Review into UK Government Union Capability',[23] an odd title possibly reflecting the author's uncertainty about what language he should use in order to describe a UK Union. Its 'we're the best' opening declaration that 'Our Union – the United

20 This is a quotation from the original 2019 version of the document. It does not seem to have made it into the second edition in 2021.

21 https://gordonandsarahbrown.com/2016/11/gordon-brown-proposes-uk-peoples-constitutional-convention/

22 https://futureu.europa.eu/?locale=en This is the official EU website for the Conference on the Future of Europe, available in all the official languages of the EU.

23 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972987/Lord_Dunlop_s_review_into_UK_Government_Union_Capability.pdf

Kingdom – is the most successful multinational state in the world' did not inspire confidence in its ability to recognise the severity of the issues at stake. The Dunlop review proposed in the time-honoured manner that problems could be solved by a committee, in this case by the formation of a UK Intergovernmental Council (UKIC, presumably to be clearly distinguished from UKIP) with various sub-committees. There was a lot of talk of 'a forum seeking to make co-decisions by consensus' (the internal market sub-committee) and a 'multi-layered approach' which would 'provide devolved administrations a substantive platform to be involved in the UK government's approach to trade negotiations, while respecting that trade negotiations are ultimately a reserved matter'. Such language promised involvement without the power of veto, consultation without control and fell short of the sovereignty-sharing which is called for in the Welsh document.

Despite the suggestions of the Welsh Labour Party, the Scottish Labour Party appears much less willing to think in terms of sovereignty-sharing. Instead, like the Dunlop report, it talks only of greater cooperation and all sorts of bodies which can supposedly make it work. Scottish Labour Party leader Anas Sarwar had a similar view to the *Senedd* document where the reform of the House of Lords was concerned but did not respond to the proposals for a sharing of sovereignty. Instead, in July 2022, he called for a new 'legal duty of cooperation' between governments in Westminster and Holyrood and 'joint governance councils,' but spoke of them as providing 'fresh models of intergovernmental working'.[24] Beneath the rhetoric, it is difficult to see this as more than intergovernmentalism in another form, with a Council of the UK playing a role similar to the Council of Europe. Sovereignty-sharing which was a step too far for so many people when considering whether to join the EEC, as the first part of this book tried to show, again threatens to be a step too far where the reform of the UK is concerned.

The 2nd edition of the Welsh report noted a proposal for a Bill of Union produced in April 2021 by the Constitution Reform Group.[25] Headed up by the Marquess of Salisbury, this body describes itself as 'a group of politicians and officials from all parties and none' which has been working on constitutional reform for some years. The proposed Bill of Union would…

24 https://www.scotsman.com/news/politics/anas-sarwar-calls-for-legal-duty-to-make-uk-and-scottish-governments-cooperate-3754969

25 Its Act of Union Bill 2021 can be downloaded from its website at https://www.constitutionreformgroup.co.uk/publications-2/

> Provide a renewed constitutional form for the peoples of England, Scotland, Wales and Northern Ireland to continue to join together to form the United Kingdom.

In particular, it would…

> affirm that those peoples have chosen, subject to and in accordance with the provisions of this Act, to continue to pool their sovereignty for specified purposes.

The 'pooling of sovereignty for specified purposes' is precisely what happens within the European Union, where some policy areas are national competences and others community competences. Within a British Union the distinction would apply to a different set of policy areas. For instance, matters like defence and foreign policy would be determined at the UK level, whereas in the EU these are very much national competences. Nevertheless, the system itself, based on pooling sovereignty in some areas and not others, replicates the EU system. On the other hand, given that Section 29, parts 5 and 6 of the Constitution Reform Group's proposed Act of Union Bill declare that 'the UK Parliament continues to exercise the authority of the Sovereign Parliament of the United Kingdom' and 'Nothing in this Act diminishes or otherwise affects the extent of that Sovereignty,' one suspects that radical proposals are being bolted onto a system of parliamentary sovereignty with which they are fundamentally incompatible.

Finally, it should be mentioned that some proposals for constitutional reform are emerging from the Labour Party in advance of the expected general election in 2024. At present, however, they are rather sketchy. It comes as no great surprise to learn that House of Commons Speaker Sir Lindsay Hoyle is opposed to Labour's plan to replace the House of Lords with an elected chamber, offering the familiar refrain that it would undermine the authority of the House of Commons. We have already seen that if it had a specific role as the protector of the rights of the devolved territories, this threat to duplicate the role of the Commons could be avoided. But once you introduce the concept of a 'British *Bundesrat*' in which regions and devolved nations are fully represented, you are bound to have to consider the wider issue of a separation of powers and the role of the courts in ensuring that they are adhered to.

At the time of writing, it is not clear whether the Labour Party is really prepared to embrace the implications of this. Keir Starmer's recent adoption of the Brexiteers' slogan 'Take back control' strengthens the suspicion that Labour's

reforms may not amount to the radical changes that are needed.[26] It is all very well to imagine the benefit of having less decided at the centre and more decided by local councils, regional authorities, and the devolved nations. It may well be right to do this. But as this book has constantly tried to make clear the real issue, where the future of the United Kingdom is concerned, it not how to give power away but how to share it. Whether or not the Labour Party is prepared to embrace this notion remains open to doubt. The danger is that a few more powers given away will be bolted onto the same old principle of parliamentary sovereignty that lies at the root of the problem.

Conclusion

This chapter examined proposals for constitutional reform coming from Wales and looked in some detail at a document produced by the Welsh Parliament in 2019. As Keating points out, referring to the repatriation of powers after the UK's withdrawal from the EU:

> The Welsh government saw an opportunity to transfer ideas from how the EU works into the UK context, consistent with its vision of union and cooperative federalism.[27]

The report by the Welsh Parliament reminds us that it is not a question of devolving more things but of a different understanding of what devolution really is. The heart of the Welsh proposals lies in their view of how the nations of the UK could *jointly* make decisions rather than simply receive a new division of the spoils of government in terms of who does what – the system that Keating in the quotation above calls 'cooperative federalism.' If we consider the points made in the previous chapter about the history of Wales, we can see how this would make sense. Decisions – even ones that have had favourable results for the country – have for long been made *for* Wales, not *with* Wales. It is in these terms that it was admitted to the industrial revolution which (to borrow the phraseology of the extreme right) meant that it was swamped by English

26 At the moment it is difficult to say. See 'Britain's 'Take Back Control' déjà vu', an article published by *Politico* in January 2023. https://www.politico.eu/article/britain-take-back-control-deja-vu-brexit-keir-starmer-labour/

27 Keating, *State and Nation*, p. 101.

immigrants with severe consequences for its national identity (think of the effects on the Welsh language). Joint decision-making, on the other hand, means the sharing of sovereignty – precisely the heart of the European Union's institutional system. It might be said that it means trying to maintain the British Union by adopting a 'federal' system, but the concept of 'federalism' has to be treated with care. Indeed, most proposals for a more federal UK find it unnecessary to question the principle of parliamentary sovereignty.[28]

The Welsh report shows that several parliaments can work together only if a legal authority like the Supreme Court is able to make binding judgments concerning whose responsibility a piece of legislation is, demanding if necessary that legislation by one of the parliaments, including the Westminster parliament, be disapplied. Though bringing in the judges is a system often presented as foreign to the UK's constitutional arrangements, it is difficult to see how it can be avoided in the context of devolution.

The *Senedd* proposals go on to suggest that the House of Lords should be given responsibility for ensuring that the constitutional position of the devolved institutions is properly considered in UK parliamentary legislation. Proponents say that this is a good way of giving the upper house a meaningful role – and the democratic legitimacy of elections – without duplicating the role of the lower house and this part of the document has received wide support, not least in proposals from the Labour Party suggested at the end of 2022 for reform of the Upper House.[29]

The proposals also emphasise the principle of subsidiarity, earnestly championed at the EU level by the UK since its introduction by the Treaty of Maastricht. The question is essentially one of multi-level governance. Finding the appropriate level for making decisions is bound to be an issue, whether you are looking at the European Union or the UK Union. But this only reinforces the point that a legal authority is needed to determine the appropriate level at which decisions should be made.

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28 See Schütze and Tierney (eds.) *The United Kingdom and the Federal Idea*; Torrance, *Britain Rebooted: Scotland in a Federal UK*.

29 See the document 'A New Britain: Renewing our Democracy and Rebuilding our Economy. Report of the Commission on the UK's Future' published by the Labour Party at the end of 2022. See especially pp. 135–143 for Labour's proposals – which may or may not still be there at the time of the next general election – for reform of the House of Lords. See https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf

The Welsh proposals call for 'a decision-making UK Council of Ministers' with an independent secretariat. They talk of 'arrangements analogous to those from which the British/Irish Council benefits.' This raises the possibility even of arriving at a constitution for the Isles. This will be considered in more detail later. It is important to make clear that such a proposal would in no way undermine the integrity of the Irish Republic as a separate nation-state. But that is just the point – the EU could have a constitution without ceasing to be made up of 27 nation-states, and the Isles could have a constitution without ceasing to be two nation-states and four or five nations.

The *Senedd* document notes that 'citizens across the UK should also have an organised ability to contribute' and calls for a constitutional convention. This raises questions about various forms of direct democracy and what form citizens' participation could take in the future. A later chapter looks at this in more detail.

The reception of the *Senedd* document has been mixed. In November 2019, Lord Dunlop produced a report that felt no radical fix was required for the world's 'most successful' multinational state. The Constitution Reform Group, on the other hand, supported 'the pooling of sovereignty for specified purposes.' Yet the Labour Party's proposals at the end of 2022 show that the document's ideas are beginning to enter the political mainstream as the clear policy of a party or parties that might win power in the UK in what will probably be a 2024 election. Nevertheless, elements of the Labour proposals remain vague and where devolution is concerned the emphasis is often upon more cooperation without much consideration of the legal and political framework that might make such cooperation effective.

What is clear is that the *Senedd* proposals have proved controversial partly because they require an alternative structure to one which insists that the sovereignty of the Westminster Parliament is the only foundation for any future constitutional arrangements. It is this insistence upon parliamentary sovereignty that is so hard to dislodge – and yet it must be dislodged if a constitution of the UK or even of the Isles is to have any credence. A later chapter will examine why it is seen as such a crucial part of the UK constitution – insofar as the UK has a constitution at all. But first it would be useful to move across the Severn for a moment in order to consider the rather different perspective from England.