BETWEEN INDEPENDENCE AND UNION: A CONSTITUTIONAL MIDDLE GROUND

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IMPORTANCE OF THE RESEARCH

Alongside COVID, the constitutional question dominated the latest Scottish parliamentary election, with the Scottish Conservatives and SNP feeding off the independence debate. Whilst the SNP returned the most seats and there is a pro-independence majority in parliament, the opinion polling suggests the country is split down the middle on independence. This research transcends the polarised independence-versus-union options to see if a compromise solution could ever be found.

RESEARCH QUESTIONS

As Scotland debates its constitutional future, two polarising options present themselves: independence or status quo union.

- ❑ Does the choice have to be so binary?
- ❑ Are there compromise solutions?
- ❑ What would a constitutional middle ground look like?

SCOTLAND'S SELF-RULE AND SHARED RULE BY INTERNATIONAL COMPARISON

Figure 1. Self-rule

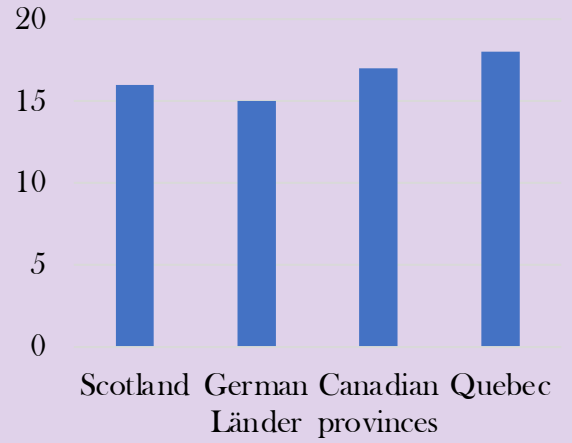
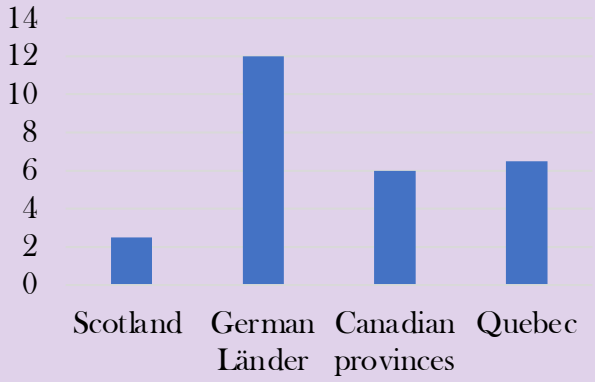


Figure 2. Shared rule



Adapted from McEwen, 2016 and Hooghe et al, 2016

RESEARCH METHODOLOGY

The project adopted a mixed-methods approach

(i) ***Literature review*** on constitutional arrangements

(ii) ***Documentary analysis***: I analysed manifestos, speeches, government publications and party/civil society publications to identify suggested constitutional reforms.

(iii) ***Coding constitutional options***: Using the Regional Authority Index (Hooghe et al, 2016), I coded what various constitutional reforms would mean for Scotland's:

- ❑ "self-rule" (the amount of authority the Scottish Government has over its own territory) and
- ❑ "shared rule" (the amount of authority the Scottish Government has in the UK as a whole).

(iv) ***Interviews***: I interviewed 6 experts and politicians to discuss constitutional reform options and their feasibility.

FINDINGS (I): *Shared rule*

- Interviews and analysis revealed that a middle ground would be more concerned with enhancing shared rule, not self-rule.
- Three areas appear ripe for reform: intergovernmental relations, the second chamber and the UK's uncodified constitution.
- Despite consensus on reform in these areas, interviewees, governments and parties differ greatly in what reforms would look like in practice.

Second chamber reform – creating a Senate of the Nations and Regions

- The reform would see devolved administrations represented in the upper national legislature and potentially possess law-making powers/vetoes there.
- There are many different versions of this reform, each with different implications for shared rule.
- Whether representatives of regions are selected by the regional governments or UK government and exactly what voting powers they have and over which issues would affect shared rule.
- Former Scottish Labour leader, Kezia Dugdale, suggests that devolved administrations should designate representatives and that they would have vetoes on certain constitutional bills.
- Jim Gallagher, former advisor to Tony Blair on Lords reform, thinks the it should have "a constitutional role...safeguarding the territorial aspect of the constitution", similar to the German model.
- If a second chamber's role were largely constitutional, this could suggest devolved administrations would only have veto power over certain bills presented before parliament, meaning shared rule is not enhanced as fully.

Intergovernmental relations reform

- This could see the UK governments co-decide on certain issues in a legally binding way.
- What issues UK governments co-decide, how disputes are resolved and how consensus is reached would all determine the level of Scotland's shared rule.
- This could range from agreeing "common frameworks", a minimum level of legislation across the UK (which usually concerns devolved competences) to co-decision on reserved powers.
- The Welsh Government wants an intergovernmental forum where decisions are made "through consensus" or with a "combination of the UK and one of the devolved administrations" (Welsh Government, 2017). Only the latter would really enhance shared rule.

Codifying a constitution

- Parliamentary sovereignty is the doctrine that the UK Parliament can make or end any law. This reform would challenge that.
- The Sewel convention holds that the UK Parliament will "not normally" legislate in devolved areas, whilst it still reserves the power to do so.
- A codified constitution could entrench and protect devolved powers and enhance shared rule, especially if the constitution gave devolved administrations vetoes over elements of reserved powers that affect devolved competence.
- The alternative is to strengthen Sewel, by making it harder to cast aside or by clarifying what "normally" means.
- The Welsh Government, for example, supports a codified constitutional arrangement to boost self-rule where "the UK Parliament will not legislate on matters within devolved competence" (Welsh Government, 2017)

FINDINGS (II): *Coding constitutional reforms*

What is the RAI?

Developed by Hooghe et al, 2016, the RAI measures the political authority of a substate unit (i.e. Scotland). Political authority is the capacity to "make legitimate and binding decisions for a collectivity" (Hooghe et al, 2016).

The index has ten dimensions, five related to self-rule and five related to shared rule, each with numerical values attached. Self-rule is measured out of 18 and shared rule out of 12.

Evaluating constitutional reform options

- Figures 1 and 2 reveal that Scotland has high levels of self-rule but retains weak shared rule.
- Table 1 indicates how some of the constitutional reform options can dramatically increase regional authority by increasing shared rule.

CONCLUDING OBSERVATIONS

- Interviews and analysis suggested that momentum is gathering but primarily within opposition parties, with suggested reforms being mostly concerned with enhancing shared rule.
- Improvements in intergovernmental relations, a Senate of the Nations and Regions and codifying a constitution to entrench devolved powers *could* enhance shared rule dramatically, but depending upon how they are implemented.
- But whilst a middle ground may *look* like all these reforms—radical or otherwise—perhaps the most convincing compromise solution is actually creating a *mindset* that the constitution should remain in flux: never "settled" but always adapting, with power shared rather than simply devolved.

With special thanks to:
Professor Laura McAllister
Ian Murray MP
Professor Jim Gallagher
Lord Jack McConnell
Kezia Dugdale
Daniel Johnson MSP

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	TABLE 1: SHARED RULE RAI SCORES	MAX OF 12
	Current RAI score.	2.5
SECOND CHAMBER REFORM	RAI score with a Senate of Nations and Regions in which the devolved administrations designate representatives and have vetoes on constitutional bills.	5.5
	RAI score with a Senate of Nations and Regions in which the devolved administrations designate representatives, have vetoes on constitutional bills and are consulted on bills affecting devolved competences (including fiscal control and borrowing control).	8
	RAI score with a Senate of Nations and Regions in which the devolved administrations designate representatives, have vetoes on constitutional bills and vetoes over bills affecting devolved competences (including fiscal and borrowing control).	10
IGR REFORM	RAI score with co-decided "common frameworks" (often simply regarding devolved powers).	3.5
	RAI score with legally binding co-decisions made at IGR forums, including decisions on constitutional change, fiscal control and borrowing control.	10
CODIFYING A CONSTITUTION	RAI score with a codified constitution which entrenches devolved competences and gives regional governments vetoes in parliament and in IGR on elements of reserved powers affecting their territory.	10-12