



Pointmaker

VOICE AND VETO ANSWERING THE WEST LoTHIAN QUESTION

ANDREW TYRIE MP

SUMMARY

- The West Lothian Question must be fully addressed. The interests of the Union, and English interests, must be protected.
- The recommendations of the 2013 McKay Commission do not go far enough – offering inadequate protection for English interests. The West Lothian Question is not answered by McKay.
- The government should go further. For the relevant – mainly English or English and Welsh – Bills, both the Public Bill Committee and Report stage should be ‘English only’. In contrast to McKay the government should not be able to amend bills at Report Stage.
- This would enable English MPs to protect English interests and would give both the government and English MPs an incentive to negotiate and compromise where they differed.
- The approach was supported by the Conservative Party’s Democracy Task Force, chaired by Ken Clarke MP in 2008. That group concluded that anything less would fail to answer the West Lothian Question.
- An English Parliament is unnecessarily disruptive to the Union. It would risk jeopardising, rather than entrenching, it.
- The McKay Commission’s approach will be unacceptable to English opinion. Its lack of an ultimate veto power would mean that the English could still have legislation imposed on them that largely or entirely affects only them.
- Action must be taken now. The call for English Votes for English Laws is not a narrow sectional demand, still less a slogan. It is a statement of the minimum necessary to stabilise the Union in the long term.



1. AN ENGLISH VOICE IN A STRENGTHENED UNION

It is essential, as the devolution settlement is recast, that the West Lothian Question is now fully answered.¹ To insist on the principle that decisions affecting England (or sometimes England and Wales) should be taken only with the consent of a majority of MPs from that area – what is commonly known as English Votes for English Laws – is not a narrow sectional demand, still less a slogan. It is a statement of the minimum necessary to stabilise the Union in the long term. The Cabinet Committee's task, at a bare minimum, is to identify how this is to be done.

The West Lothian Question must be addressed because, at a time of enhanced devolution for other nations within the Union, there should be a clear voice for England within the political process. Parliament should recognise an English dimension and specific English interests in its work.

One widely canvassed solution is to adopt the proposals of the McKay Commission.² McKay largely addressed the question of giving England 'a voice', while noting that there is very little recognition of this in current practice, even as the House of Commons becomes ever more of a chamber for English business. The growing English focus will be strengthened by further devolution to Scotland, to which all three party leaders committed themselves with

the 'vow'³ during the referendum campaign and on which Lord Smith's commission⁴ is now working.

The provision of 'a voice' for England is not enough to address the West Lothian Question. There must also be robust mechanisms to protect England's interests. In any case, many of McKay's advocates fail to grasp that what he offers is, for the most part, a menu of options, rather than firm proposals for action. Even taken together, McKay's proposals offer inadequate protection for English interests. They fall decisively short of what can reasonably be described as English Votes for English Laws, as the Commission's report implicitly acknowledges.

Reform has to go further. Not only must there be an English voice in the legislative process. England (or, in some circumstances, England and Wales) must also have protection from measures foisted on it that a majority of its MPs do not support.

In asserting the need for an entrenched protection for England, there is no need at present to canvass options such as an English Parliament (with its inevitable concomitant of an English Executive) until less disruptive remedies have been attempted and exhausted. The idea of a fully federal UK, while

¹ The constitutional anomaly whereby Members representing Scottish constituencies (and on occasion from Welsh and Northern Irish seats) may vote on legislation which extends only to England.

² A Commission established by the Coalition Government in January 2012 to consider the West Lothian Question, chaired by Sir William McKay, a former Clerk of the House of Commons. It reported in March 2013.

³ The document signed by the three party leaders that promises "permanent and extensive new powers" for the Scottish Parliament, according to a timetable that would see draft legislation published by January 2015, printed on the front page of the Glasgow-based Daily Record newspaper on 16 September 2014.

⁴ Chaired by Lord Smith of Kelvin, established by the Prime Minister on the day after the independence referendum to consider the various proposals for further devolution to Scotland. Its objective is to produce a unifying set of recommendations for further devolution by 30 November 2014.



superficially appealing and symmetrical, has two severe flaws. Firstly, there is the sheer size of England: no contemporary or historical precedent for a successful federation with one part of it so predominant exists. Secondly, the powers devolved to Scotland under the Blair government's model of devolution (and to a lesser but growing extent reflected in arrangements for Wales) are exceptionally wide-ranging; for example, they leave Westminster with little role in health and none in education.

When these two factors are combined, it is clear that under these new structures a British government would be a weak and marginal player in domestic policy, above all in comparison to the English government. There is a high risk that the Union would be jeopardised rather than entrenched. In any case, such radical constitutional change could not be enacted quickly and would almost certainly require a referendum.

We do not need to take these risks. There is a Conservative and indeed a broader British approach to institution-building on which we can rely. This latter tradition, reflected in Burke's maxim that "Politics ought not to be adjusted to human reasonings but to human nature" is one of organic reform and of innovation that preserves and renews existing institutions.

Drawing on this tradition, it is possible to reject both the inadequacy of the McKay proposals and the dangers of an English Parliament, and to provide a full answer to the demand for English Votes for English Laws.

2. THE DEMOCRACY TASK FORCE

These issues were reviewed by the Conservative Party's Democracy Task Force, chaired by Ken Clarke MP and on which I

served, in its 2008 report. It considered and rejected a number of alternative approaches. It refuted the argument that, since the English represent 85 per cent of the UK population, they can look after themselves and that "the best way to answer the West Lothian Question is to stop asking it." Decentralisation within England, while arguably desirable in itself, did not answer questions regarding the representation of England as a whole within the UK political system. The 'Stormont solution' – replicating the arrangements through which Northern Ireland, with its own parliament and government in 1921-72, was under-represented at Westminster relative to its population – would reduce but not eliminate existing anomalies and resentments, while creating new ones. An English Parliament was rejected for the reasons set out above.

This leaves only the option of 'English Votes for English Laws'. In its 'full-strength version', this would have English MPs only voting at every stage of English legislation up to and including Third Reading. This too, however, is open to serious objections, in particular 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. In systems characterised by a separation of powers, this might be considered part of normal politics. In the British system, with its tight linkages between executive and legislature and the central importance of a government's ability to carry its programme through Parliament, this deadlock would be new and arguably dangerous territory. With no equivalent of a presidential veto, ministers could be dictated to by a hostile Commons majority. It would be an English Parliament in all but name.

The Task Force noted that, "The United Kingdom was traditionally a unitary state without a formal executive-legislative separation of



powers.” This structure had now been modified without a move to full federalism; this, coupled with the relative size of England, resulted in the need for distinctive solutions.

3. THE PROPOSAL

The Democracy Task Force therefore proposed a variant on 'English votes for English laws'. It recommended that:

Bills that are certified as 'English' (or English and Welsh, a question that is addressed further below) would pass through the normal Commons procedure 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.

The key merit of this approach, the Task Force argued, was that it provided a 'double veto', giving both sides an incentive to compromise when the government did not have a majority in England. No measures could be forced on England against the will of a majority of its MPs, but equally “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.”

Thus both sides would have strong incentives to compromise. Under certain circumstances, British governments would have to learn to operate in more of a bargaining fashion, like American or many Continental European administrations. As Lord Hurd put it when discussing earlier proposals to tackle the West Lothian Question, “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.”

4. DEVELOPMENTS SINCE THE DEMOCRACY TASK FORCE

Since the report was published, a number of developments have strengthened further the case for its central recommendation. First, there is now good and consistent polling evidence that the issue is a highly salient one in England and that this salience is growing. The English sense of grievance over the devolution settlement - the 'English Question', tracked in studies such as the work of IPPR and the Future of England Survey - has increased sharply, and is focused on the issues of funding (the Barnett Formula) and representation (the West Lothian Question).

Secondly, at the time of the report's publication Wales represented an awkward half way house, part of a single legal system with England, with a devolved assembly but no legislative powers. The Task Force noted this, but also the policy direction towards fuller Welsh devolution in the Government of Wales Act 2006. Subsequent developments - notably the March 2011 referendum and the two reports of the Silk Commission - mean that, while the National Assembly for Wales still lags the other devolved institutions in terms of the nature and scope of its powers, the trend is for its role to



be enhanced. Consequently, while there will still for some time be a significant amount of 'England and Wales' legislation, the England-only element is likely to grow as Welsh devolution is strengthened. Thus, for convenience this note speaks of votes on English matters with the understanding that, in a significant but diminishing number of cases these may be English and Welsh matters.

Thirdly, there has been a strengthening of the provision of information about the territorial extent of Bills.

Given its growing salience, the West Lothian Question was touched on in the Coalition Agreement and in 2012 the McKay Commission was established with a remit to consider "how the House of Commons might deal with legislation which affects only part of the United Kingdom, following ... devolution." In its March 2013 report, the Commission set out a number of useful new proposals but fell short of the full defence of English interests that is needed.

5. THE MCKAY COMMISSION: STRENGTHS AND LIMITATIONS IN DETAIL

One of McKay's most positive proposals was for the House of Commons to adopt a resolution stating that, as a normal course of business, decisions relating to England (or in some cases England and Wales) should be taken only with the consent of a majority of MPs from that area. This has the merit of visibility and symbolic importance, complementing the more technical changes to legislative procedure that are less likely to command wider public attention.

The McKay Commission also set out its own approach to the thorny question of the definition of 'English' legislation. The Democracy Task Force had noted the growing practice of applying territorial extent to Bills,

and McKay recommended that this practice be extended and embedded, in particular by making it regular practice to record territorial extent in the Long Title of the Bill. It also set out a test of whether or not a Bill would have a 'separate and distinct' effect on England (or England and Wales) as a criterion for whether additional parliamentary procedures should be applied.

Having set out its core proposal of a principle embodied in a parliamentary resolution, the Commission proposed (without necessarily endorsing them) a menu of options to give it substance. Some of these are relatively incremental and uncontroversial:

- The use where possible of pre-legislative scrutiny by a committee replicating the party balance in England (or England and Wales), though the Commission recognised that "while ... useful and practicable, it cannot be expected to be a complete answer".
- The mimicking of the use of Legislative Consent Motions by the devolved legislatures through two mechanisms, one an English (or English and Welsh) Grand Committee to consider legislation making separate and distinct provision for the relevant area. This could ensure that the view of English MPs was clearly established before Second Reading, though any resolutions of the Grand Committee that were hostile to the government bill could still be overruled by the government's UK-wide majority.

However, decisions about core parliamentary processes, and above all the question of who votes on what, are much more exacting. The Commission rightly rejected the idea that a parliamentary resolution, buttressed by the political cost to a government of overriding it,



would be enough. “We do not think it would be regarded as sufficient in England to assert the principle and to allow politics to do the rest. ... Changes to procedural rules can shift the balance in favour of securing adherence to the constitutional principle. We think such a shift is necessary.”

Nonetheless, the Commission was sensitive – too sensitive – to concerns about ‘legislative hokey-cokey’ that would create ‘two classes of MP’. It felt that MPs from all parts of the UK should have the opportunity to consider not only the principle but the detail of legislation, not least because “changes to the detail are likely to be the most frequent means by which compromises about competing interests can be achieved.” Its emphasis was on what it saw as a positive concept – that of establishing a voice for England, or England and Wales – rather than the negative one of preventing some MPs from voting on particular issues. “We are envisaging additional roles for some MPs while retaining prerogatives for all MPs.” Finally, it also held that a UK-wide majority should in the last analysis be able to prevail, not least to ensure the government’s accountability for decisions made during its term of office.

This thinking led the Commission to conclusions that were more cautious than those of the Democracy Task Force. It fell short of giving England a veto. For the Committee stage of relevant legislation, its proposals were essentially the same as those of the Task Force: that the Public Bill Committee should reflect the party balance in England (or England and Wales) and be made up of MPs predominantly from the relevant area. The Commission believed this to be “the minimum needed” to give England a voice.

However, this could still allow an English majority to be outvoted, and see significant

amendments reversed by a UK-wide majority at Report stage. This was the Commission’s key point of difference from the Democracy Task Force, which had recommended that the English party balance be applied to both the Committee and the Report stages.

The Commission did recommend – with an air of slight trepidation – consideration of two mechanisms for ensuring that the English voice was heard at the Report stage. The first would see constitution of a Report Committee with a party balance reflecting that in England; however, if its amendments proved unacceptable to the UK majority, ministers could recommit the disputed parts of the Bill to a Committee of the whole House and get their way. Alternatively, after a Report stage on the floor of the House, a motion could be moved to recommit the Bill to a Report Committee with an English party balance. This would consider changes made at Report stage that had a separate and distinct effect on England, and for which there had not been an English majority. However, there would then be a limited second Report stage on the floor, at which the UK majority could reassert its view.

The Commission clearly believed that governments would be unlikely to override English opinion often, since the price would be high not only in political terms but also in legislative time; nonetheless, a government with a UK-wide but not an English majority would still have the last word on matters affecting England. The Commission recognised “that rejecting an ultimate veto for the majority from England (or England-and-Wales) on either the principle or the detail of legislation may limit the extent to which our proposals can assuage English concerns”, while believing that the balance of argument favoured its approach.



6. CONCLUSION

The McKay Commission's approach will be unacceptable to English opinion, and rightly so. Its lack of an ultimate veto power would mean that the English could still have legislation foisted on them that largely or entirely affects only them. It is clear that the West Lothian Question is not answered by McKay.

Equally, the leap to an English Parliament represents an unnecessarily radical and disruptive approach – alien to the British tradition of constitutional reform, and carrying huge attendant risks.

English concerns can be addressed in full without pursuing such a destabilising path. The Democracy Task Force proposals – with, critically, an English Report stage for legislation that largely or entirely affects England – offer a resolution of the West Lothian Question. They should be combined with the McKay proposals that have important symbolic value, notably the proposed parliamentary resolution. If implemented, they would under some conditions require negotiation and accommodation by both the executive and English MPs, but that is at the heart of what politics is about.

The argument about different classes of MPs carries little weight; it is already the case that English MPs have no say on a wide range of matters affecting Scotland, Northern Ireland and, increasingly, Wales.

An English stage of relevant legislation, embracing both the Committee and Report phases, offers the best resolution of the West Lothian Question. It is time at last to bring Westminster's procedures into line with the realities of devolution and the English Question.



THE AUTHOR

Andrew Tyrie MP has been Conservative Member of Parliament for Chichester since 1997. He is Chairman of the Treasury Select Committee, Chairman of the Parliamentary Commission on Banking Standards and the founder and Chairman of the All Party Parliamentary Group on Extraordinary Rendition. This publication reflects his personal views.

The aim of the Centre for Policy Studies is to develop and promote policies that provide freedom and encouragement for individuals to pursue the aspirations they have for themselves and their families, within the security and obligations of a stable and law-abiding nation. The views expressed in our publications are, however, the sole responsibility of the authors. Contributions are chosen for their value in informing public debate and should not be taken as representing a corporate view of the CPS or of its Directors. The CPS values its independence and does not carry on activities with the intention of affecting public support for any registered political party or for candidates at election, or to influence voters in a referendum.

ISBN 978-1-906996-99-4

© Centre for Policy Studies, November 2014