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Federalism, Union and Secession

Author:
David Melding
Conservative member of the Welsh Parliament (Senedd) from 1999- 2021.

Introduction

It is 25 years since the Scotland Act 1998 received Royal Assent. Did King Charles III as he swore the coronation oath wonder what further constitutional change might descend on the "Peoples of the United Kingdom of Great Britain and Northern Ireland" he promised to faithfully govern? Devolution was viewed by its architects as a means to secure domestic autonomy without the formality of a federal constitution. Paradoxically, however, such was the extent of the autonomy granted to Scotland that it was never really less than federalism, indeed the powers given to Scotland's devolved institutions were greater than equivalents in most federal states.

The price of this constitutional informality was that devolution became an open ended process rather than a stable settlement. Within eight years the Scottish National Party (SNP) had started to dominate Scottish politics and set the Union on the path to its possible dissolution. Despite securing a majority for the continuation of the Union, the Scottish independence referendum held in 2014 was even more momentous than the Scotland Act.

The Federal Trust for Education & Research
University House
109-117 Middlesex Street
London E1 7JF
T: 024 7765 1102
E: info@fedtrust.co.uk

Devolution had been adopted in large part to avoid the division of Westminster's parliamentary sovereignty. Yet there could have been no greater acknowledgment of the division of sovereignty than the proposition that the Scottish people could choose to leave the Union. The Union now has to accommodate a far more radical division of sovereignty than would have been contained in a classical federal settlement.

The UK's acceptance of constitutional secession is so strong that it is an outlier in the international community. Despite this the UK has no clear rule book to help navigate the turbulent politics of a voluntary union with a very active principle of secession. While devolution failed to treat sovereignty in a more restricted fashion than federalism, it did establish Scottish and Welsh political institutions that have gained substantial authority.

This is not to damn devolution with faint praise. Had Westminster and Whitehall taken an overbearing attitude towards the devolved institutions they might have failed to take root. Despite occasionally harsh rhetoric relations between the devolved administrations and the UK government have been notably constructive for the most part. This was seen in the negotiations to hold IndyRef 1.

The success of the devolved institutions and the ability of the UK government to be pragmatic at critical moments should give confidence to those who see federalism, or at least use of federal mechanisms, as the best way forward for the Union. Federalism offers the best means to reform the Union and give it a stable constitutional settlement. Under federalism, new multiple political identities of the Union would be suitably recognised. Nationalists would have the considerable achievement of domestic autonomy as a sovereign right; while unionists would accept the division of sovereignty between all of the Union's parliaments.

While secession would still be accepted (the precedent of IndyRef1 is too strong to expunge) it could only be secured through an extended constitutional mechanism which is above the ordinary political process. This would give other multi-national states in the international community some reassurance that the UK is aware of the likely worldwide impact of the break-up of Britain.

The Historical background

Just when did the UK start to look more like a federation than a union based on one sovereign parliament? Many Scottish nationalists claim that it was always thus and the 1707 Act of Union is a treaty that did not abrogate the sovereignty of the Scottish people. Historians tend to be more cautious in their assessment of the principal Act of Union, but Michael Fry is surely fair when he writes that for most Scots in 1707 the Union made little difference to their lives as it left "Scots to their own devices across almost the entire range of domestic affairs, notably the law, the Church and the educational system".[1]

This autonomy was steadily eroded by the modernising state so that by mid 20th century little remained as central government dominated all levels of politics. Strong political parties emphasised the scope of the UK's electoral mandate when steering territorial institutions such as the Scottish and Welsh offices. In some respect the devolution reforms of the late 1990s returned the UK to the division of authority agreed in 1707. The devolved Scottish institutions were strong from the start, more powerful in fact than many equivalents in formally federal states. Here there were echoes of Scotland's former statehood.

But internal or domestic autonomy is only one of federalism's two primary attributes. The second is the entrenchment of this domestic autonomy, something that can only be achieved through the division of sovereignty. It is true that such was the extent of Scotland's restored autonomy that some immediately called the UK a "quasi-federal" state. But the 2014 referendum on Scottish independ-

ence had nothing "quasi" about it. Most federations do not sanction the possibility of secession at all, as we will see later. Whatever we may think about the constitutional propriety of secession, if it is permitted it must surely be predicated on the sovereign right of a member nation's people to choose it. This is a fundamental division of sovereignty, greater than the constitutionally apportioned division contained in explicitly federal states.

Such a radical acceptance of divided popular sovereignty has made the UK a strange hybrid and a volatile one with an active principle of secession. It seems as if the UK has unwittingly jumped beyond federalism and become a confederation in its treatment of popular sovereignty. Yet the absolute sovereignty of Westminster is still affirmed on the basis that it has the formal power to switch the IndyRef power on and off. Matters are hardly made any clearer by the common unionist asseveration that the Union is a voluntary one, which comes close to accepting a unilateral right to secession. The Union is a potent constitutional cocktail: part federation, part confederation, part unitary state. What could possibly go wrong?!

The question is not therefore whether the UK should adopt federalism but rather should the federal principle become dominant and end the Union's currently volatile constitutional mixture? The comfortable trope that rapid repair should be avoided because the British constitution adapts through organic not conscious reform seems a grossly inadequate response to the crisis facing the Union. This trope satisfied few political actors involved in the momentous events of our constitutional history. The Glorious Revolution, parliamentary reform, the primacy of the House of Commons over the unelected Lords, female suffrage, these events did not fall like soft drizzle on our constitutional soil! Perhaps this is the political perspective we need today as we contemplate the need for constitutional reform.

Of course some significant innovations were gradual: the transfer of the Royal Prerogative to the Prime Minister for instance (somewhat perversely giving the office of PM a level of political domination that nearly always eluded the Crown). Other reforms came in a rush because gradual adaptation was entirely frustrated: the Great Reform Act took over 70 years to reach the statute book from the first serious proposition of parliamentary reform in the 1760s, and not before the State was gravely threatened by rebellion. The 1832 Reform Act is an instructive analogue in our current tribulations. As Ian Gilmour astutely observed "The logic of the great Reform Bill pointed to universal suffrage, but there was an interval of ninety-nine years between them".[2]

The power unleashed in the Scotland Act 1998 is such that a clear constitutional settlement is needed to channel its force. We do not have 99 years to work it out, and it is obvious which alternatives are most feasible: Scottish independence with its own logic of some future confederation of independent states to reshape Britain's political geography; or the greater use of federal measures, perhaps even a full federation, to preserve the UK as a multinational state and provide the rules to navigate a territorial politics that contains an active right of secession.

No state is ancient. The UK is only 69 years older than the USA. Most European states are not as old as the UK. Our union was created as a response to very intense and particular circumstances in the early 18th and it contained enough statecraft to enable a deep political unity to develop in Britain. The Union was remarkably innovative (the first single market) and asymmetrical. But the unity it so successfully nurtured has been seriously questioned since the 1970s. Against unionism stands the belief that nationhood can only be safeguarded by independent nation-states. All this when statehood and what constitutes sovereignty is undergoing rapid change in a world demanding more radical comity to deliver collective decision-making ca-

pable of meeting existential challenges such as climate change, nuclear proliferation, and the promotion of global economic security.

When compared to the rhetoric of civic nationalism, the vocabulary of unionism seems all too often archaic or ritualistic, reflecting the idea that the Union is somehow beyond history and must be affirmed or rejected as a given entity. It is more relevant to look at the UK as a multi-national state that is radically contingent because of the possibility of secession. If we want the UK to continue as a multi-national state we need to agree a new way to practice and speak about the Union.

Devolution was promoted to avoid the abnegation of Westminster's parliamentary sovereignty over Scottish and Welsh affairs, something federalism would have necessitated. That this absolute sovereignty would have little application in the practice of devolved governance was acknowledged from the start. The cost of this constitutional conceit was considerable because it meant the rule book of federalism was largely unavailable despite the granting of extensive autonomy to Scotland. It is time to look at the nature of domestic autonomy in a multi-national union, and to do so by examining federalism, union, and secession: the three major forces in territorial politics.

Federalism

In state building, federalism has been used to bring political communities together or to hold them together. The latter would apply to a federal UK and on the face of it seems to offer a constructive constitutional compromise. Because the essence of federalism is the division of sovereignty (but not its dilution within the respective spheres) it would provide Scottish and Welsh nationalists with the considerable consolation of domestic autonomy as a sovereign right in a reformed union. Unionists, by accepting the federal compromise, would hope to head-off the danger of a secession which would end the Union.

Federalism is the only solution that safeguards mutual political identities in the UK: a centralised union would deny political identity to the Home Nations; while independence for the Home Nations would abolish UK institutions and leave those holding a British identity isolated and without any means of political expression. Currently the UK is in a most peculiar constitutional position where sovereignty is held absolutely by the Crown in Parliament but simultaneously a right to leave the Union resides with the people of Northern Ireland and the people of Scotland; meanwhile the people of Wales have a plausible claim by inference to the same right of secession; but the people of England?

While the British constitution now seems incoherent in its treatment of sovereignty and secession, some apply the sedative that in practice these anomalies carry little weight. Do not tinker too much is the refrain of complacent unionism; even if the Union's dissolution is a risk, it is a remote one. Yet there seems nothing inconsequential about the ongoing secession crisis in Scotland which recently found its way to the UK's Supreme Court and may play a significant part in the next UK general election.

Devolution as designed in the 1990s drew heavily on the original pattern for Home Rule in the 1880s. It was meant to side-step the sovereignty question by establishing national political institutions (strong in Scotland, weaker at first in Wales) that were derivative of Westminster. Power devolved is power retained was the accepted if unconvincing formula of devolution, even if by the 1990s (unlike the 1970s) it was rarely expressed. England was entirely left out of the biggest constitutional change since female suffrage, creating something close to a bifurcated state. And perhaps most importantly the need for a lasting constitutional settlement was ignored; indeed the reverse has occurred since 2007 with the future of the Union becoming an open and unsettled question. While it is wrong to see a federal settlement as a panacea it

would provide an opportunity to address the fundamental questions ignored by devolution.

Barriers to a UK Federation

Several substantial arguments have been made against the practicality of a UK federation. Critics see federalism as inimical to the UK's parliamentary sovereignty; as a federation the UK would be unstable because it would contain national units capable of outright independence rather than provinces seeking a degree of domestic autonomy; and perhaps most tellingly, sceptics cannot see how such a federation could work with asymmetry on a vast scale given the size of England compared to the other Home Nations.

The nature of sovereignty has long been contemplated by political observers. For our purposes it is useful to define it as the ultimate power to act. While Westminster's sovereignty extents over all levels of government it is no longer applied in devolved fields unless the devolved parliaments specifically ask Westminster to legislate on their behalf. In a sense an ultimate power to act is retained. However, a more relevant test would be to ask if in any reasonable scenario Westminster could unilaterally abolish the devolved institutions. It is difficult to see such action resulting in anything other than a constitutional meltdown.

It is quite clear that the Scottish and Welsh parliaments (and their governments of course) are immune to dissolution in an ordinary political process under the command of Westminster. Only a very weak riposte seems possible to this constitutional reality: that devolved institutions are merely permanent and Westminster could make them empty shells by stripping them of powers or making the exercise of their existing powers increasingly cumbersome and costly.

But this insidious abolition would surely be seen for what it is and also lead to a constitutional crisis. And there is the overwhelming matter of the Union being seen as voluntary and containing the right of the people of Scotland to secede (albeit only a "once in a generation" right). Westminster's parliamentary sovereignty has already been divided even if it continues to have rhetorical life as a polite fiction. This is not to deny Westminster's sovereignty, only to recognise that it is not absolute and is now limited to its own hugely important sphere of government.

What the UK currently lacks is a rule book to navigate this division of sovereignty, something a federal settlement would provide. No democratic constitution can hope to eliminate all grey areas of jurisdiction in a rapidly changing world demanding constant innovation in models of governance. Even the best written constitution is not a bullet-proof vest for the body politic. The repatriation of powers formally held by the EU is a good example of the dynamism of political life. In this instance Westminster's authority won the day but not before a bitter dispute with the devolved governments. The devolved institutions have implacable authority too and this has resulted in a significant transfer of further powers to the devolved administrations since 1999. Again this has been navigated without any clear plan or sometimes even much logic.

Paradoxically, this haphazard process (it has surely been too rapid to call organic?) has made devolution more potent and unregulated than the federal alternative. Indeed it is not the chimera of Westminster's unlimited parliamentary sovereignty that is the barrier to a federal settlement but Scotland's political institutions which have perhaps gained a force beyond federalism. While notionally a derivative entity, devolution has made Scotland a state-in-waiting to nearly half of its electorate rather than a member nation of the UK exercising domestic sovereignty. To call Scotland's devolved institutions "quasi-federal" as many often do is a dangerous misnomer: if anything they are "extra-federal". Sovereignty in the UK is already divided as the repeal of Scotland Act would destroy the Union; and more consequential still, the people of Scotland

have the right to leave the Union. Federalism at least offers a mechanism for the UK to regulate this fundamental division of sovereignty.

A Federal United Kingdom

A federal UK would be made up of member nations (England might be subdivided but more likely not) which would set it apart from federations such as Germany, the USA and Australia (provision for indigenous nations excepted). What is more, the UK's Home Nations are amongst Europe's oldest national communities. Consequently, critics argue, a UK federation would be unstable and become the anteroom to full national independence and the "Balkanisation" of British political geography. It has to be conceded that a UK federation might not endure and so be a prelude to the dissolution of the Union.

However, the Union is clearly precarious now despite the adoption of a devolved constitution and would have become even more fragile if these reforms had not been made in the late 1990s. The case for a federation is that it is the most likely way to secure the Union's future, but it is not a guarantee. The proposition after all is not to reform a stable and immutable union. The Union currently is in deep trouble with half the voting population of Scotland regularly expressing support for independence! And there is the obvious counterpoint that the present devolved UK is made up of national units notwithstanding the messy anomaly of England as a jurisdiction without its own institutions (even Westminster's process of English votes for English laws has been abandoned). It is not clear how one can believe that devolution can work with national units but not federalism.

Some commentators have gone further and argued that federalism offers the best way to maintain the constitutional integrity of multi-national states. In a body of scholarship that has grown extensively since the break-up of the Soviet Union in the early 1990s, the whole assertion that national self-determination requires statehood is challenged because it undermines the principle of collective decision-making in the international community. The world would certainly look very different if nation-states were the norm, and the consequences for greater international comity extensive.

Accordingly, some constitutional thinkers urge the option of self-determination taking the form of national autonomy within multi-national states in preference to full independence. What has to be accepted by federalism's supporters is that a federation made up of national units would require a central government with strong authority so that it could effectively exercise its powers. As Alexander Hamilton pointed out in the Federalist Papers, all federations require this constitutional integrity if they are to function effectively. When Hamilton's federal settlement started to be challenged by South Carolina in the 1830s, the instrument chosen by the potential secessionists was the right of the Union's members to unilaterally nullify federal laws to which they objected. No union could tolerate such a situation.

Interestingly, before Euro-scepticism in Britain become a movement intent on outright secession from the EU, its proponents offered the "compromise" of member state parliaments having the right to reject EU laws. The EU, and especially its Single Market, could not have survived such impuissance. Clearly a UK federation would require a robust constitutional design that both protected the domestic autonomy of the Home Nations while preserving the UK government's authority to govern the state.

The Federal Balancing Act

Many claim that federalism is only possible when the sub-state governments are unable to dominate each other because their capacities balance out. In this view asymmetry is incompatible with a stable federation whether it takes the form of dispropor-

tionate population, economic strength, natural resources (if not owned centrally), military capacity (think of Serbia in the former Yugoslavia) or, as is likely, a combination of these factors. In the UK's case we have the problem of England. While unionism tends towards a romantic view of the creation of British political and economic institutions in 1707, historians are more likely to describe a pragmatic bargain whereby England abandoned the assimilation of the Celtic north and west in favour of a multi-national partnership that set significant limits on England's political dominance. Economic and political asymmetry was reduced by common institutions but not eliminated: in 1700 England made up 77% of the Union's population; in 1801 when Ireland was incorporated, 53%; it stood at 73% in 1901; and is at 84% today.[3]

One solution to this hard fact of political life, which confronts any treatment of Britain's political geography, would be to sub-divide England. Indeed, this very suggestion was made by Winston Churchill in 1912 during the third - and by far the most dangerous - Home Rule crisis. The love of administrative unity in England is probably much exaggerated whatever we think of the achievements of Alfred the Great, but regional identities within England do not carry the same political force as the national identities of Scotland and Wales. Thus schemes such as Churchill's appear fanciful in any scenario short of rebuilding after complete state failure. Nevertheless, municipal government has a tradition that stretches-back to the good King Alfred himself and during the 19th century and the first half of the 20th it was the most innovative part of government in improving the lives of citizens.

In the last ten years or so a form of super-municipalism has developed in the shape of executive mayoralties in English cities and regions. It is possible that these institutions will grow in authority and take on more devolved responsibilities, becoming similar in character to the London Authority. The London Assembly in turn might acquire some primary legislative powers and set a new benchmark for English sub-state institutions. Such a scenario does not seem at all fanciful as long as we don't expect it to be co-ordinated, quick or consistent. To the relief of many it would probably make the faint calls for an English parliament even more inaudible.

Churchill and his colleagues were right to be wary of the possible consequences of a single English parliament sitting alongside Westminster (or perhaps in York, as has been suggested). Indeed, it is an English parliament that the most astute critics have in mind when questioning the feasibility of a UK federation based on national units. The danger of such an arrangement would not be the risk of English dominance over Scottish and Welsh governance but its potential dominance over the UK government's jurisdiction. What needs to be more readily acknowledged is that creating Scottish and Welsh institutions created English governance too, albeit left implanted in Westminster. Whatever we do, England will always be there! Its size and power challenged the unitary union, challenges the devolved union, and no doubt would challenge a federal union.

There are still some unionists who would repeal devolution on the grounds that the Union can only operate, and the potential dominance of England be contained, with a unitary parliament and government together with stronger municipal institutions to meet local priorities. This view needs to be respected not least because both devolved and federal schemes carry risks and create anomalies absent in a unitary system of government. But it hardly seems a practical proposition to reverse devolution; and it is surely to be reduced to political despair to believe that no stable union is possible in the UK without a unitary state apparatus.

According to Alain-G. Gagnon the problem of asymmetry in multi-national federations is exaggerated because the USA is taken as the standard model. He does not dispute the role played by population size and wealth but argues that what

matters most in a federation is the sharing of authority. While some have criticised the unsystematic nature of devolution as introduced in the late 1990s, what is more often overlooked is the political presence enjoyed from the start by the Scottish Parliament. Such was the scale of this authority that some only a little fancifully claimed that it was seamlessly linked to the pre-Union Scottish parliament.

No similar claim could be made for the National Assembly for Wales, of course, but it quickly evolved into a parliament - a significant achievement itself. The remarkable success of the Scottish and Welsh parliaments was not assured, they both could have ended up as little more than stagnant political backwaters, but they now share with Westminster the authority to govern. The Covid pandemic left devolved governance further enhanced as both the Scottish and Welsh governments received high rates of public approval for the way they handled a "once in a century" public health emergency. Their authority as sub-state governments grew and increased their already extensive legitimacy as political projections of national communities.

It should also be remembered that the authority of the UK government also grew as a result of its adroit handling of the economic consequences of the pandemic which had delivered the biggest GDP hit since the early 18th century. Authority can ebb and flow as recent political crises at Westminster demonstrate, but the devolved institutions do now seem unassailable and would be likely to maintain this authority under a federal settlement.

A final observation can be made here. Those who doubt the feasibility of a federation containing the potency of national units cannot also consider asymmetry to be an insuperable impediment. Scotland and Wales are national communities of such coherence and antiquity that they are unlikely to be overawed by the impressive magnitude of England in a federation. The danger lies in the opposite direction: Scotland and Wales may one day want to leave the Union. Yet this danger faces the UK whether devolved or federal.

How would a federal UK work?

While in rather remote theory the UK's devolved institutions are derivative and the creation of Westminster, in a federal UK the political institutions of the Home Nations would be primary and entrenched. The federal constitution - perhaps in the form of a new Act of Union - would also set out the powers of the UK's institutions in a formal division of sovereignty. It would be a foundational constitutional moment that would result in the federation being a settlement rather than an open ended process which has been our experience of devolution. The recognition of domestic autonomy as a sovereign right would bring constitutional clarity to the governance of Scotland and Wales. But what about England? Are we not exchanging clarity in Scotland and Wales for constitutional confusion in England?

We need to remember that the creation of the Scottish and Welsh parliaments took decades of debate and consideration, and was particularly contested in Wales. The people of England also need the space and time for similar deliberation. Federalism need not be uniform in this respect beyond the recognition of the division of sovereignty into domestic and state spheres where it resides with the peoples of the Home Nations separately and the people of the UK collectively. The people of England might continue to see Westminster unproblematically as also their own parliament, or in time they might seek an alternative arrangement.

It would be perverse to insist that to be properly sovereign the people of England must have the same institutions as Scotland and Wales. Rather it is up to them how to give England's domestic sovereignty institutional expression. The initial position is likely to be some revived mechanism for English governance implanted in Westminster, so called English votes for English laws. Its chief risk is

that a UK government would lack a majority of English MPs and consequently lack the legitimacy needed to govern for England (although a coalition would remove this risk). To function as a dual legislature in the longer term clarity on the position of Scottish and Welsh MPs would be warranted.

While it would be reasonable to exclude Scottish and Welsh MPs from ministries of the UK government that only have English jurisdiction (and would not exist at all if there were a separate English government and parliament) the great offices of state - indisputably part of UK jurisdiction - such as the PM, Chancellor, Home and Foreign Secretaries would have to be open to all MPs. On the face of it this seems awkward but it is already the case that in practice Scottish and Welsh MPs are excluded from ministries with an England only jurisdiction.

House of Lords Reform

There may be a psychological cost in recognising the reality of divided sovereignty in the UK and tacking further to federalism to channel its consequences, but reforming the House of Lords should involve little trauma. That comprehensive House of Lords reform has been imminent since 1911 tells one a lot about the position of Westminster's second chamber in the British Constitution. It is a bizarre entity combining low legitimacy with high ability as a revising chamber capable of genuine insight. Ominously its reform is a bellwether for the survival of the Union and the vitality of unionism. The many proposals for reform since 1911 have foundered on the rock of democratic legitimacy. Too much legitimacy and a reformed House of Lords might start to challenge the primacy of the House of Commons. Too little legitimacy risks a loss of authority to challenge the government of the day and delay legislation.

Turning the House of Lords into a Senate of the Nations (or a House of the Union) would seem a compelling way to make the second chamber of Westminster relevant without threatening the primacy of the Commons. But a further reform would be possible if the House of Lords is to be made the Senate of the Nations. Arthur Balfour tendentiously claimed that the pre-1911 House of Lords was the "watchdog of the constitution" (to which Lloyd George appositely replied, more like Mr Balfour's poodle!) but this role could be genuinely acquired by a reformed House of Lords given the task of safeguarding the Union's constitutional integrity. The very highest questions of state involving defence, foreign affairs and above all the constitution could be examined through the prism of a union of the Home Nations. The voices of the Home Nations could be heard in otherwise reserved matters in a reformed House of Lords that is a territorial chamber.

Here we must face a vital question: what price the Union? If it is not worth the price of House of Lords reform, then the Union really is in secession's anteroom. A Senate of the Nations could be directly elected or nominated by each of the UK's parliaments. In either case it could be done by thirds and perhaps for terms longer than 5 years - making the Senate a more reflective institution that while not in competition with the primacy of the House of Commons would be capable of more detachment and a longer view. Had this been accomplished in the 2000s then some of the eviscerating constitutional trauma suffered in the 2010s might have been avoided: a superficial referendum on electoral reform in 2011 (proposing of all things the alternative vote); a secession referendum in Scotland that was detached from a wider deliberative process and treated as a proposition for the dissolution of a functional democratic multi-national state as if it had no implications for international order; and the Brexit referendum which turned into a plebiscite that deferred much essential deliberation until after the vote.

Brexit's consequences for the constitution were soon apparent and led to a chaos in Westminster which culminated in the UK government

attempting an unlawful prorogation of Parliament. What is even more shocking than these events is that despite them unionist insouciance remains remarkably undisturbed. Too many senior Conservative politicians, and more than a few Labour ones, seem to think the greatest danger facing the Union is contemplating its dissolution and attempting to do something to stop it. The reaction to Nicola Sturgeon's surprise resignation as First Minister of Scotland demonstrates a similar pattern in denying that the Union faces serious structural threat. Instead the goal of independence is dismissed as fragile as it is seen to rest on powerful personalities rather than a powerful cause. Part of the problem is the lack of a forum in which constitutional questions can be rigorously debated. A Senate of the Nations could provide such a forum.

A new electoral system?

While House of Lords reform on a federal basis offers substantial benefits to a union of nations, changing the way the House of Commons is elected is understandably difficult for many unionists to contemplate. Both the Conservative and Labour parties have a vested interest in an electoral system that allows them to govern on a plurality of the vote well short of a majority. The price of union for the two great parties of state is genuinely higher in that it involves a reform to the electoral system that might not otherwise be contemplated. However, the case for electoral reform is still strong whether or not the UK further federalises its constitution.

Advocates of first-past-the-post have argued that its undoubted unfairness in terms of representation is compensated by the direct means it gives the electorate to choose and dismiss a government. Most UK general elections produce a clear winner, although on a minority of the popular vote. In a two party state this system works tolerably well. Once the two party system breaks down the cost of its unfairness increases substantially and some very peculiar results are possible. The Labour government elected in 2005 with a majority of 65 had just 35% of the vote. The fact that despite the crushing injustice it metes out to "minor" parties in the UK they have still managed to attract substantial support since the 1970s, indicates that this is a permanent change.

Matters are made worse because both of the "major" parties have become vulnerable to capture by activist minorities and find it difficult to sustain their character as internal coalitions or, in popular parlance, broad churches. The Union is itself in danger of long periods where the UK government has only very limited support in Scotland and Wales. Even England ended up with a government it did not support in 2005 (despite fractionally outpolling Labour the Conservatives had 92 fewer seats than Labour in England where it took Labour 28,148 votes to elect an MP, the Conservatives 41,829). These electoral anomalies carry greater weight in a UK reanimated by Home Nation nationalism.

The minority status of majority government in the UK has not been mitigated by regular rotation since 1979 as one or other of the two major parties has been enfeebled for long periods and out of government. The introduction of PR would better accommodate the UK's multi-party politics and remove the risk of England's domestic affairs being determined by a party that had actually lost the popular vote in England (it is near inconceivable that a coalition government - the most likely outcome with PR - would lack a majority in England).

How federal states work

Federal states are often seen as a collection of governments in a bargaining relationship. While the core rules of a federation are fixed in a written constitution or basic law, there is a constant process of adjustment, interpretation, and negotiation between a federation's governments. A Supreme

Court can adjudicate particularly difficult disputes that arise even in an intergovernmental process that operates effectively. Intergovernmental machinery that treats all the governments involved reasonably equally when it comes to agenda setting and dispute resolution is a key aspect of a robust federal constitutional design.

The Joint Ministerial Committee (JMC), constituted of ministers and officials from each devolved administration and the UK government, attempted to provide a similar mechanism in a devolved UK but met with only limited success due to its infrequent meetings and weak institutional structure. Instead, the devolved administrations tended to rely on bilateral relations with UK government to further cooperation in areas of shared governance and to resolve disputes. This inhibited a more systematic approach to territorial governance and favoured the Scottish government (backed by the possibility of secession and seeing disputes as adding to the need for independence) while leaving the Welsh government relatively disadvantaged.

What is perhaps surprising is that generally relations between the UK government and the devolved governments remained mostly positive as officials dealt with the technicalities of making the system work. The JMC did not meet at all between 2002 and 2008 when Labour was in control in Westminster, Holyrood and Cardiff Bay - emphasising at an early stage the tendency to prefer informal and bilateral channels. A review of the structure was completed in January 2022 and committed the UK government and the devolved administrations to more effective collaborative working. Intergovernmental relations (IGR) will now be facilitated by regular meetings, a designated secretariat, joint agenda setting, and a dispute resolution mechanism. IGR will also be subject to greater parliamentary scrutiny. Should IGR now function as intended by the review they will be close to what would operate under a federal constitution.

It's the money, stupid

One area where intergovernmental bargaining is intense and often fraught is in the allocation of resources. There is a tendency even in robust federations for central government to dominate the revenue sharing process. Unsurprisingly the UK government has a similar dominance when determining the block grants allocated to Scotland, Wales and Northern Ireland. The Barnett formula is used to calculate increases to the block grants and dates back to the 1970s and the preparations made then for the aborted devolution proposals. Originally conceived as a rough and ready population-based calculation for temporary use, it has remained extant because of the difficulties involved in replacing it with a more equitable needs-based formula to adjust the block grant.

Nevertheless, the UK - whether federal or devolved - will lack a robust revenue allocation process until a needs-based formula is adopted, preferably under the administration of an independent grants commission. Wales has long pressed the case for such an arrangement but lacks the leverage to change an archaic formula that operates to Scotland's relative advantage and keeps the UK government out of potentially acrimonious disputes on resource allocation. One solution would be to move very gradually to a needs-based formula; but even this would be no easy task, especially if public spending is contracting.

While revenue allocation is inevitably contentious the greater fiscal danger facing devolved and federal systems comes in the form of loose borrowing powers (sometimes granted as a compensation for tight revenue settlements). A wide range of borrowing powers are found in federal states, an area of fiscal policy that rarely receives the attention it deserves. Where sub-state governments have extensive borrowing powers, involving access to debt markets, there is a danger of moral hazard. Markets will lend to sub-state governments (or at least those in stable and prosperous states) and assume

that default is highly unlikely because central government will bailout those facing a financial crisis.

This danger is far from abstract and has hit a federation as stable as Germany. The cycle runs something like this: a sub-state government borrows substantially to fund projects that cannot be supported from regular revenue or to dampen fluctuations in revenue; however, the burden of financing loans creates a financial crises threatening the delivery of key public services. Having perhaps failed to negotiate a higher grant the sub-state threatens default, at which point central government steps in to clear or re-schedule the debt.

The borrowing powers of the devolved administrations are tightly controlled by the UK government but they have been increasing gradually. A key element of fiscal devolution in the UK has been the devolved governments' lack of access to the international market. While this is prudent it has resulted in what some commentators claim is an overly restricted attitude to borrowing at the expense of more investment in innovative and efficient public services. It is unlikely that the UK would go to the opposite extreme and allow devolved governments unrestricted access to debt markets. Such a change would carry significant risks and moral hazard. A devolved administration - perhaps one contemplating secession - might borrow extensively and then demand assistance from UK government to service a rapidly growing debt, while at the same time argue in the court of public opinion that the borrowing was required to offset a poor financial settlement from Whitehall.

Given the context of the UK as a union of nations, disputes over revenue allocation and debt could become severe. An independent grants commission, as well as allocating the block grants, could be tasked with the oversight of borrowing powers which would at least lower the chance of moral hazard or burden shifting between central and sub-state governments in a federal UK. Again this is an area where a more robust mechanism is demanded whether or not devolution evolves into federalism.

The role of the judiciary

One institution that is well established already and that would play an even more prominent role in a federal UK is the Supreme Court. Established in 2009 it has made its mark in interpreting key parts of the British constitution. It famously declared the UK government's prorogation of Parliament unlawful in 2019 - and did so in a unanimous judgement (11 justices). This judgement was a watershed as it established the court as the arbiter of constitutional questions even when they occur in the midst of immediate and serious political controversy.

In October 2022 the Court declared that the Scottish government did not have the power to call an advisory referendum on independence. The Court was again unanimous (although this time only 5 justices sat) and it made reference to the judgement of the Supreme Court of Canada on the legality of secession under the Canadian constitution (1998). The Canadian judgement is still regarded as the international benchmark on the lawfulness of secession in a functioning and democratic state. It held (unanimously and including two justices from Quebec) that Quebec does not hold an absolute right to secede; but a properly conducted referendum on a clear question on independence would, if carried, place a duty on the Canadian government to negotiate on the future of the federation. Such negotiations would have to involve all the citizens of Canada as well as the people of Quebec because two majorities are involved in secession (that of Canada including Quebec, and Quebec alone).

The UK finds itself well beyond the bounds of this judgement as it accepts the legitimacy of a Scottish secession if it is ever approved by the people of Scotland alone. Unlike Canadian practice, the people of the UK have no stake in the su-

preme constitutional question as the Union can be dissolved by one of its members. True, the UK government has to grant the referendum in the first place (so far limiting the right to a once in a generation event). The Supreme Court could be further buttressed in a federal constitution which could strengthen its authority in guiding the UK through the implications of its acceptance of secession.

Several matters of vast constitutional importance are likely to come before the SC soon: How long is a generation? Does the UK government have an open-ended power to deny an independence referendum or must it have sound reasons? How should an independence referendum process be conducted, could the haphazard operation of IndyRef 1 (or that of Brexit) be repeated? Do the people of Wales, and indeed England, have the same right to secede from the Union?

The Union

Even had the UK adopted a written constitution when devolution was introduced, it would probably have been silent on these questions. While secession is an active principle in the Union's territorial governance, the consequences of being a voluntary union are rarely given much thought. Few in the late 1990s thought that Scottish devolution would radically animate the independence movement, indeed the assumption was the opposite with the Labour politician George Robertson predicting that devolution would kill nationalism "stone dead".[4] Leaving the constitution vapid on secession does not now seem feasible and some basic rules need to be worked out between the parliaments of the UK in co-operation with the Supreme Court.

There remains however a deep seated reluctance among the political elite in Britain to force the Union into what is seen as the corset of a written constitution, something thought incompatible with parliamentary sovereignty. But unless the proportion of Scottish voters backing independence drops considerably the prospect of an IndyRef2 has to be addressed. Rules of secession are needed and they must be placed beyond the reach of an ordinary political process if they are to have the authority necessary to govern this supreme constitutional question. The antipathy of the British Constitution to the written word is in any event exaggerated. Constitutional law in the UK exists in a constellation of statutes rather than in one text.

What is true is that this constitutional corpus is not basic or entrenched law and can be changed by the ordinary political process. Consequently, the whole issue of leaving the Union is open to partisan manipulation. Entrenching a written constitution would be a decisive development. Particular care would need to be taken when drafting the constitution and in the design of the amending procedure. It might require a super majority at Westminster; the House of Lords/Nations could have a veto; all the parliaments of the UK might have to agree or all but one; a referendum could follow the parliamentary stage; and so on. What is important to note is the need when amending a constitution for a consensus that extends well beyond the reach of a single party or sectional interest. It is possible to place too many constraints on the amending process making it very difficult to change the constitution.

Over time a constitution that is difficult to amend risks becoming dysfunctional and unresponsive to social and political change. The USA seems to have reached such a situation: there have only been 27 amendments since 1789 (the first 10 only two years after its adoption) and the last amendment ratified in 1992 although proposed in 1789!

Acts of Union

In the UK's context the Union is the political community that has been built through various Acts of Union (or in Wales Acts considered retrospectively to be such) to enable a multi-national state to function in Great Britain and Ireland, and since

1922 Great Britain and Northern Ireland. Wales was incorporated in the early modern period (1536 -43) regularising a situation that had existed since the extinguishing of its political independence in the late 13th century. The Union was from the start a process of state formation, a phenomenon seen across Europe.

However, English-led state building was at the less coercive end of an often a brutal spectrum, preferring models of tacit and explicit consent (from elites, of course) and offering participation in the political and economic institutions of union. Only in Ireland was this model not followed due to the intransigence of George III in blocking catholic emancipation as part of the 1800 Act of Union, against the advice of his prime minister, William Pitt the Younger. Political rather than cultural integration was the goal of English-led state building which left significant room for national identities to develop (both Wales and Scotland experienced cultural and intellectual renewal after union).

This complicated history helps explains why unionism has often been a passive concept in the popular imagination only becoming more active during times of crisis. Above all the UK was a parliamentary union, but one created well before suffrage was significantly extended. With the arrival in stages of what Victorians called the Democracy, the British electorate came to closely identify with the Union parliament. The Chartists wanted to reform parliament not instigate a revolution.

By the middle of the 20th century the Union was more likely viewed as a historical given requiring little reflection rather than a contingent political entity needing constant renewal. The historic truth that the British union was only 69 years older than the American one rarely impinged on public discourse. As an ideology unionism had become largely a received view considered in little need of active defence. Nevertheless, what some have termed insipid or banal unionism, was in some respects an unlikely outcome given the trauma of Ireland's large part-secession, but there followed a strong revival of British national unity in the Second World War and the early post-war period. The departure of southern Ireland from the Union was seen in retrospect as a misfortune rather than a symptom of state failure. It was only with the rise of Scottish and Welsh nationalism in the 1970s that the danger facing banal unionism become conspicuous. The Union now had to be actively defended in argument, although the assumptions of a received view continued to compromise unionism and go some way to explaining the miscalculations made in the early stages of devolution.

British identity

While many factors are involved in state formation, not least political happenstance, the Union has consistently been seen by its supporters as both a compact between the Home Nations and a means to avoid English domination. The cultural roots of British identity are very deep and can be traced back to the early medieval period (some would go back further to Britannia), but it was in the 18th century that the idea of Britain as an overarching or common national identity facilitated by the Union's institutions became popular. This rich antecedence leads naturally to a very big question: should we see the Union as voluntary and so reversible, or an irrevocable event as the US is viewed by American unionists? Gordon Brown's Commission on the UK's Future was vague on this seminal question despite the precedent set by Scotland's independence referendum in 2014.

This reticence is surprising as the voluntary nature of the Union became one of unionism's greatest rhetorical flourishes in the second half of the 20th century. In 1954 the Royal Commission on Scottish Affairs stated that "Scotland is a nation and voluntarily entered into union with England as a partner and not as a dependency".[5] Even when independence was seen as more feasible, in Scotland at least, it is striking how leading Conservatives were still keen to emphasise the Union's voluntary na-

ture. Margaret Thatcher stated in her memoirs that the Scottish people "have an undoubted right to national self-determination… Should they determine on independence no English party or politician would stand in their way".[6]

What is curious is that this recognition has done little to promote the concept of unionism as a dynamic force that contends with plausible alternatives and so requires regular development and renewal. The tercentenary of the 1707 Union hardly caused a ripple of celebration (less than appositely for unionists it marked the commencement of SNP government in Holyrood). In the 1990s most Conservatives simply dismissed devolution as a danger to the Union; and many devolutionists opposed federalism then and since. Colin Kidd has described this tendency with great insight in his groundbreaking work Union and Unionisms.[7] When unionism was banal in being a received and largely unchallenged view there was little need for deeper thought; what followed from the 1960s was an analytical phase which sought to defend unionism from increasing challenge but in this process tended to raise further questions that required quite radical treatment in the face of growing calls for independence.

Those who attempt to return unionism to a received view through a refusal to sanction a second referendum on Scottish independence are likely to be disappointed. Unionism just about remains the majority force in Scotland, but not now the most vital. It is on contested constitutional ground and clings to the isolated rock of Westminster's parliamentary sovereignty; an awkward position and one uncomfortably close to that taken by unionists during the long Irish crisis of the late 19th and early 20th centuries. Defend the old union or create a new one? This question broke Edwardian politics and serves as a warning today. What is beyond dispute is that any viable new union will be voluntary: IndyRef1 has seen to that. We can now turn to the question of how a new union might be constructed.

Building a new Union

The Union cannot be renewed without first setting out some basic rules on the right to secede. Two precedents stand out: the secession of southern Ireland in 1922 which had the overwhelming support of its people, and the referendum on Scottish independence in 2014 which gained 45% support - far higher than the historical trend evidenced in opinion polls. Until the issue was forced by rebellion the secession of Ireland from the Union was not thought permissible by most unionists - in other words the Union was not considered voluntary. In the years that followed southern Ireland's exit this opposition to constitutional secession changed to a notional acceptance, although it at first seemed a vanishingly remote possibility as neither Scotland nor Wales were much interested in even pursuing the Home Rule that had been granted to Northern Ireland. Yet this was a tectonic shift and it created new constitutional ground that led eventually to IndyRef 1 in Scotland.

The UK is now an outlier in the international community in holding a permissive view of secession. However, its permissiveness is not balanced by a clear constitutional mechanism to navigate the process. Instead the UK seems to find itself in a position that combines acceptance of secession by one of its member nations following a single referendum (in that nation alone) carried by a simple majority, with the fact that this super-permissiveness only becomes operational if the UK government grants a referendum to that member nation in the first place. It is difficult to think of a process in a democracy more likely to promote discord, and this on the supreme constitutional question. The UK would gain greater constitutional stability if it looked at the EU's procedure for secession (article 50 of the Lisbon Treaty) and improved on it by making it more deliberative.

While the Scottish referendum did well in terms of engagement it was in other respects a shallow debate on both sides. The Brexit referendum was no better, indeed rather worse with much of the de-

tailed debate on the nature of Brexit not occurring until after the vote. It would now be helpful for the UK's parliaments in conjunction with the Supreme Court to set out a procedure for the proper deliberation of secession. Should the UK adopt a written constitution then a secession clause would be a key component given the UK's status as a voluntary multi-national union. Alternatively, an inter-parliamentary compact could be produced again in conjunction with the Supreme Court. Neither mechanism would be a bullet proof vest for the body politic, but both could provide a constitutional framework to shape and deepen the debate. And crucially to be a rigorous and properly constitutional debate it would need to be about the nature of union as well as its alternative secession.

The process might operate thus: one of the national parliaments resolves to start a deliberation on secession; citizen assemblies consider the question in detail; the national government seeking secession enters into negotiations with UK government on the terms of political divorce and any co-operative institutions to succeed union; the other nations agree a package of reforms to adapt the Union and dissuade secession (again involving citizen assemblies); a referendum is held first throughout the UK on the offer of renewal, followed if then necessary by a referendum on independence in the member nation seeking exit.

Discussing the future of the Union

So a constructive way to respond to calls in Scotland for IndyRef2 would be to combine the independence debate with a wider one on the future of the Union, specifically whether the UK should adopt a federal constitution or at least a package of reforms that further federalise the current position. This would have the advantage of making the Union a positive proposition similar to the way independence is presented by its advocates. A clear vision for the Union would have to be developed, a significant improvement on what happened in IndyRef1 when the UK's party leaders agreed little reform until the last rather panicked moment. Even those optics were quickly shattered when in the flush of victory David Cameron standing on the steps of 10 Downing St promised to prioritise English governance instead.

Statecraft demands the most rigorous standards for a decision on the very future of the state, a decision of the deepest inter-generational significance. The flawed nature of IndyRef1 was the fault of the UK government of course. Presumably when the referendum was agreed an emphatic vote against independence was expected in Westminster and a makeshift plebiscite thought good enough. But the Scottish Government colluded in agreeing a weak process and it has shown little interest since in developing a more robust procedure to conduct an IndyRef2.

Given that the UK is a functioning multi-national and democratic state it seems more appropriate that the continuance of the Union is made the primary question to be followed if necessary by the option of secession. This would make the process to exit the Union more structured and extended, something that might help reassure an international community wary of the precedent a secession in the UK might set. In moving to federalise the UK a wide-ranging debate on the future of the Union and the nature of our democracy would be required. It would be a big constitutional moment offering a new settlement on which to base the Union. It would be an event above the ordinary political process, one that recognises a duty to both future generations and to an international community mostly made up of multi-national states.

Involving the citizens

The future of the Union is a matter for all of the UK's citizens. There was a time when the statecraft involved in drawing up a constitution was thought a task suitable only for the most senior politicians.

More recently several states, most notably for us Ireland, have used citizen assemblies to consider fundamental constitutional change or social reforms of great magnitude. This offers the UK a possible way forward to consider the merits of a Union reformed on a federal basis. A citizens' convention could be established to start a process that allows for the fullest public and civic participation before a report and recommendations are sent to the UK's parliaments for detailed deliberation.

Building on the tradition of jury service a body of citizens would be randomly selected but with a procedure that ensured the diversity of the general population is reflected in its composition. The convention would meet a set number of days each month for perhaps two years. Its work would need to be supported by a properly resourced secretariat and could draw on a wide range of specialised advice from the civic sector, NGOs, the business community and many others. It would concentrate on the broad grooves of constitutional reform rather than the detail needed later in a process of parliamentary deliberation. Most importantly a citizens' convention could engage in extensive public outreach via surveys, focus groups and community meetings.

Once completed the convention's report would move to a parliamentary stage where all of the UK's parliaments would consider its recommendations. It would then be for the parliaments to agree between them the options to be put to a referendum. The great advantage of a citizens' convention is that the constitutional challenges facing the UK would be seen in full daylight. In the run up to IndyRef1 many unionists warned that the UK was sleepwalking to its dissolution. There has been little evidence since that unionist somnambulism has ended. A citizens' convention would at least demonstrate that unionists are awake!

The English conundrum

England's gravitational pull has consistently troubled unionists intent on reform or renewal. While English state-builders opted for constitutional partnership rather than political coercion some of them saw union as a useful cloak to hide an essentially English political project. In their political discourse England and Britain could be interchangeable. Striving for what James I called a "perfect" union was not part of the enterprise, in sharp contrast to American and European unionism later (in theory at least). For much of the 18th century there was considerable resentment in English political circles about the costs of union. Often the English polity was seen to have an afterlife embedded in the new institutions of the Union. Scotland and far more Wales could not hope to dominate these British institutions. But England's size as a political economy made asymmetry a fact of political life. And as the wisest nationalists in Scotland, Ireland, and Wales know even today, England will always be there - large and potentially dominant whatever constitutional arrangement is chosen for the Isles.

The Irish Free State could not escape the Sterling zone (parity was somewhat reluctantly ended by events in 1979), its neutrality required the UK's defence shield, and what amounted to common citizenship and free movement of labour continued with the UK. European unionism allowed the Irish Republic to move more fully outside the UK's political orbit, but Brexit has once again demonstrated the force of British decision-making, a force that cannot be ignored and requires assiduous management even in a Celtic nation independent of the Union. While the Celtic Home Nations have to live with a very large neighbour, England has to accommodate significant political forces generated in the other parts of Great Britain and Ireland and potentially disturbing to its domestic tranquillity.

Nevertheless, there has always been a thread of sufferance running through aspects of English unionism, wanting as small a gap as possible between English and British political choices. This is demonstrated today by those politicians who in word or

deed urge a more confident English nationalism that seeks to reduce the price to be paid for union. When asked if they would support Brexit even at the cost of the Union's breakup, 63% of Conservative party members polled said yes they would (it is difficult to think of a more un-Unionist sentiment.[8]

There is no doubt that Brexit is a particular challenge to the Union as it starkly demonstrated the opposing preferences of Scottish and English voters on the nature of the UK. An important part of the prospectus used by unionists in IndyRef1 was based on Scotland remaining in the UK so that it could remain in the EU, a most unfortunate conjunction in retrospect. Unionism as a prior or essential idea to inform other constitutional and political choices was weakened. If Scottish independence is to be prevented England will need to commit to a reformed union.

Should Scotland leave the Union (and of course it might choose to leave even a reformed union) one thing needs to be stressed about the implications for the rest of the UK. The international standing of whatever the rump of the UK is called will be dramatically weakened. The demise of Britain as a state would not be seen by the international community as somehow England redux. England's political project to hold a multi-national state together would have ended in failure.

Whatever happens the asymmetry caused by England's size and wealth will be a factor however the political geography of Great Britain and Northern Ireland is ordered. The Union would not be made asymmetric by federalism; it is already radically asymmetric!

Secession

One of the most serious deficiencies of IndyRef1 is rarely mentioned even now. It affected both the independence and unionist campaigns equally. The impact of a Scottish secession on an international community composed of many multi-national states was rarely considered, and when discussed at all had little salience. What political scientists quaintly call demonstration effects slid by on the narrow-side of the debate. While we should avoid the vanity of political exceptionalism, the dissolution of the UK, one of the world's oldest multi-national states, would have been a beacon inspiring many nationalist groups across the world. What are the implications for international comity if many more states fragment into nation-states?

The above is not an argument in itself for the status quo of union. The UK may only be part of a wider historical pattern that will see a new international order emerge composed of many small states. The current dispensation emerged after two world wars and the collapse of Europe's colonial empires. Hardly a peaceful process. A new era of state formation based on the national self-determination of peoples might be less traumatic if based on consent and co-operation. What seems necessary from an ethical standpoint is to accept the link between a particular event - Scottish secession - and its general implication of a world composed of many, many more nation states. Should the people of Scotland ever vote for independence they would also be voting for a radically transformed international order.

Alternatively, if the "Balkanisation" of the world is seen as a real risk to international peace and security, then the urgent consideration of federalism would seem warranted in states like the UK facing the serious prospect of secession. In such circumstances should unionists fail to reform the Union they would stand in dereliction of a duty they once accepted to help uphold an international order based mainly on multi-national states (just think how many multi-national states emerged out of the British Empire). Above all the international dimension creates something akin to a fiduciary duty to agree a rigorous process to navigate secession claims. This must include post-divorce structures to deal with the effects of secession should it occur and a commitment to repudiate attempts to achieve a unilateral secession in place of more deliberative constitutional procedures.

Scotland and independence

The Scottish Government claims that the people of Scotland have the fundamental right to hold an independence referendum at a time of their parliament's choosing. To be fair to the Scottish Government it took its case to the UK's Supreme Court which ruled that only Westminster could sanction an independence referendum. Nicola Sturgeon's reaction was to seek a mandate for independence at the next UK general election - another attempt to claim a unilateral right to secede. This stance was quickly dropped by the SNP's new leadership and it remains unclear how the independence claim is now to be advanced.

Unionists should resist the temptation to be gleeful about these contortions. The rhetoric of unionism has long glorified the Union as a voluntary one, and the logic of a voluntary union is that it contains a unilateral right to secession (i.e. the right here of Scotland alone to determine the question). It is a matter of curiosity if not concern to international observers that in the UK there is little difference between unionists and nationalists on the primary question of secession's permissibility.

Having acknowledged the primary right to secession, unionism is reduced to secondary measures on the frequency of a secession referendum in an effort to assert some control. The right of the Scottish electorate to vote on independence is now limited by unionists to once in a generation (a generation is surprisingly difficult to define for electoral purposes). Even if this stratagem works, it still leaves the electorate of the UK locked out of the process, and this is a significant reason for the UK's international isolation on secession. The international suspicion of even a constitutional secession cannot be dismissed as mere self-preservation. Secession is the most profound of constitutional questions. It brings into immediate time the age-old puzzle of how political society is formed and legitimised. Should a national group (but why only a national group?) have the right to leave a functional and democratic state and form a new political association? The UK is on these tempestuous seas with few aids for navigation. If the Union hits the rocks, it will have consequences for many other states.

Grounds for secession?

Since at least the American civil war secession has been seen by most political actors as possessing an unnerving quicksilver quality that makes it unconstitutional unless a state engages in persistent and severe human rights abuses against a national minority. Until Allen Buchanan's seminal work Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec (1991) few thinkers even contemplated the ethics of secession at all. The cry "national self-determination" did not carry much beyond the break-up of the multinational monarchies after World War 1 and the decolonisation of Europe's empires after World War 2. Despite this reordering of the international community, the received view on secession did not change. As the UN's Secretary General, U Thant, put it in 1970: "The UN's attitude is unequivocal. As an international organisation, the UN has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its member states".[9]

Buchanan concluded that there is remedial right to secession, also known as a just cause theory. In the face of grave human rights abuses a national community has a right to secede, although this should be seen as a last resort after facing obduracy from a repressive state. Other thinkers have gone further than Buchanan and argued for a national primary right or ascriptive theory of secession; and some go further still, advancing a plebiscite right or choice theory of secession. We can look at these theories briefly in turn and examine how far they apply to Scotland's situation.

While the remedial right to secession is the least disputed in theory, it is the most difficult to carry out in practice. States that oppress their national

minorities are unlikely to recognise a remedial right for those communities to secede even as a last resort. Short of some supra-national organisation having the authority to step in (as the UN was intended to act by some of its founders) the remedial right seems a dead letter unless accompanied by force. Some have argued that the remedial right theory is still a useful benchmark for what would happen in a world order corresponding more closely to principles of universal justice. But this seems circular and of limited use: in a more just world order states would be unlikely to repress national minorities in the first place.

The theory has also been used to retrospectively assess the justice of state formation. An equivalent to a statute of limitations on the coercive measures frequently deployed in state formation has been suggested. For example, after three generations (one average life-span) a state observing human rights would be exempt from censure if its national communities live peaceably under its jurisdiction. Here national communities are taken to have consented tacitly, despite any initial coercion, to membership of the state. Wales was annexed in the late 13th before the era of modern statehood, but has certainly existed peaceably in the state of England and Wales (1536-1707) and the UK (since 1707). No remedial right for Wales to secede in this scheme, but neither is there one for Scotland as it was not annexed and has also lived peaceably in the UK for many generations.

The point to note here is how keen many political philosophers have been to prioritise a stable international order above a more expansive theory of the right to political association. The violence of two world wars and many more regional and civil wars has driven received opinion to a precautionary position. The people of Scotland are not denied human rights by the UK; and Scotland has its own domestic political institutions giving it a high degree of national autonomy. Consequently, the demonstration effects of Scottish secession would be substantial and potentially destabilising for international order, more so if the political divorce from the UK was acrimonious and lacked any institutional agreement on future co-operation.

It is the national primary right to secession that is most frequently used by supporters of an independent Scotland, and it is a right accepted by unionists who acknowledge the Union to be voluntary. Some thinkers in the 19th century, reflecting on the consolidation of the UK as a democracy and constitutional monarchy, and on the emergence of Italy and Germany as unified states, saw the achievement of modern functioning statehood as the proper benchmark of a community's national status. World War 1 dealt a heavy blow to this restricted view but the core idea was applied to smaller national groups seeking political identity in the rubble of the defeated multi-national empires (hence the Poles and Czechs successfully petitioned the allies for statehood, but the Irish were not even given a hearing; the Arabs were heard, but ignored).

Many have tried to extrapolate a universal principle from President Wilson's 14 points to end the war but as Margaret MacMillan has written "Of all the ideas Wilson brought to Europe, this concept of self-determination was, and has remained, one of the most controversial and opaque".[10.] To be fair to President Wilson, his 14 points did not contain the phrase "national self-determination", merely the right to "autonomous development" for the "peoples of Austria-Hungary" (point 10) and the "other nationalities which are now under Ottoman rule" (point 12). This is important because national self-determination, the common phrase then as now, was not inevitably seen as a justification for statehood (and secession to achieve it) but could also be expressed through domestic autonomy in multi-national states.

Whatever the political goal sought by those advancing a claim to national self-determination, a particular problem occurs when defining a national community. J.S. Mill set a high bar for definition

that would only produce nations by the few dozen; the current international community has 195 states, producing 195 nations if states are seen as nations; but most of these states are multi-national and contained within them are many groups having a plausible claim to be national communities, producing potential nation states in the high hundreds or low thousands. How would an international community of 500 or more states function when attempting to resolve existential global challenges such as nuclear proliferation or climate change? And what constitutes a plausible claim to nationhood?

In 1983 Benedict Anderson famously depicted nations as "imagined communities", a welcome move away from definitions based on blood, soil, and religion. Yet if nationhood is to be defined more in terms of social solidarity, political preferences, and civic institutions what is to stop any group of citizens in a particular territory claiming to be a nation with a right to self-determination to the point of statehood? Might the people of California one day seek to go beyond their domestic autonomy and leave the USA? Of course the Home Nations of the UK do not face these problems of definition - they are all taken to be among Europe's oldest nations - Wales possibly the oldest (although Armenia and Georgia have a claim to that title) and Scotland is a nation that was once a state. That Scotland is a nation and could function again as a state is beyond dispute.

What has to be acknowledged is that a Scottish secession would not be seen as an isolated decision of the Scottish people without implications for other states in the international community. It would be a force multiplier for secession and at least the possibility of many, many more nations seeking statehood in the 21st century. The only way to avoid this conclusion is to argue that there are peculiarities in the Scottish case that invalidate the extrapolation of a general principle. This exceptionalism is difficult to justify, more so as secessionists cleave to civic notions of nationalism. This in itself is not an argument against Scottish independence, only grounds to see the question as a profoundly international one.

Nations and statehood

Some thinkers have abandoned the concept of nations, however defined, being the gateway to statehood. Plebiscite or choice theories of secession affirm the right of non-national groups to seek self-determination to the point of statehood. This is justified as an extension of the right to free association. As we have just seen, the concept of civic nationalism moves along the same road but choice theorists abandon the need to call a political community a nation. This view of statehood is radical and it is unlikely to be made a practical proposition anytime soon. Nevertheless, it has been advanced by some when considering the possible ramifications of greater access to secession procedures.

The control in the choice theory (following a plebiscite) is that both the new state and the remaining state from which the territory has seceded can function effectively. A secession on the part of a small but vastly wealthy region of a state (London for example) would not be seen as legitimate. Choice theories also open the door to secession within secession. Some sub-secessions could be legitimate even when the other state is weakened. Three quarters of Ulster in effect sub-seceded from the Irish Free state and so remained part of the UK, the alternative at that point probably being civil war. (Under the Anglo-Irish Treaty the Parliament of Northern Ireland was allowed to request that the powers of the Free State parliament not be extended to the six counties of Ulster deemed to comprise Northern Ireland. This request was made the day after Irish Free State was constituted on 6 December 1922.)[11]

Scottish secession is unlikely to face a similar situation, but it is possible that parts of Scotland - perhaps Orkney and Shetland, or the Borders - might be much cooler to the prospect of Scottish inde-

pendence. It is enough to note here that if international borders are to face a period of comprehensive challenge and revision, many secession claims could come forward. The test in the choice theory not to leave the remainder state unviable could be applied to the UK. Would Scotland's secession from the Union leave a UK constituted of England, Wales, and Northern Ireland a stable constitutional entity? Could Welsh domestic autonomy - either federal or devolved - flourish in such circumstances? In a fully deliberated secession process the matter would carry considerable weight and it is at the very least a reminder of how fundamentally a Scottish secession would affect all of the UK's citizens.

Conclusion

Devolution was favoured by its proponents as a pragmatic alternative to federalism as it in theory avoided the dilution of Westminster's sovereignty. Practice has proved an altogether different matter. Westminster has sensibly followed the Sewel convention and not legislated in devolved areas unless asked by the devolved parliaments to do so. More powers have been transferred to the devolved institutions although sometimes with little thought about constitutional design. Intergovernmental relations have been informal and infrequent with Whitehall (and in truth the Scottish government also) preferring bilateral relations. This is set to change with the recent agreement for a more robust IGR structure.

The Supreme Court has acted with authority in the interpretation of the constitution and would offer much needed insight into any future constitutional design, especially on the navigation of a secession process. By far the biggest constitutional event of the last 25 years was the referendum on Scottish independence held in 2014, greater even than Brexit. While probably conceded on the grounds that it was unlikely to attract substantial support, it shook the very foundation of the Union with 45% voting to exit the UK. It also implied a radical division of popular sovereignty. Moving to a federal settlement, or at least further use of federal mechanisms, would offer a path to firmer constitutional ground.

The federation would be initially asymmetric leaving time for England to work out the type of institutional structure its people want. But two linked principles would stand out from the beginning: the division of sovereignty between the parliaments of the UK and the embedded status of all the federations political institutions. This would end what has been called the process of devolution with the constitutional event of a new and federal union. The people of Scotland may still opt for independence, but they would only do so after considering the offer of a renewed union. This seems the proper constitutional sequence: to vote first on the renewal of the existing state before a vote on its dissolution. It would also help make the UK less of an extreme outlier in the international community on the question of secession.

It is in the option of a robust federation that the UK's best chance for continuation as a multi-national state lies. To fail to develop this option and leap instead to the UK's dissolution as a consequence of Scottish secession would surely be to disregard the interests of other multi-national states in the international community. However, even if agreed a federal UK might not itself endure. But that is the situation any voluntary union must face. Federalism has been aptly termed a bargain between different political communities to enable domestic autonomy within a common state. Care would be needed to keep the bargain of a UK federation relevant. Should the UK instead evolve into a confederation of independent states, the federal stage would still have had value in helping to prepare the institutional ground for such a radical reworking of Britain's political geography.

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