

***Where now for the British constitution?
Evaluating Labour's constitutional proposals***

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In this lecture I want to discuss the Labour party's constitutional proposals, set out in the Commission chaired by Gordon Brown with which I was closely involved, and to get behind them to explain *why* they have the shape they do, and maybe consider a few of the criticisms which have been made of them. And we might then have time to discuss what happens next.

Despite being an immensely weighty report with 40 recommendations this is *not* a comprehensive reform of the UK's constitution, still less a full codification. It was a Commission on the Future of the UK, not on the constitution. It focuses on aspects of our constitution which are manifestly broken and require to be fixed because of the real world damage they are causing. Plenty of the UK constitution will still be in need of modernisation even once these recommendations are implemented.

Those things manifestly broken, with real world effects, are things of which we are all aware but which we have perhaps ceased to see. Some economic, some political.

Crisis and Decline

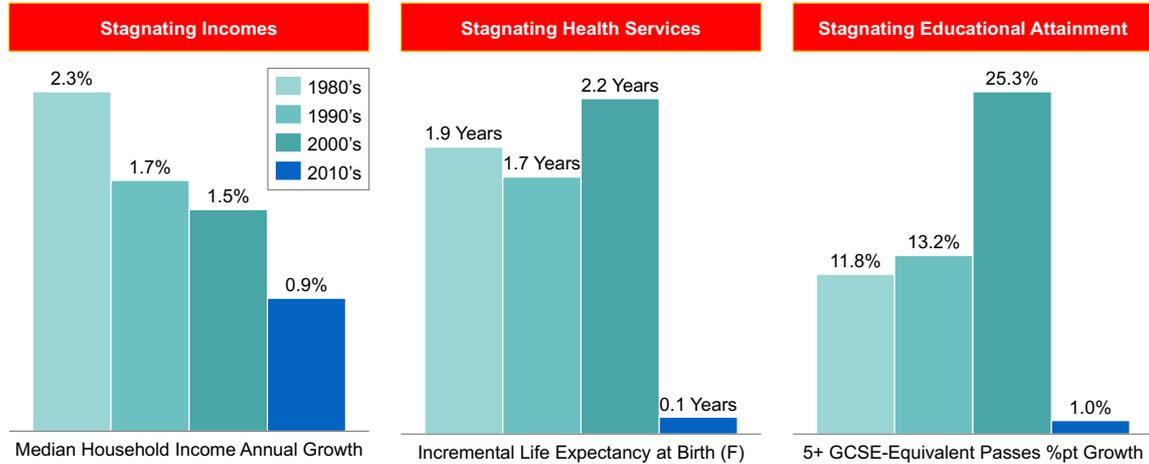
Start with the economic. Recent years have felt like constant crisis. It certainly feels like "polycrisis" in the UK. One crisis seems to pile up on another. Increasingly unstable weather, migration that we are incapable of managing either effectively or humanely, covid and now the near collapse of our health system, rocketing energy prices driven by the war in the Ukraine and so on. And some quite remarkable self-inflicted wounds like letting Liz Truss break the UK's reputation for fiscal prudence overnight.

So you might be forgiven for thinking the challenge this country faces is one of better crisis management, navigating our way through a series of (largely) external shocks faced by most of the rest of the world too.

This would however be to mischaracterise the last decade. Because behind the story of crisis upon crisis, is a story of secular decline. In the last decade the UK has moved from being at or near the top of the league of G7 countries in terms of economic growth to languishing at or near the bottom.

This isn't just about abstract GDP numbers. British households a decade ago were as comfortably off as those in France or Germany. Now they are well behind. And it's not just about incomes; as the economy has stagnated, so has improvement in our health, educational attainment and so on.

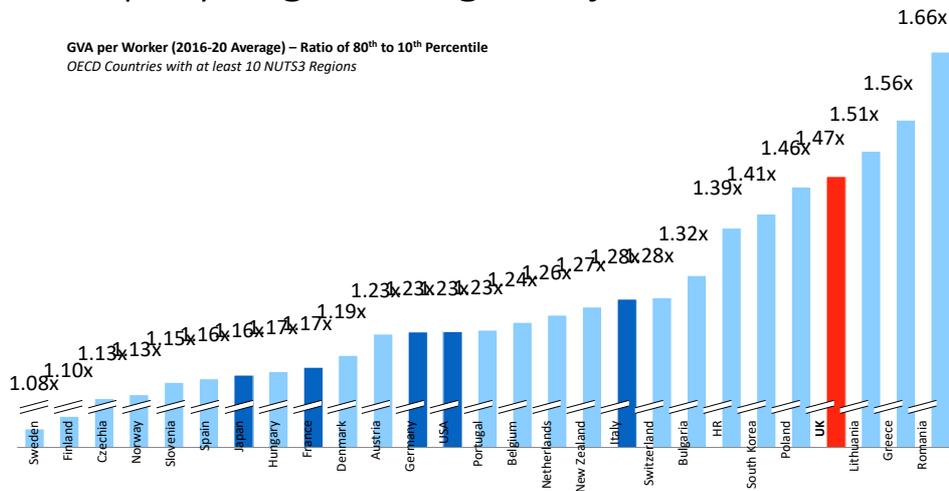
The UK's society and economy has undergone a decade of stagnation



Economic inequality

Perhaps you spotted this relative decline. But I wonder if you have also thought about its underlying geography. We're so used to the UK's north-south divide we've ceased to be aware of just how deep and pernicious and worsening it is. The UK is on a basket of measures the most unequal large country in the developed world, and getting more so. There are many ways of measuring this. Here's the simplest.

The UK's regional economic imbalance is uniquely large amongst major economies



The UK's inequalities are very striking. London's *per capita* GDP is more than twice that in the six poorest regions of the UK, and its hourly pay is about one third higher.

And once again don't be fooled into thinking this is just about money: it has extraordinarily deep, damaging effects. Poor people in poor regions suffer multiple and cumulative disadvantage, and, remarkably, outcomes for poor people in poor places are worse than outcomes for equally poor people in richer places. A child born today in one of the three poorest regions of England has four years less healthy life expectancy than in the three richest. A child on free school meals in one of the three poor regions is less than half as likely to go onto higher education than a child *on free school meals* in London.

The comparison with Germany is particularly telling. Over 30 years ago the Federal Republic took in the former East German Lander, whose GDP was roughly one third the West German level. Today, it is over 85 % of that, and it's been getting better year by year. Indeed today UK and East German GDP are pretty much the same so most of the UK is poorer than East Germany. Something surely is seriously wrong the UK's economic model.

The implicit approach of our economic management certainly for the last decade or more has been to create the economic conditions in which the trading economy of London and the South East can flourish and expect that the benefits will trickle down across the whole country.

Up to a point, Lord Copper. To be fair, our model does at least include substantial fiscal transfers from the rich South to the poor North, but not to rebuild their economies - rather to guarantee that their pensions, benefits and public services are not dependent on economic activity locally. That's why most parts of the UK have very substantial fiscal deficits (Scotland included). But it is not working well. Overheating and unaffordable housing in one corner of the country is matched by forced migration and decline in others.

A broken political system

There is something wrong in our political model as well. Our central institutions of state are among the least trusted in the world. And it has got a much worse over the last ten years. The figures are actually quite shocking.

Symptoms

The crisis in Britain's democracy cannot be overstated – trust in UK central government is lower than any other major developed nation and is in decline

OECD Trust in Government Benchmarks, 2010-20



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Other British state institutions –police, legal system, local government and so on - are as broadly speaking trusted as other countries'. The problem is the central state. And, what's more, the further away you are from London, the less you trust government as polling data shows. Indeed *Over half* of people across England, Scotland and Wales agree 'it doesn't matter who you vote for, nothing will ever really change in Britain'.

Some of this has to do with the personal behaviour of politicians. While the UK is not by any international standards a corrupt country, standards in public life have taken a serious beating in recent years. We've never before had a Prime Minister who received a criminal penalty while in office, and whose ethics advisors resign in despair.

Not since the time of Lloyd George and Maundy Gregory century ago has it been plausible to talk about the purchase of Honours, but it in recent years it seems to have been widely understood that conservative party Treasurers can expect a peerage once they have donated £3m. These individual instances of impropriety need to be dealt with individually under the formal processes that exist, but the system is nothing like strict enough to prevent them. The Commission report has a bundle of recommendations on this, but I'm not going to focus on them, in the interests of time.

That is because causes of this corrosive distrust are deeper and more structural than just ministerial misbehaviour. They reflect people's (accurate) perception of being economically left behind and politically ignored by government in London.

A point too readily ignored in discussions in Scotland that focus endlessly on national identity is that the view of London is the same from Grimsby as Glasgow and from Doncaster as Dundee. People all across England are as unhappy with London government as people in Scotland are. Indeed they expressed their dissatisfaction in a very material way in the Brexit vote, even more tellingly than in Scotland by expressing support for independence.

But where people have devolved government, or metro mayors, or effective local government, it is more trusted to look after the interests of its electorate.

Who's trusted?

Which of the following groups of people do you trust most to have your best interests at heart? Please rank your top three. *Included in top three*

	England	Labour 19	England Swing	Scotland	Middle Scotland	Wales
#1	Local councillors	Local councillors	Local councillors	Local councillors	Local councillors	Local councillors
#2	Directly elected city/regional mayors	Trade union leaders	Directly elected city/regional mayors	Members of the Scottish Parliament/Senedd	Members of the Scottish Parliament/Senedd	Members of the Scottish Parliament/Senedd
#3	School governors	Directly elected city/regional mayors	School governors	Trade union leaders	Trade union leaders	School governors
#4	Civil servants	School governors	Trade union leaders	Directly elected city/regional mayors	Civil servants	Trade union leaders
#5	Trade union leaders	Civil servants	Civil servants	Civil servants	Directly elected city/regional mayors	Directly elected city/regional mayors
#6	Members of Parliament	Members of the House of Lords	Members of the House of Lords	School governors	School governors	Civil servants
#7	Members of the House of Lords	Members of Parliament	Members of Parliament	Members of Parliament	Members of Parliament	Members of Parliament
#8				Members of the House of Lords	Members of the House of Lords	Members of the House of Lords

Devolved governments naturally like to say they are trusted because they are better governments. But it's actually because they are closer to the people they govern. A root of our problem is that most of the United Kingdom has no such level of government and the essential 'meso' level between the centre and the very local.

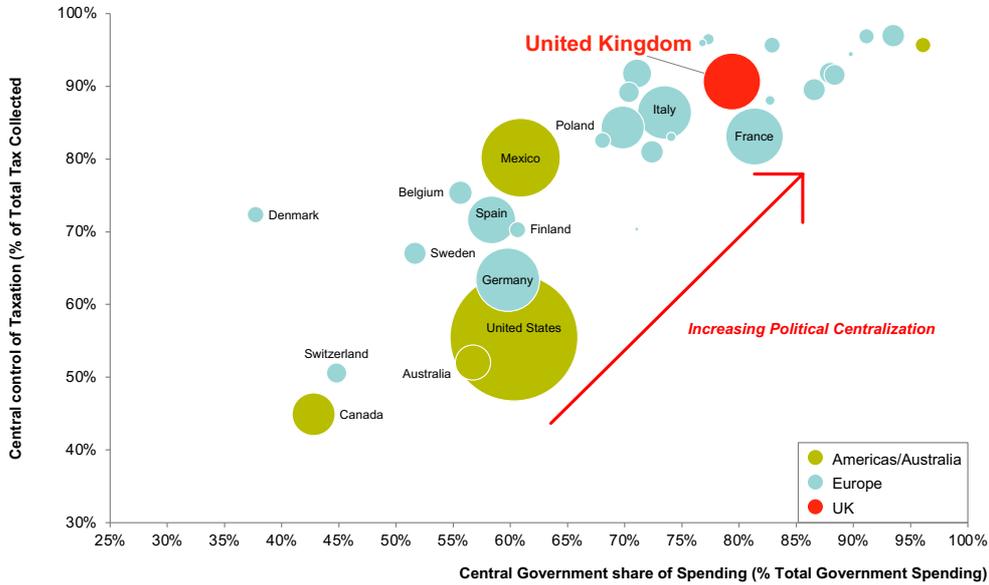
A hyper centralised state

Now we're getting closer to the root of the matter. The UK is pretty much the most centralised big country in the developed world. Almost all our political decisions, devolution excepted, are taken in Westminster and Whitehall. 95% of the UK's taxes are levied and decided on at the centre. No other country does this. 75% of UK public spending is controlled at the centre, and much of what is supposedly local government's is in fact hugely circumscribed and interfered with by central government.

Diagnosis

Britain has the most centralized system of government of any large developed country

UK Central Government Tax & Spend vs OECD (Bubble Size = Population)

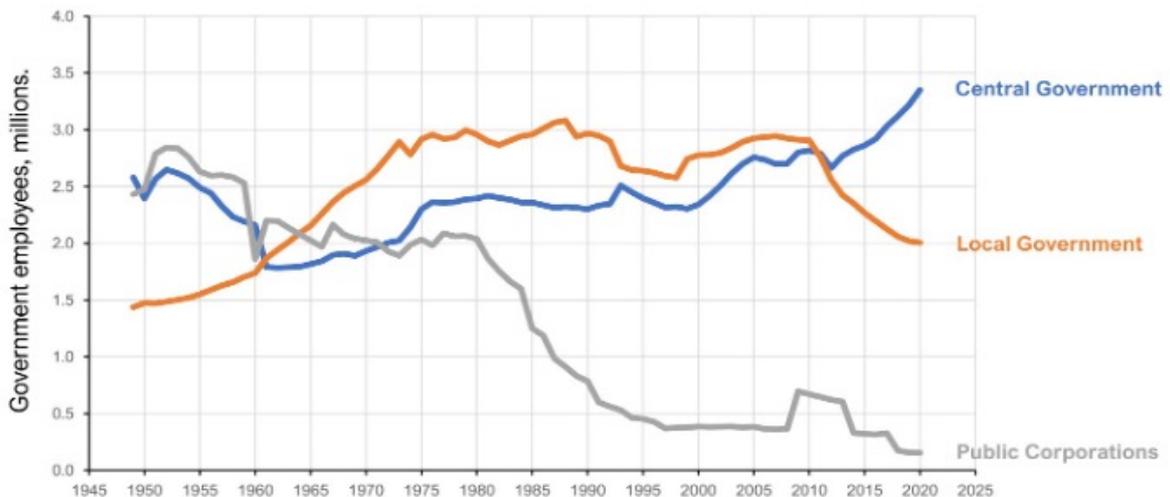


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Given devolution, this is principally an issue about England, which has become increasingly centralised over the last decade, as local councils have been systematically cut and disempowered. An obvious metric of this is in the number of public employees in central and local government.

The Westminster takeover

Central government in the UK has never employed more people.
Local government employment is at its lowest since 1963.



Source: Civil Service Statistics and Quarterly Public Sector Employment Survey, Office for National Statistics
Source: A millennium of macroeconomic data, Table A51. Public Sector Employment and Armed Forces Estimates, 1690-2016, Bank of England

A million local public jobs gone and a million national ones created. Council funding in England has been reduced since 2009 by no less than 37% in real terms. Local government

has been reduced to, at best, a delivery agent for central government, constantly bidding for resources from rapidly decreasing totals. (And before anyone in Scotland starts to feel smug, the picture is pretty similar here as well.)

Much follows from this. First, central government cannot do local government's job well. It cannot make locally sensitive decisions: it does not have the information, the capacity or the incentives to do so. But as it seeks to micromanage decisions all across the country it can't do its own job properly either. This is an elementary error in organisational design: no large business, no large organisation of any sort would do this.

But there is a second set of consequences as well. If central government sees itself as the micro manager of the entire country, it will not cope well with the powers of the devolved nations. Cooperation between devolved government and London has struggled even since 1999. There are many reasons no doubt but the underlying structural problem is that the UK is a unitary state for 85% of its population, trying to be at the same time a quasi-federal state for the other 15%.

This obsession with centralisation has grown over decades. Victorian Britain would not have recognised it. But today it is inbuilt to our political and media culture, but it's also in built into our constitutional expectations. And that's where come to issue of "sovereignty". Dicey's famously claimed that the one principle of our constitution was the sovereignty of parliament. That might work as a simple rule of legal recognition, but is deeply poisonous as a guiding principle for how to run a country.

Someone who put his finger on the problem half a century or more ago was the Tory politician Quintin Hogg, Lord Hailsham. He was making a partisan political point when he talked about the UK government as an "elective dictatorship", but he was spot on realising that, in a majoritarian system without a genuinely powerful second chamber, a party which controls a majority in the Commons can do more or less whatever it likes. That idea has entered the political culture so that when politicians talk of parliamentary sovereignty, they really mean their sovereignty as ministers, and go on to show it.

That has been never clearer than in recent administrations. The government of Boris Johnson was twice taken to the Supreme Court over the implementation of Brexit, and twice lost, because it failed to distinguish between its power and that of parliament. Recent administrations have also chosen to override the convention which had operated successfully since 1999 that Westminster will not legislate on devolved matters or powers without consent. A coach and horses has been driven through that, to the delight of nationalist politicians in Edinburgh, and the despair of devolved government in Cardiff.

If the UK is to work for the benefit of all its citizens and indeed if it is to survive as a union of nations we have to do something about this concentration of unlimited and unconstrained power at the centre of the UK executive, and make that change stick.

The politics of identity

You might be a little surprised I haven't focussed so far on the big constitutional eruptions of our time, Scottish nationalism and English nationalism in the guise of Brexit. Because I want to get behind not just the commission's recommendations but those phenomena too - what underlying economic and social pressures drive these demands. So I was delighted, just earlier this month that Kier Starmer was even blunter than the Commission, and said that its recommendations were about "taking back control". This is a set of ideas not tough on Brexit, but tough on the causes of Brexit: realising that there are many people who feel economically left behind and politically ignored.

Now the drivers of Scottish nationalist feeling are not identical to Brexit, but they have much in common, and the arguments presented and the consequences that follow are eerily similar.

Indeed identity politics is more powerful when it reinforces economic and political dissatisfactions, but nevertheless as I've argued in a previous lecture in this university identity does matter, and must be reflected in political structures. This the report does have recommendations about devolution, noticeably giving it constitutional protection and also new obligations of cooperation and institutions to make them effective and some additional powers. But the main focus is on changing the nature of the UK as a whole.

Constitutional changes

And that at last takes me to the recommendations. The Commission made around 40 so I am not going to look at each in detail. But a guiding principle here is that what needs to be done to fix our broken political culture and our broken economic model have a deep commonality: decentralisation of power to allow for both economic and political change to be locally led. They start with some new constitutional principles proposed to be put in legislation.

Some constitutional recommendations

- The political, social, and economic purposes of the UK as a Union of Nations to be stated in a new constitutional statute to guide how political power should be shared within it.
- A requirement to require decisions to be taken as close possible to the people affected by them
- A requirement to respect the autonomy of local government
- A requirement to rebalance the UK's economy
- Plus new, constitutionally protected, social rights

These are essentially about mandating and enabling decentralised power. Mandating it quite directly, through a constitutional statement of subsidiarity, but also enabling it by defining clearly what the central state, alone, is responsible for and must do, and putting some limits on the level of decentralised variation, notably through new social rights on healthcare, poverty etc. An innovation here is the idea that government should be under a constitutional pressure to produce greater economic equality across the territory. This is based in part on the German experience, but also on provisions in the Canadian constitution, and indeed elsewhere.

And then as a result there are substantial proposals, almost all for England, for greater devolution, beginning with a “starter pack” of economic development powers, as that is the priority, but moving on to much greater powers over time. The Commission report says explicitly that the constraints on executive devolution in England are no greater in principle than the constraints in Wales or Scotland.

The right powers in right places

- New economic powers for towns and cities in England to drive growth locally
- Reformed economic development programmes, replacing EU regional funds
- An economic growth plan for every town and city
- The UK Infrastructure Bank to address regional inequality in infrastructure.
- **The British Business Bank to bridge the equity finance gap outside London and SE**
- 50,000 civil service jobs and more Public Bodies HQs transferred out of London
- Longer-term financial certainty and more revenue capacity for local government.
- **Localities to take new powers from the centre, through a new, streamlined process to initiate Special Local Legislation in Parliament.**
- Support for “Double devolution”, pushing power closer to people

One innovation on the constitutional side here is the idea that decentralisation of power in England will start with legislation to give additional powers to local government and partnerships of councils, but needs to build up locally as effective partnerships are constructed at the appropriate geographical levels to fill the “missing link” of meso level governance in England - regional or city-regional governance. A proposition from the Commission is that this is done by locally promoted legislation, rather than by grace and favour from central government. This is a blast from the past. Those of you who know your local government history will realise that much of Victorian reforming local government gained its powers through locally promoted legislation.

There are also some very specific recommendations about Scotland and Wales. In the interests of time I will focus on the Scottish recommendations.

Scotland

- Constitutionally protection for devolution by strengthening the Sewel Convention and through the new second chamber.
- Scottish Government able to enter into international agreements and join international bodies in relation to devolved matters.
- MSPs to have the same protections as MPs in relation to statements made Parliament
- Strengthened cooperation with the UK Government
- Devolution of JobCentre network
- The British Regional Investment Bank to support innovation, with with the SNIB and EIB.
- Case for pushing power closer to people in Scotland, and for directly elected Mayors.

The Welsh recommendations are similar, and they start from the same principle of subsidiarity and state clearly that devolution to Wales can include if desired anything which is devolved in Scotland. The current issue in Wales is of course whether the justice system should be devolved: the Commission were clear that that was entirely possible, and indeed proposed that it might begin with youth justice and probation, but all of this is subject to the Welsh government's own independent Commission report on devolution, which the Brown Commission did not wish to anticipate.

Similarly, the constitutional changes, notably the protection for devolution, which I'm going to come back to, should be applicable in Northern Ireland, although circumstances obviously differ there.

There are additional devolved powers here, notably over international relationships and running the job centre network. One of these is of great symbolic importance and another of great practical importance for jobs, but this is not another Calman or Smith Commission. It's not a huge shift in the boundaries of devolution, because that work has already been done recently.

The problems with devolution today are not typically with powers, but lie in relationships, and the difficulty of making intergovernmental cooperation a reality. Radical English devolution will change the context here, but the Commission recommended more formal changes too. Cooperation is essential, but nowhere in our constitution do we say so, nor set out any legal framework for it. Hence this set of recommendations.

Shared government: making cooperation work

- A legal obligation of co-operation between the different levels of Government and institutions across the UK.
- A Council of the Nations and Regions based in law, with an independent Secretariat
- Joint policy initiatives proposed, from climate change to security
- International trade policy to be more inclusive of devolved leaders
- All UK departments and public bodies to make space in their governance for national and regional representation
- Respect areas of decision making that are England only

In the interests of time, I'm going to skip over the recommendations on cleaning up politics, which include new arrangements for the ministerial code and the (hapless) Prime Minister's adviser on ethics, responding to recent unacceptable behaviour. Instead, I will focus finally on the most headline catching of the commission's recommendations, abolition of the House of Lords.

Reform of the second chamber

The House of Lords is another of those aspects of British life that we've become so accustomed to we don't see how wrong it is. Some people become legislators by descent. And others by Ordination. But too many by cosying up to the Prime Minister. The biggest problem is that the Prime Minister of the day can appoint whomever he or she wishes, suitable or not, and in recent years they've been doing just that. As a result, we have a chamber which, although it contains many decent, hard-working, thoughtful public servants, is now impossible to defend.

Spotting the problem is the easy bit. But reform has been unfinished business for more than a century. The commission's report is different because it proposes a different function for the second chamber, and a function which addresses the core problem of the British constitution – the unconstrained executive power that comes from a Commons majority.

Reform of Second Chamber

- A constitutional moment.
- Not whole new written constitution (for which no consensus) but major shifts of political and economic power, irreversibly entrenched
- So abolish (indefensible) House of Lords and replace with a new, much smaller, elected chamber
 - “Assembly of Nation and Regions”
- Given the role of protecting key constitutional provisions, notably devolution, by rejecting legislation breaching them

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“Assembly of Nations and Regions”

- 200 members, directly elected on regional basis
- Different electoral system and cycle from Commons – exactly how for consultation
 - Option of indirect participation by some devolved legislators or even Mayors
- Different role from Lords
 - Power to reject legislation (as today for extending term of Parliament)
 - But only if relates to specified constitutional provision, as judged by Supreme Court
 - Eg Sewel Convention, strengthened
 - Option of making subject to Commons override by eg 2/3 majority
- “Entrenchment” of constitutional rules
 - Govt no longer do “whatever it likes”

The key issue here is what the Second Chamber of parliament is for. On the commission's plan, in some respects be less powerful than today, being unable to insist in general on amendments to legislation by delaying whole bills. The last time that power was used was, ludicrously enough, in relation to fox hunting. But in one key respect it should be more powerful, and able to reject legislation relating to certain listed constitutional statutes. The most obvious example would be the Sewel convention, so protecting devolved power, but other examples are listed in the Commission's report. Such constitutional statutes would be listed in the new Parliament act, and whether proposed legislation “relates to them” and therefore engages the veto power would be a question of law to be decided by the Supreme Court.

The Commission report also includes options to confirm the supremacy of the House of Commons by allowing it to overrule the second chamber on such a matter, but only by 2/3 majority or some other hurdle.

The overall purpose of this is clear, and this is to make certain constitutional statutes significantly more difficult to amend or overturn than ordinary laws. It achieves this while respecting the principle of the Supremacy of Parliament, but alters the balance of power between its two chambers. Oddly enough, this is a principle which Dicey would recognise, appalled though he would be at the idea of electing members of the upper house.

As you can see, the proposal is a markedly smaller house elected by different system from the Commons, subject to consultation as to which, but it could, for the sake of example only, by a regional list system or some similar proportional process, yielding a composition different from the Commons so the protective power had effect.

Some criticisms which have been made

I think it's fair to say that people are still digesting this report, in part because (mainly due to the covid pandemic) it wasn't subject to anything like as much prior consultation as would have been desirable. So it has landed as a bit of a surprise with which people are getting to grips with. Nevertheless a few issues have surfaced.

The first is purely political. House of Lords reform is either undesirable in principle, or never going to happen in practice because it's too difficult. There's no real answer to that except to say that it will be too difficult until it happens, at which point it will turn out to have been possible.

The next pair are even more obviously political. First, why not many more devolved powers, especially for Holyrood - often from who see more powers as another step down the road to independence. In fact, the criticism might be of failure of the Smith Commission, which looked at devolved powers, and but not consider making central and devolved power operate effectively together. (Calman didn't make that error, but didn't make powerful enough recommendations to be effective.)

Some, to be fair, argue for more devolved power because they perceive policy failures, for example over migration. The Commission response is that better cooperation should solve the policy failures. If it fails, more devolved power might be the right answer.

The very political one: why does the Commission not offer a route for Scotland to leave the UK, and set out how a referendum on independence can be achieved? Quite simple. This is a Commission about how the UK can work better, rather than about how it might break up. It is an alternative to independence, a reformed UK, rather than a route to it. What else would you expect?

A more interesting set of challenges is of the commission's constitutional protection idea. Too weak and not really entrenchment, essentially because they do not address the question of parliamentary sovereignty. There are two answers to that, I think.

The first is that our laws are not those of the Medes and Persians. Entrenchment, at its simplest, means that some laws, typically the constitutional laws which set out how other laws get made, are harder to change than others. These recommendations do achieve that; just how hard change is and which changes would be rejected depends on the behaviour of the second chamber, for sure; but no form of entrenchment avoids all risk of that sort.

The fact is that we do not have a Ground Zero moment in which we could have a wholly codified constitution, which disposed of the question of parliamentary sovereignty. Nor is there a secure way round to get rid of it. In these recommendations, parliamentary sovereignty is not a bug in the system, but as the IT developers say, a feature.

Next steps

One person who has got to grips with these recommendations is Keir Starmer and he has committed to implementing them and the Labour Party will start the process of consultation to initiate that.