

Debating Welsh Independence: The Political and Constitutional Pathways to a Referendum

On 15 July 2020, on the final day of sitting before summer recess, the Senedd considered a series of motions and amendments, in a debate on Wales' constitutional future. The original motion in this debate, tabled by Plaid Cymru, focussed on Welsh independence, and called on the current Welsh Government to seek the authority from Westminster to hold a binding referendum on independence during the next Senedd term, following the elections in May 2021. The motion failed to gather sufficient support on the day and was rejected by a vote of 9 For, 43 Against, and 1 Abstention. Instead, the Senedd voted in favour of a Welsh Labour amendment, which replaced the original Plaid Cymru motion with a commitment to Wales' "continuing membership of a reformed United Kingdom" – a commitment that in itself raises some interesting constitutional questions. While the motion on seeking an independence referendum failed, however, its tabling marks an important milestone in the evolution of the debate on Wales' constitutional future. A debate which recent surveys show includes an increase in support for independence.

In a report published by the Welsh Political Barometer poll in June 2020, 25 per cent of respondents indicated that they would vote in favour of Welsh independence, if a referendum were to be held on the subject tomorrow (a rise of four percentage points since January 2020). While these figures are notably short of a majority, the political debate in Wales is nevertheless evolving to include independence as a serious alternative to the constitutional status quo. On this point, recent reports also show that alongside those in clear support of independence in Wales, there is a broader spectrum of 'Indy-curious' voters, defined as "persuadable" to the idea of independence. Such changes in voter attitudes are also shown through the increase in activity of pro-independence groups in Welsh civil society. In May 2019, the streets of Cardiff played host to Wales' "first ever" march for independence – with similar marches having subsequently taken place across Wales. Non-partisan pro-independence groups, such as YesCymru, in seeking to emulate the influential Yes movement for independence in Scotland, have also reported a consistent rise in membership in recent months. While independence remains a minority position in Wales, it is a minority that is no longer confined to the fringes of the political debate on Wales' constitutional future.

Developing this point, this blog analyses the constitutional path a future Welsh Government would be required to navigate in seeking to hold a referendum on Welsh independence. However, before engaging in this discussion, the next section of the blog will briefly map the role of independence in the constitutional strategy of the main nationalist party in Wales – Plaid Cymru.

Plaid Cymru and Welsh Independence

In its 2019 Manifesto, Plaid Cymru laid forth its most detailed commitment for securing Welsh independence, which includes a plan to hold a referendum on the subject before 2030. This commitment to a roadmap for independence marks a significant development in the constitutional strategy of the party. Historically, Plaid Cymru has been reluctant to adopt the terminology of *independence*, and has for much of its history preferred the more nuanced constitutional goals of Welsh "freedom", or "full-national status" within the European Union. Indeed, it was not until 2001 that the party voted to formally include the term *independence* as part of its constitutional strategy. Even then, the proposals put forward were for a heavily

nuanced form of independence, and made no mention of a timescale by when independence should be achieved.

More recently, spurred on by the entrenched political attitudes created by the Brexit process, as well as the steady rise in support for independence in Wales more generally, Plaid Cymru has moved to push independence forward as a salient issue in Welsh politics. In November 2019, the party set up an Independence Commission to consider in more detail its plans for an independent Wales. Speaking in June 2019, the leader of Plaid Cymru, Adam Price, set out a vision for an independent Wales in a new British confederation – a so-called “Benelux Britain” – whereby some sovereignty would be pooled in central institutions, and regulated by a Council of Ministers and a Confederal Court. However, while momentum appears to be gathering behind the cause of independence, Plaid Cymru – like the SNP in Scotland – remains committed to securing independence via lawful means, and within the existing requirements of UK constitutional law. Developing this point, the next sections of this blog identify the constitutional frameworks relevant to authorising a referendum on independence in Wales.

The Constitutional Path to a Referendum

Unlike the juxtaposition of abolishing the Senedd, there is no requirement in law for a referendum to take place in order for Wales to become an independent state (although there is arguably a constitutional requirement in favour of a referendum, based on issues of political legitimacy, as well as the precedent established in 2014 in Scotland). What *is* definitely required in order for Wales to lawfully become an independent state, however, is the agreement – be that explicit, implied or implicit – of the UK Parliament. Under Schedule 7A, Part 1, para 1(b) of the Government of Wales Act 2006, the “union of the nations of Wales and England” is a reserved matter and, as such, requires any lawful change to the union to have the consent of the UK Parliament.

In order for a Welsh Government to therefore lawfully hold a referendum on Welsh independence, it would first require a transfer of legislative competence from Westminster. This could come either by way of primary legislation passed by the UK Parliament, or by an Order in Council from the UK Government. The process of requesting the necessary powers to lawfully hold a referendum in Wales is broadly similar to the procedure followed in Scotland under the section 30 Order – the necessary statutory framework for which in Wales is contained under section 109 of the Government of Wales Act 2006. Due to final legal authority residing with Westminster, however, the UK Government – less the UK Parliament – is under no legal obligation to transfer such powers to the Senedd.

Securing a Referendum

Having set out the constitutional framework for seeking the legal authority to hold a referendum on independence in Wales, we now turn to consider the question of whether a mandate for Plaid Cymru at the Senedd Elections in May 2021, would equate to a constitutional mandate to allow for a referendum on independence. On this point, we find an interesting observation for analysis in a comment made in the 15 July debate by the former First Minister of Wales, Carwyn Jones [at 874]:

There is a constitutional convention already, which states that if a party stands on a manifesto commitment in favour of a referendum on independence, then there should be such a referendum. We've seen that in Scotland.

In testing this statement, we find that the implication of a mandate for Plaid Cymru holds very different chances of a referendum taking place, when viewed from a legal or political perspective. In law, for reasons already outlined, there exists no explicit obligation on the UK Government to authorise a section 109 Order to allow a future Welsh Government to hold a referendum on independence. Moreover, as argued in a previous blog by McCorkindale and McHarg, a legal challenge in favour of a referendum, based on a political mandate or a manifesto commitment, would likely fail due to the complex task of establishing voter intention behind such a mandate. Similarly, a legal challenge under the more standard grounds of judicial review also offers little chance of success.

In law, while there exists no explicit restriction under UK constitutional law outlawing the *possibility* of a referendum on independence taking place – in contrast to the Spanish Constitution – there is also no straightforward legal remedy or *requirement* on a UK Government to transfer to the Senedd the powers required to lawfully hold a referendum. Indeed, as recent events in Scotland suggest, a request to authorise a referendum on independence does not guarantee the agreement of the UK Government, and ultimately falls outside of the realm of legal adjudication. In the event that Plaid Cymru enters Welsh Government at the Senedd Elections in May 2021 – either as a single party or in a coalition – the task of securing a referendum in Wales will therefore depend not only on acting within the limits of UK constitutional law, but also of convincing the politics of the UK Government.

Concluding Remarks

While the independence debate is gathering traction in Wales, levels of support for independence remain confined to a minority of the Welsh electorate. That this minority is steadily increasing in number, however, is a reflection of the changing nature of the political debate in Wales. Independence is now regularly considered as an option in debates on Wales' constitutional future, and looks set to continue as a key part of Plaid Cymru's election strategy in the run up to the Senedd Elections in May 2021. Going forward, however, the chances of a referendum on independence taking place will require campaigners to not only secure the support of the Welsh electorate, but also the cooperation of Westminster.

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