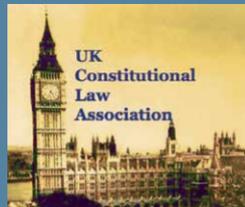


The Crisis of the Constitution

By Vernon Bogdanor

2nd Edition

THE
CONSTITUTION
SOCIETY



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By Vernon Bogdanor
Professor of Government,
King's College London

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Acknowledgements

I am most grateful to Paul Evans, Clerk of the Journals to the House of Commons, for his advice on factual matters on an earlier draft. But he is not responsible for the use I have made of his advice nor for my opinions.

First published in Great Britain in 2015 by
The Constitution Society
Top Floor, 61 Petty France
London SW1H 9EU
www.consoc.org.uk
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ISBN: 978-0-9928904-8-3

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PART 1

The Inter-linked Constitutional Questions

The general election of 2015 answered conclusively, to the surprise of most commentators, the question, ‘Who governs Britain?’ by yielding a single-party government with an overall majority in the House of Commons. But it did not answer two of the fundamental constitutional questions facing Britain. The first is how Britain is to be governed in an era of party fragmentation in which the electoral system, even when, as in 2015, it produces a single-party majority government, yields one enjoying just over one-third of the popular vote.

The second and even more fundamental question is – will there still be a Britain to be governed, will the United Kingdom remain in being, or has the outcome of the election in Scotland, where 56 of the 59 seats were won by the SNP, given an irreversible push to separatism. The general election has raised a large question mark both over the first past the post electoral system, but also over the very future of the country. It has resurrected the Scottish Question. These two issues – the electoral system and the Scottish Question – are, as we shall see, inter-connected.

But these are not the only constitutional questions that Britain will face. There are in addition a European Question, a Human Rights Question and an English Question. The constitution, which many politicians hoped might have been disposed of after

the Scottish referendum, has returned to the political agenda with a vengeance.

The return of the Scottish Question was quite unexpected. The Prime Minister – and no doubt many others too – hoped that the referendum held on 18th September in 2014, would end the debate on independence. Indeed, David Cameron said immediately after it that the issue of independence had now been ‘settled for a generation or – perhaps for a lifetime’. Instead, there has been a wave of support for the SNP. To keep Scotland within the Union will require exceptional reserves of sensitivity on the part of Unionists, a sensitivity that they have not always shown in the past.

Britain faces, therefore, a Scottish problem. But it has also faced, since January 2013, a European problem. For, in his Bloomberg speech of January 2013, Prime Minister, David Cameron committed the Conservative Party to a referendum on Britain’s continued membership of the European Union. This referendum would be held after a new ‘general settlement’ in the European Union had been achieved, a settlement which, so the Prime Minister hoped, he could ‘enthusiastically’ recommend to the British people. Negotiations between Britain and the other member states of the European Union have now begun, and the referendum is due to be held by the end of 2017.

In addition to the Scottish problem and the European problem, there is also a human rights problem. The Conservative Party’s election manifesto promised to ‘scrap the Human Rights Act and introduce a British Bill of Rights. This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK’. The manifesto also promised that it would ‘curtail the role of the European Court of Human Rights so that foreign criminals can be more easily deported from

Britain.’ But a Conservative Party policy document published in October 2014, entitled ‘Protecting Rights in the UK’ proposed that the British Bill of Rights should replicate some of the rights in the European Convention of Human Rights, while curtaining others. Proposals to give effect to this commitment have not, at the time of writing, yet been produced. But the Queen’s Speech of 2015 proposed to introduce a British Bill of Rights which would replace the Human Rights Act.

These two problems – the European problem and the human rights problem – need to be confronted within the framework of what, as the general election has emphasised, has become a multinational state. For, in the four component parts of the United Kingdom, the Conservatives won a majority of the seats only in England. For the first time in British history, there are different majorities in each part of the United Kingdom. In Wales, Labour is the majority party, and the Conservatives won 27% of the vote. In Scotland, the SNP is the majority party, and the Conservatives gained just 15% of the vote and one MP. These are the lowest percentages of the vote in Wales and Scotland of any governing party since the war. In Northern Ireland, the majority party is the Democratic Unionist Party and the Conservatives, as well as Labour and the Liberal Democrats, are unrepresented.

In the past, most English people, at least, regarded the United Kingdom as the home of a single nation, the British nation. Now, it is being transformed into a union of nations, each with its own identity and institutions.

The European problem and the human rights problem need to be resolved within this multinational framework. For they could affect the Union with Scotland and also the Belfast Agreement of 1998 in Northern Ireland. Suppose that, in a referendum on the European Union, a majority in the United Kingdom, which

includes a majority in England, votes to leave, but the Scots vote to remain. Nicola Sturgeon, the SNP leader, has indicated that such an outcome would not be accepted as legitimate in Scotland and that Scotland cannot be forced out of the European Union without its consent. She has argued that a mandate for the United Kingdom to leave the European Union can only be achieved through the consent of each of its constituent parts – England, Scotland, Wales and Northern Ireland. Without such a mandate, she has said that a ‘No’ vote in England would create an irresistible demand for a second referendum in Scotland, one in which Scotland might well choose to leave the United Kingdom so as to remain in the European Union. In Northern Ireland, the consent of both Unionist and Nationalist communities might well be needed to legitimise a vote to leave the European Union. So a vote to leave the European Union against the wishes of the Scots or the Northern Irish could provoke a constitutional crisis.

The human rights problem also impinges on the Union with Scotland, and on the Belfast Agreement. Both the European Convention on Human Rights and European Union law are incorporated directly into the devolution statutes in Scotland, Northern Ireland and Wales. So, even if the European Communities Act of 1972 and the Human Rights Act of 1998 were to be repealed, EU and ECHR law would remain incorporated in the law of the non-English parts of the United Kingdom. Repealing the Human Rights Act would not, of itself, remove the obligation of the Scottish Parliament to comply with the European Convention of Human Rights. The devolution statute would have to be amended. But, by convention, the government does not amend the Scotland Act or the legislation establishing the other devolved bodies without the consent of the devolved legislatures. The Smith Commission, which reported on Scottish devolution after the independence referendum, proposed that

this commitment, not to amend the devolution settlement without the consent of the Scottish Parliament, be embodied in statute.

Repeal of the Human Rights Act is particularly problematic in Northern Ireland. For the Belfast Agreement provided for Northern Ireland to enjoy not fewer rights than those in the Human Rights Act which enacts the European Convention but, on the contrary, 'rights supplementary to those in the European Convention on Human Rights to reflect the particular circumstances of Northern Ireland – These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem and – taken together with the European Convention of Human Rights – to constitute a Bill of Rights for Northern Ireland'. Some political leaders believe that, instead of curtailing some of the rights in the Human Rights Act, as the Conservatives are suggesting, greater protection of rights is needed than is offered by the Human Rights Act. The Belfast Agreement provided for the establishment of a Northern Ireland Human Rights Commission so that the identity and ethos of both communities in the province could be respected, and it also proposed a general right to non-discrimination. It envisaged that the Human Rights Commission in the Republic would join with that of Northern Ireland to produce a charter endorsing agreed measures to protect the fundamental rights of all those living in the island of Ireland. This has not yet been achieved.

The Belfast Agreement, moreover, is an international treaty signed by the British and Irish governments, which required the British government to 'complete incorporation into Northern Ireland law of the European Convention of Human Rights, with direct access to the courts, and remedies for breach of the Convention'. Because the Belfast Agreement commits the British government to the incorporation of the Human Rights Act in

Northern Ireland and to additional rights there, it is arguable that it not only prevents the Northern Ireland Assembly from legislation in contravention of the Act but also commits the British government not to alter it. In return for commitments made by the British government, the Irish government, after a referendum, altered its constitution removing the historic claim to jurisdiction over Northern Ireland. A unilateral alteration to the Belfast Agreement by the British government could give rise to an accusation by nationalists in Northern Ireland and by the Irish government of bad faith and breach of a treaty obligation.

The idea of a British Bill of Rights, therefore, could unpick the delicate balance achieved in the Belfast Agreement which served to reconcile the interests of the unionists of Northern Ireland, who wished to remain British citizens, with those of the nationalists, who did not, and who may not see themselves as British at all.

From a strictly legal point of view, of course, the protection of rights is a reserved and not a devolved matter. But, as we have seen, by convention, the devolved bodies are consulted before there is any alteration in their powers. These devolved bodies might well wish to decide for themselves whether or not to curtail some of the rights in the European Convention and to accept the proposed British Bill of Rights. There is therefore some tension between the principle of devolution and that of the entrenchment of rights UK-wide. It would be desirable to secure the consent of the devolved bodies, as well as MPs at Westminster, to a British Bill of Rights. That would not be easy either in Scotland or in Northern Ireland since neither the SNP nor Sinn Féin, would want to agree to something that they saw as 'British'. They would prefer that rights for Scotland and Northern Ireland were self-generated, product of specific Scottish and Northern Irish experience. If the devolved bodies were not involved in the negotiations, they might not accept a British Bill of Rights as legitimate. In 1982 Pierre

Trudeau patriated the Canadian constitution against the wishes of the government of Quebec which, having its own provincial bill of rights defending the French language and education rights, did not wish to accept the patriated constitution, since Quebec believed that this would weaken its autonomy in relation to French language and education rights. The issue remained as a running sore, poisoning relations between Canada and Quebec for many years. A British Bill of Rights, therefore, could prove a highly divisive issue both in Scotland and in Northern Ireland.

If the British government preferred not to involve itself in difficult disputes with the devolved bodies, the alternative would be to propose a bill of rights applying only to England. There would then be an English rather than a British Bill of Rights, and the devolved bodies could be left to adopt whatever arrangements they chose in relation to the European Convention. But it would hardly be satisfactory if, outside Northern Ireland, there were to be different standards of human rights in different parts of the United Kingdom. If Scotland and perhaps Wales also had different standards of human rights, that could weaken the sense of Britishness which the idea of a British Bill of Rights is intended to confirm, and it might increase support for separatism.

The issues of Europe and of human rights, therefore, are very much inter-connected with the future of the United Kingdom and the Scottish Question; and, in the case of human rights, with the delicate balance embodied in the Belfast Agreement for Northern Ireland.

PART 2

The English Question

In addition to the Scottish, European and human rights questions, Britain also now faces an English Question. For not only did the referendum fail to resolve the Scottish Question, it also inaugurated a constitutional debate in the rest of the United Kingdom, and put the English Question at the centre of the political agenda.

Although the outcome of the referendum on Scottish independence was a comfortable 55% to 45% majority against independence, a week before the vote, a YouGov poll had shown a small majority for independence, while other polls had shown only a very narrow lead for the Unionists. This led the three British party leaders – David Cameron, Ed Miliband and Nick Clegg – to promise the Scots more devolution and, in particular, extra powers over taxation and welfare if they agreed to remain within the United Kingdom. The promise was endorsed by the former Prime Minister, Gordon Brown, who represented a Scottish constituency and was perceived by many Scots as speaking for Scotland.

But Conservative MPs protested that they would not support further powers for Scotland unless something was also done for England. Therefore, when David Cameron welcomed the outcome of the referendum on the morning of 19th September, he declared that, in addition to fulfilling the promise to Scotland, the ‘voice of England should be heard’ ‘in tandem with’ and ‘at the same pace as’ further devolution for Scotland.

But what is the English Question? England is by far the largest part of the United Kingdom containing around 85% of its population.

But it is also the only part of the United Kingdom without a devolved body of its own, a Parliament or assembly to represent its interests. England, therefore, seems to be the anomaly in the devolution settlement. This, many in England argue, puts it at a disadvantage at Westminster. For devolution has transformed Britain into a multinational state. How in that multinational state can England defend its interests? If English interests are neglected, then, some argue, the unity of the United Kingdom could come under threat, not from Scotland but from England. Admittedly English nationalism has not yet proved a political force of any moment, since many in England still treat being English and being British as interchangeable. But that could change. Some would argue that the United Kingdom Independence Party – UKIP – is really an English nationalist party, since the bulk of its support comes from England, and its supporters feel a stronger sense of English identity than the supporters of other parties; and, significantly, UKIP favours the establishment of an English Parliament.

The English Question in fact comprises two questions. The first is the West Lothian Question, named after the MP who first raised it, Tam Dalyell, who was for many years MP for West Lothian. The West Lothian Question asks whether it is fair that, while English MPs can no longer vote on domestic matters such as health, education and housing affecting West Lothian in Scotland, because these matters have been devolved to the Scottish Parliament, Scottish MPs can continue to vote on matters affecting West Bromwich in England. This means that legislation affecting the health service, schools or housing in England can be put on the statute book as a result of the votes of Scottish MPs, while English MPs no longer have responsibility for these matters in Scotland. The second question is whether there should be decentralisation in England, not to new legislative bodies with powers comparable to the Scottish Parliament or the National Assembly of Wales, but to local authorities either as at present constituted or perhaps grouped together as in Greater Manchester.

PART 3

Asymmetrical Devolution

How should the English Question be answered? The obvious logical answer is a quasi-federal solution. But the trouble is that the English, while prepared to accept devolution for the non-English parts of the United Kingdom, do not want it for themselves and have always firmly resisted it.

Devolution in England could take two forms. The first would be devolution to the regions of England. That, however, would only provide a logical answer to the West Lothian Question if it were to take the form of legislative devolution. Few, however, believe that it would be sensible to fragment the English legal system by providing for different laws in different parts of England, different laws in Newcastle from the laws in Bristol. But in any case, there seems little support for regional devolution in any form. In 2004, voters in the north east, thought to be the area most sympathetic to devolution, rejected a proposal for non-legislative, executive devolution to a regional assembly by four to one in a referendum. It is doubtful if opinion has altered very much since then. The truth is that, in England, by contrast with many countries on the Continent and by contrast with federal states such as the United States and Canada, there is little regional feeling. If one asked someone in Bristol or in Canterbury which region they belong to, they would be likely to respond with a blank look. Most people in England feel that they belong to a town and a county but not to a region. In England, the regions are little more than ghosts.

The second, alternative, form of devolution in England would be to an English Parliament with legislative powers, parallel to the devolved bodies in Scotland, Wales and Northern Ireland. This proposal has some popular support, and is, as we have seen, advocated by UKIP. But there is no federal system in the world in which one of the units represents over 80% of the population. The nearest equivalent is Canada where 35% of the population live in Ontario.

The case against an English parliament was best summed up by the Royal Commission on the Constitution, the Kilbrandon Commission, in 1973.

‘A federation consisting of four units – England, Scotland, Wales and Northern Ireland – would be so unbalanced as to be unworkable. It would be dominated by the overwhelming political importance and wealth of England. The English Parliament would rival the United Kingdom federal Parliament; and in the federal Parliament itself the representation of England could hardly be scaled down in such a way as to enable it to be outvoted by Scotland, Wales and Northern Ireland, together representing less than one-fifth of the population. A United Kingdom federation of four countries, with a federal Parliament and provincial Parliaments in the four national capitals, is therefore not a realistic proposition.’¹

Federal systems in which the largest unit dominates have little chance of survival. That is the lesson of the former USSR, dominated by Russia, of the former Czechoslovakia, dominated by the Czechs, and the former Yugoslavia, dominated by the Serbs.

A quasi-federal solution, therefore, in either of its two forms, is not a plausible solution to the English problem.

¹ Cmnd. 5460, 1973, para. 531.

What alternative solution is possible? The Conservative answer is 'English votes for English laws' (EVEL) which has been the party's official policy since 2001, and was reiterated by David Cameron in the immediate aftermath of the Scottish referendum. This has generally been understood as meaning that MPs representing Scottish constituencies should not be allowed to vote on English domestic legislation.

The McKay Commission report of 2013, commissioned by the coalition government, recommended a form of EVEL-lite, whereby an English Grand Committee, comprising all MPs representing constituencies in England, would be asked to consent to Parliament legislating on matters relating only to England; just as, under the Sewel Convention, the Scottish Parliament is asked to agree to legislative consent motions before Westminster legislates on matters falling within its competence. The decision of the English Grand Committee would have been purely advisory, although perhaps there would have been a political price to pay were it to be disregarded.

But the proposals put forward by the new Conservative government in July 2015 and agreed by the Commons in slightly modified form in October, go much further than this. Under changes in the Standing Orders of the Commons, the Speaker is now required to certify, at the outset of a bill's career in the Commons, those parts of government bills which relate only to England (or to England and Wales) and where the provisions proposed would be within the power of the devolved bodies. If a whole bill falls within these terms, then its committee stage may be taken either in a public bill committee comprising only MPs from England or within a new body, a Legislative Grand Committee for England, comprising all MPs from England.

But the fundamental difference occurs later in a bill's career. Once the report stage is completed, there is a wholly new

stage in the legislative process before the bill can proceed to its Third Reading. This stage, dubbed by the Commons Procedure Committee in its 1st Report of 2015 – HC 410 – , the ‘Consent Stage’, requires that any ‘certified’ portion of a bill, including new material added at committee or report stage, must be agreed in one of three new ‘legislative grand committees’ – for England, England and Wales, or, very occasionally for finance bills, England, Wales and Northern Ireland. If those committees reject any certified provision, the rejected portions can go back to a further report-style stage in the whole House where an attempt at conciliation can be made and the provisions referred back to the appropriate grand committee or committees for a further vote. But, if the grand committee exercise its veto at this stage, then those provisions are deemed to be struck from the bill and it is presented for Third Reading with those parts excluded.

If the Lords make alterations to a bill sent to them by the Commons, or reject or amend alterations made by the Commons to a bill which started in the Lords, a similar process of certification occurs before the Commons consider the views of the Lords. But, instead of these matters being referred to the Grand Committees, a system of ‘double majorities’ is adopted. The whole House may vote, but the results of any division relating to a ‘certified’ provision must obtain not only a majority of the whole House to be agreed, but also amongst those members representing the relevant constituencies in England or in England and Wales. Without the double majority consent, they fail.

A similar system is applied by the new standing orders to delegated legislation. The Speaker must consider every statutory instrument laid before the Commons and decide whether it should be certified using the same criteria as for primary legislation. Any instrument so certified must, if there is a vote, in the House, achieve a double majority if it is to be approved, or negated in the case of the negative resolution procedure.

In consequence, and by contrast with the McKay Commission proposals, MPs for England (or England and Wales) have a veto over legislation applying to the relevant restricted jurisdiction even if that legislation has been supported by the House as a whole. This is a more far reaching power than the purely consultative power offered to the devolved legislatures through the legislative consent process and adds a further degree of asymmetry to the devolution arrangements.

To meet the objection that an alteration in public expenditure in England could, under the Barnett formula, affect spending in Scotland, the government amended its original July proposals to spell out that MPs from all parts of the United Kingdom would continue to enjoy full rights in voting on supply and appropriation bills and also on financial resolutions. Thus, for example, if the government decided to increase university tuition fees in England, and thereby reduce government funding to universities, a policy that would have consequences in Scotland, through its effect on the block fund, changes to the legislation itself would be subject to veto only by English MPs, but the money resolution accompanying it would be voted on by all MPs.

The trouble is that, as the House of Commons Procedure Committee has pointed out – HC 410, 2015, para. 50, ‘in reality, the estimates and supply procedures of the House validate prior decisions about policy, including those which have been given effect through primary legislation. In practice, there are extremely limited opportunities for Members to have any substantive effects on departmental spending through the Estimates approval process (not least because of the rule of Crown initiative, which restricts Members who are not Ministers to making reductions and forbids them from proposing increases in Estimates.) The House cannot reverse its previous legislative

choices by tampering with the Estimates, except in the bluntest way by removing the resources to give effect to those choices’.

In consequence, MPs representing constituencies outside England (or England and Wales) might still seek the right to vote on legislation which they feel may have a direct or even indirect effect on public spending levels in their local jurisdictions or constituencies. This could give rise to representations to the Speaker asking him to take consequential matters into account when considering certification.

The idea of English votes for English laws seems, at first sight, perfectly logical. If Scottish domestic legislation is in the hands of the Scots, Welsh domestic legislation in the hands of the Welsh and Northern Irish legislation in the hands of the Northern Irish, why should not English legislation be in the hands of the English? But the proposal is in fact incoherent.

Under the proposal for a Legislative Grand Committee (England), so its supporters argue, a government without a majority of the seats in England would have to negotiate with the Committee and sometimes no doubt accept defeat. It would, so it is suggested, be in an analogous position to that of a minority government such as the Wilson government of 1974, which had to negotiate with opposition parties to secure passage of its legislation. The idea of a Legislative Grand Committee, therefore, is, so its supporters believe, perfectly compatible with the conventions of parliamentary government.

But this analogy seems misconceived. Minority governments survive in the House of Commons because there is not a determined and united majority against them. The other parties, being for one reason or another, opposed to a rapid general election, or unable to come together, are therefore willing to

tolerate the continued existence of a minority government. In consequence, it is true, minority governments may fail to secure some of their legislative proposals. But, on the whole, such governments have in fact been able to secure a good deal of their programme. Under the English Grand Committee proposal, by contrast, a government without an English majority would often face a disciplined opposition controlling the Committee. It would regularly be unable to secure whole swathes of its legislation – on education, health, and other matters devolved to Scotland. The government might well, therefore, be left with a legislative package with which it radically disagreed, and which it was unwilling to take responsibility for.

The Grand Committee would in effect have a veto on matters such as health and education, matters which could have revenue-raising implications. But, if they were to veto policies which cut public spending, the government would have to raise taxes to fill the gap. No government, however, would agree to raise taxes for policies with which it fundamentally disagrees. Moreover, since income tax, with the exception of allowances, has been devolved to Scotland, the Grand Committees would, presumably, also have a veto on English rates of income tax. That tax yields around 25% of all government revenue. So a government dependent for its majority upon Scottish MPs might well not be able to secure its budget through the House of Commons. There would be, in effect, a separation of powers of the kind which paralyses government in the United States. Bifurcated government would become deadlocked government.

But the United States, of course, does not have a parliamentary system. There is no place in the British parliamentary system for a separation of powers of the kind that English votes for English laws would engender. It would mean that, whenever a government depended upon Scottish MPs for its majority, there

would be a United Kingdom majority for foreign affairs, defence, economic policy and social security; but an alternative English majority for health, education and other devolved matters. The government would not be able to secure its legislation even though there was a majority for it in the House of Commons, and possibly also in the House of Lords. There would then in effect be one government for reserved matters and a government of a different political colour for devolved matters. So English votes for English laws would undermine the principle of collective responsibility according to which a government must be collectively responsible to Parliament for all the policies that come before it, not just a selection of them. And of course, it is, constitutionally, the United Kingdom government which is accountable to the voters in general elections for its policies. The Legislative Grand Committees are in no way similarly accountable to voters in England or in England and Wales.

Proposals for 'English votes for English laws' in the form of a Legislative Grand Committee (England) in effect create an English Parliament, albeit an English Parliament within Westminster rather than as a separate institution. But it would be an English Parliament without an English executive. Bernard Jenkin MP, Chairman of the House of Commons Public Administration and Constitutional Affairs Select Committee drew the natural conclusion in a letter to 'The Times' on 16 September 2015, that an English Parliament in fact entailed an English executive. 'We could', Jenkin insisted, 'never have a Scottish UK chancellor setting English taxes in England at the annual budget but not in his or her own constituency. So Parliament will have to consider how to establish an English executive with an English first minister and finance minister...'. The logic, then, of the proposal for English votes for English laws, is a parliament for English domestic affairs and an English Prime Minister, within the United Kingdom Parliament

at Westminster. Such a parliament, as we have seen, would restore English dominance in the United Kingdom and recreate some of the grievances which led to the demand for devolution. Scottish MPs would be completely excluded from English business, and it would be difficult for a Scottish MP to become Chancellor of the Exchequer as Gordon Brown and Alastair Darling were from 1997 to 2010, since income tax, the main tax which their constituents pay, would no longer be within the purview of the United Kingdom Parliament. Scottish MPs would enjoy but a tenuous role in the House of Commons. The creation of an English Parliament with an English Prime Minister, therefore, could threaten rather than reinforce the Union with Scotland.

The decision as to whether a bill or any part of a bill is 'English' or 'English and Welsh' is to be made by the Speaker. The criterion is that it 'relates exclusively to England or to England and Wales, and is within devolved competence'.

The Speaker will not be faced with an easy task. For there is no clear-cut or obvious formula to determine whether legislation is within the legislative competence of one or other of the devolved legislatures – the question is particularly vexed in the case of Wales where the division of powers is less coherent than in the case of Scotland or Northern Ireland.

Under the devolution Acts, the final arbiter of that question in any particular case is the Supreme Court. Under the EVEL proposals the Speaker will be required to determine those questions in relation to the procedures of the House of Commons. In a debate in the House of Lords on 21 October, Lord Hope, a retired Scottish Supreme Court judge, declared, 'I know from sitting in such cases how difficult it sometimes is to determine whether something is a devolved issue or a reserved issue. These are tricky questions of law, and to solve the problem in the way that is being

proposed seems to increase the risk of challenge which is the last thing one would want in the case of legislation the Government wish to pass to enable them to run the country according to the established procedures.' (col. 762). In a Supreme Court case *Martin v Her Majesty's Advocate* [2010] UKSC 10, Lord Hope declared that 'The scheme of legislative devolution of legislative power which the Scotland Act 1998 sets out recognises that it was not possible if a workable system was to be created, for reserved and devolved areas to be divided into precisely defined watertight departments. Some degree of overlap was inevitable...' – para. 11. The case concerned the question of whether a statute passed by the Scottish Parliament, the Criminal Proceedings (Reform) Scotland Act 2007, increasing the maximum sentence for statutory offences under the 1998 Road Traffic Act, lay within the competence of the Scottish Parliament. It would seem to the lay person that such a question was fairly straightforward. In fact, it proved highly complex and the Supreme Court judges disagreed about it. In Wales, there have been three Supreme Court cases involving the Wales Office that turned on the issue of whether particular items of legislation were within the competence of the National Assembly of Wales.

The Speaker is in fact being asked as Lord Hope suggested, in the House of Lords, to decide a 'tricky' question of law. This is by contrast to decisions that he makes, under the provisions of the Parliament Act, as to whether a bill is a money bill or not. That is a judgment that a non-lawyer is equipped to make. But, to decide whether a bill is purely 'English' or not, whether it is or is not within a devolved competence, he is being asked, for the first, time, to decide a question which is one of law. For this reason, it is possible that his decision could come to be questioned in the courts, since it may be alleged that he has made an error of law. The new procedures, embodied in the standing orders

of Parliament seek to ensure that the Speaker's decision will not be open to such question. And, of course, Article 1X of the Bill of Rights of 1689 provides that proceedings and debates in Parliament cannot be questioned in a court of law. That Article was designed to protect MPs performing their parliamentary duties from accusations of seditious libel, although it has been given a much wider application since 1689. Nevertheless, it is by no means clear that the Speaker could remain immune from legal challenge in such matters – not least by the presiding officers of the Scottish parliament or the National Assembly of Wales on behalf of those bodies (or their governments) were the Speaker to rule that something was not – or even was – within their competence when they believed the opposite to be the case.

The Procedure Committee – HC 410 2015 – recognised that the Speaker in certifying that legislation was a proceeding in Parliament and should be immune from judicial challenge, nevertheless also observed that 'since, rightly, it is for the courts to determine the ambit and application of Article IX of the Bill of Rights, we cannot rule out the prospect that a determined challenge to a certificate issued by the Speaker might be granted leave to apply for judicial review, or might be successful in such an application. We bring this matter to the attention of the House.'

Were the Speaker's decision to be reviewed by the courts, it is unlikely that his certificate would be regarded as conclusive. In a Supreme Court case *Imperial Tobacco Ltd. v The Lord Advocate* [2012] UKSC 61, also concerned with the legislative competence of the Scottish Parliament, Lord Hope commented that, although the relevant statute had been accompanied by a statement by the Presiding Officer of the Scottish Parliament, roughly equivalent to the Speaker at Westminster, and the Scottish Law Officers, that it was in fact within that Parliament's competence, nevertheless, 'there is no presumption of legislative competence from the fact

that an objection to the competence of these sections has not been raised by the Presiding Officer or any of the Law officers.' He add that 'if an issue as to legislative competence is raised, it will be entirely a matter for the courts to determine' – para. 7. Of course the Scottish Parliament, by contrast with Westminster, is a non-sovereign Parliament. Nevertheless, the courts are suspicious of granting any public authority an unrestricted discretion which cannot be reviewed. The Speaker is almost the only public authority in the country to be given such an unrestricted discretion.

Until now, and during an earlier period, from 1922 to 1972 when Northern Ireland enjoyed devolution, the House of Commons has always treated all of its Members as enjoying equal rights. The government argues that English Votes for English Laws puts an end to an anomaly, the anomaly being that there are already two classes of MPs, since English MPs cannot vote on matters devolved to the Scottish Parliament. But Scottish MPs cannot vote on such matters either. The Commons has also been willing to differentiate between MPs on the basis of territory. There have been Scottish Standing Committees and Scottish, Welsh and Northern Ireland Grand Committees. But bills were only referred to these Committees after the whole House had agreed to do so; and in practice, bills tended not to be referred unless they were relatively uncontroversial. No government would be likely to send a contentious bill to a committee on which it did not have a majority. But, in any case, these Committees had no power of veto, and any amendments they made could be altered at report stage by the whole House. But, with English Votes for English Laws, it is the Speaker rather than the House who decides that the process for consideration of English or English and Welsh legislative provisions will be put into operation. The decision, therefore, is taken out of the hands of ministers and of the majority, while one

section of the House – MPs representing English constituencies – is given an enhanced role in the process, indeed a veto on certain items of legislation. So there is to be not just an English voice, which would be perfectly reasonable, but an English veto. This creates, surely, a most unfortunate precedent, which could be used to deprive other MPs too of their right to vote.

But there is an even deeper reason why English votes for English laws is misguided. It is a separatist proposal, whose effect would be to separate two systems of government – the English and the Scottish – which need to be brought together if the Union is to be strengthened. It is no accident that the SNP used to have a settled policy of not voting on ‘English’ laws for it is an openly separatist party, favouring the separation of the Scottish and English systems of government. It is odd to find some Unionists seeking to follow suit. Devolution, while in my view an overdue and necessary reform, has made many English politicians believe that Scotland is another country with which they need not concern themselves. But constitutional reform should aim to link the various parts of the United Kingdom, and in particular to link together the Scottish and English systems of government, not to separate them.

There is, of course, an English Question. But, as long as England rejects devolution, there can be no tidy constitutional solution to it. The United Kingdom is bound, under these circumstances, to remain asymmetrical. Asymmetry indeed is the price that England pays to keep Scotland within the Union. In the 19th century, England refused to pay that price in relation to Ireland by refusing to grant Home Rule. The consequences proved disastrous.

It is in any case a fallacy to believe that the English voice is not heard at present. Under a Conservative government, which normally has an English majority, there is no danger of the English

voice not being heard and the new standing orders are quite pointless, although on English legislation, they would increase the normal Conservative majority of 12, in practice 16, to 105. If a government was returned which did not enjoy an English majority, it could simply repeal the standing orders by using its overall United Kingdom majority. The alterations to House of Commons standing orders to secure English Votes for English Laws do not, therefore, offer a sustainable solution to the English Question.

It is worth remembering that, of the 650 constituencies represented at Westminster, 533 are English. England remains the dominant nation in the United Kingdom. A note from the House of Commons Library of 4 December 2014, 'England, Scotland and Wales: MPs and Voting in the House of Commons', noted that of around 3,600 divisions between June 2001 and September 2014, just 22 – 0.6% – would have concluded differently under provisions for English Votes for English laws. Just three of the 19 governments since 1945 have not enjoyed a majority amongst English MPs. One of these was the Labour minority government of March to October 1974, the other two were the Labour governments of 1964 and October 1974 with small majorities of 5 and 3 respectively. The government's proposals, seek to resolve a problem which hardly exists, and does so in a manner more likely to weaken than to strengthen the United Kingdom.

The truth is that the English as the dominant nation have no need to beat the drum or blow the bugle. If they do, the devolution settlement will be strained to breaking point. The existence of the United Kingdom rests fundamentally on restraint by the dominant nation. Unionists, therefore, should continue to be guided by Disraeli's dictum that England is governed not by logic but by Parliament.

PART 4

Devolution in England

The English Question can, however, be alleviated, though not fully answered, by means of devolution in England. At present, Scotland through her Parliament, enjoys a great deal of political leverage; so also does London through her directly elected mayor, even though the mayor has but limited statutory powers. But, until now, the rest of England has had much less leverage. That was particularly the case with the great cities of the Midlands and the North – Birmingham, Manchester, Newcastle etc. – which show no inclination to favour regional devolution. These cities claim that they face social and economic problems every bit as serious as those of Scotland, but have lacked the political leverage to ensure that Westminster does something about them. In his first major speech as prime minister, in 2010, David Cameron seemed to agree with this view, declaring that the long-standing economic imbalance between London and the north was ‘fundamentally unstable and wasteful’. But the remedy, as the government appreciates, involves more than economic rejuvenation. It means also giving northern cities the political clout to match their economic potential.

That is the rationale for the policy of the Northern Powerhouse, associated particularly with George Osborne, the first Chancellor to represent a north of England constituency since Denis Healey in the 1970s. There is a developing consensus, spearheaded by Lord Heseltine for the Conservatives and Lord Adonis for Labour, for decentralisation to England, not to new regional authorities,

for which there is little demand, but to local government. In November 2014, George Osborne signed a city deal with ten local authority leaders from Greater Manchester, who, in return for agreeing to form a combined authority under a directly elected mayor, will gain far-reaching powers over economic development, transport, skills, social care and the police. The Cities and Local Government Devolution bill, currently before Parliament, is an enabling bill, which can be applied flexibly to different areas by secondary legislation. The Chancellor has provided further assistance to the policy of devolution by announcing in October 2015, that local authorities would in future be allowed to keep 100% of their revenue from business rates. By the end of October 2015, four other deals had been signed with combined authorities – Leeds/West Yorkshire, Sheffield, Teeside and the north east – and one with a unitary county council, Cornwall, which will receive various devolved powers without being required to provide for a directly elected mayor.

The 2015 Queen's Speech amended the title of the cities devolution bill to add 'local government' to the title, and this indicated that the government intended to empower county councils as well as city regions. Most county leaders do not favour a directly elected mayor, and it has not yet been made wholly clear under what circumstances a directly elected mayor is required before a devolution deal can be signed. The current position is that, where a directly elected mayor is not required, the government will be required to be satisfied that there are effective, accountable and transparent governance arrangements before a deal can be agreed. Cornwall has a Leader-Cabinet model, a model which, apparently, fulfils the government's criteria for clarity of accountability. Around 34 other proposals from English local authorities are, it appears, currently being considered by the government, including proposals from the London boroughs,

agreed with the mayor of London. But, it is not yet clear what arrangements are appropriate for areas such as, for example, Oxfordshire which do not have unitary councils and are not part of a city region, yet wish to enjoy the benefits of devolution.

The fundamental case for devolution is the stimulus it gives to local patriotism and pride in the development of services, a patriotism and pride which can well stimulate improvement in services. But local authorities in England are at present widely unloved. Turnout rates in local elections at between 30% and 40% are amongst the lowest in Western Europe and so local authorities enjoy a far weaker mandate than the House of Commons; nor does local government provide the same focus of loyalty as the Scottish Parliament. Voters do not identify with it in the way that they have come to do with Holyrood. No doubt the government hopes that the combined authorities will provide a more genuine focus of loyalty, that there will be more loyalty to Greater Manchester than to the individual local authorities which comprise it. But the experience of London government does not wholly sustain such a belief. Despite the fact that exciting independent candidates such as Ken Livingstone and Boris Johnson have been running for office, turnout in the four London mayoral elections has been 34%, 37%, 45% and 38%, hardly sufficient to yield a convincing local mandate.

A precondition for successful devolution in England, therefore, must be a programme of reform and modernisation of local government so that it can inspire the enthusiasm needed for a radical transfer of power from the centre. Such a programme ought to include electoral reform – proportional representation – so as to put an end to permanent one-party councils, councils where one party enjoys a permanent majority even though it often has no more than a bare majority of the vote, and sometimes not even that. Before the county council elections of 2013, the

Electoral Reform Society estimated that 21 million people in 104 councils in England lived in one-party states – where a single party held at least 75% of council seats without securing anywhere near 75% of the vote. Electoral reform, therefore, must be a precondition for a policy of devolution.

Public attitudes towards devolution in England are more ambivalent than they might at first sight appear. Many speak warmly of decentralisation and the dispersal of power to local communities. But, when problems arise with a local service, the very same people often demand that ‘the government’ does something about it. When, in 2014, there were allegations of infiltration by Muslim extremists of schools in Birmingham, parents would not have been mollified by being told to consult local councillors or officials, who seem to have neglected the problem. They demanded that ‘the government’ put things right. It is understandable for ministers to take the view that, if they are to be blamed for deficiencies in local services, they should acquire the powers to match the responsibilities that are being placed upon them. That is one of the main causes of centralisation in England.

Moreover, the same people who speak warmly of decentralisation, often also object, without perceiving the inconsistency, to the ‘postcode lottery’ whereby some areas enjoy better welfare services than others. But the postcode lottery of course is a logical consequence of decentralisation. The greater the freedom granted to local authorities, the greater the likelihood of divergence in public service standards. It is therefore inconsistent to support devolution while objecting to the inevitable divergences which are bound to arise from such a policy. But, because we tend to blame central government for deficiencies in local services and because we object to the postcode lottery, it is we the people, not power-grabbing politicians, who are primarily responsible for our profoundly centralist political culture.

If the public are ambivalent about devolution, so also are the politicians. Do they really believe in it?

There is a revealing passage in Paddy Ashdown's diaries, from the years when Ashdown was Liberal Democrat leader, when Blair, the architect of the devolution legislation, complained to him that the Liberal Democrats were pressing for a more generous policy on student support than was being implemented in England.

'You can't have Scotland doing something different from the rest of Britain', said Blair.

'Then you shouldn't have given the Scots devolution', Ashdown retorted, 'specifically, the power to be different on this issue. You put yourself in a ridiculous position if, having produced the legislation to give power to the Scottish Parliament, you then say it is a matter of principle they can't use it'.

'Tony Blair (laughing), 'Yes, that is a problem. I am beginning to see the defects in all this devolution stuff?'

Blair seems to have assumed that the devolved bodies in Scotland and elsewhere would be run permanently by Labour, and would follow broadly the same policies as a Labour government at Westminster. But, were that to be the case, what would be the point of devolution? In fact, Blair had surrendered the powers to determine student fees in Scotland. What powers is George Osborne prepared to surrender? One suspects that a city region that wanted to do something that central government did not like such as building a new grammar school or charging for a visit to the doctor, would get short shrift.

2 *The Ashdown Diaries, vol. 2, 1997–1999*, Allen Lane, The Penguin Press, 2001, p. 446: entry for 7 May 1999.

That is not necessarily to be condemned. For Blair's complaint to Ashdown does draw attention to a conflict between two fundamental principles – devolution and a principle on which the welfare state was founded, the principle of territorial equality, the principle that benefits and burdens should depend upon need and not on geography. It was for this reason that, in 1946, Aneurin Bevan, though Welsh, insisted that, instead of creating separate English, Scottish, Welsh and Northern Irish health services, Britain should have a single National Health Service.

Devolution, of course, has already begun to undermine the principle of territorial equality, though so far only in a limited way. But there are now divergences in welfare provisions in the various parts of the United Kingdom. Few object to one part of the country supplementing basic provision. That is the rationale for Scotland providing for free university tuition and Wales free prescription charges. There might, however, be objections were one part of the country to decide to abandon what is thought to be a fundamental principle of the welfare state by, for example, charging for a visit to a GP. On 25 November 2015, Lord Porter, the Conservative chairman of the Local Government Association warned that devolution of health care would mean an end to national standards 'it won't be a national service. It will be a range of local services'. (Financial Times, 25 November, 2015).

But the government seeks to maintain national standards. Lady Williams, the minister responsible for the legislation in the Lords told that House on 29 June 2015, that 'The Government are committed to the view that health and social care services in any area, whatever devolution arrangements are entered into, must remain firmly part of the National Health Service and social care system --- that all existing accountabilities and national standards for health services, social care and public health services will still apply, and that the position of NHS services in the relation to the

NHS constitution and mandate cannot change' (col. 1867). The Secretary of State, therefore, remains responsible for decisions about health care in the devolved authorities. In the same debate, Lord Heseltine, a leading proponent of devolution, insisted that it was in reality 'a new form of partnership' rather than a transfer of powers. For, whatever party formed the government, it was 'entitled to see its manifesto implemented. --- we are not in any way challenging the right of central government to have its manifesto implemented. What is different is that in the implementation of government policies the talent of the nation is involved in trying to do the best they can to implement that, as suits their own localities.' (cols. 664–5). In the 2015 Autumn Statement, the Chancellor gave local authorities the option to raise council tax by up to 4% a year so long as 2% was earmarked for social care. It is, therefore, by no means clear precisely how much local autonomy the new combined authorities will have if they wish to depart from national policies in matters such as health and social care.

The principle of territorial equality, therefore, is bound to constrain the extent of devolution. But it does not mean our centralist political culture needs to continue. What is needed is a statement of what functions are so fundamental to the welfare state, so much a part of the social contract, of our fundamental social and economic rights, that they cannot be devolved. For Unionism has a social and economic dimension as well as a constitutional one. If devolution is to be compatible with fairness to all of the citizens of the United Kingdom, there must be a statement of the basic social and economic rights which all citizens of the United Kingdom, wherever they live, are entitled to enjoy. That basic statement is best embodied in a constitution delineating those powers that need to remain at the centre as embodying the fundamental rights of the citizen.

PART 5

The Crisis of Representation

As if these problems were not serious enough, Britain faces an even more fundamental constitutional problem which arises from the social changes that have transformed the two party system of the 1950s into the multi-party system of today. For the development of a multi-party system undermines the case for the first past the post electoral system, a system designed for a two party system, but one that works erratically when more than two parties enjoy substantial electoral support.

Britain in the 1950s was certainly a two-party system. Over 90% of us voted Conservative or Labour. To adapt the famous couplet of W. S. Gilbert –

Every little boy or girl born alive,
Was born a little Labourite or a little Conservat-ive.

In 1951, there were just 9 MPs who did not belong to the Labour and Conservative parties. By 2005, there were 92, of whom 62 were Liberal Democrats. In 2010, there were 85, 57 of whom were Liberal Democrats. In 2015, there were 87 MPs who did not belong to the Conservative or Labour Parties, of whom 56 were SNP. For the first time in post war politics, four parties – the Conservatives, Labour, UKIP and the SNP – had secured over 5% of the vote. In Scotland and Wales, five parties secured over 5% of the vote. Multi-party competition on this scale is quite unprecedented. In the multinational and quasi-federal state which Britain has now become, Scotland and Northern Ireland have their own party

systems quite distinct from that in England. For this reason alone, Britain is unlikely to return in the foreseeable future to the pattern of two-party competition of the 1950s and 1960s. The multi-national state will continue to be reflected in the Commons by a multi-party system. But there are, as we shall see, reasons why, even in England, multi-party politics has come to stay.

In consequence of the development of a multi-party system, the likelihood of future hung parliaments must be much greater than it was in the 1950s or 1960s. But, even where the electoral system does yield a single-party majority government as in 2015, that government is likely to be based on the support of not much more than one-third of those voting. The Conservative government, elected in 2015, secured just 37% of the vote. It was a government to which nearly two-thirds of the voters were opposed. The 2015 election, therefore, is bound to raise questions about the justice of the electoral system.

The aim of an electoral system in a democracy must be to ensure that the majority rules and that all significant minorities are fairly represented. The first past the post system now fails spectacularly on both counts.

The Conservatives' overall majority, gained on 37% of the vote, was a smaller percentage than Winston Churchill's Conservatives gained in 1945 when they lost the election. In 2005, Tony Blair won an overall majority of 62 on just 35% of the vote. Over three-fifths of the voters did not support the government and were presumably opposed to it. The last government to secure even 40% of the vote was Tony Blair's in 2001 and that gave him a landslide majority of 176. Previous landslides – in 1983, 1987 and 1997 – with governments enjoying majorities of at least 100 – were secured on between 42% and 44% of the vote – governments which nearly three-fifths of the voters rejected. Single-party

majority government, therefore, even when it comes about, does not exemplify the principle of majority rule, but of rule by the largest minority, a minority sometimes amounting to just over one-third of the voters.

Minorities, other than the largest minority, are represented in haphazard fashion according to no clear principle. While 4.5% of the United Kingdom vote yielded 56 seats for the SNP, 3.8% of the United Kingdom vote yielded 1 seat for the Greens and 12.5% – one-eighth – of the United Kingdom vote yielded 1 seat for UKIP. Nearly four million voters have failed to secure representation. This, of course, has a significant political effect. It means that the voice of those who want Britain to leave the European Union will not be effectively heard in Parliament.

In England, 525 of the 533 English seats are held by the Conservative or Labour Parties. That is the greatest strength of the two party system in the Commons for England since 1979. But 23% – nearly one-quarter of the voters in England – supported other parties. These voters are represented by just 8 MPs – 6 Liberal Democrats, one UKIP MP and one Green MP.

It is hardly surprising that both UKIP and the Greens have joined the Liberal Democrats in favouring proportional representation, as has the SNP, even though it would, at present, be harmful to them.

A further consequence of the growth of a multi-party system is that only a minority of MPs represent a majority of the voters in their constituency. In 1955, in the heyday of the two-party system, only 37 MPs were elected on a minority vote. But in 2015, 331 MPs – just over half of the 650 MPs – represented a majority of those who voted in their constituency; 319 MPs did not. In 2010, 433 MPs – around two-thirds – were elected on a minority vote, the largest percentage of MPs elected on a minority vote since the 1920s, when the party system was also in flux. Since

1997, just three MPs – all elected in 2015 – have secured the votes of a majority of the electorate in their constituency, while in the heyday of the two-party system, in 1951, there were 214.

The Conservative Party is currently legislating to ensure that no trade union in the public sector should be able to call a strike unless it is supported by 40% of its members in a ballot. That criterion would render every government since 2001 illegitimate.

Under proportional representation, the outcome of the 2015 election would have been as follows:

Conservatives	244
Labour	201
UKIP	83
Liberal Democrats	52
SNP	30
Greens	25
Others	15

In Scotland, the disproportion is even more acute than it is in England. As we have seen, the SNP swept the board, winning 56 of the 59 seats. That would lead the incautious observer to conclude that nearly every Scottish voter supported separatism. In fact, the SNP vote was 50%, just 5% higher than its vote in the Scottish Parliament election in 2011 and 5% higher than the ‘Yes’ vote in the referendum of September 2014. The 50% of the voters who supported separatism secured 56 seats; the 50% of the voters who supported the Union secured 3 seats. David Cameron declared after the election that he would respect the wishes of the Scots in their choice of representatives. It is to be hoped that he will also respect the wishes of the 50% of the Scots who voted for Unionist parties.

The percentages of the votes secured by the main parties in Scotland and the number of seats that they won were as follows:

SNP	56 seats	50%
Labour	1 seat	24%
Conservatives	1 seat	14%
Liberal Democrats	1 seat	8%
Others	0 seats	4%

Under a proportional electoral system, the allocation of seats would have been:

SNP	30
Labour	14
Conservatives	9
Liberal Democrats	4
Others	2

The House of Commons now resembles nothing more than a distorting mirror, of the sort one used to see at the fair, which magnifies some opinions and diminishes others to the point of invisibility.

The reason for this is that, under first past the post, the number of seats which a party wins depends not only upon how many votes it wins but upon the geographical structure of its vote. A party whose vote is evenly spread, such as UKIP, may gain a large number of second places but it will win hardly any seats. A party whose vote is geographically concentrated, such as the SNP, whose vote is of course concentrated in Scotland, will be over-represented.

These distortions are now of more than theoretical interest. As is clear from the 2015 general election, they now threaten the very

unity of the kingdom, by making Britain appear more divided than it actually is. There are of course considerable differences in voting behaviour between England and Scotland, but these differences are exaggerated by the electoral system. The electoral system therefore exacerbates the West Lothian Question, divides England from Scotland, and increases the likelihood of separatism. One powerful argument for proportional representation is that it would alter the dynamics of the conflict between England and Scotland and make it more manageable.

Why has the transformation from a two party system to a multi-party system come about? Transformations of party systems generally follow from and are caused by changes in society. The development of multi-party politics in Britain is no accident, but results from a profound transformation in British society since the 1950s – the transformation from a *société bloquée*, – dominated by large nation-wide socio-economic blocs based on occupation and class such as trade unions and large scale industry – to a more socially and geographically fragmented society, a society that David Cameron has characterised as post-bureaucratic. In such a society, it is hardly surprising if party allegiances have also become more fragmented. There has been a gradual unfreezing of the class structure; the large socio-economic blocs based on occupation and social class, which characterized the first half of the twentieth century, have broken up. All this has served to weaken party identification and to undermine tribal politics. There are not many voters today who say – ‘I’ve always been Labour’ – or ‘my family have never voted anything other than Conservative’. Just as the great nationalized monopolies have broken up, in response to consumer demand for wider choice, so the monolithic party allegiances of the past have been dissolving, though admittedly at a glacially slow pace. Voters have come increasingly to shop around so as to seek the best deal to meet

their individual preferences, rather than the preferences of their class or occupational grouping. This greater fluidity is perhaps the most important of all the many changes in British society during the postwar period and it has had radical consequences for electoral behaviour.

It has made Britain a far more geographically and socially fragmented society than it was sixty years ago. In 1951, outside Northern Ireland, there was a fairly standard Conservative/Labour battle in every constituency, with the Liberals reduced to the role of impotent onlookers, while the nationalists seemed to many to be irrelevant, cranky even, and, as Attlee suggested in the late 1950s 'out of date'.

In 2015, by contrast, there was a different electoral battle in the different parts of the United Kingdom. In Northern Ireland, the battle was between parties representing the mainstream Unionist and Nationalist communities. There was only one party which sought to straddle the two communities, and that was the Alliance Party, but it failed to retain its single parliamentary seat. There is little connection between the electoral battle in Northern Ireland and that on the other side of the Irish Sea.

In Scotland, the electoral battle was primarily between Labour and the SNP. The Conservatives could do no more than hold on to their single seat in Scotland, and were serious contenders in only a very few of the constituencies north of the Tweed. The leading party at Westminster, therefore, was the third party in Scotland. In the South West of England, by contrast, the electoral battle was between the Liberal Democrats, the majority party, which, before the election, held 12 out of the 25 seats, and the Conservatives, with 9 seats, while Labour, with just 4 seats in the region was very much the third party. On the east coast, much of the competition was between the Conservatives and UKIP.

The geographical fragmentation of Britain is not only between the nations and regions comprising the United Kingdom, but also between the cities and the countryside. By contrast with 1951, when the Conservatives were strongly represented in the cities as well as the countryside, they entered the general election of 2015 without a single seat in the large cities of the Midlands, the North or Scotland. They were totally unrepresented in Birmingham, Bradford, Edinburgh, Glasgow, Leeds, Liverpool, Manchester, Newcastle, Nottingham and Sheffield, and these cities still stubbornly refused to return a single Conservative. It is sometimes suggested that the Conservatives are insensitive to the problems of urban deprivation in the inner cities. If so, that is hardly surprising, since they have hardly any representation there. Labour, by contrast, won just 8 seats out of 139 in the south east and south west regions. Indeed, there is only one non-Conservative seat in the whole of the south-west – Exeter – held by Labour. This does not mean, of course, that there are no Conservative voters in the large conurbations of the Midlands and the North, and no Labour voters in the south of England. What it means is that these voters are unrepresented, since the first past the post system penalises not only minor parties, but also major parties in areas where they are weak.

In consequence of this fragmentation, the 2015 general election was fought not primarily on a national basis but within regional enclaves, and the government which resulted was formed on just over one-third of the popular vote, and a narrow basis of regional support, largely confined to particular areas. It could hardly be said to enjoy a national mandate. It will, in consequence, not be easy for the Conservatives to achieve their ideal of a 'One Nation' Britain.

Britain used to be seen as a paradigm of strong and stable government, made possible by the dominance of two large parties with mass support alternating in power through the swing of the

pendulum. The electoral system was defended on the grounds that, whatever its theoretical unfairness, it did at least yield strong and stable single party government. That defence seems no longer available. The traditional model is now of historical interest only.

First past the post works with a rough and ready logic when two parties with national appeal share most of the vote – as in the 1950s. It does not work in a multi-party system. But reform of the electoral system, so it has been assumed since 2011, is a dead issue. For in 2011, there was a referendum on the alternative vote. That is not a system of proportional representation, and it had been characterised by Liberal Democrat leader, Nick Clegg as a ‘miserable little compromise’ – though this did not prevent him advising voters to support it. But the alternative vote was rejected by a 2 to 1 majority on a derisory turnout of 42%.

Yet electoral reform could, like Lazarus, rise from the dead precisely because the electoral system in 2015 has so seriously misrepresented opinion by installing a government in power supported by just over one in three of the voters and failing to give fair representation to minor parties with substantial support.

The first past the post electoral system no longer yields majority rule either at national or at constituency level. It serves the interests not of the voters but of the two major parties, the political insiders, the political class. It is no longer fit for purpose.

PART 6

The Case for a Constitutional Convention

In 1997, the Welsh Secretary, Ron Davies, declared that Welsh devolution was a process not an event. The same is true, surely, of constitutional reform as a whole. The accumulation of unresolved constitutional problems – the Scottish Question, the European Question, the Human Rights Question, the English Question and the Question of Representation – means that Britain is approaching a crossroads in its constitutional development, perhaps indeed a crisis of the political regime.

Our constitutional problems must not be regarded as separate and discrete. They are in fact inter-connected. We have seen that resolving the Scottish problem would be easier to achieve with reform of the electoral system. Resolving the English problem through devolution requires the reform of local government. The referendum on Britain's membership of the European Union and the proposal for a British Bill of Rights could impinge upon the Scottish Question and also upon the Northern Ireland settlement. A successful policy of devolution requires a clear understanding of what matters are fundamental to the United Kingdom as a whole – basic constitutional, social and economic rights – and what matters are capable of different treatment in different parts of the United Kingdom. It is because our constitutional problems are inter-connected that there is so strong a case for a constitutional convention.

Speaking at Edinburgh in 2013, Douglas Alexander, then the Shadow Foreign Secretary, called for a Scottish Convention to consider the future of the Scottish constitution similar to that of the Scottish Convention of 1989 which paved the way for devolution. But the future of Scotland should not be seen in isolation from that of the rest of the United Kingdom; nor can devolution be considered in isolation from such matters as the reform of local government and electoral reform. What is needed, therefore, is a United Kingdom wide constitutional convention, with popular participation, to consider the constitution as a whole. The various forms which such a convention might take have been well laid out by Alan Renwick in his paper, *After the Referendum: Options for a Constitutional Convention*, published by the Constitution Society, and there is no need to repeat them here.

But, before such a convention sits, it needs to be preceded, in England at least, by a learning process. For, while the Scots have been thinking about their constitution for many years, many in England have only just begun to think about it. English thoughts need to become more focussed. The best way of achieving this would be through a Royal Commission, or equivalent body, which would hold hearings in public in different parts of the country, hearings which would be highlighted in the media. The Commission would be in the nature of a learning process, collecting the thoughts of the interested public and providing options for the constitutional convention to consider. The Commission, composed as it would no doubt be of the great and the good, would not itself make proposals for reform, but would provide an agenda for the constitutional convention.

One obvious matter for a constitutional convention to consider would be whether it is not time for Britain to enact a constitution. It is, after all, difficult to have a sensible debate about constitutional reform until we are clear precisely what

our constitution actually is. In May 2015, a report from the Bingham Centre for the Rule of Law, entitled 'A Constitutional Crossroads', advocated, in its Foreword, 'a written constitution' that 'would most directly provide the advantage of clear ground-rules to serve as a framework for our territorial arrangements and to secure their permanence'. But, perhaps before we proceed to draw up a constitution, it might be best to be clear about the position that we have actually reached, and the principles that underlie it. For that reason, the Report suggests that the first stage should be a 'Charter of Union which would lay down the underlying principles of the UK's territorial constitution and of devolution within it'.

Britain, remains one of just three democracies, together with New Zealand and Israel, without a codified constitution. It was said, over a hundred years ago, that our constitution was based on tacit understandings rather than codified rules but that 'the understandings are not always understood'. That remains true today. It is no longer satisfactory.

If one joined a tennis club, paid one's subscription, and asked to be shown the rules, one would not be pleased to be told that the rules had never been gathered together in one place, that they were to be found in past decisions of the club's committee over many generations, and that they lay scattered among many different documents; nor would we be pleased to be told that some of the rules – so-called conventions – had not been written down at all, but that we would pick them up as we went along, with the implication that if we had to ask we did not really belong. Such a rationale would make it very difficult for anyone who wished to reform the rules of the club. It might perhaps have been acceptable in the past when Britain was a more homogenous and deferential society. It will hardly do for the more assertive, multicultural country that Britain has now become, a country

in which people are conscious of their rights and determined to assert them. In the 1950s, Britain resembled a country house suitable for those prepared to live in it as guests and to accept the rules of the proprietors. A codified constitution could help in the process of making Britain a genuine home for all of its citizens.

Countries tend to adopt a constitution when they have reached a constitutional moment, a break in their development, such as a revolution or the attainment by a colony of independence. Britain has not had such a constitutional moment since 1689 when the Bill of Rights instead of providing a constitution, served to emphasise the principle of the sovereignty of parliament. That principle acts as a break upon and has served to inhibit constitutional thinking. For, if Parliament is sovereign, and there can be no rule superior to that enacted by Parliament, a constitution or fundamental law can have no authority. The British constitution indeed can be summarised in just eight words – Whatever the Queen in Parliament enacts is law. There is no point therefore in having a constitution unless the principle of parliamentary sovereignty is abandoned.

But it may be that now, over 800 years after Magna Carta, we are approaching a peaceful constitutional moment, one not marked by revolution or a struggle for independence, but by the concatenation of inter-connected constitutional problems, all pressing for a solution. These constitutional problems reflect the forces of social change. There is in fact a growing conflict between these new social forces and traditional constitutional forms. It is becoming increasingly clear that our constitutional forms are relics of a previous era, and that we need to bring them into alignment with the social forces of the modern age. Our political system needs to become congruent with the public philosophy of a post-bureaucratic age whose watchword is fluidity and whose leitmotiv is a politics of openness in place of the tacit understandings of the past.

The democratic spirit in Britain is not unhealthy. As the Scottish referendum showed, there is a huge reservoir of civic potential which the political parties have largely failed to tap. It is the institutions and the mechanisms which seek to represent the democratic spirit that are at fault. The links that have in the past connected citizens with their political institutions are, slowly but surely, being undermined. Disenchantment with politics flows from the conflict between a maturing democracy in which voters are accustomed to wider choices than in the past and a political system which still bears all too many of the characteristics of a closed shop. The task now is to channel the democratic spirit into constructive channels. That is the fundamental case for a constitutional convention, and the reason why constitutional reform is likely to remain at the centre of the political agenda for many years to come.

Vernon Bogdanor, December 2015

The Crisis of the Constitution

By Vernon Bogdanor

The general election of 2015 answered conclusively, to the surprise of most commentators, the question, 'Who governs Britain?' by yielding a single-party government with an overall majority in the House of Commons. But it did not answer two of the fundamental constitutional questions facing Britain. The first is how Britain is to be governed in an era of party fragmentation in which the electoral system, even when, as in 2015, it produces a single-party majority government, yields one enjoying just over one-third of the popular vote.

The second and even more fundamental question is – will there still be a Britain to be governed, will the United Kingdom remain in being, or has the outcome of the election in Scotland, where 56 of the 59 seats were won by the SNP, given an irreversible push to separatism.

But these are not the only constitutional questions that Britain will face. There are in addition a European Question, a Human Rights Question and an English Question. The constitution, which many politicians hoped might have been disposed of after the Scottish referendum, has returned to the political agenda with a vengeance. In the second, post-2015 General Election, edition of this pamphlet, Vernon Bogdanor addresses these issues.

This pamphlet presents the personal views of the author and not those of The Constitution Society, which publishes it as a contribution to debate on these subjects.



The Constitution Society is an independent, non-party educational foundation. We promote public understanding of the British Constitution and work to encourage informed debate between legislators, academics and the public about proposals for constitutional change.

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