

The Smith Commission must choose between a Union based on either separation or sharing

By Democratic Audit UK

*The Smith Commission is the body tasked with making recommendations on the future status of Scotland within the UK. **Christine Bell** argues that there is a critical choice for the Commission (and any subsequent political negotiations over devolution in Scotland and beyond). One the one hand there is the option to pursue a Union based on a rationale of separation, where 'sharing' of power across the UK at Westminster will require to be justified on an on-going basis in terms of effectiveness, efficiency and legitimacy. The alternative option is a Union based on a rationale of sharing, which views the Union as existing because it encapsulates and can protect a set of common baseline values to which constituent parts of the Union subscribe to and have a stake in.*



Credit: [Andrew Bowden](#), CC BY ND 2.0

Smith and the Context

The push is now on to define 'home rule' or 'devo-max' for Scotland. All four main parties have made a public submission to the [Smith Commission](#), and the deadline for wider submissions closed on Friday. The Scottish Government have [published substantial new proposals](#) which essentially propose devolving all power except aspects of monetary policy, Westminster elections and political system, and aspects of international foreign policy. The Labour Party, Liberal Democrats and Conservatives have essentially publicly re-committed to their pre-referendum documents as their starting points, which to different degrees contemplate further devolution of further tax and welfare-related powers (see submissions on [Smith Commission website](#)). The Conservatives affirm their commitment to the Strathclyde Commission proposals, but interestingly note that these are 'a floor and not a ceiling'. The Labour Party re-commits to the Lamont Devolution Commission proposals, and the Liberal Democrats to Menzies Campbell's 2012 Home Rule and Community Rule Commission, Federalism Report.

There is overlap between the proposals which potentially could be horse-traded between parties to come up with some new amalgam of powers. However reaching a deal this way will be difficult to achieve, and is likely to result

in a constitutionally incoherent and unpredictable set of arrangements. Constitutionally incoherent because they will be driven by trade-offs rather than any coherent political or constitutional vision for either Scotland or the UK. Unpredictable because they will not focus on how people's lives are affected. Matters such as access to health and welfare, capacity to move within the jurisdiction without bureaucracy, or to trade without different tax regimes – all critical objections to independence – will once again come into the frame, but in contrast to independence, in ways which lack the same level of clarity, transparency or public awareness and debate.

The Important Choice: Separation or Sharing?

Lurking in this detail, however, is a critical choice for the nature of the Union that remains that deserves more overt attention. That choice is between **separation** or **sharing**.

Separation focuses on an autonomy model of devolution and understands the critical negotiation to be between how delimit Scottish power and Westminster power respectively. The separation model of devo-max views the Union's central justification as one rooted in pragmatism and functionalism. Centralised power and the need for 'Union' is justified only to the extent that it can be argued to be more effective at delivering select public goods such as macro economic policy and defence. Where it cannot be demonstrated to be more effective than devolved or local government, it is redundant.



The separation model of Union dominates current submissions and debate. This is unsurprising. The separation model is pre-figured in the current devolution arrangements and most obviously appears to be an adequate response to independence demands. Again unsurprisingly, the Scottish Government proposals set out the most robust vision of how extensive a form of separation can sit with the retention of the Union (but of course this is also what Brown seemed to promise). However, some common ground as to a separation approach lies can be seen also in 'the Vow' and the other parties' submissions to Smith. These repeatedly contemplate some more aspects of taxation and welfare to be devolved, while seeking to retain control over macro-economic policy (or 'prosperity'), and defence and aspects of international relations ('security').

Separation also has historical precedence: as the term 'Home Rule' was intended to point to, a clear precedence for the separation model can be found in the Irish and Scottish Home Rule Bills of the turn of the century before last, and subsequent Government of Ireland Acts of 1914 and 1920, on which the Scottish government proposals are fairly closely modelled.

Sharing, in contrast understands some more substantive content to the Union to underpin it, rooted in shared values and common political commitments. This model views some substantive vision of Union as important to its existence. This substantive vision flows from the idea that the United Kingdom is the relevant political community which generates the constitution. This sharing understanding of Union would approach more devolution from the perspective of seeking to define and protect some vision of what common values lay at the heart of that political community. While British constitutional arrangements are often vaunted for their pragmatic rather than ideological nature, this is quite different from completely conceding the UK as merely a sort of micro-1950s-EU of nation state-lets.

Back to the Future: The Negotiating Dynamics and Consequences for the Union

Separation. The consequences for the Union of negotiations focused on separation – already emerging – are easy to predict. Anyone in doubt should merely re-read their Dicey. The negotiation over this form of Home Rule essentially opens up a negotiation over the amount of separation, the consequences for where finance is raised, and the consequence for Scottish representation in Westminster.

The trade-offs are fairly obvious and simple. More powers to Scotland, more finance-raising in Scotland, and accordingly, the less Scottish representatives need to be involved in Westminster (because it will have very little remaining role in Scotland). As the Home Rule Bills and Acts of a century ago show, the logical implication of separation is to limit the participation of devolved politicians in the Westminster Parliament. In the ultimate Government of Ireland Act 1920, the model was to reduce to the number of Irish MPs, so that they had a much

reduced chance of holding the balance of power in a hung parliament (and remember these too were Coalition times). However, in earlier Home Rule Bills the removal of Irish MPs was more radical: Irish MPs were to be removed completely from the Westminster parliament, with provision to re-call them for the purpose only of re-configuring the Home Rule arrangements themselves.

Objections to Home Rule at that time, were that it would create the British Parliament as two Parliaments (see similar objections to Cameron's linking of Scottish Home Rule to 'English votes' to-day as a 'logical absurdity' by [Vernon Bogdanor](#)). Dicey argued that Gladstone's Home Rule Model of 1886 would create the British Parliament as two Parliaments: first, the British Parliament as it had existed prior to union with Ireland, and second, as an 'Imperial Parliament' to comprise the British Parliament plus members of the Irish Parliament, which had an authority only over the terms of Home Rule itself.

Dicey Turns in his Grave at the new English Unionism

The Scottish Government has not addressed the question of representation in Westminster. But of course David Cameron has. On the day after the referendum he was quick off-the-mark to link more powers for Scotland with fewer at Westminster, and the idea (not new of course) that Scottish MPs should have no role in English-only legislation. There is a great irony in this equation now being pushed by English Unionists.

As Dicey noted, separation, while formally saving the Union, does so by completely re-configuring the Union and the British Parliament – in fact it was Dicey's view that Home Rule would even constitute implied repeal of the Acts of Union. He pointed out something that Labour proponents of Scottish Home Rule as part of a UK-wide devolution to other cities and regions might also want to re-fresh themselves on: giving increased powers to a unit understanding itself as a nation, is very different from giving increased powers to a city or region not viewing itself as such, and carries different implications for parliamentary sovereignty because it is of different constitutional significance.

It is worth noting, however, that Dicey's main objection against Home Rule was that it would not satisfy the mood for Irish independence. He even turned from academy to political stump to promote sedition. Why re-configure the UK parliament and reduce England's advantages (for many of his arguments against the arrangements paradoxically were explicitly made as an Englishman rather than a Unionist), for something that would not work and would merely fan the flames of, and become a stepping-stone to, Irish independence anyway?

Dicey put it graphically (with dare-I-say-it Salmond-esque rhetorical devilment):
"Brandy is good, and water is good; but when a neighbour asks for a glass of spirits, it is mockery to tender a glass of water on the ground that both spirits and water are drink. The benevolent person who makes the offer must not wonder if he receives no thanks."



In Scotland to-day, the difference is that a democratic vote has already seen voters chose the water of home rule when offered the Brandy of independence – something the Scottish Government takes care to state it fully accepts. Nevertheless, as no fan of Dicey's, I had a slightly surreal Diceyan moment, when I heard Boris Johnson push for English-only votes at the Westminster parliament and Scottish MP 'removal' as the triumph of preserving the Union. Effective removal from Westminster in return for Home Rule? 'Quite', I could almost hear an invisible Scottish Nationalist respond, 'but isn't that what we just asked for?'

Conversely, on finances the Scottish Government proposals put the hallowed Barnett Formula up for grabs. Surprising perhaps, but logically they must. The (again century-old) maximum home rule formula is that Scotland should legislate, spend and fund-raise for itself, and then make a small subvention to the centre for the limited 'reserved functions' that remain. This could resonate well to Conservative ears in England. Interestingly, Home Rule in Ireland involved debt and resource allocation negotiations, as tied to subvention, and although no-one seems to mention it, debt servicing is implicated in this devo-max model just as clearly as it was with independence.

What differs from a century ago, is that on Home Rule there now curiously appears to be signs of a new English Unionist and Scottish Nationalist alliance on a separation model (unholy and fraught as it will be).

The consequences for the Union are fundamental. A clear separation model of Union will mean a Union whose continuing rationale depends on two matters being accepted as continuing: first, the symbolic global capital of having a Union and a United Kingdom, and second the functional usefulness of the Union for delivering macro-economic policy and defence on a territory-wide basis.

Sharing

The second and different approach to Union is to attempt to place some inviolable substance at its core, which cannot be unilaterally amended without the consent of all the devolved bits. This type of approach is typical of federalism. Federal models achieve protection of the core by placing fundamental values of the federation as only within the powers of all the constituent elements of the federation to amend. They typically involve an institutional model which requires (using a variety of legal mechanisms) a level of consensus across the federation with regard to changing federation-wide powers and quite often the values that are considered to bind the federation are put even further beyond political reach, for example, because they are justiciable.

Achieving this type of sharing model, appears to require the UK to throw out of its current unwritten constitution and start again. This would need a huge negotiation over a new written constitution capable of re-working Parliament with some element of regional representation at the centre, perhaps a new regional second chamber, and full and extensive public consultation on what the values of the federation are.

All of this is out-with the remit of the Smith Commission or its timescale. So Liberal Democrat federal-style proposals which are the most coherent with regard to a sharing model, are unlikely to carry much sway, and Labour recognising that this is 'long-grass' constitutional-reform want to throw 'English Votes for English Laws' into it.

However, there is another more subtle alternative model of sharing that could also be viewed as in continuity with the current British system. This model is that of consociationalism – sometimes referred to as 'power-sharing' – which with a bit of creative thinking could be operationalized pragmatically without a never-ending big-bang constitutional reform process (because let's face it, British Constitutional reform has never been achieved this way at home).

More detail on this anon, but in outline this model would involve effective legislative vetos for devolved legislatures: putting the Sewell convention / legislative consent motions for all the UK's devolved regions, and also a new one for England (see McKay Commission) onto a legislative basis, although perhaps a strong central government affirmation would do the trick. This is not a terribly dramatic departure from the current state of affairs. Such a veto would protect and clarify devolved power from unilateral UK amendment – because the Devolution Acts themselves could not be amended without legislative consent (no doubt it would generate a slew of new PhDs on Dicey and parliamentary sovereignty and whether it was law or politics that was prevailing, but prevail it would).

However, requiring devolved legislative consent alone would not prevent the central government from radically changing the central tenets of the Union, for example, by jettisoning the Human Rights Act, or getting rid of the welfare state, or leaving the EU. Protecting any substance to 'the Union' would therefore also require placing a veto on the central government's capacity to unilaterally amend the Union's substantive core.

What then would be placed at the value-driven core of the Union – well ideally that is one for 'the people', Constitutional conventions etc. But pending all that, in fact there is substantial agreement to be found in all the current proposals and in the current principles and values underpinning Union reflected in current reserved powers: a common welfare platform below which no person can fall, a commitment to a common floor of human rights which no devolved region can take its people below, power to declare and make war, international membership and participation in international treaties, and the status of the UK as monarchical. I like some of these and not others, and they are not fixed for all time, but they reflect some common political commitment to UK wide values. The point is: that if there is to be a substantive Union with values at its heart, until we negotiate new

ones, consensus decision-making across the devolved regions should govern the amendment of such ones as we have.

Could this type of sharing approach be achieved in the Smith time frame and remit, without a written constitution? Well yes: it would be possible to achieve this result pragmatically by the central government committing to generating proposals relating to any change to core values, not from within the UK Cabinet, but from within an executive body in which all the devolved regions were represented and in which they had a form of veto power. In fact, a version of such an executive body already exists – the Joint Ministerial Committee. This Committee is made up of the First Ministers of the devolved regions (joint First and Deputy First in Northern Ireland's case), abides by a form of collective responsibility, and deals with areas:

where it is necessary to ensure uniform arrangements for relations between the UK Government and the three devolved administrations. In particular, broadly uniform arrangements need to apply to: handling of matters with an EU dimension; financial assistance to industry; and international relations touching on the responsibilities of the devolved administrations. ([Devolution Memorandum of Understanding](#))

It could be a particularly 'British' constitutional solution to the problem of needing ['two executives' to parallel the two Parliaments](#), to view this Ministerial Committee as a second UK-wide cabinet for reserved powers and just go for the 'two parliaments' 'two executives' hook-line and sinker.

British Constitutional heresy?

Of course, any mention of consociationalism for the UK, will sound like mad heresy to British constitutional ears. However, that Dicey and his Parliamentary sovereignty model came to prevail was more accident of history than some sort of long-standing constitutional commitment (and of course this itself is very British). In fact, Britain when faced with losing the 'white dominions' of the empire post-first world war, seriously considered agreeing a fully federal empire as a way of retaining that Union. So the matter is not without its own British constitutional historical precedent. There are also of course obvious political objections, and I hope to address these in a further blog.

In conclusion, therefore, I would merely say for now, that while separation seems to be the attractive model to Conservative Unionists and Nationalists, it will be much less attractive to Labour and part-explains why their devolution proposals are the most limited. It is not as simple as Westminster Labour self-interest, or a failure to grasp post-referendum politics (as McLeish and McConnell seemed to suggest a week ago). Labour has a more existential difficulty because having fought for 'home rule' to save the Union, now the other shoe drops: a new separatist Union will be unable to deliver the UK-wide social justice vision that made it worth saving in the first place.

But, it is not without possibility that others could find reason to shift towards consociationalism and hints of this are already emerging. Should Nationalists find that in the horse trading they are getting something less than the Home Rule that they want, there may be reasons to try to work to ensure some sort of veto rights on issues such as social justice, human rights, and international relations (read: welfare, ECHR, and EU). Were they to so shift, they would soon find many allies in other devolved regions as these same issues stand to collapse the Northern Ireland Executive, and push the Welsh further into devolution-as-austerity-resistance.

Labour could in consociationalism find a new way to marry home rule with its social justice commitments for the UK as a whole, by being prepared to find common ground with the SNP on social justice for the UK as a whole, through a 'devolution-veto' mechanism.

Similarly, Tories may well re-discover the appeal of old-fashioned Unionism and find become prepared to pay the price to the devolved regions for something of more ambitious value than a new little England. More cynically, any Tory wanting to back-stop against Farage without turning into UKIP themselves (never a great strategy for electorally defeating more radical opponents), could well find the 'need for devolved regional veto' a useful way to



tie their own hands. With a bit of leadership and a good speech this might even be something they could sell to the middle-ground as both British, and progressively Conservative and Unionist, the sell that got Cameron into government in the first place and urgently needs resurrected if the conservatives want to retain power.

Despite its current lack of popularity and its heretical flavour, with a bit of vision all round, surprising as it may sound, sharing could hold the most space for middle ground across the political spectrum, and produce the most coherent constitutional arrangements and the greatest degree of political consensus within Scotland and across the UK.

Is it really so impossible that such a vision and consensus could emerge and receive bi-partisan central commitment through next year's general elections?

Note: this piece originally appeared on the [Scottish Constitutional Futures Forum](#) and is reposted with the permission of the author. It represents the views of the author and not those of Democratic Audit or the LSE. Please read our [comments policy](#) before posting. Ballot paper image credit: [Ninian Reid, CC BY 2.0](#); Big Ben image credit: [Credit: Loco Steve, CC BY ND 2.0](#); Salmond image credit: [Community Land Scotland, CC BY 2.0](#)

Christine Bell is Professor of Constitutional Law at the University of Edinburgh

