


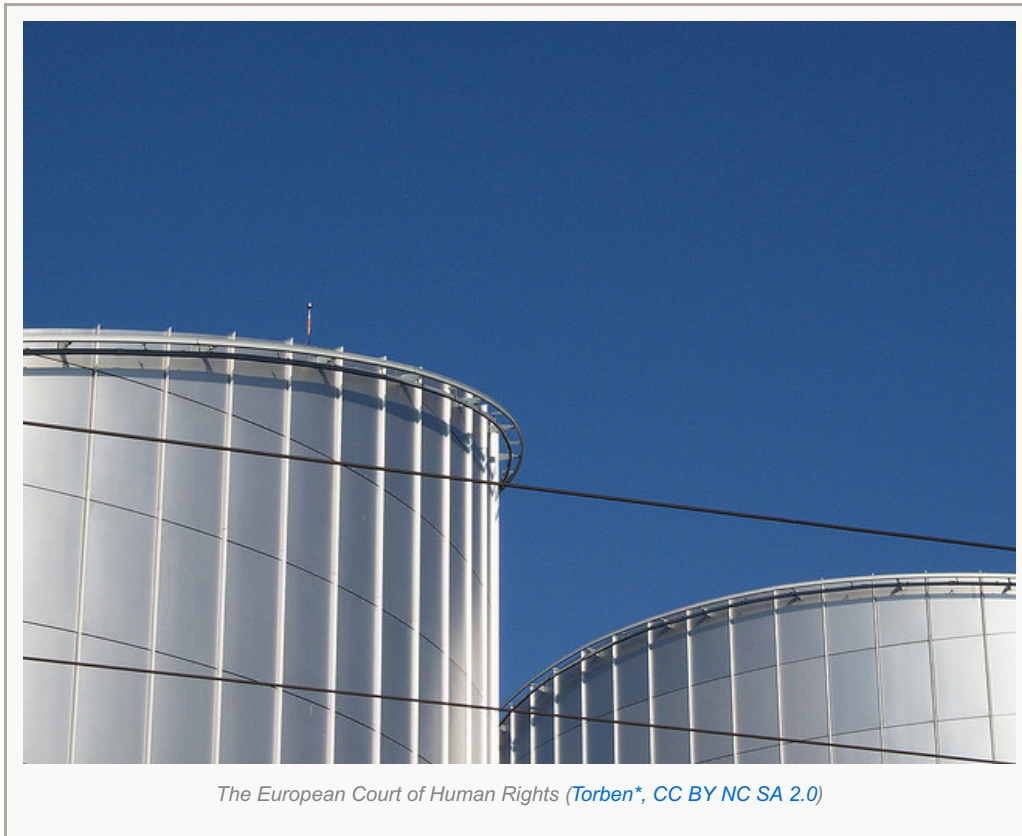
Federalism could be the only means of resolving some of the UK constitution's fundamental difficulties

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By Democratic Audit UK

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*The Queen's Speech saw the incoming majority Conservative government propose a number of laws with constitutional implications, including the Scotland Bill, the repeal of the Human Rights Act, and the introduction of some variant of "English Votes for English Laws". **Andrew Blick** argues that given this range of issues, federalism may be the only holistic solution to the growing incoherence of the UK's constitutional arrangements.*



The new government has now outlined its programme for the coming parliamentary session in the Queen's Speech. Taken in conjunction with other statements, it confirms that the Conservative administration is committed to a range of measures with constitutional implications, including:

- A system of 'English Votes for English Laws' ('EVEL'), that will entail excluding members of the House of Commons elected from devolved territories from taking part in certain proceedings in the Westminster Parliament deemed to involve only England (or England and Wales).
- Further devolution for Scotland, implementing the conclusions of the Smith Commission;
- Devolution for England;
- To consult on the possibility of repealing the *Human Rights Act 1998*, its replacement with a British Bill of Rights and Responsibilities, and the removal of the United Kingdom (UK) from the jurisdiction of the European Court of Human Rights; and
- A referendum on continued membership of the European Union, preceded by negotiations intended to create a package of some kind to present to the electorate in the vote.

These plans, and the political issues with which they engage, seem set to attain prominence not only through the present parliamentary session, but for much of the remainder of the term of office of the present Prime Minister, Mr. Cameron. In seeking to analyse this important set of proposals, it is useful to deploy a concept, that of “federalism,” which has only lately reappeared as an acceptable part of mainstream political discussion.

The term “federal” has until recently been a contaminated term in the political vocabulary of the United Kingdom (UK), applied mainly as a term of abuse in relation to the European integration project. But lately, and particularly from around the time of the Scottish Independence Referendum of September 2014, the position began to change. Politicians from across the spectrum and various commentators are now willing to talk about a ‘federal’ UK as a desirable, perhaps even inevitable, outcome. In such accounts, the concept broadly serves as a means of realising a number of purposes. First, it is hoped it will provide Scotland with a degree of autonomy sufficient to induce it to remain within the Union. Second, there is an expectation that a federal system could allow the other devolved territories of Wales and Northern Ireland to continue to expand their authority. Third, it is anticipated that this model might give England more control over its own affairs, either as a single unit or via regional devolution of some kind, or both.

A new willingness to embrace the federal concept in the UK is welcome. Yet the notion of a federal UK as a frictionless and compromise-free solution to some of the major constitutional and political difficulties the UK is vulnerable to the charge of over-optimism. The federal concept was for many years rejected without due consideration of its real meaning and possible application to the UK. Now there is a danger that it is being taken up in equally casual and unreflective fashion. The apparent logic of some current “federal” discourse in the UK is flawed in at least two respects.

Too many born-again federalists assume that different parts of the UK can largely divest themselves of responsibility for each other; and these same recent converts assume that the Westminster Parliament will continue to possess at least in principle an unlimited legal authority. Both propositions are contradictions of true federal principles. Under a federal constitution, powers are divided between a ‘federal’ centre, and the different component parts or ‘states’ without this division’s undermining the political and economic solidarity of the whole political system. At the same time the entrenched autonomy of lower levels of government is not subject, even in theory, to interference from a ‘sovereign’ central legislature, with a core set of functions reserved to the ‘federal’ governmental institutions.

Federal models do offer a potential means of managing a multi-national territory such as the UK, and are employed in countries of this sort including Belgium, Canada and Spain, though not without difficulties. But if the end of binding together a nationally diverse country through a federal approach is to be achieved, certain conditions must be fulfilled. The system must attach the same degree of importance to cohesion that it does to diversity. At present, in some areas such as fiscal powers, there is reason to believe that UK policy-makers are affording excessive attention to diversity, with a priority attached simply to transferring tax-raising capacity, in particular to Scotland, without due consideration of the consequences for the whole of such wholesale transfer.

A further condition of success for a federal system is that, while it is important to retain key powers at the federal level, there must be mechanisms to ensure that these authorities are deployed in a consensual fashion that engages, as far as possible, both the states and the federal tier. This principle is difficult to reconcile with the traditional UK constitutional doctrine of parliamentary sovereignty. Though there are signs of a softening in the approach to the Human Rights Act and ECHR, the present government nonetheless remains wedded in principle to the idea that Westminster Parliament can legitimately deploy its special authority to force through changes of a constitutional nature, even if there is significant opposition to them in other parts of the UK.

Federal concepts are undoubtedly relevant to the contemporary UK for a number of reasons. They have formed part of the current of ideas from which the constitutional agenda of the present government has derived, in particular in its proposals for EVEL and the extension of devolution. A federal perspective can help us to understand current Conservative plans, and assess their chances of delivering on their objectives. It also provides a potential alternative constitutional model for the UK with which we can compare our current arrangements and their patterns

of development.

Finally, it can provide a basis for a project intended to devise proposals for workable reform of the UK constitution. Such a project, drawing on knowledge of federal principles and practices, can offer examples of systems to follow and adapt, and discourage the pursuit of conceptually flawed pseudo-federal solutions. Properly conceived, a federal UK could be a means – or perhaps the only means – of resolving some fundamental difficulties within the UK constitution. It should not however be misconstrued as an easy enterprise, as a painless and minor adjustment of present structures.

With these ideas in mind, certain observations are possible regarding the Queen's speech and overall government constitutional programme.

- *EVEL could prove detrimental to the cohesion of the UK. Some might regard it as providing a means whereby English national identity can find an institutional expression that it presently lacks, and which it needs. Even if this view is correct, EVEL could well have a destabilising impact, and undermine the chances that the UK will survive in its current form. A main reason for this possible difficulty is the relative size of England within the UK, accounting for more than 80 per cent of the total population. Supposedly 'English' decisions made by English MPs, from which non-English MPs were excluded, would inevitably impact upon the rest of the UK. Viewed from other parts of the UK, EVEL could be perceived as amounting to a unilateral declaration of independence by England. Seeking to provide for English legislation within the UK Parliament rather than through a specially created institution, as would happen under a federal system, could create problematic divisions at the highest level of the UK constitution. The absence of devolution from England (outside Greater London) while it exists elsewhere in the UK, is an increasingly problematic anomaly for the UK constitution. EVEL runs the risk of creating more problems than it solves.*
- *It is clear that a substantial increase in the power wielded at devolved level in Scotland is about to take place. The Smith Commission drew conclusions some of which will be practically difficult to implement, yet equally difficult politically not to implement. Smith required that Scottish devolution should become permanent, an idea that is in contradiction of the doctrine of parliamentary sovereignty, according to which Parliament can undo any of its earlier legislative acts, including those that created the Scottish Parliament and government. Furthermore, Smith called for the extension of fiscal power to an extent that could undermine the cohesion of the UK, potentially transferring discretion over tax-raising to Scotland on a scale far greater than would be likely to be possessed at 'state' level within a federal constitution.*
- *The present government is committed to a process of transferring powers to chosen city regions on a piecemeal basis, with the terms determined at the centre, and the Chancellor of the Exchequer playing a leading role. There is a strong case for enhancing sub-national democratic governance in England. But the range of powers on offer is far less extensive than those available to the already devolved territories of the UK, and the arrangements intended for democratic oversight of the powers once transferred appear to be of questionable effectiveness. People living in England seem to have little say in whether they will be the recipients of devolution, and if so the form it will take. Under a federal system, 'state' level government might be expected to cover the entire country, and a 'federal' level finance minister would not possess the degree of unfettered authority that the UK Chancellor of the*

Exchequer presently wields.

- *The Conservative plan to repeal the Human Rights Act 1998, substituting it with a British Bill of Rights and Responsibilities, and to withdraw the UK from the full authority of the European Convention on Human Rights, if it is proceeded with following the consultation phase, would be likely to have the effect of diluting human rights protection in the UK. Under a federal system, it is normal to have a bill of rights to which all public authorities are subject, which the courts are responsible for upholding. The UK has never possessed a full bill of rights, and though the Conservative Party use this description, the measure they envisage could in practice move the UK in the opposite direction from the attainment of such an instrument. Furthermore, it seems that this change was planned without reference to the impact upon the systems of devolved governance across the UK, and that it might be executed without their consent. A federal approach would necessitate more attention to the system as a whole, and the involvement of the different sub-components within it. Similar observations are possible regarding the approach being taken to the referendum on the EU, withdrawal from which would seem to require for the present government only a simple majority among UK voters, without the views of the individual territories of the UK being taken into account. The plans for both human rights and the EU could also serve to aggravate the difficulties involving Scotland and its place in the Union, as well as causing difficulties over Northern Ireland and its peace process.*

Over the coming months, [Federal Trust](#) will continue to analyse the unfolding government agenda, applying to it and judging it against federal principles. We will discuss how far we can expect individual measures to succeed on their own terms, and explain their relationship to the whole. We will also consider the wider political context within which the government operates, including circumstances involving Scotland and Europe. Finally, drawing on a domestic and international evidence base, we will make concrete proposals for a UK constitution that are a practically realisable expression of genuine federal values.

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Note: This piece represents the views of the author and not those of Democratic Audit or the LSE. It also appears on the Federal Trust website. Please read our [comments policy](#) before posting.

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