

Answering the Question

Devolution, The West Lothian Question
and the Future of the Union

By the Conservative Democracy Task Force

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Introduction

‘... while we will listen to all proposals to improve our constitution in the light of devolution, we do not accept the proposal for English votes for English laws, which would create two classes of Members of Parliament—some entitled to vote on all issues, some invited to vote on only some. We will do nothing to put at risk the Union.’

The Prime Minister, presenting the Green Paper The Governance of Britain to Parliament, 3 July 2007

We do not agree with the Prime Minister. The Democracy Task Force believes that it is current arrangements, those implemented in the devolution reforms of 1997-99, that represent a long-term threat to the integrity of the Union. They do so because they create an imbalance in the ability of the different nations of the United Kingdom to make their own laws and to protect their own interests. We believe that, if this problem is not addressed, the resulting sense of grievance on the part of the Union’s largest nation, the English, could undermine the current constitutional settlement.

Many attempts to address this problem propose ‘English Votes for English Laws’, the concept that only English MPs should be able to vote on measures relevant to England alone. While the proposal has an obvious apparent logic and justice, it has also been met with a host of objections. Many of these are, we believe, spurious or plainly motivated by party political interest. However, there is one practical problem which has considerable constitutional importance. This is the question of what would happen were a UK government of one party to be confronted with a House of Commons majority of English MPs of another party or parties. Given the tight linkages between executive and legislature that characterises the British system, with formation of a government (usually of one party) dependent on the ability to carry its programme through Parliament, this deadlock would be new and arguably dangerous territory.

The Democracy Task Force recommends that there is a variant on ‘English Votes for English Laws’ that would overcome this dilemma. We propose that:

- Bills that are certified as ‘English’ would pass through the normal Commons processes as far as and including Second Reading. The whole House would vote on Second Reading.

- The Committee Stage, however, would be undertaken by English MPs only, in proportion to English party strengths
- At Report Stage, the Bill would similarly be voted on by English Members only
- However, at Third Reading the Bill would be voted on again by the whole House. Since no amendments are possible at this stage, the government party would have to accept any amendments made in Committee or at Report or have the Bill voted down and lost

By limiting the Committee and Report stage of Bills to English MPs, this measure would protect England from having measures that a majority of English MPs found unacceptable being passed by non-English votes. However, its provisions for the Third Reading stage would also protect a government from having measures relating to England which it found unacceptable foisted on it. The great value of this situation, in our opinion, is that it would give both sides an incentive to bargain.

This incentive to compromise is critical. Sensible political compromise would offer a way of resolving any potential constitutional crisis. As Lord Hurd put it: ‘The government of the United Kingdom would have to ensure that its English measures were acceptable to enough English MPs – or else not put them forward. There would be nothing extraordinary in this process: it is called politics.’¹ Put another way, British governments would simply have to learn to operate in more of a bargaining fashion, like American or many Continental European administrations.

The analogy is not exact. The separation of powers is part of normal US political life, as is coalition-forming in countries with PR voting systems. We do not favour either practice in the UK as British political culture would take a very long time to adapt to either practice. Our proposal would retain the overall parliamentary majority of the UK Government for all policy and daily business. The English MPs would only have reserved to them the detailed scrutiny and amendment of legislation exclusively affecting their constituents, the residents of England. However, by its ability to reject any legislation which contained unacceptable amendments passed at the Committee and Report stages, the UK government would be able to protect its interests by something very similar to a presidential veto.

¹ Douglas Hurd, *Financial Times*, 24 November 2000, cited in Robert Hazell, ‘The English Question: Can Westminster be a proxy for an English Parliament?’ *Public Law*, Summer 2001

The nature of the problem

‘English Votes for English Laws’ is a response to “what those with short memories call the West Lothian Question”². This ‘question’ is associated with Tam Dalyell, who constantly raised it during the devolution debates of the 1970s. In fact, it has a much longer pedigree – hence the question of ‘short memories’ – bedevilling the various attempts at Irish Home Rule by successive Liberal administrations between 1886 and 1914. The persistence of the ‘question’ reflects the fundamental dilemmas of devolution within a unitary state. Nonetheless, the ‘West Lothian’ term has become widely understood, and since it is the current Scottish devolution settlement that has given the issue its salience, we will continue to use it.

Unsurprisingly, the West Lothian Question is more complex than at first sight appears. It is often expressed in terms of *how a government might be formed* when there were different balances between the UK-wide result of an election and the result in England. The most dramatic possibility is that of a Labour government with a UK-wide majority confronting a Tory majority in England, and being dependent on ‘Scottish votes’ to carry its measures.

This account needs to be qualified. Firstly, it forgets Wales. So far, the Welsh Assembly has not had primary legislative powers; the Government of Wales Act 2006 strengthens the Assembly and Executive, and over time will move some areas effectively out of the orbit of Westminster MPs by approving Assembly actions via an Order in Council. It also envisages the longer-term possibility of full primary legislative powers following a referendum. There is still something of a half-way house relative to Scotland; the longer-term likely direction is clear, but for the present it is not possible to view Welsh MPs in exactly the same light as Scottish MPs. The restoration of effective devolution to Northern Ireland raises similar questions regarding transferred powers, although there is of course much less link between Northern Ireland and the party politics of the rest of the UK than in the case of Scotland or Wales.

Secondly, even if Wales is treated on the same basis as Scotland, the most extreme outcome – a Conservative majority in England, a Labour majority UK-wide – is theoretically possible but unlikely under current conditions. Even during the post-war era of (almost) pure two-party politics, this situation arose only in 1964; on the two other occasions of Labour governments with small UK majorities (1950 and October 1974), the two big parties were essentially

deadlocked in England.³ Under our current, more multi-party system, the most extreme outcome seems still less likely.

What, however, *is* much more plausible is a Labour government that had a UK-wide majority but a position of ‘No Overall Control’, probably with the Conservatives as the biggest party, in England. This would still represent a significant departure from recent experience. In the two elections since devolution, Labour has won a majority of seats in England.

However, the question of *votes on individual issues* is a quite different matter, and one that has already arisen. The Labour government has not had an English majority on every issue. Both foundation hospitals and university tuition fees which only affected English hospitals and English students were enacted only by the votes of non-English MPs contrary to the majority of English MPs. Such a situation is likely to arise on a number of occasions and raises the West Lothian Question in its sharpest form.

Are there other solutions?

Given that the West Lothian problem – even before it acquired the name – has arisen periodically in British politics over the last hundred and twenty years, it is not surprising that various possible solutions have been proposed. However, in our view none of the alternatives to our proposal offers a satisfactory resolution.

‘Do nothing’ or ‘get over it’. This approach was most famously formulated in Lord Irvine’s argument that the best way to answer the West Lothian Question was to stop asking it. Put more fully, the argument is that, since the English make up 85% of the United Kingdom population (and current demographic trends indicate that this share is rising), their interests cannot be seriously threatened. If the current position is an anomaly, it is no more than has been seen under, for example, the rolling devolution programme enacted in Spain. In any case, the Scots long had to put up with having legislation for which there was no majority in Scotland foisted on them. The English should stop worrying about it.⁴

We do not find this argument acceptable. Current arrangements create a fundamental inequality between MPs, and between the citizens that they represent. Arguments from the past are flawed: this was under a very different constitutional settlement, and much the same that was said of Scotland could have been said of many English regions. In

2 Iain Maclean, ‘Barnett and the West Lothian Question’, Paper for ESRC Conference, December 2005, www.nuff.ox.ac.uk/Politics/papers/2005/BarnettandtheWestLothianQuestion.pdf

The phrase is that of the Northern Irish constitutional lawyer Brigid Hadfield.

3 Figures in Hazell, ‘The English Question’. It should however be remembered that in all those elections the Conservative presence in Scotland was significantly bigger than it is now.

4 Vernon Bogdanor, *Power and the People*; see also some of the speeches in response to Lord Baker of Dorking’s Bill, House of Lords, 10 February 2006.

any case, Scotland's experience produced just the sort of alienation that it is essential to avoid now in England.

The 'Stormont solution'. Prior to 1999, there was one precedent for a devolved Parliament within the United Kingdom: that of Northern Ireland, based at Stormont, between 1921 and 1972. The peculiar status of Northern Irish MPs at Westminster was rarely an issue during this period (though Harold Wilson raised it briefly when he had a small majority in the mid-sixties). The approach taken was to compensate for Northern Ireland's peculiar status by under-representing it, giving it 11 MPs when its relative size would have justified 17.

We do not believe that this offers a way forward. As Gladstone's critics pointed out when he considered the same approach for Ireland as a whole as a counterpart to Home Rule, this reduced the anomaly but did not eliminate it. Arguably it only worked in the 1921-72 period because Northern Ireland's small weight within the United Kingdom – much less than that of Wales, let alone Scotland – meant that the votes of Northern Irish MPs were seldom critical. In any case, Scotland's earlier over-representation at Westminster has been scaled back (though the slow nature of boundary reviews, combined with the different demographic trends in England and Scotland, means that some anomaly remains); to go to a position of *under*-representation would replace an English sense of grievance with a Scottish one.

An English Parliament. 'Devolution for England' has an obvious and appealing symmetry. However, it would need to be accompanied by an English executive, leaving the UK Parliament and government with an attenuated role limited largely to foreign and defence affairs. We do not believe that this position would be sustainable, especially given the overwhelming preponderance of England within the Union. The result would be the effective – and probably in time, formal – break-up of the United Kingdom.

Devolution within England. Devolution to regions or to local government within England has sometimes been put forward as a solution. Even if we leave aside the obvious artificiality of regional structures within England, the powers that advocates such as John Prescott proposed for regional assemblies came nowhere near those enjoyed by the Welsh Assembly, let alone the Scottish Parliament. Devolution of legislative, as opposed to administrative authority within England was far off even before the referendum defeat for the North East Regional Assembly in 2004. The Brown government retains an enthusiasm for regions, but this is for purposes of economic

development and enforcement of house-building targets on recalcitrant local authorities: the government does not propose it as an answer to the West Lothian Question. The same goes for local government: there are strong arguments for decentralisation within England, but not even the most convinced localist is likely to argue for high levels of legislative autonomy for county and unitary authorities.

'English Votes for English Laws': the full-strength version. This is the most common form in which the 'English MPs only' concept has been presented, and has English MPs only voting at every stage of English legislation from Second Reading to Third Reading. It is subject to the objections set out earlier, that it could leave the UK executive in a very weak and powerless position on important public service issues of serious political importance.

Pitfalls and objections

Many of the other arguments that have been put against the full strength version of 'English votes for English laws' could apply to our proposal too. However, we believe that these objections and others that might be put can be answered.

It will be hard for the Speaker to define what is an English bill, at least to do so without controversy (Gladstone worried about the same problem for what he designated 'imperial' legislation under his 1893 Irish Home Rule bill)⁵ - the Speaker could be politicised

Reporting on this issue in 1999, the Commons Procedure Committee concluded that it *was* possible to define bills according to the countries of the Union that are affected by them. Nor has the government found this an insuperable problem: its draft legislative programme, published in July, sets out to which countries each bill is applicable.⁶

Bills would have to be separated out, sometimes by clause, into what is and is not English legislation, producing a messy and confusing voting process

We believe that for many bills this would not be necessary; the government's clear separation of whole bills in its current programme according to the country affected supports this conclusion. We would expect governments not to muddle up different sorts of bill and jurisdiction in its legislative programme. If necessary to break down a Bill's clauses according to the country affected, the Public Bill Committee sessions could be broken down between English only

⁵ Iain Maclean, 'Barnett and the West Lothian Question', Paper for ESRC Conference, December 2005, www.nuff.ox.ac.uk/Politics/papers/2005/BarnettandtheWestLothianQuestion.pdf
⁶ House of Commons Procedure Committee, *The Procedural Consequences of Devolution* (1999); Office of the Leader of the House of Commons, *The Governance of Britain – The Government's Draft Legislative Programme*, July 2007

elements and those that were UK wide. This would require some careful adjustment of numbers by the Committee of Selection, but is not an insuperable problem. In any case, we do not believe that under most circumstances the problem needs to arise. In practice Governments would draft and present discrete English only Bills.

There would be two classes of MPs, with the non-English MPs squeezed out of decision-making

There would indeed be differences in the range of areas on which MPs from different countries could vote, though a quick glance at the current legislative programme makes clear the number of highly significant bills – such as those concerning climate change, counter-terrorism and EU finance – that are UK-wide in their implications. In any case, there is already an imbalance, not so much between MPs as between citizens: those in Scotland can have many of their affairs resolved by Scottish representatives alone (in the devolved parliament), as can those in Northern Ireland and, to a lesser but growing extent, those in Wales. Those in England cannot. This is the more serious anomaly, and one that needs resolution.

This proposal would exclude those representing non-English constituencies from many of the most senior government positions, including that of Prime Minister, since they could not vote on major domestic issues, including those affecting their own portfolios and programmes

We do not believe that it is necessary for a minister to be able to vote on measures to hold a particular portfolio. However, we believe that non-English MPs – thus including ministers – should have a right to *speak* on English measures, leaving scope for ministers to lead debate on issues within their portfolios.

Measures taken with respect to England would have knock-on effects on other countries, yet MPs from those countries would be unable to vote on them

This is already the case with respect to devolved measures (such as Scottish university fees, or prescription charges in Wales) that have an impact on English constituents who might wish to use those services.

Large numbers of ‘English measures’ would have financial implications, leading via the block grant approach to financing to a knock-on effect on the budgets of the devolved assemblies

The block grant/ ‘Barnett formula’ approach to funding the devolved assemblies adds an extra complication. Since the funding formula drives devolved executive funding off the overall (and predominantly English) settlement, it makes the

executives dependent on others’ decisions.

This is, of course, already the case (indeed, the public spending squeeze of coming years will have a significant effect on block grants), and reflects the imbalance of the current devolution settlement (between high levels of law-making and policy autonomy on the one side and lack of effective revenue-raising capacity on the other). However, this is a different problem from ‘English Votes for English Laws’. It is argued that the two would intersect when an English majority pushed through measures which, while not being directly finance bills, have the effect of driving down public spending and thus ultimately the block grant. However, finance bills remain a UK-wide matter; thus, in theory, any policy changes with spending implications would be compensated elsewhere within the overall total. In any case, the Third Reading provision of our proposal would give some safeguard to the governing party and to non-English MPs.

Where would this leave a reformed and elected House of Lords? It would presumably have to have similar arrangements

We believe that the same arrangements would have to apply to a reformed and elected Lords, but do not see this as an insuperable obstacle.

This is an anti-Scottish (or, in the future, anti-Welsh) measure, and privileges England with special arrangements

The proposal is not anti-Scottish (or Northern Irish, or Welsh); it simply seeks to come to terms with the implications of the devolution settlement. Strikingly, polling evidence indicates that Scots are sympathetic to some form of ‘English Votes for English Laws’, seeing it as a fair counterpart to their own devolution. It is true that the Parliamentary procedure that we propose would be unique to England; however, that is because there is no workable proposal for ‘English devolution’ along the lines already achieved (to varying degrees) in the other countries of the Union. Our proposal in effect offsets that.

You should opt for full strength ‘English Votes for English Laws’: you are still not giving the same to the English as to other nations.

We believe that the main sense of English grievance, and thus the main threat to the Union, is the likelihood that under some circumstances measures can be imposed by the votes of MPs whose constituents are not affected by them. Our proposal gives protection against that possibility. Under most circumstances, a country that makes up more than 85% of the population of the United Kingdom should have little difficulty defending its interests.

Conclusion

The current devolution settlement contains long-term risks to the Union. The Democracy Task Force recommends to David Cameron a modified version of 'English Votes for English Laws', incorporating English-only Committee and Report stages but a vote of all MPs at Second and Third Reading. We believe that this proposal can remove the main source of English grievance at the current devolution settlement without some of the risks to political stability that critics have seen in proposals for a completely English procedure.

The United Kingdom was traditionally a unitary state without a formal executive-legislative separation of powers. By modifying this structure without moving to full federalism, the devolution reforms of 1997-99 introduced significant anomalies, and any change that seeks to resolve these will continue to have some inconsistencies. There is no perfect 'answer' to the West Lothian 'question'. However, we believe that our proposal is both workable and the best safeguard of the future of the Union.

