

SCOTLAND, BRITAIN AND EUROPE: A NEW UNITED KINGDOM FOR A NEW CENTURY

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Each generation likes to believe that it has unique solutions to the constitutional problems facing the country. Devolution has been such a theme of the latter part of the 20th Century. In its time Home Rule performed a similar role. It is ironic therefore to realise that the genesis of Devolution does not belong with the politics of the 1960s, or even the fertile mind of William Gladstone. Its origins can be said to begin with no less a person than Andrew Fletcher of Saltoun who, during the debates on the Act of Union, offered his own solution to the West Lothian question. It might in the circumstances be best described as the East Lothian answer.

Fletcher, in 1704, argued that Devolution within the whole of Britain would be the ideal solution to Scotland's aspirations and Britain's needs. He remarked:

Do you not think the remoter part of England injured by being obliged to London for almost everything. ... I am of the opinion that if instead of one we had twelve cities in these Kingdoms possessed of equal advantages, so many centres of men, riches and power, would be much more advantageous than one.

He went on to conclude that

so many different seats of Government will highly tend to the improvement of all arts and sciences; and afford a great variety of

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entertainment to all foreigners and others of a curious and inquisitive genius.

He suggested that London, Bristol, Exeter, Chester, Norwich, York, Stirling, Inverness, Dublin, Cork, Galloway and Londonderry might perhaps be the centre of regional governments. Where that leaves Edinburgh and Glasgow I am not so clear! Fletcher's plea for devolution throughout Britain was an attempt to ensure for Scotland maximum autonomy combined with the benefits of a close political relationship with its southern neighbour. This has been a constant theme of the relationship of the two countries over the centuries. Mutual interest and mutual dependence have been a permanent factor that enlightened self interest has taken into account.

Soon we will have a Scottish Parliament again in Edinburgh while Scotland will remain an integral part of a United Kingdom. While it will be the first Scottish Parliament for almost 300 years, the overall relationship will bear striking similarities to a previous Constitutional structure which Scotland and England once shared. It is often forgotten that the Regal Union of Scotland and England between 1603 and 1707 was more than the sharing of a Monarch. Because, in those days, the King, to a considerable extent, not only reigned but also ruled, Scotland and England shared a single executive or Government in the person of the King, albeit it was administered through separate structures. So for 104 years Scotland had its own Parliament but ultimate power remained with a Government in London with prime responsibility for Defence, Foreign Affairs and other concerns affecting the whole island. It is worth recalling that the King became king of Great Britain in 1603, not in 1707, although he had to do so by Proclamation because he could not get agreement from his Parliaments for the necessary statute.

Not only did a British executive co-exist with a Scottish Parliament during the Regal Union, but the Scots appear to have been as over-represented in the affairs of the island as some might claim they are today in Mr Blair's Cabinet. In the 1630s, for example, 20% of the English Privy Council were Scots. English officials, however, were excluded from the Scots Privy Council by both James VI and Charles I, except for short limited periods. Not surprisingly, there was some resentment amongst the English at this preference the early Stuart kings shared for their Scottish subjects. From time to time this rivalry gave rise to witty satire. For example John Cleveland in the 1640s wrote:

Had Cain been Scot
God would have changed his doom

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not made him wander
but compelled him home.

The Regal Union combining a Scots Parliament and a British ruling Monarch worked satisfactorily until the Constitutional turmoils of the 17th Century led the Scots Parliament, alongside its English counterpart, to seek greater power at the expense of the Monarch. It was because the Scots Parliament declined to give automatic endorsement to the Hanoverian succession and reserved the right for Scotland to be at peace when England was a war, and vice versa, that by the arrival of the 18th Century a new constitutional dispensation was seen to be necessary on both sides of the Border.

This lecture is not meant to be an historical assessment, but it is worth for a moment considering why, during the debates on the Act of Union, a Federal Britain was not adopted in preference to the Incorporating Union with a single British Parliament. There seems little doubt that a Federal Union would have been preferred by most Scots at that time. One of the Commissioners who negotiated the Union, Sir John Clerk of Penicuik, remarked at the time that

the first general point debated by the Commissioners for Scotland amongst themselves was whether they should propose to the English a Federal Union between the two nations or an Incorporating Union. The first was most favoured by the people of Scotland but all the Scots Commissioners to a man considered it ridiculous and impractical for that in all Federal Unions, there behoved to be a supreme power lodged somewhere and wherever this was lodged it henceforth became the ... Parliament of Great Britain under the same Royal power and authority that the two nations are at present.

In other words, despite a strong popular preference for a Federal Union, the Scots Commissioners agreed with their English colleagues that it was not a practical proposition. In part, this was because the concept of divided sovereignty, controversial even in our own time, was not recognised as being available in the early 18th Century. It was assumed that wherever supreme power was lodged, there effective power would be exercised, and that a Scottish Parliament would be impotent. In a strict constitutional sense this is an issue of some contemporary relevance as it is quite clear that, from a legal point of view, power devolved is power retained. This however ignores the contemporary political reality that a Scottish Parliament, and its counterparts in Wales and Northern Ireland, will be free to exercise its powers without constant supervision or interference whatever the formal relationship may be.

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The rejection of a Federal Union in 1707 was conclusive, but even then the English did not entirely have their own way. Many in England had assumed that the Union would continue the process of the development of the English State which up till then had involved the full absorption of new territory to the English Crown. In such a way had England extended its borders, and, after the conquest of Wales, amalgamated that territory with its own in a very full sense. The Union with Scotland however was of a different order. Not only had a king of Scotland become the king of England rather than the other way round, but the Union was to come about by treaty and by the Acts of the Parliaments of the two countries. In addition, the guarantees for the continuance of Scottish Law, the Scottish Church and other fundamental characteristics of the Scottish national identity meant that, for the first time, England's aspirations had to be compromised in the interest of the British Isles as a whole. Thus, the Union was a partnership rather than an absorption, albeit a partnership of unequals.

There is one other consequence that has a strong contemporary flavour to it. We are conscious of the benefits that the European Union has created by establishing a single market throughout Europe. It is significant that the degree of economic integration achieved in 1707 within the British Isles was unique in Europe at its time. Brian Levack, in his book **The Formation of the British State** remarks that

in no other part of Europe could a merchant transport a commodity a distance of 800 miles, the distance from the north of Scotland to the southern coast of England, without paying one if not many internal customs or fees.

Even within France or Spain, political union did not constitute a single free trade zone within those countries for some considerable period of time after their emergence as single states.

I have dwelt on these historical aspects because they have a contemporary resonance. They emphasise that the debate about Scotland's relationship with England is not a recent phenomenon nor one that has ever been entirely resolved in a logical or consistent fashion. The Scots and the English for centuries have determined that their common interests require common institutions but the precise relationship between these institutions has been a matter of some controversy and continuing debate. The debates over the Act of Union in 1707 were resolved partly to England's satisfaction in that a full Incorporating Union was established but also involved an unprecedented

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degree of English compromise through the continuing vitality of Scottish institutions.

That brings us to recent developments and their implications for the future of the United Kingdom both with regard to its domestic needs and to its international identity.

The first observation that one must make is that the future is not what it used to be. We have the establishment of a Scottish Parliament, a Welsh Assembly and the re-establishment of a Northern Irish Parliament constituting fundamental change in the nature of the United Kingdom compared to that which has been known for almost 300 years.

In particular, there is unfinished business with regard to the government of England. The Scots and the Welsh should have no hesitation in recognising that the English do have a legitimate grievance as a result of the Constitutional changes associated with Devolution. The House of Commons will in future not only deal with the business of the United Kingdom as a whole but also be the sole legislature for England. It is both unfair and illogical that the Scots should vote on domestic English issues while English MPs will no longer have the opportunity to influence and help decide these matters when they affect Scotland.

The logical solution to this problem would be the creation of an English Parliament or a number of English regional Parliaments with comparable powers to that of the Parliament at Holyrood. Logic has been defined as the art of going wrong with confidence and that would undoubtedly be the case in this respect. England has 85% of the population of the United Kingdom and it would be a ludicrous waste of money and an absurd bureaucratic imposition to establish an English Parliament co-existing with the British Parliament to replace the current arrangements.

Nor is it realistic to contemplate the creation of English Regional Assemblies with legislative powers. While the English regions do have a distinct identity and in the Northeast in particular do have aspirations to develop this further, there is no demand anywhere in England for a subdivision of the country into states comparable to that which one finds in Germany or the United States of America. To force through such a change would cause justified resentment and be of little practical benefit to the people of England.

As a consequence, there is no straightforward answer to the West Lothian Question. But there is nevertheless a solution available which would largely remove the consequential sense of unfairness. There is no reason why the

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legislative consideration in the House of Commons of purely English business should not be reserved to English Members of Parliament. The best way to do this would be to constitute an English Grand Committee consisting of all English MPs which, because of its size, would meet on the floor of the House of Commons. Such a Grand Committee should have the power to vote on all legislative proposals which the Speaker certifies as solely applying to England, and because such a Grand Committee like those from Scotland and Wales would be reserved to MPs from that part of the United Kingdom alone, there would be no risk of the wishes of English MPs on purely English matters being over-ruled by Scottish, Welsh or Irish votes.

Such a solution would not create two classes of MPs as in theory any decisions of the English Grand Committee could be over-ruled by the full House of Commons, as can the conclusions of any Parliamentary Committee. However, it would not be difficult to imagine a convention developing whereby the Government respected the judgement of the English Grand Committee on purely English business and did not use its formal power to invite the House of Commons to over-rule such a matter. The political reality is that to try to do so would be so controversial within England that it would be quickly established that such a solution was not available to the British Government.

It might be objected that the creation of such a situation would be contrary to our constitutional traditions as it would mean that a Government might not have a majority for part of its legislative business if it normally depended on Scottish or Welsh votes to provide a party majority. If such a concern was raised, my reaction would be to say 'too bad'. The Government has in its wisdom decided that it will in future be unable to impose on Scotland and Northern Ireland legislation unacceptable to a majority from those countries. There is no good reason why the same constraint should not apply in England and that is something that British Governments would have to get used to.

Some have argued that the consequences of Devolution should also include a savage reduction in the number of the Scottish and Welsh Members of Parliament in the House of Commons on the grounds that the current over-representation is unjustified. This is not a new issue and indeed has absorbed the energies of the Scots and English ever since 1603. During debates on the Act of Union, the Scots argued that the number of Scottish MPs at Westminster should be based on the relative number of parishes in Scotland compared to the number of parishes in England which would be a solution which was largely based on population. The English however suggested that

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it should be on the basis of relative taxable wealth, in other words on the financial contribution being made to the British Exchequer. If the English approach had been applied, that would have resulted in only 13 Scottish MPs sitting at Westminster rather than the 45 that was eventually agreed. So even the Barnett formula has an honourable precedent in Scottish and British history!.

There is a powerful case that Scotland does not at the present time need the over-representation that the current figure of 72 implies, but I would, on Unionist grounds, strongly oppose any suggestion that this over-representation should be replaced by under-representation as some have argued. That was the solution decided in Northern Ireland in the 1920s and it was a very bad precedent. If such a system was applied at the present time to Scotland, Wales and Northern Ireland it would make the British Parliament overwhelmingly English in character. That I believe would be of little benefit to those who wish to preserve and strengthen the United Kingdom.

The House of Commons is going to continue to be the legislature for Scotland not just for Defence and Foreign Affairs but also for at least 97% of taxation, for Social Security, for Pensions, for Europe and for a whole host of other issues. It also remains where sovereignty resides and where a final decision can be taken on any matter affecting these islands. The proper course of action therefore is for Scotland, Wales and Northern Ireland to have the representation that their population justifies, neither more nor less. That would be a good solution for the United Kingdom and one that is fair to all the peoples of these isles.

Devolution is of course a dynamic phenomenon and it is not only in respect of England that further change will be justified and desirable. The Government, despite their radicalism on constitutional issues have been unimaginative in many of their proposals.

For example, I very much hope that the first meeting of the Scottish Parliament will take place in the old Parliament House where the last Scots Parliament sat between 1603 and 1707. While, no doubt, my former colleagues in the Faculty of Advocates and on the Scottish Bench may be concerned at being evicted from their premises for 24 hours, there would be I believe powerful arguments in favour of such a proposal.

Not only is the new Parliament building at Holyrood not yet going to be ready, but there would be a symbolic benefit from emphasising the continuity between the new relationship of Scotland with England with that of the Regal Union between 1603 and 1707 when Scotland shared a

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Government with England but also had its own legislature. It is interesting to recall that the old Scots Parliament began its proceedings with a traditional riding in procession from Holyrood to the Parliament House. Such a tradition should be reinstated when the new Scottish Parliament comes into existence and indeed the tradition will have all the more relevance given the future siting of the Parliament at Holyrood. John Hill Burton in his **History of Scotland** described the last traditional riding in procession to Parliament House on 6 May 1703. He referred to 'the procession that poured into that noble oak roofed hall which still recalls by its name (Parliament House) and character associations with the ancient legislature of Scotland'. The Queen driving in State with the Honours of Scotland and the officers of State from Holyrood Palace to the Parliament House would not only be a grand ceremonial in its own right but would also emphasise that continuity with Scotland's and Britain's past.

I very much hope, too, that the Government will drop the ridiculous proposal to describe the head of the Scottish Executive as 'First Minister'. The use of the terms 'Scottish Executive' and 'First Minister' are a silly attempt to minimise the constitutional significance of the changes being introduced. The reality is that Scotland is to have a Government and therefore should have a head of Government with a title that is both dignified and accurate. 'First Minister' sounds like something invented by the old Soviet Politburo along with 'First Secretaries' and the like. Australia has a sensible way of dealing with these matters. Australia has one Prime Minister for the whole country. Each of the States has a Premier. Scotland too should have a Premier, as should Wales and Northern Ireland.

One of the questions that the Government still failed to deal with will be how to ensure Scotland's interests in Europe are fully taken account in future. Indeed the current proposals mean a reduction in current Scottish influence rather than an enhancement. At present and in the past the Secretary of State for Scotland has been a Member not only of the Cabinet but of the Cabinet Committee which deals with the details of European policy. He has therefore been able to ensure that Scottish interests are fully taken into account. It has also been the custom for Scottish Office Ministers to be part of and occasionally to lead the Ministerial delegations to meetings with the Council of Ministers when specific Scottish issues such as fisheries or agriculture are being discussed. I do not believe that it will in practice prove possible for Members of a Scottish executive to sit as full members of a United Kingdom Cabinet Committee, especially as they may be from a different political party which may be in opposition to the British Government of the day. Nor is it realistic to believe that they could be, even on occasion, leading a British

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Government delegation involved in International negotiations. A special responsibility would therefore fall on the Secretary of State for Scotland if that office continues after Devolution. But even he will be unable to carry the same clout as at present because he will not be in charge of the Scottish executive and indeed may not be in political sympathy with them.

There is no simple solution to this predicament. The closest co-ordination will be needed and an informal partnership will be no doubt developed. If there is good will the problems can be overcome but if there is political acrimony between the Scottish executive and the United Kingdom Government then that will bode badly for Scottish interests.

So far as the office of Secretary of State is concerned, this is an area where the Government have been least convincing and most evasive. Their formal position, as I understand it, is that the office can continue and carry out important functions. The reality is that if you deprive the Secretary of State for Scotland of his budget, of his legislative powers, of his Department and of most of his other responsibilities, then you are left with a mere shadow of the previous office. In the political world that means that his authority in Cabinet will be greatly reduced. Nor is it conceivable that the residual responsibilities would justify the full time involvement of a senior politician.

It remains, however, important that Scottish interests should be directly represented in the British Cabinet in some formal way. There is a solution which I believe can help meet these requirements. It can be safely assumed that in all future British Cabinets there will be at least one, if not more than one, senior Scottish politician serving in a United Kingdom department. In future such a person should combine their United Kingdom responsibilities with the modest residual responsibilities that will remain to the Secretary of State for Scotland. The office should in other words be retained and it should be part of the responsibilities of a Scottish MP who is part of the United Kingdom Cabinet. In that way, some of the remarkable benefits that have been associated with this important office of State will be able to be continued in years to come.

Against this background, what is the Constitutional future for the United Kingdom? In many respects what is evolving bears substantial similarities to a Federal system. We will have a United Kingdom Government and Parliament with responsibilities for the whole nation combined with Parliaments for three of the four constituent countries. There are likely to be significant changes for England either of the kind that I have mentioned earlier in my remarks or other proposals with similar objectives in mind.

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Having said that, a formal Federal system is unlikely to be the end result. Our Constitution is evolving in a way that is unlikely ever to produce exactly the same decentralised powers for each of the constituent parts of the Kingdom. Scotland is to have executive and legislative devolution. Wales, at least for the time being, is to have executive devolution but without legislative powers. In my own view it is only a matter of time before the Welsh will expect and receive similar legislative powers to those available to the Parliament at Holyrood. That is for the future. Northern Ireland will have a unique system of power sharing between the Protestant and Catholic communities which is relevant to its particular needs. England as we have seen will require yet a different type of approach. Accordingly a normal Federal structure is unlikely to be available. In addition, a Federal system normally implies a written constitution with all the rigidity that this results in as between the powers of the Federal Government and those of the local Parliaments. I doubt if such an approach is going to be suitable in the United Kingdom because of our unique political and social structures.

In practice, we should not get too excited about legal niceties and frameworks. The whole history of the British Constitution has been of a gradual evolution of Constitutional change to meet new requirements. The evolution of our Parliamentary Democracy has happened step by step and the result has been a Constitution that works but has extraordinary anomalies. We have a Monarch who reigns but does not rule, a Lord Chancellor who combines executive, legislative and judicial roles in one, a Hereditary House of Lords but with substantial numbers of Life Peers, an unwritten Constitution which is to be found in many written documents and a Sovereignty of Parliament which is constrained by many treaty obligations.

The arrival of Devolution is simply a further stage in that evolution, and, while it may be difficult for the constitutional theorist to categorise it, the crucial question will be whether it works. In practice the United Kingdom in my view is becoming not so much a Federal system but a partnership in a formal sense. It has always had the characteristics of a partnership in the past but that is now institutionalised through the local Parliaments that are being created. It could be a very healthy development.

There are others, however, in the Nationalist parties in Scotland and Wales who do not seek partnership but the creation of separate states. The very future of the Union is bound to be a major issue over the next few years with much speculation as to whether the United Kingdom will survive. My own personal view is that the Union will not only survive but prosper for very many generations to come as I believe that it has a continuing relevance,

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vitality and energy. The basic question is whether the Union of England and Scotland is to be seen as an accident of history, an aberration, or whether it was an organic development which reflected the increasing common interest of England and Scotland and the obvious benefits of a common, shared destiny. I believe that the latter is the case and that that common shared destiny continues to have validity. We share a small island, we speak the same language, we have evolved common political values. There is hardly a family in the land that is not English with some Scottish blood or Scottish with English connections. There has been an uninterrupted history of friendship, peace and partnership for 250 years and there are few if any other parts of the world of which this can be said.

The Nationalists counter these arguments with a simple argument which is both seductive and highly superficial. Scotland they say is a Nation and therefore should have a State of its own. They go on to point out that other nations around the world including small nations have independent status, and it is in their view intolerable that Scotland should not be in their company. The argument may be seductive in some quarters but its superficiality and shallowness is self evident with only a moment's thought.

To equate Nationality with Statehood implies that the one will be endangered without the other. Yet the very fact that Scotland's national identity has survived and prospered almost 300 years after the Act of Union, as has that of England and of Wales, demonstrates that national identity is not dependent on any specific set of political institutions.

Nor is the growth in the number of states that are members of the United Nations any comfort to the Scottish National Party. The vast proportion of these new countries were in the past either colonies of European empires or incorporated against their will by dictatorial regimes and kept in a state of subjection. Of course colonial dependencies prefer independence to colonial subjection. Of course the 15 republics of the Soviet Union opted for independence when it was no longer possible for Moscow to impose its will by oppression and dictatorship. Of course Yugoslavia disintegrated when the iron hand of Tito was removed. The partnership of England and Scotland however is a partnership of free peoples who have enjoyed political liberty, the rule of law and democratic institutions. Not even the most fanatical Scottish Nationalist believes that the Scots have been oppressed by the English, although the reverse may occasionally appear to be the case! Furthermore, the idea that Nationality requires a separate state would be disastrous if applied throughout the world. The former United Nations Secretary General Boutros Boutros-Ghali, has said

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yet if every ethnic, religious or linguistic group claimed statehood there would be no limit to the fragmentation and peace, security and economic well-being for all would become evermore difficult to achieve.

Instead of 180 countries in the United Nations there would be several thousand. India alone has three principal ethnic groups and 24 major linguistic groups. It could subdivide on nationalist principles into dozens of countries each with several million people.

In any event it is difficult to justify secession within a democracy. A Canadian Minister has recently remarked that

Democracy calls on us to show solidarity to all our fellow citizens while secession obliges us to pick and choose, keeping some, rejecting others according to criteria that will inevitably be ethnic, religious or linguistic. Democracy on the other hand invites us to help our fellow citizens who are different from us and to accept their help. To see our sometimes difficult cohabitation as a process of learning a more complete citizenship that is closer to universal values.

Just as the world would be poorer if Canada disintegrated, so too the same argument applies with even greater force to the United Kingdom.

The case for the Union must not just be expressed in material term of pounds and pence. Of course the disintegration of Britain would be destructive to employment, to prosperity and to business confidence. That must be emphasised with vigour and with clarity but it is only part of the argument. The Union is not just about prosperity, jobs and investment. It has also been and continues to be the realisation of an ideal and of a principle. The United Kingdom has been seen throughout the world as a model of tolerance, of liberty and of the rule of law. For almost 300 years, despite a previous history of conflict and combat, the English, the Scots and the Welsh have lived together in peace and harmony. We have built a society which has a better and longer record of freedom under the law than any other in the world.

Imagine the reaction throughout the world if Britain was to disintegrate. When Canada was on the verge of collapse there was a sense of shock, of sadness and of alarm not just in Canada but in Britain and throughout Europe. What hope could there be for the European Union, for the gradual construction of common political institutions for the nations of Europe, if the most successful union that Europe has ever known was unable to be at peace with itself? Britain is a living example of the principle that with freedom and

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the rule of law, people who were once enemies can forge a partnership and a shared political identity and thereby enhance their own society and be an inspiration to the world.

We must never allow the SNP to confuse Patriotism with Nationalism. Patriotism is a positive force based on love of one's country. Patriotism is not diminished by sharing free political institutions with one's fellow citizens from elsewhere in this island. Nationalism by contrast is a negative force which thrives on real or alleged grievances, sows discontent and discord and gives birth to prejudice, bigotry and factionalism.

Over the months and years ahead it will be necessary for all those who share such a belief in the common humanity of mankind to remind our fellow citizens that the partnership of the peoples of the United Kingdom is not only of importance to themselves but an example to the wider world and an inspiration for future co-operation and progress.

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