

A Federal Scotland within a Federal UK

Executive Summary

1. A degree of volatility and uncertainty surrounds the status of the United Kingdom. In Scotland, the rise of the Scottish National Party (SNP) and, in England, the media and political attention afforded to the Barnett Formula and the so-called 'West Lothian Question', have served to call into question arrangements for an asymmetrically devolved country.
2. Devolution in Scotland is now a firm part of the un-codified UK constitution. But it has not, as was hoped and despite some initial signs it might do, successfully removed Scottish independence from the political agenda.
3. The status quo for Scotland is not a realistic option: some extension of devolution is widely accepted as necessary.
4. Continuing to operate within the existing framework for devolved governance may prove to be a flawed approach since the *Scotland Act* is an amorphous basis for a settlement.
5. The use of federal structures in Scotland could provide an administrative realisation of a dual sense of Scottish and British nationality, and potentially reduce the threat of secession.
6. A federal settlement for Scotland would necessitate federal structures for the entire UK. Such an approach might benefit from learning lessons from the experiences of other multi-national and asymmetrical countries.
7. A federal UK that included England as a single unit might not prove in practice workable, given its vast relative size; but while breaking up England into regions may appear a more viable option, at present there is a lack of popular support for such a project.
8. The introduction of federal structures to the UK moreover would be an enormous task of campaigning and institutional design; and would meet with much cultural and political resistance, particularly to the idea of a codified constitution. But it should not be assumed that English attitudes towards the regions are immutable, or that barriers to federal approaches are impossible to overcome.
9. Consideration should be given to the introduction of a symmetrical framework for a federal UK, within which a set of powers was available for individual participant units to call down if they chose, up to a limit which safeguarded the integrity of the UK federal state. Within these parameters there would be symmetry of possibility, while at the same time a likely asymmetry in terms of the amount of powers which particular constituent parts of the UK chose to claim.

Introduction

The year-before-last saw the three-hundredth anniversary of the Act of Union. But the event was marked by little celebration. This lack of observation in part reflects the degree of volatility and uncertainty surrounding the status of the United Kingdom (UK). In Scotland, the rise of the Scottish National Party (SNP) and, in England, the media and political attention afforded to the Barnett Formula and the so-called 'West Lothian Question', have served to call into question arrangements for an asymmetrically devolved United Kingdom (UK); and even cast doubt upon the UK's long term future.

In response to these tendencies, one possible course of action which has attracted interest is that of the adoption of federal structures. This paper considers the form and content that such a settlement might take; the chances, from the perspective of those who favour the continuance of the Union, that it would resolve present difficulties; and the prospects for this change's being implemented. It begins with a consideration of circumstances and options for Scotland; then it moves to consider the future structure of the UK as a whole, with a particular focus on England. Northern Ireland and Welsh devolution will be considered in future Federal Trust publications.

Part One: Scotland

The Devolution Settlement

Devolution for Scotland was a key manifesto pledge of the Labour government elected at Westminster in May 1997. In a referendum held in September 1997, on a 60.4 per cent turnout, 74.3 per cent voted for a Scottish Parliament; with 63.5 per cent supporting a proposal that it should be granted tax-varying powers. Devolution was then given statutory form through the *Scotland Act 1998*.

The powers of the Scottish Parliament are defined in a negative sense. Under Clause 29 of the *Scotland Act* it can legislate in areas that are not 'reserved' to London (the protected legislation and policy areas are contained in schedules to the Act). The Scottish Parliament has powers in many 'domestic' policies but is excluded from fields such as foreign affairs and defence and national security. Yet there remain a number of fields reserved to Westminster that could be transferred at least in part to Edinburgh without undermining the UK state, as we discuss below. (For a list of reserved and non-reserved powers see Appendix One).

The *Scotland Act* makes relatively easy the transfer of further powers to Scotland. Through Order in Council, (subject to affirmative resolution in the House of Lords, House of Commons and Scottish Parliament), the 'reserved' list can be modified to transfer an item to (or away from) the Holyrood Parliament. The Act also enables powers to be transferred to (or away from) Scottish ministers, as opposed to the Parliament. There is further provision for specific tasks to be delegated from UK ministers to their Scottish counterparts (and vice versa), without overall responsibility for the exercise of powers in the particular policy areas concerned being affected.

Technically speaking the locus of sovereignty for the whole of the UK remains at Westminster, with the 'Queen in Parliament'. Under certain circumstances UK ministers have an (as yet unused) power to veto Scottish primary and secondary legislation; and to give instructions to Scottish

ministers. In the UK – which does not have a formally defined constitution – no enactment enjoys a special protected status. The *Scotland Act* can therefore be amended by the UK Parliament (as it was by the *Scottish Parliament [Constituencies] Act 2004*) and it could in theory be repealed in the same way. Westminster retains the ability to legislate in devolved areas, subject to the non-statutory 'Sewel Convention', by which the consent of the Scottish Parliament is required through what is now known as a 'Legislative Consent Motion'.

There are a number of mechanisms for regulating the relationship between the Scottish Parliament and administration on the one hand and Westminster/Whitehall on the other hand. Statutory provisions exist to ensure the Scottish Parliament does not exceed its remit, with the Presiding Officer at Holyrood, the Scottish and UK Law Officers and the Judicial Committee of the Privy Council playing an enforcement role. There are also more informal bodies and arrangements intended to ensure mutual observation of responsibilities – including ministerial councils, a memorandum of understanding, concordats, a joint ministerial committee; and the aforementioned 'Sewel Convention'.

Behind all of this statute and practice it can reasonably be stated that the Scottish devolution settlement has become a firm part of the un-codified UK constitution. While it may appear fragile in strict legal terms, it is politically and culturally embedded. Tiers of government which are believed to enjoy a high level of security can be abolished by the UK Parliament – as happened with the Greater London Council in 1985. But for the foreseeable future a reversal of devolution without assent through a referendum in Scotland (which it is hard to conceive of even being called let alone won in the present climate) is not a realistic proposition. Nor is the UK government or Parliament likely to use its powers to intervene in the business of devolved institutions.

An Unstable Settlement?

The introduction of devolved government to Scotland through the *Scotland Act 1998* can be viewed in two lights. First, it was part of a programme of transferring power away from Westminster and bringing authority and the means of holding it to account closer to those on whose behalf it was exercised. In this sense it was part of a broader regional programme initially pursued for the UK as a whole by the Labour government elected in 1997. Judged against the objectives of those who pursued it, Scottish devolution can in this sense be seen as a success. The Scottish electorate greeted the devolution proposition warmly. The existence of the Scottish Parliament and administration is now widely accepted throughout the UK and across parties; the powers of both have been extended over time; and the only serious debate now is about how far the process instigated by the *Scotland Act* should go, not if it should be reversed or halted (although the government submission to the Calman Commission, discussed below, was suggestive of some possible institutional resistance to further development). Of all the projects emerging from the UK regional/national agenda, it is the one that has made the most progress, demonstrating that there is an appetite for the transfer of power downwards from Westminster in this way in Scotland at least.

On the other hand, the introduction of a new tier of governance for Scotland (as in Wales and Northern Ireland) was partly motivated by a desire on the part of its advocates to resolve tensions associated with separatist nationalism. Devolution would on this hypothesis keep Scotland within the Union but – it was hoped by its champions – could provide sufficient autonomy to reduce the secessionist appeal of the Scottish National Party (SNP). This outcome was particularly desirable to the Labour and Liberal Democrat parties, both advocates of the Scottish Parliament. Each has a significant base of support in Scotland. They were likely to be well represented at a devolved assembly.

But devolution has not, as was hoped and despite some initial signs it might do, successfully removed Scottish independence from the political agenda. Within less than ten years, in the third election to the Scottish Parliament of May 2007, the SNP won more seats than any other party (47 to Labour's 46, of a total of 129) and went on to form a minority administration. Further evidence of growth in the popularity of the SNP was provided in July 2008 when, following the death of the sitting MP, a large electoral swing saw it capture the Glasgow East (Westminster) parliamentary constituency previously held by Labour. The failure of the SNP to win the Glenrothes Westminster by-election of 6 November 2008 was a political setback, but only because of the high expectations that had been raised. Though Labour held the seat and performed well, with a 3.2 per cent increase in its vote share, there was a 13.1 per cent swing towards the SNP, and swings away from the pro-Union Liberal Democrats and Conservatives of, respectively, 10 and 3.3 per cent.

Ironically, there is no conclusive evidence of an upsurge in underlying support for Scottish separatism associated with the recent successes of the SNP. Not every vote for the SNP is an indication of support for independence. For instance, in his analysis of polling data, John Curtice has noted that 'one of the ironies of the 2007 election campaign is that although the SNP came first in the election, support for independence fell away during the campaign.'¹ The behaviour of the Scottish electorate may be explained to some extent in terms of mid-term tactical voting against a Labour Party that, as well as having dominated all tiers of representation in Scotland for many years, has been in government at Westminster for more than a decade and has endured periods of unpopularity across Britain as a whole.

However, whatever the electorate may tell pollsters at a given time about how they would vote in a future referendum, the 2007 Scottish Parliament elections demonstrate that a significantly larger proportion of them were willing to

support a party which has one clear objective: Scottish independence. Furthermore, the mere advent of an SNP administration, now calling itself the 'Scottish Government', combined with the party's exploitation of the opportunities provided by office to promote its ultimate goal, has increased the salience of this issue, as well as encouraging general reassessments of existing constitutional structures in Scotland and the UK as a whole.

More difficult times for the Union may lie ahead. The settlement represented by the *Scotland Act* enjoyed favourable circumstances in terms of the relationship between Edinburgh and Westminster, since it had involved between 1997 and 2007 a Labour-led Scottish administration dealing with a Labour government in London. Devolution is now undergoing its first serious trial, with one party, the SNP, perhaps intent on testing it to destruction; and the other, the Labour government in London, less inclined to cooperate with Edinburgh than it was previously. Areas where interlinked disputes over policy and authority have already developed since the SNP took office include nuclear power, local government finance, the allocation of Treasury funds, which body should run Scottish parliamentary elections; responsibility for firearms; territorial waters; identity cards; and policing costs.

The sense of instability around the Union engendered by the new political conjunction is exemplified and heightened by the launch of two parallel, conflicting processes for considering the constitutional future of Scotland. The SNP has indicated that it would like to hold a referendum on independence by 2010 and as a first step towards this objective the Scottish Government introduced *A National Conversation* in August 2007. In the consultation document for the *Conversation, Choosing Scotland's Future*, three options are referred to: continued activity within the existing settlement; the adoption of 'a specific range of extensions to the current powers of the Scottish Parliament and

Scottish Government' stopping short of independence; and independence. The document does not set a clear time limit on the process, but promises full public engagement leading to Scotland ultimately choosing between the three outcomes set out. There is included in the document the draft text of a bill that would make possible a referendum on independence.

In response to this initiative, the main opposition parties in the Scottish Parliament and the Labour government at Westminster instigated what was eventually launched in March 2008 as the Calman Commission on Scottish Devolution. Chaired by Professor Sir Kenneth Calman, it recently produced an interim report for consideration by the Scottish and UK parliaments (see Appendix Two). One of its stated purposes is to 'secure the position of Scotland within the United Kingdom' – in other words it seeks to exclude independence as an option.

However, it may not ultimately prove possible to withstand political momentum towards a referendum on secession. The SNP would need a majority in the Scottish Parliament to pass a referendum bill, so that it would require the support of one or more other parties. However, the Scottish Labour Party, while not supporting the holding of one outright, has already engaged in a debate about the timing of such a plebiscite, stating that one should be held sooner than 2010. This intervention suggests a willingness to countenance such a vote, if only in the hope of winning it and dealing a blow to the independence movement.

Were a referendum held, what would be the prospects for Scottish secession? One important consideration is the possibility of a General Election victory by 2010 for the Conservatives, a party which enjoys little support and endures much animosity in Scotland. Such an outcome might in the SNP calculation be followed by more tension within the existing constitutional settlement and provide the nationalists with further opportunities for promoting the case for Scottish independence. Presumably it is partly for this reason that the SNP

hopes to hold a referendum in 2010. How is a Conservative government likely to conduct itself in such circumstances? Support for the Union is built into Conservative Party DNA and only a small fringe of the Conservatives would pre-emptively favour Scotland's leaving the Union. However, some Conservative rhetoric and policy ideas associated with the status of MPs from Scottish constituencies in the UK Parliament suggest a desire to play to English nationalist sentiment which could inflame relations between Edinburgh and London. It is also conceivable that, if some kind of endgame were apparently being entered with an independent Scotland looming, a Conservative government might behave differently to a Labour one. The concessions the Conservatives would be prepared to make in order to boost Scottish support for the Union might not be as great as those that Labour would countenance, given the respective levels of Scottish support for the parties in recent decades (at present the Conservatives have only one Westminster MP elected by a Scottish constituency).

In order to proceed smoothly towards independence, the Scottish Government would probably have to win a clear majority in support of it in a referendum, on a substantial turnout. If the majority in favour of separation was only slight, or the turnout was low, the political resistance to such an action would be heightened, and its legitimacy reduced.

If there was a clear mandate for secession, some observers have claimed there would be further obstacles. Lengthy negotiations with the UK government would be necessary. The terms of separation ultimately arrived at might prove unpopular with the Scottish electorate, which the UK government might insist on being consulted in a further plebiscite. Finally, a new Scottish state might not, as the SNP anticipates, be fast-tracked to full membership of the EU, since the governments of countries such as Spain might wish to avoid giving encouragement to nationalist separatists within their own borders.

A substantial surge of popular support for independence within Scotland, if one is occurring or takes place at some point in the future, is unlikely, however, to be restrained by such niceties. Even if there was only small a majority against continued Scottish participation in the UK, there would be a destabilising impact upon the Union, by demonstrating there was a lack of consensus around it. Indeed, a large minority backing for separation would create similar problems. Another referendum at a later date would not be precluded. Those who seek independence only have to be successful once, since if affected secession could not be reversed for the foreseeable future. If the remainder of the UK was content for Scotland to accede to the European Union, which it probably would be after an amicable separation, it seems unlikely that other EU members would wish to use a veto. For all the reasons discussed above the prospect of Scottish independence needs to be taken seriously.

Future Options

No mainstream political group now advocates ending devolution, so this course of action can be regarded as off the political agenda. Nor seemingly is the simple status quo regarded as an option by significant players. At the Scottish Parliament debate of 6 December 2007 leading to the instigation of the Calman Commission, the tenor of the contributions from the main pro-Union parties, including the Conservatives, who initially opposed a Scottish Parliament, was one of acceptance in principle and indeed anticipation that devolution would in some ways be enhanced. There seems to be a generally accepted calculation that the appeal of secessionism can be reduced only by the transfer of more powers to Edinburgh – although the government submission to the Calman Commission took an extremely cautious tone, perhaps inspired by Civil Service reservations. Polling suggests that the balance of Scottish public opinion is inclined to favour devolution.

Option 1: Operating within the existing settlement

The first approach is the one broadly favoured by Labour and the Conservatives, though no doubt with differing views of what it would mean in practice. It involves retaining the constitutional form set out within the *Scotland Act* and within this framework transferring powers from Westminster/Whitehall to Edinburgh. Proponents of this approach could make a number of points in support of their case. The *Scotland Act* is a flexible statute that provides for further devolution to be rapidly affected without need for primary legislation. It is tried and tested, a prominent part of the un-codified UK constitution that has already accommodated change, such as the progressive transfer of responsibility for rail transport to Scottish ministers and the Scottish Parliament.

However, as noted above, the devolution programme as encapsulated in the *Scotland Act* has not eliminated or even lessened the appeal of separatism, indeed it may have assisted the cause. Why, it might be asked, will more activity within the same framework be successful? Furthermore, it may be that the nature of the Act and the existing settlement is contributing to existing uncertainties. On the one hand there is no clear end to the amount of devolution that could be enacted under it. The Scottish Government document of August 2007, *Choosing Scotland's Future*, goes as far as to claim that: 'The Act...sets up a system of "unlimited" devolution, in which any reserved matters could be devolved to the Scottish Parliament, using the mechanisms already in the Act. No further primary legislation would be required at Westminster or Holyrood'. On the other hand, existing arrangements do not benefit from a clear rationale as to *which* powers should be transferred from London (and which should be retained). A reading of the Calman Commission interim report shows that the Commission clearly suffers from this deficiency. If decisions over the location of powers are made on a piecemeal basis, they are likely to be determined purely

by what is judged necessary at a given time to avert independence. If devolution is handled – and perceived as being handled – in this way, problems for the overall acceptability of operating within the existing *Scotland Act* are likely to arise.

Moreover it is probably hard to rally pro-Union support around such an amorphous arrangement as that embodied in the *Scotland Act*. It provides ground that is constantly shifting. The settlement could, at least in the view of the Scottish Government, seemingly expand as far as to accommodate independence, yet at the same time could theoretically be repealed at Westminster on a simple majority vote. Those seeking a firm – though not entirely inflexible – arrangement, embodying a clear set of principles must look elsewhere.

Option 2: A federal structure

The second option is to address the *form* as well as the *content* of the existing settlement. In practice this approach would entail affording it legally entrenched status – in other words meaning that the *de jure* position was brought into line with the *de facto* one that the Scottish Parliament is an established part of the UK constitution. Whatever specific label was attached to it, this structure would be federal. Certainly the idea of a federal solution for Scotland is discussed as a possible option in both academic and political circles (and sceptics have paid it the tribute of explaining why they think it could not work in the UK). *Choosing Scotland's Future* alludes to 'changing the underlying nature of the devolution settlement to a federal system' as an option on the table; while the subtitle of the 2006 report produced by the Steel Commission for the Liberal Democrat Party (though not binding as a policy statement) is *Moving to Federalism – A New Settlement for Scotland*.

A number of potential advantages to a federal model can be identified. It would provide a more certain settlement, around which it might be possible to conduct a more positive

campaign in favour of the Union. One particular presentational advantage over the option of remaining within the existing settlement could be that federal structures offered the Scottish Parliament a formally defined share of sovereignty, even if in practice the Parliament in Edinburgh is already entrenched as an autonomous institution of the UK system of governance.

Furthermore, while the piecemeal approach to devolution offered by the *Scotland Act* lacks a clear set of principles providing guidance over which powers to shift to Edinburgh, with federal principles there would be a clear rationale, namely that each responsibility should rest at the appropriate level, with a propensity for bringing it closer to those on whose behalf it was exercised. This approach would mean that numerous powers could be transferred to Scotland, but there would be clear limits to the process, namely that it should not undermine the integrity of the UK state. There would be a further possible value to this principle. As well as protecting the status of institutions in Edinburgh with respect to London, it could set out the rights of local authorities in Scotland in relation to Edinburgh. Observers have noted that, as well as drawing powers down from Westminster/Whitehall, another impact of devolution in Scotland has been to absorb them upwards from councils in Scotland to Edinburgh. Plans for a local income tax (now dropped), as initially envisaged by the SNP, in which the rate would be set at Edinburgh, would accelerate this process. A federal approach could therefore open up a new front against secessionism, turning its own rhetoric of self-determination against the SNP by portraying it as seeking to create an over-centralised Scotland in place of an over-centralised UK.

The Form and Content of a Federal Settlement

As previously noted, at present the powers devolved to Scotland are

broadly defined negatively – that which is not forbidden can be done. It may be that, under a federal settlement, areas of authority would be set out positively, though such an approach is not universal to federal states. Also as suggested above, it would be necessary for the rights of the Scottish administration to be constitutionally entrenched, enjoying equal formal status to those possessed in London. Mechanisms for liaison between the Scottish and UK executives would probably have to be made more formal. Edinburgh would be given a clearer role in such areas as influencing external policy, parts of which could even be considered to be joint responsibilities. Where a dispute emerged between the two parties, ultimate arbitration would fall to the UK Supreme Court, which the Westminster Parliament would not be able to trump simply through passing an Act.

Powers that could be shifted to Scotland, at least to some extent, under a federal system might include:

- the fiscal, economic and monetary system
- trade and industry, including competition and customer protection
- social security
- broadcasting
- the civil service
- energy
- employment
- equal opportunities

Disputes over where one policy ended and another started would be inevitable – but they occur under the existing arrangement as well. For instance, though energy is a reserved matter, the Scottish Government has pursued its resistance to new nuclear power plants through its responsibility for planning. Moreover, a properly designed federal settlement would create clear mechanisms for the resolution of such disagreements, the use of which could be viewed as evidence of the effectiveness and legitimacy of the system rather than of its instability. An issue that would need to be considered carefully would be whether a federal

settlement included in it an 'exit clause', setting out the terms under which Scotland could leave the UK. The existence of a formalised route to secession for Scotland might have a destabilising influence, providing a continual temptation. However, the lack of one could be used by secessionists in attempts to undermine the legitimacy of a federal settlement.

Perhaps the most fundamental issue to address would be that of fiscal policy. While presently the Scottish Parliament can vary the basic rate of income tax by up to 3p in either direction (under clauses 73-80 of the *Scotland Act*, though it has not yet done so) and has responsibility for local government finance, a federal settlement would entail significantly more fiscal autonomy passing to Edinburgh (though Scottish local authorities might in turn be given their own protection from intervention from Edinburgh).

Possible Problems Posed by the Federal Option

There are a number of potential barriers to the successful introduction of the federal option. If the possibility of an alteration to the fundamental settlement was seriously raised, the detailed consideration and level of consultation it required would consume a substantial amount of time and political resources and may serve to divide pro-Union groups. Inevitably the final decision made would be controversial; as would the process used to arrive at it. Both would provide advocates of independence with the opportunity to promote their cause, demanding that it was included as an option and campaigning in its favour. However, to suppose that difficult issues relating to the Union can be avoided forever simply by remaining within the *status quo* would be misguided. Existing arrangements are already the subject of critical discussion and the examination of different possible structures is inevitably part of this discussion.

The Likely Long Term Impact of the Adoption of Federal Structures

As noted above, one calculation behind the introduction of federal structures to Scotland would be that it might appeal to some potential or actual secessionists. Two ways of measuring success would be a decline in support for independence as measured in opinion polls; and falling electoral popularity for the SNP. It is also conceivable, though unlikely at present, that a successful federal approach could cause the SNP to modify its objectives, downplaying independence as Plaid Cymru has for Wales. Alternatively there could be a split in the party between hardliners and moderates.

How might a federal structure encourage one or more of these outcomes? Its central appeal would be to offer Scotland secure and powerful self-government combined with the benefits of forming part of a larger country of international standing. In *Choosing Scotland's Future* the SNP-led Scottish Government envisages that 'an independent Scotland and the remainder of the United Kingdom would seek to maintain a series of cross-border partnerships and services...An independent Scottish Government could also look to build on the existing close working relationships within the current United Kingdom'. In other words, even separatists concede that joint institutions and policies will remain necessary. A federal structure could offer the correct balance between autonomy and pooled responsibility, without a need for secession followed by a reconstruction of relations with the remainder of the UK.

However, some might argue that a federal system would be a staging post to Scottish independence. The *Choosing Scotland's Future* document could be read as indicating that the SNP sees it in this light. The introduction of this system could be portrayed as a victory for the secessionist movement, affording it greater political momentum. The further transfer of powers – including possibly such responsibilities as broadcasting – could

lead to a reinforcement of Scottish separatist sentiment, compounding such psychologically important changes as the Scottish Executive unilaterally renaming itself the Scottish Government. Such a shift could increase the chances of independence coming about. However, similar changes could also arise as a consequence of the acceleration of devolution using the *Scotland Act*.

In any case, nationalism can take on many forms without necessarily leading to secessionism. A joint Scottish and British nationalism is possible. Consistently since the 1970s, when forced to choose, a substantial majority of those asked in Scotland have tended to classify themselves as Scottish rather than British, the split for 2007 being a not-atypical 72 per cent/19 per cent. However, questions which permit more nuanced dual classifications paint a different picture. Since the early 1990s, between 19 and 37 per cent of those asked have described their national identity as 'Scottish not British'. The 2007 figure is 27 per cent. However, in the year 2007, 69 per cent of Scots interviewed also included 'British' as at least a component of their national identity. 30 per cent considered themselves 'More Scottish than British', 28 per cent felt they were 'Equally Scottish and British', 5 per cent 'More British than Scottish', and 6 per cent described themselves as 'British not Scottish'. So there is a tendency towards dual identity, though weighted towards Scottishness.² A federal system could lend itself well to this sort of duality, satisfying a desire for Scottish autonomy coupled with continuing Britishness.

Part Two: The UK Perspective

England – A Single Federal Component within a Multi-National, Asymmetric UK?

So far this paper has examined the federal approach in terms of how it might benefit Scotland and possibly make it more committed to the Union. But there are other, UK-wide,

dimensions to this debate. Measures which might discourage secession in Scotland could prove unpopular, even intolerable, elsewhere in the Union; or could require balancing administrative arrangements which are difficult, or might even prove themselves in practice unworkable.

Two interlinked themes are significant here. The first is that of the UK's status as a multinational country, including within it England, Scotland, Wales and – to complicate matters further – Northern Ireland with its specific national and constitutional characteristics. Other multinational countries which have adopted or moved towards federal structures, such as Canada, Belgium and Spain, have had to give careful attention to the status of their internal national divergence in the institutions and procedures they have established.

The second, closely associated, theme is that of asymmetry. The UK has always been characterised by uneven administrative arrangements such as the separate legal system for Scotland; and the varied form and content of the different devolution settlements. Perhaps even more critical is the preponderance, both in economic and population terms, of England, making difficult the formation of a balanced system for the UK. (See Appendix Three).

Any federal programme for Scotland must take into account the tensions and problematic anomalies which can arise from the asymmetry of the UK, which have confronted those seeking to decentralise authority in the UK since the Gladstone era. It is hard to conceive of federal structures being introduced for Scotland without a more general recasting of the settlement for UK governance as a whole.

First, a federal approach would entail the codification of constitutional arrangements, creating 'higher law' which could not be overturned by a simple majority at Westminster. Such a process could surely not be carried out for one part of the UK in exclusion from the rest.

Second, there presently exists English resentment around a number of issues relating to devolution. One is the 'Barnett formula' for the central redistribution of funds, which is seen by some as being biased against England. Another is the 'West Lothian Question', which relates to the anomalies of representation raised by the asymmetrical nature of the devolution process. The fundamental objection raised is that when votes take place in the UK Parliament MPs from Scottish constituencies are able to play a part in decisions impacting upon England, while MPs from English constituencies do not have an equivalent influence upon Scotland. Such disaffection might worsen if Scotland were granted greater, more entrenched autonomy without corresponding change elsewhere.

But were there increased autonomy all-round, which a federal approach would provide, these problems could be eased. Tensions associated with the Barnett Formula might be lessened if the Formula, which was only ever intended as a short-term stop-gap, were supplanted by a new needs-based approach to the reallocation of funds at federal level. Perhaps a full debate around principles might help undermine the idea that 'England' or 'London' was subsidising others, though it could probably not eradicate it. Federal structures, if they can address problems of UK asymmetry, are the best way of answering the West Lothian Question as well, if one accepts that the other way of dealing with it, namely the reversal of devolution, is both undesirable and impractical. The federal solution is certainly more plausible than proposals for 'English votes for English laws' which tend to suffer from fundamental misconceptions, including the idea that there is such a thing as an easily-identifiable 'English law' (or even 'English' clauses within bills); and that MPs within the UK Parliament function solely as representatives of geographical constituencies.

Other often-voiced English complaints include the claim that Scots are overrepresented at Cabinet level. Those concerned about such issues could

advocate the adoption of a practice from other multi-national federations, whereby a formula is applied to ensure the allocation of government posts is balanced according to nationality.

But while it is clear that federal structures will be needed for the UK as a whole if they are introduced for Scotland; and that they can potentially offer some solutions to UK constitutional problems, the issue of symmetry raises some questions for those advocating them:

Is England too large to be a member of a federal UK in its own right?

The prospect that England could be a single constituent part of the UK on an equal level with Scotland, Wales and Northern Ireland raises various problems. Salutary lessons can be drawn from the fate of past federal constitutions devised for the West Indies, Central Africa and Nigeria, all of which failed partly because of the presence of a single dominant component within them (respectively, Jamaica, Rhodesia and Northern Nigeria). If at federal level England was afforded representation commensurate with its population, it could outvote all the other states combined in whatever institutions were established for federal governance, surely an unacceptable arrangement. At the same time, were safeguards introduced, implying, for instance, that England had to act within federal bodies with the support of at least one other state, then resentments similar to those associated with the West Lothian Question and Barnett Formula might resurface, possibly in more virulent form. England may be reluctant to accept that if it wants the continued existence of a UK in which it will always be the predominant partner, it has to make certain institutional, financial and political concessions.

Aside from more technical issues, there are clear symbolic and practical problems raised by the prospect of the existence of parallel UK and English governments and prime ministers, possibly of different political complexions. Disputes between the two

– which would be inevitable – could be in practice difficult satisfactorily to resolve; would be damaging to the national interest; and possibly undermine the integrity of the UK. Furthermore, in the UK context, a federal system could have a decentralising impact. But any such benefits would be negligible with the transfer of power from a UK of 60 million to an England of 50 million.

Finally there is the issue of demand. When English people are asked about their national identity, they are less likely to emphasise it over their Britishness than the Scots (or Welsh) rate their particular identities over being British, although English identity may have risen since the advent of devolution. Moreover, there is no clear evidence of strong, deep support for an English Parliament; and political candidates running on such a ticket have not enjoyed success.

Could England be broken up into regions?

While English national identity may not be as strong as Scottish or Welsh, it is generally greater than regional identity within England. Where strong sub-national English identities exist, such as in Cornwall, they do not correspond directly to the nine existing official regions. The closest fits are the North East; and Yorkshire to 'Yorkshire and the Humber'. (See Appendix Four for a list of the English regions and populations). There is little meaningful popular support for the establishment of directly elected regional assemblies in England. Even the North East overwhelmingly rejected the idea of such a body in November 2004. The obvious exception here is London, the electorate of which in May 1998 voted to establish directly elected governance. The 'top-down' approach to regionalism taken by the Labour government since 1997 has – in England – failed to connect with any 'bottom-up' enthusiasm. (This is not to say that constitutional settlements devised from above are doomed to fail – after all the Belfast or 'Good Friday' Agreement of 1998 was a 'high political' arrangement,

subsequently endorsed by referendums on both sides of the border in Ireland). The government proposal, recently adopted by Parliament, for regional select committees at Westminster represents the continued pursuance of a failing strategy. It cannot lead to enhanced legitimacy for regional governance, since it entails it being scrutinised from a tier above.

Nonetheless, an England of regions seems to be the only means by which a workable federal structure for the UK could be constructed, given the relative size of England. This conclusion has been reached by others in the past, such as the then-Liberal Cabinet member Winston Churchill in a proposal he produced shortly before the First World War, endorsed by David Lloyd George.

What Would a Federal UK Look Like?

Within a federal UK, there would have to be a codified apportionment of powers as between different tiers of government (including, as suggested above for Scotland, local government). Certain key powers, particularly in the area of external policy, would be retained at the centre. The Calman Commission interim report, though not advocating federal structures, broadly described the position when stating that it is 'vital to the interests of the people of Scotland and the wider United Kingdom that the UK Parliament and Government will continue to be responsible for national defence and security, representing Scotland in international affairs.' However, it might be argued that certain responsibilities in external policy – such as parts of EU policy – could be regarded as shared between different tiers. Other items Calman added to its list of core powers were: 'the monarchy, the UK constitution...currency and coinage'. The main divergence between this outlook and that of an advocate of federal structures would be that for the latter, the constitution would presumably not be owned by any one tier of government. Beyond these areas, the appropriate locus for a

whole range of domestic policies would be the subject of much debate. Formal structures for cooperation between the different components in the federal UK would be necessary, for which the existing British-Irish Council and British Inter-Parliamentary Body could provide models or embryos.

A clear route to the resolution of disputes would be required, presumably leading to the UK Supreme Court. It would probably be necessary to make the acts of both federal and sub-federal legislatures and governments subject to judicial review on a basis of human rights obligations. This arrangement would entail making it possible for primary legislation produced by the UK Parliament to be struck down under the *Human Rights Act 1998*, equalising the position with other tiers of government. Within a 'written constitution', acknowledgement of the status of the different nations would be necessary, including political, linguistic and cultural considerations.

Beyond these issues, it is harder to arrive at clear conclusions about the nature of a federal UK than it is to postulate what would be the role of Scotland within such an entity. But those who are sympathetic to such an outcome need seriously to address a series of questions, set out below.

How would the powers apportioned to different tiers of government be defined?

In other words, would the federal government have its authorities defined positively; would the lower tiers have their powers explicitly set out; or would some other dual arrangement be possible? These questions have been answered differently across various federal constitutions. While the Canadian constitution defines the powers of states positively, the German constitution concentrates on the powers possessed by the federal government, and those that are shared with the states. At present in the UK, devolution to Scotland and Northern Ireland is negatively defined; but to Wales it is set out positively. Would it be possible in a definitive federal

settlement to continue to define the powers possessed by the regions and nations of the UK in different ways? Probably not. For those who favour the maximising of national/regional autonomy, the negative approach would seem the better option, since it creates a default position of the power being exercised closer to those whom it affects; a view taken by many working within the devolution settlement in Scotland.

Would every constituent part of the UK have an exit clause?

Such provision was explicit for a devolved Northern Ireland following the Belfast (or 'Good Friday') Agreement of 1998, given statutory expression in Clause 1 of the *Northern Ireland Act 1998* (and has existed in various forms since the *Ireland Act 1949*). Could it be denied to other constituent members of the UK? The most likely solution here is to provide 'exit clauses' to Scotland and Wales, alongside the one possessed by Northern Ireland, but not to the English regions. It would be difficult, with an arrangement introduced in a context of rising forces of separatism in Scotland, to do otherwise. Once such a power was granted to Scotland to fail to do so for Wales would be inflammatory. Such an arrangement could form another safeguard against English dominance of a federal UK.

Should Northern Ireland be treated as exceptional, or as far as possible incorporated into a general settlement?

This is a complex issue which is not addressed here, but its significance must be acknowledged.

The following are arguably second order issues, to be dealt with once the higher priorities set out above have been resolved. Nonetheless, they will need at least to be considered in advance. There is not space to discuss them – and many others that could be raised – in full here. The purpose of listing these questions is to show how much work is entailed for those who seek to construct a credible programme for a federal UK.

Would the reconstituted UK Parliament be bicameral or unicameral?

It seems likely that a directly elected lower chamber would be balanced by an upper chamber of regional or national nominees. Consideration would have to be given to the precise balance of power between them.

How would it be elected?

Would the first-past-the-post system used for Westminster elections be retained? Or would a more proportionate system be used, or the imperfectly proportionate Alternative Vote?

Where would it be located?

To place the UK Parliament in London would perhaps be to negate the logic of adopting federal structures. Creating a new city along the lines of Brasilia is not a realistic option for a country at the UK's level of economic maturity. Cities that are presently seats of devolved government would probably not be ideal; and Northern Ireland could be problematic for various reasons. So the options are narrowing. Birmingham? Milton Keynes? York? Swansea? Glasgow?

Precisely which powers would be passed down from the old UK Parliament and which would be retained by the new one?

The crucial issue here would be to take as a starting point the bare minimum of powers required by the centre for the UK to function properly as a single country.

Resistance to the Federal Approach

To some extent, a federal approach would run counter to strong political and cultural tendencies in the UK. As has been documented, UK theorists and governments have had an international influence upon federalism and the introduction of federal structures, and the idea has at times been fashionable in the UK. For some the term – in public

discourse at least – has negative connotations. Though such objections to federal ideas exist primarily in a European rather than UK context, attempts will be made to link the two. In a Westminster Hall debate held by the Labour MP Derek Wyatt, who is an advocate of an English Parliament within what would be a federal UK, the Conservative MP Eleanor Laing asked: 'Why would we want a federal system? Would it be so that it would fit in with the idea of a European superstate or so that the United Kingdom could be divided into bite-sized chunks, ready to be gobbled up by a federal Europe?'³ However, the use of such arguments points to the need for a wide and considered constitutional discussion in which they would surely not be sustainable.

Another obstruction to the introduction of federal structures is the natural tendency of Whitehall to oppose change that, involving as it would the transfer of power away from the centre, would undermine its own position. Observation of the advent of enhanced regional governance in former Communist countries during the 1990s suggests that once it opens, the political time-window for such change is small, soon to be closed by a resistant bureaucracy. The UK had its moment for transformation following its own form of 'regime change' to a Labour government in 1997, following 18 years of Conservative hegemony. Various constitutional reform policies, including devolution, came soon afterwards. It may be that after nearly twelve years in office the Labour government cannot be expected to generate substantial radical momentum; and that the influence of permanent officials who are institutionally disposed to obstruct change of the sort that federal options would entail have had the opportunity to exert a decisive influence over the consideration of policy options. The government submission to the Calman Commission is evidence of such a tendency. While claiming to support devolution, it complains that the transfer of certain powers 'has the potential to cause difficulty' by creating an 'overlap between devolved and

reserved matters'. Influenced by the dispute between the UK and Scottish administrations over nuclear power, the document states that it 'was clearly not the intention of Parliament in passing the Scotland Act that the use or threatened use of devolved powers should undermine the delivery of the reserved policies'.

Other resistance to the federal option may arise because the constitutional codification it required for the UK would challenge basic principles associated with the country, which by tradition favours informal arrangements. But after one major constitutional change, in the form of devolution, another may be easier to contemplate. Moreover, under the UK Labour government since 1997, there has been a limited degree of constitutional codification in the form of such measures as the *Human Rights Act 1998*. Another source of opposition to federal structures will be their implications for the doctrine of parliamentary sovereignty. Yet the *de facto* supremacy of Westminster has already been undermined by such events, organisations and trends as Scottish devolution; EU membership; NATO membership; the Human Rights Act/European Convention on Human Rights; and the progressive lifting on restrictions on the global movement of capital in the post Second World War era.

Taking into account all these obstacles, a project for a federal UK is not to be taken lightly. It is an enormous enterprise, both of political propaganda and persuasion and detailed schematic design.

What is the way forward?

So far this paper may have appeared pessimistic regarding the prospects for a federal settlement being adopted and effectively implemented in the UK. But certain opportunities exist which must be engaged with immediately and for a sustained period by proponents of a federal UK. The first is the position in Scotland. Motivated in part by fear of secession, all the main pro-Union

parties are agreed that the institutions associated with the *Scotland Act* should in some way be strengthened. It ought to be attractive to them that the federal approach offers a clear rationale for the selection of powers to be exercised at Edinburgh while safeguarding Scottish participation in the UK.

Second, limited but significant opportunities are provided by the *Governance of Britain* programme instigated by the current Prime Minister in July 2007 shortly after taking up his post. This process has not generated substantial political momentum and within it a deliberate attempt has been made to avoid discussion of the Union. But for the first time a government has referred to the possibility of a 'written constitution' for the UK. Discussion of this codification could provide an opening for advocates of federal structures to promote their agenda. So too, if to a lesser extent, could the promised consultation on a UK Bill of Rights.

Another outgrowth of the *Governance of Britain* programme to which advocates of federal structures should afford attention is the official endorsement of new methods of national policy consultation including Citizens' Juries and Citizens' Summits. The use of such practices would be apt for consideration of the future of the Union, both for Scotland and the UK as a whole. Supporters of the federal approach should advocate the fullest possible consultation process. To be effective it would have to involve civil society and the public to an even greater extent than the Scottish Constitutional Convention which sat from 1989-90. Federal structures could then be included as an option, for which its supporters could campaign. One difficult issue to resolve would be whether to bar Scottish independence as a possible outcome. The legitimacy of the process would probably require its inclusion, and the Calman Commission is weakened by not doing so.

It may be that other new means of public engagement – such as

participatory budgeting – could be used to stimulate greater popular attachment to regional governance in England, in lieu of directly elected assemblies. Experiments along these lines could bring another advantage. If they were used in decisions over the allocation of public funding at regional level, including in some instances EU funding, they could demonstrate the value of the federal approach in achieving the democratic control of decisions at the appropriate level.

The development of the English regions as viable units within a federal UK is a long-term project. Yet a transitional position is available. There could be established a symmetrical framework within which a set of defined powers were available for individual participant units in a federal UK to call down if they chose, up to a limit which safeguarded the integrity of the UK federal state. Within these parameters there would be symmetry of possibility, while at the same time a likely asymmetry in terms of the amount of powers which particular constituent parts of the UK chose to claim. It might be expected, for instance, that Scotland would move towards the maximum autonomy, while some English regions would be less ambitious at first. An innovative range of potential powers could be made available to the various components of the UK to draw on. For instance, they could be allowed to introduce their own bills of rights, which build upon existing human rights norms, including such measures as economic and social rights (a process that could lead to this outcome is underway in Northern Ireland, although the recommendations recently produced by the Northern Ireland Human Rights Commission have met with hostile reactions in some quarters). Clearly detailed work would have to be carried out on the issues of how and by whom increased autonomy could be triggered. Consideration might be given to the idea that sub-units within particular English regions, such as metropolitan areas, could take on greater autonomy if the region as a whole was not yet enthusiastic.

In developing such a model, there is some useful international precedent. The Spanish constitution of 1978, within the context of a country which is, like the UK, multi-national, allows for varying degrees of autonomy, which have been taken up to differing extents. However, while positive lessons can be drawn from the Spanish experience, it has been argued that since no clear end to the decentralisation process is set out in Spain (as with the *Scotland Act*, which also has no stated limits), instability has been produced. For this reason it would be important when establishing a framework for variable autonomy for the UK to define which powers could be exercised at the sub-central level and which could not. Perhaps the model used for Northern Ireland could be built upon, whereby there are two lists, one of 'excepted matters' which can never be removed from the centre; and 'reserved matters' which can be, but have not yet.

Wyatt MP for a ten year constitutional convention does not underestimate the scale of the task. If an attempt is made to adopt federalism when the UK is faced by a crisis of apparently impending Scottish secession in five or ten years time, yet no preparatory work has been carried out, it will surely be too late. A concerted campaign is needed immediately to explain the merits of such an approach in its own right, not merely as a means of reducing the appeal of Scottish secession. This campaign should establish and set out convincingly the detail of how a federal UK could work in practice. Any model that is adopted must take into account the multi-national and asymmetrical nature of the UK. But in allowing for the divergent constituents of the country to find proper expression, there must be clear limits upon the national and regional autonomy permitted for those components.

Conclusion

Credible grounds exist for supposing that there is an increasing threat to the Union. Supporters of continued Scottish membership of the UK are seemingly agreed that, at the very least, the existing devolution settlement must be extended; or that federal structures should be introduced. Of the two options pro-Union forces are faced with, the federal one has much to commend it. However, the introduction of a federal approach for Scotland would necessitate equivalent measures for the UK as a whole. There are two main obstacles to such a development. One is cultural resistance to the constitutional change that federal structures would entail. Another is England, both for its size and apparent lack of interest in either an English parliament or directly elected regional assemblies.

The development of federal structures for Scotland and the UK, if it is achieved, will inevitably involve a process with a time horizon beyond not only the next General Election, but probably the two that follow it. The call made by Derek

Notes:

¹ See: N. McEwen (ed.), *Scotland Devolution Monitoring Report*, London: Constitution Unit, May 2008, p.37; J. Curtice, *Where stands the Union now? Lessons from the 2007 Scottish Parliament Election*, London: Institute for Public Policy Research, 2008.

² Scottish Election Studies 1974-97; Scottish Social Attitudes Survey 1999-2007.

³ Hansard, House of Commons Debates, 18 June 2008, Col. 254 WH.

Appendix One: Powers of the Scottish Parliament and powers reserved to Westminster

The Scottish Parliament has powers in areas including:

Health; education and training; local government (including local government finance); social work; housing; planning; tourism, economic development and financial assistance to industry; some aspects of transport, including the Scottish road network, bus policy and ports and harbours; law and home affairs, including most aspects of criminal and civil law; the prosecution system and the courts; the police and fire services; the environment; natural and built heritage; agriculture, forestry and fishing; sport and the arts; statistics, public registers and records

A number of powers are 'reserved' to London and consequently without the remit of the Parliament. They include:

the constitution; defence and national security; fiscal, economic and monetary system; trade and industry, including competition and customer protection; transport (not particular to Scotland) including (partially) railways, transport safety and regulation; social security; medical ethics: abortion; human fertilisation and embryology; genetics; xenotransplantation and vivisection; broadcasting; foreign affairs; the civil service; immigration and nationality; energy: electricity, coal, oil, gas, nuclear energy; employment; equal opportunities

Appendix Two: The Calman Commission interim report, The Future of Scottish Devolution within the Union: A First Report, December 2008, excerpts

We believe that certain functions are integral to the effective functioning of the United Kingdom as a sovereign nation-state with international responsibilities, and where devolution would be undesirable in principle because retaining them at UK level is fundamental to the very concept of Union. These comprise the monarchy, the UK constitution, defence, national security, foreign affairs, currency and coinage. In addition, certain aspects of management of the UK economy are indispensable to maintenance of the Union. These we will not consider further...

[There are functions for which] *the Commission has received substantial or significant evidence and there appears to be a plausible case for further consideration as to the most effective way to exercise a particular function – here we include broadcasting; energy policy; animal health and movement; firearms; misuse of drugs; regulation of health care professionals; and marine planning among others...*

[There are other functions] *where an issue may be important, but where we have not yet received sufficient evidence to decide whether there is a case for further consideration, and where we shall be seeking further evidence before deciding whether to make recommendations – here we include the civil service; insolvency; employment law and relevant aspects of immigration; and health and safety among others.*

Appendix Three: Population of the UK nations

Mid-2007 UK population estimate by constituent kingdoms

| | | |
|------------------|-------------|---------------|
| England | 51, 092,000 | 83.8 per cent |
| Wales | 2,980,000 | 4.9 per cent |
| Scotland | 5,144, 200 | 8.4 per cent |
| Northern Ireland | 1,759,100 | 2.9 per cent |
| United Kingdom | 60,975,400 | |

Appendix Four: Population of the English Regions (in millions, by Government Office)

| | |
|--------------------------|--------|
| East Midlands | 4364.2 |
| East of England | 5606.6 |
| London | 7512.4 |
| North East | 2555.7 |
| North West | 6853.2 |
| South East | 8237.8 |
| South West | 5124.1 |
| West Midlands | 5366.7 |
| Yorkshire and the Humber | 5142.4 |