Justice for Wales—Written evidence (UDE0025)

1 Justice for Wales is a gathering of lawyers who have come together in a non-partisan campaign to call for the reestablishment of a Welsh jurisdiction separate from England. On 23.09.2015, we launched the pamphlet “Justice for Wales”, a copy of which is sent with this response¹.

2 This response deals with some of the specific questions posed in the call for evidence, and we send with it other material that we believe the committee will find of interest.

The Union

1. What are the essential characteristics of a nation state? Are these different for a state in which power is devolved and, if so, how?

2. What are the key principles underlying the Union between England, Wales, Scotland and Northern Ireland? Are there principles that are unique to the UK’s Union?

3 We do not believe that it is useful for us to respond to the first question posed. Although we recognise that it is of interest, as a group making a collective response we believe that we can be of most assistance to the committee responding to other questions.

4 One key principle of the Union between England, Wales, Scotland and Northern Ireland can easily be identified; that it is a voluntary union. This is distinct from, say, the United States (where the right to leave the Union was the subject of the civil war) or Spain (where there is a Constitutional guarantee of the country’s territorial integrity, and Madrid’s attitude towards the question of an independence referendum in Catalonia can be contrasted with the approach to the referendum on Scottish independence here). We think that the voluntary nature of the Union is highly valuable.

¹ In Word format as the call for evidence requires.
We believe that a key principle in the Union’s dealings with Wales has been to regard Wales as essentially part of England, not to be treated in the same way as the other devolved nations. We believe that this principle is objectionable, and that it should be replaced with the following principles;

(a) The Union should only do what it is necessary for it to do – defence is an obvious matter, the maintaining of a single market inside the Union is highly desirable. The Union needs to be responsible for the UK’s foreign relations, including our membership of the EU. That means that the Union must be able to ensure that all constituent countries of the Union meet EU requirements, even in devolved areas;

(b) The devolved nations (and England, in whatever arrangements its people and their representatives may decide to adopt) should be free to take on as much competence as they wish consistently with maintaining the Union;

(c) That there should be a presumption in favour of devolved competence;

(d) That any matter that is within the devolved competence of any of the constituent nations of the Union should be open to being devolved to any of the other nations.

Note: there is a question regarding what happens when devolved assemblies bring international treaties into direct effect through primary legislation, as has recently been done in Wales in relation to the UN Convention on the rights of the child. Our view is that where the treaty concerns a devolved area this does not weaken the union, but does create a shift in the relationship between international organisations and the constituent nations of the UK that is worth considering further. Whilst the Union must be able to ensure compliance with the international obligations of the UK, that central ability should be without prejudice to the devolved legislatures’ ability to bring treaties into direct effect.
Devolution

3. On what principles are the UK’s devolution settlements based, or on what principles should they be based? Have principles emerged through the process of devolving power, or as power has been exercised by the devolved nations and regions?

4. Are there applicable examples from other countries with multi-level governance structures?

6 We have answered question 3 in the course of our answer to question 2 above.

7 There are examples. We consider that, of federal countries, common-law countries such as Australia or Canada\(^3\) are the most comparable. Their institutions and political and legal culture are more similar to our own than, say, those of Mexico or Germany. The number of states in the United States goes to mitigate the population imbalance between, say, California and Wyoming, and whilst no single Australian state or Canadian province contains the overwhelming bulk of those countries’ populations as England does in the UK, the small number of states & provinces may make for better comparison of the relationship between proportionally large units such as New South Wales or Ontario and smaller ones such as Tasmania or Newfoundland and Labrador.

8 The quasi-federal nature of the UK at present is perhaps most closely comparable with Spain. However, Spain’s political and legal culture are very different from Britain’s, its written constitution’s guarantee of territorial integrity contrasts with our voluntary union, Spain’s arguments against Catalan independence have been whole legal rather than making a positive case for their continued union, and we do not consider it a model that the UK should copy.

Implementation

\(^3\) We mean no slight to the people of Quebec.
5. How might these two sets of principles\(^4\) be embedded in the UK’s constitution, or entrenched in the work of governments and legislatures across the UK?

9. We consider that a formal acknowledgement of the principles set out in our answer to 2 above would be a first step. They cannot be formally embedded in the UK’s constitution unless a written constitution were adopted. Whether that should be done is a question on which we do not have a collective view. Although there are legal questions about whether it could be done, we think that it could be, and that the courts would recognise the political reality that a decision to end the doctrine of parliamentary sovereignty had been made.

10. The principles can be entrenched to a degree by enacting legislation that reflects them (e.g. by devolving all that can be devolved, subject perhaps only to a decision by a devolved legislature to vote to take on any competence that it does not currently exercise) and by co-ordinating between the devolved and Union governments. Ultimately this will require a development in the UK’s political culture, which is likely to flow from such legislation and co-ordination. At present, we believe that the UK’s political culture regards Wales as less equal than the other Celtic nations.

Practical steps to strengthen the Union

6. What is the effect on the Union of the asymmetry of the devolution settlement across the UK? What might be the impact of the further proposed devolution of powers to Scotland, Wales, Northern Ireland and English local government? Is the impact of asymmetry an issue that needs to be addressed? If so, how?

7. What might be the effect of devolving powers over taxation and welfare on the economic and social union within the UK? Are there measures that should be adopted to address the effects of the devolution of tax and welfare powers?

8. What other practical steps, both legislative and non-legislative, can be taken to stabilise or reinforce the Union? How should these be implemented?

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\(^4\) Subsidiarity and reciprocity.
9. Is the UK’s current constitutional and legal structure able to provide a stable foundation for the devolution settlement? What changes might be necessary?

11 The impact of the asymmetry impacts most upon Wales. Wales has a lower level of self-government than the other devolved nations, and is joined in a legal jurisdiction with a nation whose population is massively larger than ours. The asymmetry, which has persisted ever since the introduction of devolution (we recognise that it has however been mitigated) not only reflects, but we believe perpetuates the attitude that Wales somehow deserves a lower level of devolution than the other devolved nations.

12 We consider that, so long as asymmetries exist, there will be the potential for grievances and for misunderstandings as to which governments should be blamed for whatever dissatisfies a particular citizen. This is detrimental to all in the Union. It cannot help if, for example, people in England (and even in Wales) do not understand that, in Wales, the NHS is the responsibility of a different government.

13 Devolution to local government within England is, we consider, a matter for England. It is wrong in principle to compare the self-government enjoyed by nations that choose voluntarily to remain in the Union with that which those nations may choose to devolve to their own constituent parts.

14 We recognise that devolving welfare and tax powers has considerable potential to impact on the future of the Union. We note that the devolved legislatures already have some taxation power. To the extent that their budgets are determined (or perceived to be determined) by political choices made at UK level that concern only England, we note that there is a difference between supply (how much money the UK government decides to raise in taxation) and spending (how much it
decides to spend on any subject). Beyond those observations, it is difficult for a non-partisan group with members from across the political spectrum to have a common position.

15 As to question 8, we think that the principles we set out in the answer to question 2 above would be a valuable guide. Rather than thinking about devolution piecemeal to each of the Celtic nations, we think it would be beneficial to think through what the Union is about and what it needs to do. We also consider that the continuance of the Union is as much about sentiment as economic benefits. It is likely to continue so long as each one of its constituent nations feels part of a family with the others.

16 Question 9 goes to the very issue about which Justice for Wales came together. We do not believe that the UK’s current constitutional and legal structure is able to provide a stable foundation for the devolution settlement. We believe that England and Wales need to separate their justice systems. There is a wide acceptance in Wales that, sooner or later, such a separation is inevitable. Experience supports this, in that there is no example of which we know in which two nations, with two primary legislative bodies, share a common justice system as do England and Wales. It therefore follows that, until the separation is made, a stable foundation will be lacking – because it is acknowledged that the joint jurisdiction is unstable and will, sooner or later, come to an end.

17 It would not be possible to set out within the confines of a 6 page submission the entirety of the reasons why we believe that the common jurisdiction is flawed. We refer the Committee to our pamphlet. We also commend to the Committee the submissions prepared by some of our number in response to the Welsh Government’s consultation on the establishment of a separate Welsh jurisdiction, the memorandum of evidence prepared by David Hughes in response to the Welsh Assembly’s

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5 Not all the signatories to these earlier submissions to the Welsh Government are members of Justice for Wales.
Constitutional and Legislative Affairs Committee’s inquiry into the same subject, and the dissertation of Michael Imperato.

18 In addition, we are aware of the report on devolution published by the Wales Governance Centre on 24.09.2015, which we commend to the Committee.

Signed by:

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