Delivering EVEL: English Votes for English Laws[1]

Cosmo Graham, Leicester Law School, University of Leicester

Before the constitutional changes brought in by the 1997 Labour government, there was a clear orthodox narrative about the United Kingdom constitution and the relationship between its constituent parts: England, Scotland, Wales and Northern Ireland. The United Kingdom was a unitary or union state,[2] not a federal one, with one Parliament which had the powers to make any laws it wished for any part of the United Kingdom.[3] Within this schema, the role of Members of Parliament (MPs) and Lords in Parliament was straightforward: all MPs and Lords were entitled to participate in debates on all proposed legislation and to vote on it regardless of their territorial affiliation. The unitary nature of the state was also reflected in the arrangements for the financing of public services in the different regions of the UK. This was done through a device known as the Barnett formula[4] which applied to about half of all public expenditure in the UK and tried to ensure that comparable sums were spent on public programmes across the UK. It did this by tying the funding paid to Scotland, Wales and Northern Ireland to the increase in public expenditure for England, multiplied by the extent to which a programme was comparable, multiplied by the population of the relevant area region as a proportion of the English population. This formula was introduced around 1979, originally as a temporary measure but remains in place.[5]

This orthodox narrative is, however, over-simplified and concealed a more complicated reality. Indeed, the Act of Union 1707 between Scotland and England made provision for Scotland to have its own legal system and its own established church. From the late nineteenth century there were a number of piecemeal developments where different parts of the United Kingdom were treated differently for the purposes of government and the legislative process. In relation to Scotland separate administrative arrangements (the Scottish Office and Secretary of State for Scotland) were put in place in 1885 and this was also reflected in Parliament from 1907 in the creation of Scottish committees which dealt with, among other things, specifically Scottish legislation.[6] In Wales, various administrative matters were decentralised to Wales over the course of the twentieth century and a post of Secretary of State for Wales was established in 1965. Similar Parliamentary provisions to

[1] . The slogan and acronym seem to have originated with the journalist, Daniel Finkelstein. See his column in *The Times* 24 September 2014.

[2] . For the distinction between "unitary" and "union" see V. Bogdanor `The West Lothian Question'63(1) Parliamentary Affairs 156 (2010) at 168-9.

[3] . Subject to some debate about the effects of entry into the European Union via the European Communities Act 1972.

[4] . Generally, see Select Committee on the Barnett Formula `The Barnett Formula' HL 139 (2009)

[5] . See H. M. Treasury `Statement of funding policy: funding the Scottish Parliament, the National Assembly for Wales and Northern Ireland Assembly' (2015, 7th ed.).

[6] . Generally, see V. Bogdanor *Devolution in the United Kingdom* ((1999) at 111-119.

those in Scotland were also created from 1960.[7] The clearest example of separate institutions was that between 1921 and 1972, Northern Ireland had its own Parliament which legislated on Northern Irish issues.[8]

To summarise, throughout most of the twentieth century certain policy matters were left to the regional institutions and this was reflected in the UK Parliament where certain legislation, for part of its passage through the House of Commons, would be considered only by MPs from that area with the highest profile example being Scotland.[9] The most striking exception to the orthodox narrative was the Northern Ireland Parliament. Controversy over these arrangements was muted or non-existent largely it seems because there were less cross-cutting issues and also because the major political parties contained MPs representing the various regions of the UK, with the exception of Northern Ireland. Indeed, it is interesting that the position of the Northern Irish members of the House of Commons became a matter of controversy in the 1960s foreshadowing the current debate.[10]

Since 1997, however, there has been a fundamental change in the institutional arrangements for governing the UK accompanied by significant changes in the base of the two major political parties: Labour and the Conservatives. The institutional change was the devolution settlement which created three legislative assemblies for the three main regions of the United Kingdom: Scotland, Wales and Northern Ireland.[11] The Scottish Parliament and the Northern Irish Assembly were given legislative powers from the outset, although the Welsh Assembly only gained legislative powers in 2007. Although the arrangements were somewhat different for each legislature there was a basic similarity in that each legislature was given a series of areas within which it had the exclusive competence to legislate (devolved matters) and there were matters which were reserved to the UK Parliament (reserved matters). The legislation stipulated that Parliamentary sovereignty was unaffected and this was supplemented by a convention (the Sewel convention) in relation to Scotland that the UK Parliament would only legislate on Scottish matters at the request of the Scottish legislature.[12]

The West Lothian Question

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[7] . Ibid at 157-162.
[8] . Ibid at 69-81.
[9] . See J. Bulpitt *Territory and Power in the United Kingdom* (Manchester University Press, 1983).
[10] . See M. Russell and G. Lodge *The government of England by Westminster* in *The English Question* (R. Hazell ed. Manchester University Press 2006) at 77-8.
[11] . Through, respectively, the Scotland Act 1998, Northern Irealnd Act 1998 amnd the Government of Wales Act 1998.
[12] . Scotland Act 1998 s. 28(7) and (8), Government of Wales Act 2006 s. 107(5), Northern Ireland Act 1998 s. 5(6). On the Sewel Convention see: http://www.gov.scot/About/Government/Sewel# (accessed 19/05/16), Devolution Guidance Note 10 `Post-Devolution Primary Legislation Affecting Scotland' (2205, Department for Constitutional Affairs) and Memorandum of Understanding and Supplementary Agreements between the UK Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee (2013).

The devolution arrangements do, however, create an anomaly, namely that English MPs in the House of Commons have no influence on devolved matters whereas non-English MPs in principle are allowed to speak and vote on the equivalent of devolved matters for England. This anomaly is often referred to as the "West Lothian question" after the constituency of Tam Dalyell, the MP who raised the issue at the time of the devolution debates in the later 1970s:

> "For how long will English Hon members tolerate... Hon Members from Scotland, Wales and Northern Ireland exercising a probably… often decisive effect on English politics while they themselves have no say in the same matters in Scotland, Wales and Northern Ireland?"

Although the issue was raised at an early stage, it was not generally considered to be a major problem and public opinion was largely indifferent to the issue of principle. The exception to this was the Conservative party which addressed this question in a number of reports coming broadly to the conclusion that there should be some mechanism to ensure that English MPs could be given a distinctive voice on legislation which solely affected England.[13] Under the Coalition government a commission (the McKay Commission) was set up to study the issue which duly reported in 2013[14] and was followed by a paper from the then Leader of the House of Commons, William Hague.[15]

The Conservative interest in this issue is related to the substantial drop in support for the Conservative party in Scotland from 1997. From the general election in 1997 to 2015, which includes five General Elections, the Conservative party has only managed to get one MP elected to represent a Scottish constituency with a share of the vote ranging from a low of 14.9% in 2015 to a high of 17.5% in 1997.[16] Although in the General Elections of 1997 and 2001, there were no Welsh Conservative MPs, the party's position has recovered to the point where it returned 11 MPs at the 2015 election.[17] Since none of the national UK parties field candidates in Northern Ireland, what these figures indicate is that the Conservative party's electoral base is overwhelmingly in England. To illustrate this point, after the 2015 General Election, of the Conservative's party's 331 MPs, only 12, about 3%, were from non-English constituencies.

By contrast, the Labour party has always had a greater share of the seats in Scotland and Wales. In the 2010 General Election, the Labour party returned 258 MPs of which 67,

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[13] . *The Report of the Commission to Strengthen Parliament* (2000), *The Conservative Democracy Task Force* (2008).
[14] . McKay Commission *Report of the Commission on the Consequences of Devolution for the House of Commons* (2013).
[15] . First Secretary of State and Leader of the House of Commons *The Implications of Devolution for England* (2014), Cm 8969.
[16] . C. Rallings and M. Thrasher eds *British Electoral facts 1832-2012* (Biteback Publishing 2012) at 59 and http://www.bbc.co.uk/news/election/2015/results/scotland (accessed 18/03/16).
[17] . http://www.bbc.co.uk/news/election/2015/results/wales (accessed 18/02/16).

around 25%, were from non-English constituencies. In the 2015 election, this became 26 non-English MPs out of a total of 232, around 11%. The reason for this was a disastrous performance in Scotland, where the election was dominated by the Scottish Nationalist party who won 56 of the 59 seats available, on a 50% share of the vote. It would, however, be inaccurate to think that the Labour party has always had, and always will have, a smaller electoral base in England than the Conservatives as it had a greater share of the vote and more MPs elected in the general elections of 1997, 2001 and 2005.

What has given the issue greater profile has been two events: the Scottish independence referendum of 2014 and the General Election of 2015. As is well known, the Scottish referendum resulted in a vote against independence but by a smaller majority than anticipated, 55% to 45%. In the immediate aftermath of this vote the Prime Minister, David Cameron made a statement where he announced the formation of a cross-party Smith Commission to look at the further devolution of tax, spending and welfare powers to the Scottish Parliament.[18] At the same time he endorsed the principle of English votes for English laws and suggested that this should be taken forward in tandem with the proposals for the devolution of further powers.[19] The Conservative manifesto for the General Election in 2015 promised to give English MPs a veto over matters only affecting England, in line with their long-standing policy.[20] During the election campaign, one issue that the Conservative party exploited was the possibility that the Labour Party would have the largest number of seats but would only be able to form a government with the support of the Scottish Nationalists and that such a coalition government would implement policies which had not been supported by a majority of English voters. In the event, the Conservative party won a small overall majority at this election and then, in line with its manifesto promises, introduced its proposals to ensure English votes for English laws as well as devolving new powers to Scotland through the Scotland Act 2016.[21]

Alternatives to EVEL

Before looking at the proposals and the changes that have been implemented, it is worth considering what alternative options there were for dealing with the West Lothian question. The first possibility was simply to do nothing and maintain the status quo. This position has been strongly supported by Professor Vernon Bogdanor.[22] His argument seems to rest of three propositions. First, that England is the predominant part of the UK and will continue to be so, even though it is possible to imagine situations where a government of the UK is elected with a minority of English votes. Secondly, he argues that the idea of English votes

[18] . See https://www.smith-commission.scot/ (accessed 01/04/16) for the Smith Commission report.
[19] . Public Administration and Constitutional Affairs Committee *the Future of the Union , part one: English Votes for English laws* HC 523 (2016) at para. 6.
[20] . Conservative Party `The Conservative party manifesto 2015' at 71. Available at: https://www.conservatives.com/manifesto (accessed 01/04/16).
[21] . Cabinet Office `English Votes for English Laws: Proposed Changes to the Standing Orders of the House of Commons and Explanatory memorandum' (2015).
[22] . See V. Bogdanor `The West Lothian Question' (2010) 63 *Parliamentary Affairs* 136.

for English laws is incoherent because, if such a situation came to pass, a government would not be able to pass its entire programme. A government which had a majority of votes in the House of Commons through a combination of a minority of English MPs which, when combined with non-English MPs had an overall majority would be able to pass its UK wide programme but would be frustrated from passing its English programme, assuming this was opposed by the majority of English MPs. Thirdly, he argues that the proposal is a separatist one and that, in order to preserve the Union, it is necessary to link England and the other constituent parts of the United Kingdom together. The consequence of this is that an asymmetrical, untidy system must be accepted but this is a consequence of not being able to create a conventional federal system, given the predominance of England as compared to the other parts of the United Kingdom. The problem could be further alleviated, although this does not appear to be part of Bogdanor's argument, if the number of Scottish and Welsh MPs were reduced so that they were proportional to the population of the regions.

This argument was dealt with fairly dismissively by the McKay Commission, who took the view that the evidence of public opinion was that there was a problem and therefore it needed to be addressed. It does seem that public opinion on this issue has shifted since 2001 and that people, when asked the question, do favour some version of English votes for English laws.[23] How important this issue is to the general public is another matter and not one which has been much studied and the polling data does seem to be mixed.[24]

The second possibility which has been suggested has been the move to a fully federal system with the creation of an English Parliament, which would deal with English matters. There would then be a separate UK Parliament which would deal with matters which were common to the UK as a whole. This argument can be dismissed quite quickly. Federal systems tend to be constructed on the basis of rough equality between their constituent parts. England is so much larger than the other constituent elements that this is not possible and there is no federal system in the world today which looks remotely like the one envisaged. Even in the United States, where there is significant disparity between the largest and the smallest states, the disparity between the largest state by economic activity and population, California, and the rest of the United States, is nothing like as large as that between England and the rest of the United Kingdom. In political terms, this is also a deeply unattractive option, as there is very limited support for it among the wider public. The Constitution Committee of the House of Lords has concluded on this point that an English Parliament was not a viable option.[25]

The third possibility which has been mooted is to move to some form of proportional representation for elections to the House of Commons. The argument here is that the first

[23] . See Public Administration and Constitutional Affairs Committee, note 7 at 10.
[24] . House of Lords Select Committee on the Constitution `The Union and devolution' (2016), HL149 at para 360.
[25] . Ibid at para 376.

past the post system distorts the outcomes of the elections in various ways. So, for example, as mentioned above, in the 2015 General Election the Scottish Nationalists obtained almost all of the Parliamentary seats in Scotland, but only on the basis of a 50% share of the vote. If the election of MPs tracked the shares of votes more accurately, one result would be that the Conservative party would have greater representation in both Scotland and Wales. It would be much less likely that a situation would arise where there was a government which was implementing policies that had not been approved by a majority of English voters. Regardless of the merits of this argument, it has always been politically unattractive to the Conservative and Labour parties and the question of moving away from the first past the post system for general elections was put to a referendum in 2011 when the option of moving to the alternative vote system was decisively rejected. So this alternative option can be put on one side.

Proportional representation would not, in any event, appear to solve the problem. If the problem is, for example, that Scottish MPs can vote on all "English" legislation but English MPs do not have a say on those issues that have been devolved to the Scottish Parliament, whether those Scottish MPs are elected under a proportional or first past the post system seems irrelevant. If the problem is that a UK government only has a majority in the House of Commons because of its Scottish MPs, only returning a minority of the MPs in England, the proportional representation might solve this problem. The same problem might, however, be recreated in a different form if there was a coalition between a party with a minority of English MPs and a party with a majority of Scottish MPs. So the argument about proportional representation does not seem to address the concerns lying behind English votes for English laws.

Varieties of EVEL

If it is accepted that there is a problem, then it seems that the only practical solution would be some version of English votes for English laws. This conclusion begs the question because there are a number of alternative proposals for ensuring a sufficient voice in the legislative procedure for England. At one extreme is the idea of constituting, in essence, an English Parliament within the existing House of Commons. On this proposal, legislative matters which related solely to England would be decided on solely by English MPs and MPs from outside England would not be given a vote. This proposal has always been criticised for creating, in effect, two classes of MPs: those who can vote on all proposals (the English) and those who can only vote on legislation that is not exclusively English. A variant on this approach is what is called the double-lock approach.[26] All MPs would be able to vote on any question arising on an England only bill but some questions would be determined not by the overall majority but also whether within that majority there was also a majority of MPs representing England. The McKay Commission rejected this idea because it was inconsistent with their basic principle that decisions about particular parts of the UK should normally be

[26] . See McKay Commission Paras 187-188.

decided by the elected representatives from that part of the UK but that they should not have a veto.

Less radical alternatives were proposed by the Norton and Clarke commissions. The Norton commission proposed that English only bills, certified as such by the Speaker, would automatically be referred to a bill grand committee where only those MPs from the territory affected would have a right to vote (although all MPs could speak). If the Bill passed its second reading it would be referred to a standing committee, composed of MPs from the affected territory reflecting the party strength in that territory. The bill would then return to the grand committee for the report stage but the third reading stage would be done by the entire House of Commons, although the Commission hoped that a convention would develop whereby MPs from areas not affected by the legislation would not vote or participate in the debate.[27] The Clarke Commission proposed that English only bills, again certified as such by the Speaker, should go through English only Committee and report stages, with the entire House of Commons voting on the second and third readings.[28] The McKay Commission proposed a menu of possibilities. It started with the idea of an equivalent to a legislative consent motion before second reading.[29] This would either be within the province of an English only Grand Committee or consideration of the resolution on the English only parts of the Bill, although all MPs could vote. The Bill would then follow the normal Parliamentary procedure and it would mean that English MPs would not have a veto on any legislation. Alternatively, they suggested the committal of English only bills to an English only public bill committee, with a party balance reflecting England.[30] This would be subject to a more limited report stage and a third reading of the whole House of Commons. As further protection the McKay Commission suggested that here could be an English report committee which could amend the bill.[31] If it did so in a way unacceptable to the UK majority, the majority could discharge the order for a third reading and recommit the disputed parts of a bill to the whole House of Commons.

All these less radical alternatives share a common theme: the ultimate decision on legislation is for the House of Commons as a whole. They do not envisage the possibility that a minority of MPs, from a particular part of the UK, would be able to prevent the passing of legislation which commanded an overall majority in the House of Commons. As

[27] . Commission to Strengthen Parliament *Strengthening Parliament* (2000) at 54. Available at: http://www.webarchive.org.uk/wayback/archive/20080908011209/http:/www.conservatives.com/pdf/norton.pdf (accessed 23/03/16)

[28] . Conservative Democracy Task Force *Answering the Question: Devolution, the West Lothian Question and the Future of the Union* (2008) at 1. Available at: https://devolutionmatters.files.wordpress.com/2014/09/answering_the_west_lothian_question2.pdf (accessed 23/03/16).

[29] McKay Commission at paras 204-217.

[30] . Ibid at paras 222-230.

[31] . Ibid at paras 231-232.

will be seen, however, the new rules do allow English MPs to have a veto on proposals which do not command a majority amongst them.

Before discussing what was put in place a starting question would be how should such a proposal be implemented? Under the UK system the alternatives are either through legislation or through an amendment to the procedures of the House of Commons. Given the importance of the changes at a constitutional level there is a strong case for using the legislative process which would provide some standard tools for scrutiny and debate. This was not, however, the favoured view of the McKay Commission and not the route that was taken by the government. The perceived problem with using legislation was that this would make part of the procedures of the House of Commons a matter of law and therefore in principle subject to the jurisdiction of the courts. It has, however, been a longstanding constitutional principle that the House of Commons is the master of its own procedures and that there is no role for the courts to play. The government introduced its first proposals for changing the standing orders of the House of Commons early in July 2015 and then amended those proposals to address concerns that members outside England and Wales would be unable to vote on the consequences for public expenditure in other parts of the UK for legislation applying to England only or England and Wales only. There was thus a relatively limited amount of time to discuss these very controversial proposals which were implemented for the Parliamentary session beginning in November 2015. The controversial nature of these changes is illustrated by the House of Commons Procedure Committee already having issued one interim report, while conducting further inquiries and the House of Lords Constitution Committee conducting its own inquiry into the changes.[32] For its part, the government has promised to undertake a review of the working of the standing orders after their first year.

The Rules of EVEL

The changes to the standing orders work in the following way. The first step is that before the second reading of a public bill presented or taken up by a Minister of the Crown the Speaker of the House of Commons must certify if any such bill, or any clause or schedule of it, relates exclusively to England or to England and Wales and is within devolved legislative competence.[33] Devolved legislative competence means for English matters that any clause or schedule would be within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly. For English and Welsh matters, it must be within the legislative competence of the Scottish Parliament and the Northern Ireland Assembly. A bill may only relate exclusively to England or to England and Wales so long as every clause and schedule within it is within the devolved legislative

[32] . House of Commons Procedure Committee `Government proposals for English votes for English laws: interim report' (2015) HC 410,

[33] . Standing Order 83J(1). The first reading of a Bill is a purely formal matter.

competence.[34] Matters in a clause or a schedule which only have minor or consequential effects outside of England or England and Wales shall be regarded as relating exclusively to that area.[35]

In deciding whether to certify a bill, clause or schedule under these standing orders, the Speaker may consult two members of the Panel of Chairs who are appointed by the selection committee for this purpose. The decision of the Speaker under this standing order will be announced to the House of Commons. Nothing is said about the giving of reasons in the current standing orders, although the initial proposals stated that reasons would not be given.[36] In the first instances in which the new Standing Orders came into play, the Speaker did give an explanation of his decision, although he also added that this was not going to be a general policy.[37] What the Speaker has done, as a matter or practice, is to issue provisional certificates which provide an opportunity for MPs to make representations on the issue to the Speaker.

The certification procedure does not apply to certain Bills, namely those relating to the Scottish, Welsh and Northern Irish Grand Committees, consolidation bills under Standing Order 140, bills whose main effect is to give effect to proposals contained in a report by a Law Commission and tax law rewrite bills.[38] In addition, a Private Member's Bill would not be subject to the certification procedure as it would not be a bill presented by a Minister of the Crown.

After certification, the second reading debate is held as normal. This is a debate and vote on the bill in principle, in other words, no amendments are made to the Bill at this stage. The bill is then assigned to a committee which will scrutinise it in detail and has the power to amend its provisions. Bills which are certified by the Speaker as only relating to England and within devolved legislative competence may only be committed to the Legislative Grand Committee (England) or a public bill committee composed only of English MPs.[39] By contrast, the McKay Commission suggested that it should be possible not to use this procedure in certain circumstances.[40] Where a bill or clauses and schedules of a bill have been certified as relating exclusively to England or to England and Wales and being within devolved legislative competence and the bill has completed all its stages before the third reading then a legislative consent motion must be passed by the legislative grand committee for the area to which the certification related before a third reading.[41] Such

[34] . Ibid 83J(5).
[35] . Ibid 83J(6).
[36] . Cabinet Office `English Votes for English Laws: revised Proposed Changes to the Standing Orders of the House of Commons and Explanatory Memorandum' (2015) at 4.
[37] . HC Debs 13 January 2016 cols 861-2.
[38] . Ibid 83J(10).
[39] . Ibid 83K.
[40] . Mckay commission at para 239.
[41] . Ibid 83M

motions may only be moved by a Minister of the Crown and may specify those parts of the bill which the committee consents to and those of which it disapproves.

If there is an absence of consent, the bill is then returned for reconsideration to the whole House to consider amendments to the Bill to resolve the matters in dispute. The Speaker will then consider the certification of any changes to the bill. The relevant legislative grand committee then meets for reconsideration of any of the certified changes to the bill. If the committee does not agree to consent to an entire bill then the bill may not be given a third reading. If the committee does not agree to particular clauses or schedules, those provisions are removed and it is the bill as amended which proceeds to its next stage.

The overall aim of these changes is to ensure that bills or clauses and schedules in bills which related to England or England and Wales only are approved by a majority of the MPs from that area and that they are also approved by the House of Commons as a whole. To put it another way, the new standing orders are intended to prevent a minority of English MPs, supported by Scottish and Northern Irish MPs, for example, from passing legislation which does not have the support of the majority of English MPs.

Under the procedures in the House of Commons it is possible for a bill to be amended after its second reading but before its third reading. The standing orders therefore allow the speaker to reconsider the certification of the bill in the light of any amendments and certify if the bill or any clause or schedule of it relates exclusively to England or to England and Wales and is within devolved competence.[42] In addition, the Speaker must examine amendments which were not made by the Legislative Grand Committee (England) or an all English public bill committee and either resulted in there being no certification when there would otherwise have been one or changed the area to which a certification would have related.[43] In other words, where an amendment changed a provision from, for example, English to UK wide or changed a provision from English to English and Welsh.

Financial procedures

One of the main concerns in relation to these new processes is how they would impact upon the financial procedures of the House of Commons, both in relation to public expenditure and as regards taxation. As regards public expenditure, the new standing orders make it clear that they do not affect the right of any MP to vote on the consideration of estimates, ways and means motions and motions for money resolutions nor do they apply to Consolidated Fund or Appropriation Bills.[44]

Finance Bills have a different treatment because the certification procedure is extended to include Northern Ireland. As regards Finance Bills, or bills only containing provisions which

[42] . Ibid 83L(2).
[43] . Ibid 83L(4).
[44] . Standing Order 83J(11).

would normally be within a Finance Bill, the certification procedure in Standing Order 83J is modified to extend it to Northern Ireland so that a Finance Bill may extend exclusively to England, Wales and Northern Ireland.[45] This is in consequence of certain powers over taxation having been given to the Scottish Parliament. If such bills have provisions which affect Northern Ireland, as well as England and Wales, then there must be a consent motion from the Grand Committee (England, Wales and Northern Ireland).[46] If there is a need for more than one consent motion by a Grand Committee, this is to be taken from the largest Grand Committee to the smallest, that is, starting with England, Wales and Northern Ireland, moving to England and Wales and finishing with England. The intention does seem to be that these motions could be moved on after the other in a quick sequence.

Amendments from the House of Lords

The first stage is similar to that of a Bill starting in the House of Commons; the Speaker must certify whether any motion relating to a Lords amendment to a Bill or any other message from the Lords in respect of a Bill relates exclusively to England, or England and Wales and is within devolved legislative competence. If there is any division of a motion in relatin to a certified matter, the motion will only be agreed to if there is a double majority, for example, in relation to English maters, a majority of members representing England and a majority of members in the House as a whole.[47] If such a double majority is not reached, then the decision of the House of Commons is to disagree with the motion in front of it and, in other cases, take a decision that would leave the Bill in the position it was before the Lords' amended it.[48] A problem here, as pointed out by Kenny and Gover, is that it is unclear whether the word "it" in the Standing Orders refers to the motion or the amendment it seeks to reject.[49]

The position of the House of Lords in relation to this issue is decidedly peculiar. The amendments to the Standing Orders relate wholly to the House of Commons, with no changes having been made to procedures in the House of Lords. Because members of the House of Lords are not appointed to represent a geographical area, although their titles often reflect a connection with an area, it would be impossible to replicate the arrangements for the House of Commons. Nevertheless, the House of Lords is still part of the legislature and it seems odd that a procedure for taking into account the territorial concerns only exists in one of the two Houses.

Secondary legislation

As regards secondary legislation certain types may be certified by the Speaker in the same way as Bills. Unlike Bills, the statutory instrument will be considered in its entirety. These

[45] . Standing Order 83S.
[46] . ibid 83S.
[47] . Standing Order 83O,
[48] . Standing Order 83O (9)(a).
[49] . M. Kenny and D. Gover `English Votes for English Laws' (2016, Centre on Constitutional Change) at para 13.

provisions only apply to delegated legislation which is subject to the affirmative resolution procedure, is subject to the negative resolution procedure but has been objected to and scheduled for debate or if the Regulatory Reform Committee has recommended its consideration.[50] A double majority is again needed to approve such instruments, being a majority of all Ms and a majority of those MPs from the affected territory.[51] It is worth noting that this process does not cover all secondary legislation, for example, orders made under the royal prerogative.

Certification issues

A key stage in the process is the Speaker's certification of whether or not a bill or a provision within it is an English or English and Welsh provision. There are three limbs to this question: does the provision relate exclusively to England or to England and Wales? Is it within devolved legislative competence? Will the effects of this provision outside England or England and Wales be more than minor and consequential?

The third question has one part that seems to be considered straightforward, what falls within minor,[52] and another which is considered less so, what falls within consequential. In most cases it is probably true that the question of whether an effect is minor will be straightforward although there may be possible instances where the issue is not straightforward. For example, the question of whether a merger between bus companies in South Yorkshire was considered to be a merger affecting a substantial part of the United Kingdom for the purposes of merger control, although the area concerned contained only around 3% of the total UK population had to be decided by the then House of Lords.[53]

The issue of consequential effects is considered more difficult and can be divided into two situations. The first situation is where there is a piece of legislation which is, for example, England only but there are effects in another territory. The favoured example often used has been of changes to the NHS in England which could have an effect on the structure or services provided by the NHS near the border of Wales which would have an effect on people in Wales referred for such services.[54] Other examples might include changes to the funding of English universities or for the funding of social care. As the Procedure Committee pointed out, in these circumstances, MPs living close to the border might wish to vote on such measures but, as drafted, the Standing Orders would not allow the Speaker to take these points into consideration.

[50] . Standing Order 83P
[51] . Ibid 83Q.
[52] . House of Commons Procedure Committee `Government Proposals for English votes for English Laws Standing Orders: Interim Report' (2015) para 35
[53] . *R v Monopolies and Mergers Commission ex parte South Yorkshire Transport* [1993] 1 WLR 23.
[54] . House of Commons Procedure Committee `Government Proposals for English votes for English Laws Standing Orders: Interim Report' (2015) para 36.

The second problem relates to public expenditure. Broadly speaking, as a consequence of the Barnett formula discussed above, changes in the levels of public expenditure in England, which may be driven by legislation, will have a consequential change in the level of public spending in, for example, Scotland because the Barnett formula ties the two areas together. The problem is that, as drafted, the Standing Orders do not allow the Speaker to take into account such consequences and so, for example, Scottish MPs could not intervene in such debates.

The largest problem for the Speaker will be in deciding whether or not a matter is within the devolved legislative competence of the various bodies. This is by no means a straightforward issue and case law has been generated.[55] Given that the new arrangements involve changes to the Standing Orders of the House of Commons and that the UK courts have a long-standing rule that they will not interfere in proceedings in the House of Commons decisions of the Speaker on this issue will not be subject to judicial review. There are, however, a number of questions for the future. The first is that, in questions of interpretation, what incentives are there for the Speaker to rule one way or another? If, in a matter of contention, the Speaker rules that an issue is within devolved competence, then this brings into play the panoply of English procedures. If the Speaker rules the other way, then the normal UK wide processes are followed. Given that there are many more English than non-English MPs, it might be thought that there is some incentive on the Speaker to give a broad interpretation of devolved legislative competence. These decisions cannot, in any event, be isolated from their political context. There are, however, other pressures. It would be problematic if the Speaker of the House of Commons rulings on devolved legislative competence were different from the opinions of the Speakers in the devolved legislatures. Such a difference could certainly spark a challenge to the *vires* of, for example, a Scottish Act. There is no formal provision in the standing orders for consultation to take place between the various speakers to try and prevent avoidable conflicts.

The context of constitutional reform

One way of interpreting these changes is to see them simply as a piece of party politics because it is only the Conservative party that is in favour of them.[56] They are therefore likely only to last for the duration of a Conservative government. Although predicting the outcome of future elections is fraught with problems, the Labour Party's current poor performance in Scotland, combined with a relatively unpopular new leader and the poor electoral showing of the Liberal Democrats suggests that the Conservative are likely to remain in power until at least 2025. Although this is longer than the span of one Parliament, on a constitutional time scale, even ten or fifteen years of a partisan measure would not

[55] . See *Axa General Insurance* [2011] UKSC 46, *Attorney General v National Assembly for Wales Commission (Re Local Government Byelaws (Wales) Bill 2012)* [2012] UKSC 53, *Attorney General for England and Wales v Counsel General for Wales (Re Agricultural Sector (Wales) Bill)* [2014] UKSC 43, *Re Recovery of Medical Costs for Asbestos Bill* [2015] UKSC 3.

[56] . See Public Administration and Constitutional Affairs Committee paras 51-54.

suffice to make it constitutional. It is possible that, if these procedures are seen to work well, whatever that might mean, they could be transformed from partisan measures to part of the UK constitution.

The changes made to the standing orders are complex and difficult to understand, a point made by the Public Administration and Constitutional Affairs Committee.[57] If the object of these reforms is to respond to some public feeling about a lack of influence on decision making in the legislative process, then such complicated arrangements are not conducive to greater public understanding. Nor is it obvious that these new procedures will meet the demand of the English public for greater say over their own affairs.

At this point, it worth noting that the current government has a localism agenda which involves the devolution of greater powers to certain regions in England, notably Manchester, as well as other parts of England.[58] It has often been argued that the devolution of more powers to regions in England is a separate issue from that of English vote for English laws, as discussed in this article.[59] In one sense that is correct, because the devolution of powers to English regions, without giving them their own law-making powers, does not provide an answer to the West Lothian question. If the real concern is about the ability of local people to have an influence on policies in their local or regional area, then these developments may indeed be relevant.

The episode does illustrate one of the weaknesses of the process of constitutional reform in the UK, namely the temptation to do things at speed and without considering the consequences fully and relationships between the various parts of the system. On the other hand, there are a number of issues in the UK system which seem peculiarly intractable such as reform of the House of Lords. Famously, the Parliament Act 1911 talks in its preamble of its rules being merely an interim measure until reform of the House of Lords. Over a century later and despite much recent discussion of reform the Lords, it remains a chamber composed largely of appointed members and a small minority elected by and from amongst the hereditary peers.

The issue of devolution and the pressures that it, arguably, places on the Union has in the same way become a topic of much debate. As well as a major report from the Constitution Committee of the House of Lords,[60] there have also been contributions from the Bingham Centre,[61] the Federal Trust[62] and the Constitution Reform Group.[63] They all start from the

[57] . at paras 47-50.
[58] . See Cities and Local Government Devolution Act 2016 discussed in House of Lords Select Committee on the Constitution `The Union and devolution' (2016), HL149 at paras 384-424.
[59] . For example, R. Hazell `The English Question' (2006) 36 *Publius* 37.
[60] . House of Lords Select Committee on the Constitution `The Union and devolution' (2016), HL149.
[61] . Bingham Centre for the Rule of Law `A Constitutional Crossroads: Ways forward for the United Kingdom' (2015)
[62] . The Federal Trust `Devolution in England: A new approach' (2015)
[63] . Constitution Reform Group `Towards a New Act of Union' (2015).

premise that there is a threat to the Union but offer different diagnoses and remedies. The idea of a threat to the Union may be overstated; although there is clearly a strong nationalist movement in Scotland, support for independence for Wales or a union of Northern Ireland with Ireland seem much weaker. Given the very different views about what needs to be done, which suggests that it will be difficult to reach political agreement, it looks entirely possible that devolution will be another issue that will remain open for the foreseeable future.