

Creating a Constitutional Moment

Baroness Pauline Bryan

Sometimes when you ask for directions you are told 'I wouldn't start from here'. That may be the best response when considering the UK Constitution.

Not having a codified constitution may have some advantages. It has allowed changes to be introduced quickly when governments have to respond to significant political pressure. On the other hand, quick fix solutions are not necessarily the best. In the UK it has resulted in a piecemeal approach to devolving powers leaving a patchwork of different arrangements in different parts of the UK.

As a result, we have ended up with the Scottish Parliament, the Welsh, Northern Ireland and London Assemblies, each with different powers. Across the remainder of England there are Metro Mayors, Police and Crime Commissioners, City Deals, Unity Authorities, Metropolitan Districts, County Councils, District Councils, London Boroughs and the City of London. And finally, as a response to the Scottish independence referendum, up popped English Votes for English Laws (EVEL).

Regardless of the Brexit outcome it is important that the UK looks at its constitution from top to bottom, or better still from bottom to top.

Centralisation

Local authorities across the UK are being starved of funding but also have a list of statutory duties. The traditional powers excised by local government over decades have not been safeguarded as is shown by the Scottish government bypassing local authorities, and in the name of giving more powers to Head Teachers, taking more direct control of schools which has effectively taken education out of local democratic control. This follows the centralisation of Fire & Rescue and Police Scotland.

The SNP government followed in the footsteps of Margaret Thatcher's rate capping by placing restrictions on how much council tax could be raised without incurring prohibitive sanctions. The business rate is set by the Scottish Government and collected centrally. In all, the powers of local government have been diminished and councillors have been encouraged or required by law to behave more like company directors than political representatives. It can mean

that the unelected officials have disproportionate influence on the work of councils. Rather than devolving power the Scottish Parliament has led to more central control at Holyrood and less at local council level.

When the Scottish Parliament was established it had a range of devolved powers including the power to vary taxation. In 1999 it was probably assumed there would be a period of stability while the Parliament bedded in and tested the limits and possibilities of its powers.

Following the death of Donald Dewar and the quick resignation of Henry McLeish there were three First Ministers in less than 3 years. The coalition governments were uninspiring and failed to justify the expectations of those who had campaigned for the Parliament. This, together with the Blair government's involvement in the Iraq war and other policies, helped spread a disillusionment with the coalition of Labour and the Lib-Dems and encouraged support for the SNP and, to some extent, independence.

The Scottish Parliament's history seemed to confirm Michael Keating's claim in a Paper from 2009 entitled Second Round Reform, that once you start down the road of devolving powers there will be demands for more. The British Constitution is particularly vulnerable to these demands because making a fundamental change only requires an Act of Parliament.

Precarious powers

The powers of the Scottish Parliament could theoretically be withdrawn by the Westminster Parliament. While the Sewel convention established that the Westminster Parliament would not legislate on devolved issues without the express consent of the Scottish Parliament, we have seen from the repatriation of powers through Brexit that this may not always be adhered to.

A referendum on independence was 'granted' by the Cameron government, and to succeed it only required a simple majority. As with the EU referendum the outcome appeared to be assured, but as the campaign went on polls showed that support for independence was growing. As the gap narrowed the UK government made promises of additional powers for the Scottish Parliament. This led to the Smith Commission and, even though no Scottish government had maximised the use of existing powers and the tax varying power had never been used, more powers were devolved.

The range of powers that the Scottish Government received under the Scotland Act 2016 included raising its own income tax, rail franchising, Crown Estate in Scotland, Air Passenger Duty, enhanced control over 8 social security benefits and legislating on abortion.

The Red Paper Collective has always asked “what is the purpose of a new power? – what will it be used for?” It believes in Powers for a Purpose, not for their own sake.

A new constitutional settlement

Constitutional experts have explained our lack of a codified constitution as being due to not having gone through a ‘constitutional moment’ when circumstances obliged the state to codify and put in writing the rules under which it would operate. Britain had its ‘moments’ mainly during the 17th century before the concept of a constitution had been established. Unlike similar states the British Constitution is based on conventions, but these are not on a statutory footing and even what we may think they are set in stone they can be overturned simply by an Act of Parliament. For example, the Human Rights Act could be removed or amended as easily as a change to laws on shop opening hours.

Could Brexit be that ‘constitutional moment’ for the UK? Adjusting our constitution for the return of powers from the EU is not straight forward. It is not simply a case of returning to what applied in 1972 before entry. Most crucially there was no Scottish Parliament or Welsh Assembly at that time. What we are seeing in the process of adjustment is that the UK Government is immediately claiming the repatriated powers centrally and it is the UK Government that will decide what will be passed on to the devolved governments. Theresa May retained control of 24 areas that are covered by devolution including public procurement, fishing, agriculture and some environmental issues. This challenge to the devolved settlements and concern for how devolution can be safeguarded gives further impetus to those supporting a more federal arrangement for the UK.

Radical means starting from the root

A poll conducted last year for the Electoral Reform Society showed a clear majority support reform of the House of Lords. Many would argue that is long overdue and that a second chamber cannot continue to be unelected,

unaccountable and have among its members hereditary peers. There is growing interest in replacing it with a Senate of the Nations and Regions of the UK?

Jeremy Corbyn has stated: “We have a House of Lords which is dominated by a small number of people from London and the south east. I would want to see an elected second chamber that it is representative of all regions and nations of the United Kingdom. I think that’s very, very important. I think it should have an electoral mandate to go with it.”

One of the issues raised when considering a fully elected House of Lords is that it would challenge the sovereignty of the House of Commons. Both Houses would have the same legitimacy of being elected, so what is there to stop stale mate between the two resulting in the UK equivalent of the US government shutdown.

One way to avoid this is to make the two Houses responsible for different aspects of government. Without the EU providing common standards and regulations between the devolved Parliament, Assemblies that role could be undertaken by a second chamber. Considering this arrangement immediately raises the question of how would England be represented? A single English Parliament would raise concerns about its size in proportion to the other parts of the UK. I suspect that it would also reinforce demands for powers to be devolved to the regions of England.

Some argue that the second chamber could be a mixture of elected and appointed members so that people with significant expertise in particular areas can be given a role. The ‘expertise’ of the current Lords reflects the British establishment and while these people are eminently qualified in their areas of interest, it doesn’t make them better able to make decisions on behalf of the vast majority of people in the country. You can see some of the members of the current chamber who have wonderfully impressive experience and knowledge and who sit on the Tory benches supporting the Government’s attacks on working people.

Progressive federalism

The Red Paper Collective has for the past 10 years argued the case for progressive federalism. It will campaign at Scottish Labour Party Conference and the Trade Union Congress for support for a radical, democratic constitutional settlement, based on the commitment to redistribute power and wealth, and that takes account of the consequences of Brexit.

The new settlement should move from the existing model, where power is devolved from the central state to Scotland. It should instead be a relationship of shared power based on partnership, not hierarchy. Under this arrangement there must be common minimum standards across the UK on human rights, employment rights, consumer protection and environmental protection and that the Scottish Parliament should have the power to enhance but never detract from these minimum standards.

Any new constitutional framework should:

- Make our economy democratically accountable;
- Enable the redistribution of wealth and power within and across the UK;
- Sustain and strengthen the Labour and trade Union Movement and class solidarity across the UK.

Conclusions

- The UK's Constitution has developed in an ad hoc way resulting in a patchwork of different institutions and powers covering different parts of the UK.
- Local Government in Scotland has lost powers to increasing centralisation by the Scottish Government.
- The Scottish Parliament has gained additional powers in response to political pressures, but these can be curtailed as easily as they were granted.
- Brexit will result in the repatriation of powers but the UK Government is reserving some powers that would usually be devolved.
- The House of Lords must be totally reformed. One option is to replace it with a Chamber of the Nations and Regions which is elected and accountable.
- The future relationship between the Holyrood and Westminster should be based on partnership and not hierarchy.

Thanks to Seán Griffin for his comments, but any errors and deficiencies are my own.

Baroness Pauline Bryan was appointed by Jeremy Corbyn in 2018 to develop the party's constitutional policy.