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ENGLISH VOTES FOR ENGLISH LAWS

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About the author

Louis Flood is the current Lyell Scholar of the Society of Conservative Lawyers. After reading law at the London School of Economics, where he was awarded the John Griffith Prize for the highest mark in the Public Law examination, he has worked for the last two years in the House of Commons. From September 2018–19, he worked as Administrative Assistant to Maggie Throup MP. Since September 2019 he has been Parliamentary Assistant to Chris Heaton-Harris MP, current Minister of State for Transport. He hopes in due course to read for the Bar.

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FOREWORD

The Procedure Committee of the House of Commons has recently announced that it is undertaking an inquiry into the ways in which the procedures of the House of Commons engage with the UK's territorial constitution. This will include examining the operation and effect of the standing orders which establish the procedures known as 'English Votes for English Laws', or to constitutional lawyers and parliamentarians as 'EVEL'. Louis Flood, the current Lyell scholar of the Society of Conservative Lawyers, a law graduate, who is currently Parliamentary Assistant to Chris Heaton-Harris MP, embarked on this paper in July, at the suggestion of the Society's chair of research, Lord Sandhurst QC. It could not be more timely.

The experience of devolution and its impact on the Westminster Parliament has been to raise sensitive issues about the future of the Union and how best to represent English interests within the United

Kingdom Parliament at Westminster. These matters are subject to sharper interrogation as we have left the European Union and the consequential return of many competencies to the devolved administrations and Westminster.

Louis Flood sets out in unemotional terms the West Lothian question and its significance. He explains the development of the concept of EVEL, and its introduction in 2015 to the procedures in the House of Commons. Of particular value is his exposition of how the complicated processes operate and the practical difficulties which can arise. These issues are not going to go away, and he makes helpful suggestions for improving current practice. These are important matters for all who are concerned with the democratic process and the good governance of the United Kingdom. I commend this excellent paper to parliamentarians and lawyers alike.

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I – INTRODUCTION

Prior to devolution, the UK was a highly centralised state. England, Scotland, Wales and Northern Ireland were governed exclusively from Whitehall, and the Westminster Parliament was the sole lawmaking body. Over the past two decades, the transfer of legislative and executive functions to devolved institutions has decentralised the UK's governing arrangements. While the process brought government closer to the people in some parts of the country, a lack of any provision for England has meant that English legislation continues to be made at Westminster. This has prompted debate about how English interests should be represented in the post-devolution constitution.

The Procedure Committee of the House of Commons has recently announced that it is undertaking an inquiry (for which it has called for evidence¹) into the ways in which the procedures of the House of Commons engage with the UK's territorial constitution.

Issues the Committee plans to examine include, but are not limited to:

- The operation and effect of the standing orders establishing the 'English votes for English laws' procedures
- Procedures for notification to the House of decisions of the devolved legislatures relevant to matters under consideration in the House, including decisions on legislative consent motions
- The procedural steps required to facilitate greater joint working between committees of each of the UK's devolved legislatures and committees of the House, for purposes including shared scrutiny of intergovernmental working on policy areas of common interest

This paper was nearing completion when the inquiry was announced and it was decided to proceed to publication.

¹ <https://committees.parliament.uk/call-for-evidence/256/the-procedure-of-the-house-of-commons-and-the-territorial-constitution>

Devolution: an overview

The legislative frameworks for devolution were initially set out in the Scotland Act 1998, Government of Wales Act 1998 and Northern Ireland Act 1998. These statutes provided for bespoke settlements that reflected the historical and institutional background of each nation.

Scotland had retained its legal system following the Act of Union in 1707, and other public services including schools and the police had also been managed separately from their English equivalents.² As such, Scotland was awarded the greatest degree of autonomy. Devolution introduced a Scottish Parliament with powers to pass primary legislation in any area not reserved to Westminster.³

The settlement in Northern Ireland represents a multi-party agreement, reached at the end of a three-decade-long conflict. Power is shared between the Nationalist and Unionist communities and its Assembly can legislate in those areas which are transferred, while Westminster legislates in excepted areas. In addition, there is a third category of 'reserved' matters that could be transferred by Order-in-Council if there is cross-community agreement.⁴

Wales has a much closer relationship with England, largely due to the fact that the two nations have had a unified legal system since the sixteenth century. Initially, the Welsh Assembly could not pass its own primary legislation and had to negotiate with the UK Government to pass laws on its behalf.⁵ The Wales Act 2017 altered this arrangement and, like the Scottish Parliament, the Assembly now operates on a reserved powers model.⁶

² Aron Cheung, Akash Paun and Lucy Valsamidis, Devolution at 20, (Institute for Government 2019), p60

³ Schedule 5 of the Scotland Act 1998 sets out the powers reserved to the UK Parliament

⁴ Northern Ireland Act 1998, s4

⁵ Aron Cheung, Akash Paun and Lucy Valsamidis, Devolution at 20, (Institute for Government 2019) p61

⁶ Wales Act 2017, sch1

The devolved administrations receive funding primarily through annual block grants from the UK Government. These grants are set using the Barnett formula, which automatically adjusts the amount of public expenditure allocated to reflect changes in spending levels for public services in England.⁷ As a supplement to their block grants, the devolved governments have limited tax-raising powers. The Scottish Government can set all rates and bands of income tax above the tax-free personal allowance. It also receives 50% of all VAT revenue generated in Scotland. In Wales, the Welsh Government can vary the rate of income tax by 10p in the pound and has responsibility over stamp duty and landfill taxes. Fiscal devolution is less extensive in Northern Ireland. Corporation tax was devolved in 2015, but this measure has not been enacted due to the suspension of Northern Ireland Assembly.

The West Lothian Question

As a consequence of devolution, Westminster has become increasingly focused on English legislation. Yet, until recently, the realignment of Westminster's functions was not accompanied by any reassessment of the voting rights of MPs representing Scottish, Welsh and Northern Irish constituencies. This gave rise to a constitutional imbalance, commonly referred to as the 'West Lothian Question'. In essence, it asks why non-English MPs can vote on legislation for England, while English MPs have no reciprocal right to vote on legislation on reserved matters affecting other parts of the UK.

The West Lothian Question has proven difficult to answer. In the late 19th Century, the Liberal Party was forced to confront the issue when it sought to introduce Home Rule for Ireland. An 'in and out' solution was proposed, whereby Irish Members would vote only on bills and clauses with UK-wide territorial application.⁸ However, these plans were abandoned after Gladstone concluded that it 'passed the wit of man' to define the territorial scope of legislation.⁹ Later in the 1960s, Ulster

Unionist MPs opposed Wilson's nationalisation programme, despite it not applying in Northern Ireland. The Attorney General was instructed to review the 'in and out' model, but once again the proposal was considered too complex and the plans were shelved.¹⁰

Throughout its time in office, New Labour refused to address the West Lothian Question. According to its own Lord Chancellor, Derry Irvine, the best solution was to 'stop asking it'.¹¹ There is some merit to this position. Between 1997 and 2010, there was no general election where the Labour Party did not secure a majority among English constituencies. It was only when the Government experienced large backbench rebellions that the combined votes of Scottish, Welsh and Northern Irish MPs affected legislation that applied primarily to England.¹² This occurred twice during votes on the Health and Community Standards Bill and Higher Education Bill.¹³ As the West Lothian Question was for the most part a minor anomaly, it is questionable whether it would have been worthwhile committing time and resources to finding an answer.

Although the issue has rarely had an effect on policy, the Conservative Party has long been in favour of rectifying the asymmetry. A cynical explanation is that limiting the influence of non-English MPs would provide the party with a political advantage. For example, it would prevent Labour-led UK Governments, sustained by Scottish and Welsh MPs, from legislating over English domestic issues. But there is a principled case for answering the West Lothian Question: that it is central to achieving fairness within the UK's constitutional settlement. To many, it cannot be considered just that legislators in a representative democracy are able to make

⁷ *ibid* 48

⁸ Vernon Bogdanor, *Devolution in the United Kingdom* (Oxford University Press 2001) p30

⁹ Jim Gallagher, *England and the Union: How and Why to Answer the West Lothian Question* (Institute for Public Policy Research 2012) p60

¹⁰ *ibid*

¹¹ HL Deb 25 June 1999 c1201

¹² Health and Social Care (Community Health and Standards) Bill; Higher Education Bill

¹³ Meg Russell and Guy Lodge, *Westminster and the English Question* (The Constitution Unit 2005) p13

decisions impacting the lives of citizens without any electoral accountability. Voters' perceptions matter.

The Conservative Party has not proposed providing England with a devolved Government of its own. Instead, it has favoured a more modest

approach of reforming parliamentary procedure to strengthen the voices of English MPs within the legislative process. This innovation is termed 'English Votes for English Laws' (EVEL) and several variants have been mooted since the introduction of the devolution settlements.

II – DEVELOPMENT OF ENGLISH VOTES FOR ENGLISH LAWS (EVEL)

During its period in opposition, the Conservative Party produced two reports that made recommendations for how EVEL could function. In 2000, the Commission to Strengthen Parliament proposed that legislation relating exclusively to England (or England and Wales) should be considered only by English (or English and Welsh) MPs at second reading, committee and report stages.¹⁴ This would equip those MPs with a veto early on in the legislative process and also allow them to have a decisive influence over the content of legislation. At third reading, the normal rules of the House would apply, although the Commission expected a convention to develop that non-English MPs would not participate.¹⁵ Later in 2008, the Conservative Party Democracy Taskforce endorsed a revised model, whereby non-English MPs would only be excluded from committee and report stage.¹⁶ Under these proposals, English (or English and Welsh) MPs could still substantially alter legislation, but would not have a binding veto.

The McKay Commission 2013

When the Conservative Party entered into Government in 2010, its coalition partners, the Liberal Democrats, did not commit to implementing either variant of EVEL. Instead, the independent McKay Commission was established to consider the consequences of devolution for the House of Commons. Reporting in 2013, the Commission rejected the proposition of providing a subset of MPs with a veto over affected legislation,

claiming that any such mechanism would automatically create a tiered system of membership in the House of Commons.¹⁷ It recommended¹⁸:

'The constitutional principle that should be adopted for England (and for England-and-Wales) is that: decisions at the United Kingdom level with a separate and distinct effect for England (or for England-and-Wales) should normally be taken only with the consent of a majority of MPs for constituencies in England (or England-and-Wales). This principle should be adopted by a resolution of the House of Commons and the generalised principle endorsed'.

As an alternative, it floated a menu of procedural innovations to strengthen the representation of English interests. These included territorially-constituted public bill committees; English (or English and Welsh) Grand Committees to give consent to legislation, and the double counting of divisions to show the votes of English (or English Welsh) MPs. Furthermore, the Commission recommended that that House of Commons adopt, by resolution, the principle that 'decisions at the United Kingdom level with a separate and distinct effect for England should normally be taken only with the consent of a majority of MPs for constituencies in England'.¹⁹

¹⁴ Philip Norton, Report of the Commission to Strengthen Parliament (Conservative Party 2000)

¹⁵ *ibid* p53

¹⁶ Conservative Party Democracy Taskforce, Answering the Question: Devolution, The West Lothian Question and the Future of the Union, (Conservative Party 2007) p5

¹⁷ Sir William McKay, Report of the Commission on the Consequences of Devolution for the House of Commons (The McKay Commission 2013) p9

¹⁸ *Ibid*. Executive Summary p2–3

¹⁹ Sir William McKay, 'Report of the Commission on the Consequences of Devolution for the House of Commons' (The McKay Commission 2013) p36

Further developments: the Scottish Independence Referendum 2014

In the wake of the Scottish Independence Referendum, David Cameron gave a vow to find a 'decisive answer' to the West Lothian Question.²⁰ A command paper was presented to Parliament by William Hague, the Leader of the House of Commons, which outlined the various options for EVEL.²¹ The Conservative Party favoured a

²⁰ Scottish Independence Referendum: statement by the Prime Minister' (19 September 2014) www.gov.uk/government/news/scottish-independence-referendum-statement-by-the-prime-minister

²¹ Leader of the House of Commons, The Implications of Devolution for England, (CM8969, 2014)

III – EVEL PROCEDURES

The EVEL procedures ensure that legislation relating exclusively to England (or England and Wales) can only become law with the consent of MPs representing constituencies in England (or England and Wales) and the whole House of Commons. Put differently, EVEL implements a double veto in the legislative process. The following section outlines how the procedures apply to Government bills and statutory instruments.

Government Bills

The Speaker of the House of Commons decides whether a Government bill, or any clauses or schedules of a Government bill, will be subject to the EVEL process. He does so by applying a two-stage test. Firstly, the Speaker must be satisfied that the relevant piece of legislation relates exclusively to England (or England and Wales) and, secondly, that it falls within the power of at least one devolved legislature to make a comparable provision.²³ Legislation that meets both parts of the test will be issued with a Speaker's Certificate before its second reading.

Any bill certified as relating to England in its entirety will be scrutinised by a public bill committee that comprises solely of English MPs.²⁴ If an England-

²³ HC SO 83J(1)(b)

²⁴ HC SO 83K(a)

strengthened version of the McKay Commission proposals. Under this model, English (or English and Welsh) MPs would be asked to give consent to legislation affecting England (or England and Wales) before third reading; if consent was withheld, a bill, or relevant parts of it, would stand vetoed. As the proposal failed to win the support of the Liberal Democrats, the matter was not pressed to a vote. However, following the 2015 election, the Conservative Party secured a majority that enabled it to implement the reform. The draft Standing Orders were speedily published and the House agreed to the changes in October the same year.²²

²² HC Deb October 22 2020 vol600 cc1253–1256

only bill is considered in the Chamber at committee stage, that is done by the Legislative Grand Committee for England, instead of a Committee of the whole House.²⁵ Only English MPs can move amendments or vote in the Legislative Grand Committee for England, although MPs representing constituencies elsewhere may still participate in the debate.²⁶ There is no requirement in the Standing Orders for England and Wales-only bills to be scrutinised by territorially-constituted committees.

After a bill is considered in committee, it will return to the House for report stage, which provides all MPs with the opportunity to propose further amendments. At the conclusion of report stage, the Speaker reconsiders the bill to determine whether any amendments apply only in England (or England and Wales).²⁷ MPs representing the geographical area affected by a certified provision will then form a Legislative Grand Committee and must pass a consent motion to approve the provision's inclusion in the bill.²⁸ If the entire bill relates exclusively to England (or England and

²⁵ HC SO 83K(b)

²⁶ MPs' Guide to Procedure, England-only bills, <https://guidetoprocedure.parliament.uk/articles/fwjHMbRE/england-only-bills>

²⁷ HC SO83L

²⁸ HC SO83M

Wales), the Legislative Grand Committee for England (or England and Wales) must grant consent before it can proceed to third reading.²⁹

In the event that a Legislative Grand Committee does not pass a consent motion, a reconsideration stage takes place where the House will attempt to reach a compromise.³⁰ Once this process has completed, the Speaker must again certify any provisions that apply only in England (or England and Wales).³¹ A Legislative Grand Committee will reconvene and be asked to consent to the alternative provisions. If consent is withheld a second time, the disputed parts of the bill will stand vetoed. At this point, the bill may proceed to 'consequential consideration'. This allows minor and technical amendments to be made to remedy any defects that may arise from removing clauses or schedules.^{32 33} Finally, third reading takes place where all MPs have the opportunity to vote on the amended bill.

As EVEL is governed by the Standing Orders of the House of Commons, the legislative process in the House of Lords is unchanged. If the House of Lords amend a bill, the Speaker will certify any motions relating to Lords amendments that apply to England (or England and Wales) only. Any votes on certified motions will be subject to a double majority.³⁴ This requires approval from both English (or English and Welsh) MPs and the House of Commons as a whole for the amendments to become law.

Finance Bills

For Finance Bills, the Speaker may certify clauses and schedules as relating exclusively to England, Wales and Northern Ireland. The Speaker would do this if the bill contained provision for a tax

²⁹ *ibid*

³⁰ HC SO83N

³¹ HC SO 83(L)

³² HC SO 83N(9)

³³ As there have been no instances to date in which consent has not been given to all certified provisions, the reconsideration and consequential consideration stages have not taken place.

³⁴ HC SO83O

measure that could be introduced in the same form for Scotland by the Scottish Parliament.^{35 36} The relevant Legislative Grand Committee must pass a consent motion before third reading for a certified provision to be included in the bill.

Finance Bills are introduced after the passage of what are known as 'founding resolutions'. Most commonly, those are the Budget resolutions, which are considered at the time of the Budget. Founding resolutions state what can be in the bill. If a founding resolution allows a bill to contain a provision which relates exclusively to England (or England and Wales, or England, Wales and Northern Ireland), and the provision is 'within devolved legislative competence', then the Speaker must certify it. If the Speaker certifies a founding resolution, it's subject to a double majority vote.^{37 38}

Delegated Legislation

The EVEL procedures also apply to delegated legislation. The Speaker must certify any statutory instrument that applies to England (or England and Wales) only and is within devolved legislative competence.³⁹ If a statutory instrument is made under an Act, which resulted from a Finance Bill, the Speaker must issue a certificate to it if it relates exclusively to England, Wales and Northern Ireland, and the Scottish Parliament could make corresponding provision.⁴⁰ Any vote on a motion to approve or annul a certified statutory instrument is subject to a double majority requirement.

³⁵ HC SO83U

³⁶ MPs Guide to Procedure, Finance Bills and EVEL, UK Parliament
<https://guidetoprocedure.parliament.uk/articles/LOmqYNCq/finance-bills-and-evel>

³⁷ *ibid*

³⁸ Erskine May, Motions for Founding Resolutions for Finance Bills, UK Parliament,
<https://erskinemay.parliament.uk/section/5224/motions-for-founding-resolutions-for-finance-bills>

³⁹ HC SO83P

⁴⁰ MPs Guide to Procedure, EVEL and Delegated Legislation, UK Parliament
<https://guidetoprocedure.parliament.uk/collections/aTEgrs2w/evel-and-delegated-legislation>

IV – CRITICISMS OF EVEL

EVEL has attracted significant criticism across party lines. Some have raised practical objections: that the procedures are too complex and may place the Speaker in an uncomfortable position. Others have concerns relating to EVEL's constitutional implications, such as the perception that the procedures create a hierarchy among MPs and may fail to provide a permanent solution to the West Lothian Question. This section considers each of these criticisms in turn.

Complexity

A common complaint against EVEL is that the procedures are exceptionally complicated. According to the Procedure Committee, consent, reconciliation, veto and consequential consideration can add up to eight stages during a bill's passage through the Commons.⁴¹ When MPs debated the motion that introduced EVEL, the process for certified legislation was described as 'incomprehensible' and 'unbelievably obscure'.^{42,43} The Standing Orders underpinning the procedures also lack simplicity. Commentators have suggested that legalistic drafting has made the rules difficult to interpret.⁴⁴ Indeed, in evidence to the Public Administration and Constitutional Affairs Committee, two former Clerks of the House both confessed to having some difficulty discerning the meaning of the provisions. While parliamentary procedure is technical in nature, if experts in this field have difficulty mastering the processes, it may do little to reassure the public that steps have been taken to address the West Lothian Question.

⁴¹ Procedure Committee, English votes for English laws Standing Orders: report of the Committee's technical evaluation Report on EVEL, 19 December 2016 HC 189 2016-2017, para 6

⁴² Chris Bryant MP, HC Deb 22 October 2015 vol600 c1186

⁴³ Sir William Cash MP, HC Deb 22 October 2015 vol600 c1218

⁴⁴ Daniel Gover and Michael Kenny, Finding the Good in EVEL: An evaluation of English votes for English Laws in the House of Commons, (Centre for Constitutional Change 2016) p27

Politicisation of the Speaker

Opponents of EVEL have also argued that the certification process could politicise the office of the Speaker.⁴⁵ While the Chair regularly takes decisions that have a substantive effect on proceedings, such as selecting amendments and granting Urgent Questions, certification provides for an extraordinary development whereby the Speaker may routinely exclude classes of MPs from votes on primary and secondary legislation. The difficulty for the Speaker is that the two-stage certification test is not straightforward. At times, there may be differences of opinion relating to its correct application, which has the potential to cause political disputes.

Determining the territorial application of a provision should, in theory, be relatively simple. However, the Standing Orders instruct the Speaker to disregard any 'minor and consequential effects' that a provision may have on other parts of the UK.⁴⁶ This complicates matters because it requires the Speaker to make a subjective judgement. As Lord Lisvane⁴⁷ explained in evidence to the Political and Constitutional Affairs Committee, cross-border effects may be considered 'minor and consequential' by the Speaker from a UK-wide perspective, but those living in the affected areas may take a different view.⁴⁸ Quite understandably, MPs representing such areas may raise objections if they believe the legislation affects their constituents.

Decisions by the Speaker on territorial application have been challenged intermittently on the floor of the House. During the passage of the Housing and Planning Bill, clarification was sought on why a clause was certified as relating exclusively to

⁴⁵ HC Deb 22 October 2015 vol 600 c1202

⁴⁶ HC SO83J(2)

⁴⁷ As Sir Robert Rogers, former Clerk of the House

⁴⁸ Public Administration and Constitutional Affairs Committee, Oral Evidence: English Votes for English Laws and the Future of the Union, HC 523, 27 October 2015, Q116

England, despite its express reference to Wales.⁴⁹ On another occasion, the certification of the Charities (Protection and Social Investment) Bill as relating to England-only was queried on the basis that the legislation had an indirect effect on Northern Ireland.⁵⁰ Most recently, a dispute occurred in relation to the NHS funding bill. The Speaker certified the bill as applying exclusively to England, but Pete Wishart MP argued the bill would have 'a fundamental impact on the health funding of Scotland through the Barnett consequential'.⁵¹ On each of these occasions, MPs directed their criticisms towards the procedures rather than the Speaker himself. But as further powers are transferred to devolved legislatures, more legislation will be subject to the EVEL process. Therefore, the possibility of a more serious dispute arising in future cannot be ruled out.

Although the boundaries of devolved legislative competence are far from clear-cut, the application of the second limb of the certification test has not been contentious. In part, this is because the Speaker has access to expert legal and constitutional advice to ensure the test is decided correctly.⁵² Nevertheless, it is conceivable that a certification could be contradicted by a subsequent Supreme Court ruling, which while not going so far as to review the Speaker's certificate might interpret differently from the Speaker the extent of the devolved competence. But it is hard to see what this might achieve. Since Article IX of the Bill of Rights precludes proceedings in Parliament from being questioned in the courts, it is unlikely that there could be any effective challenge to the Speaker's decision.⁵³ The courts

⁴⁹ Lady Sylvia Hermon MP, HC Deb 13 January 2016 vol604 c861

⁵⁰ Lady Sylvia Hermon MP, HC Deb 26 January 2016 vol605 c228

⁵¹ Pete Wishart MP HC Deb 4 February 2020 vol671 c215

⁵² Procedure Committee, Government proposals for English votes for English laws Standing Orders: Interim Report English votes for English laws Standing Orders: Report of the Committee's technical evaluation Report on EVEL, 19 October 2015 HC 410 2015–2015, para 51

⁵³ Nonetheless, as it is for the courts to determine the ambit of Article IX, the House of Commons Procedure Committee

do not have power to quash an Act of Parliament. Instead, under these circumstances, there would be an uncomfortable revelation that a subset of MPs had been erroneously excluded from stages of the legislative process, and thereby deprived of opportunities to represent their constituents. It is uncertain how this would affect the relationship between the Speaker and those Members.

Two Classes of MP

A further objection to EVEL is that it creates 'two classes of MPs'. The innovation of territorially constituted Public Bill Committees and Legislative Grand Committees has led to complaints that some MPs receive preferential treatment over their counterparts in the legislative process. At times there have been acrimonious disputes, such as in February 2020 when Plaid Cymru and SNP Members protested against the fact they could not vote during the NHS Funding Bill's Legislative Grand Committee stage.⁵⁴

Whether a hierarchy exists is a matter of perception. While EVEL does exclude MPs from participating at certain stages of the legislative process, the existence of the double veto means that all legislation must receive the support of the whole House to pass. Moreover, MPs have had differential participation rights based on the constituencies they represent long before EVEL was introduced. For example, territorially constituted Grand Committees have been a feature at Westminster since 1907, and in their current form provide a forum for Scottish, Welsh and Northern Irish MPs to consider matters relating to their constituent part of the Union. There is a case to be made that EVEL is merely another way for reconfiguring the Commons, with the ambition that it will strengthen the representation of English

have suggested that a legal challenge cannot be ruled out (see Procedure Committee, Government proposals for English votes for English laws Standing Orders: Interim Report English votes for English laws Standing Orders: Report of the Committee's technical evaluation Report on EVEL, 19 October 2015 HC 410 2015–2015, para 49)

⁵⁴ SNP accused of 'stunt' over English-only vote, BBC News, 4 February 2020 www.bbc.co.uk/news/uk-scotland-scotland-politics-51378669 accessed 23 October 2020

interests, and create some degree of parity between England and the devolved nations.

Permanency

Events at Westminster during the COVID-19 pandemic have cast doubts on the permanency of EVEL. Like most other workplaces, the House of Commons adopted alternative arrangements to ensure it could still function.⁵⁵ These include changes to the way divisions are conducted, which made it difficult for the votes of English MPs to be counted separately.⁵⁶ As such, the EVEL Standing Orders are temporarily suspended, despite the fact that many of the public health measures passed relate exclusively to England.

Although the suspension may be necessary under present circumstances, it does highlight EVEL's vulnerability. Any future Government seeking to repeal the procedures may do so on the basis of a simple majority vote. The strength of opposition to EVEL among MPs suggests that it is unlikely to survive a change in administration. When the House of Commons divided on the motion that introduced the procedures, it did so along partisan

⁵⁵ HC Deb 22 April 2020 vol675c74

⁵⁶ Daniel Gover and Michael Kenny, Five years of EVEL, The Constitution Unit, 23 October 2020 <https://constitution-unit.com/2020/10/23/five-years-of-evel>

lines; five years later, there is little evidence that attitudes have changed. Indeed, the protest staged during the passage of the NHS Funding Bill has exposed the hostility that opposition members continue to have towards the reform.

A Government seeking to repeal EVEL would undoubtedly have to face the political cost for doing so. However, if it depended on non-English MPs to form its majority, repealing the procedures may be preferable to incurring legislative defeats. But that still leaves the unappealing prospect of by far the largest part of the UK's population being potentially subjected to legislation, e.g. in respect of Health or Education, which a substantial majority of English MPs has opposed and for which the English taxpayer will provide funding.

There is an argument for embodying the procedures in primary legislation to provide some degree of entrenchment. The Government has rejected this option, as setting the procedures out in statute could bring them into the purview of the courts.⁵⁷

⁵⁷ Leader of the House of Commons, Technical Review of the Standing Orders Related to English Votes for English Laws and the Procedures they Introduced (CM9430, 2017) para39

V – RECOMMENDATIONS

With legislative entrenchment not an option, consideration must be given for how to secure support for EVEL and therefore guarantee it as a permanent fixture of the UK's territorial constitution. Three recommendations for achieving this goal are outlined below.

Legislative Grand Committee

There is a strong case for reducing the complexity of EVEL. If the procedures were more widely understood, it would be easier to demonstrate that steps have been taken to strengthen the representation of English interests at Westminster.

- At present, proceedings in Legislative Grand Committees are perfunctory. Substantive

debates rarely take place (the Housing and Planning Bill and NHS Funding Bill among the few exceptions) and consent motions have been passed on every occasion.

- Although the elaborate procedures have not been particularly burdensome on the business of the House, it seems unnecessary that they should automatically take place if they offer no benefit. Applying EVEL only to bills where there is evidence that MPs will intend to exercise their veto would simplify the process.
- The writer wonders whether some mechanism might be devised for the Speaker to give a 'provisional' ruling that the EVEL procedure should not take place, unless there is a motion

to the contrary supported by a given number of MPs or some similar procedural device.

- Alternatively, the Procedure Committee recommended amending Standing Order No.83M 'so as to provide that where a Minister has indicated under 83M(3) the intention to move a consent motion it shall be deemed to have been passed by the legislative grand committee for the area to which the certification relates unless an objection is taken.'⁵⁸
- In its technical evaluation of the Standing Orders, the Government claimed that 'making Legislative Grand Committee dependent on dissent being indicated at the right time would risk making the procedures opaque and consequently rarely used.'⁵⁹
- But the current process also suffers from opacity – observers of proceedings may struggle to understand why complex procedures are applied to legislation when they often serve no purpose.

A Simplified Veto

A further way of improving the comprehensibility of EVEL would be to simplify the veto process.

- Under the current process for primary legislation, provisions may be vetoed following report stage, or during the consideration of Lords amendments. While this does provide for a robust veto mechanism, the sequence of events is difficult to follow.
- In order to simplify the process, consideration could be given to whether it is preferable to have just one veto point, at the end of a bill's passage through the Commons. This would eliminate the need for the Speaker to re-certify

legislation upon its return from the Lords and for double majority voting on Lords amendments to take place.

But having a single veto point would necessarily weaken EVEL's ability to address the West Lothian Question: it would give all MPs an equal say on whether to adopt any amendments made by the Lords.

- However, it should be acknowledged that EVEL already falls short of fully rectifying the asymmetrical voting rights in the House of Commons. The existence of the double veto means that all MPs continue to have a decisive input on affected legislation.

Removing the veto

It may be the case that the only way to assuage the concerns of EVEL's opponents would be to remove the legislative veto altogether.

- EVEL could be modified to reflect some proposals of the McKay Commission, or Conservative Party Democracy Taskforce, not least:
 - That the amending stages of legislation relating exclusively to England (or England and Wales) would be considered only by MPs from those parts of the UK.^{60 61}
 - That the House adopt the following declaratory resolution: *decisions at the UK level with a separate and distinct effect for England (or for England-and-Wales) should normally be taken only with the consent of a majority of MPs for constituencies in England (or England-and-Wales)*.⁶²
- This model would allow MPs from England (or England and Wales) to have the decisive say over the content of legislation but fall short of

⁵⁸ Procedure Committee, Government proposals for English votes for English laws Standing Orders: Interim Report English votes for English laws Standing Orders: Report of the Committee's technical evaluation Report on EVEL, 19 October 2015 HC 410 2015–2015, para 54

⁵⁹ Leader of the House of Commons, Technical Review of the Standing Orders Related to English Votes for English Laws and the Procedures they Introduced (CM9430, 2017) para 27

⁶⁰ Conservative Party Democracy Taskforce, Answering the Question: Devolution, The West Lothian Question and the Future of the Union, (Conservative Party 2007) p5

⁶¹ Sir William McKay, Report of the Commission on the Consequences of Devolution for the House of Commons (The McKay Commission 2013) p10

⁶² *ibid* p36

facilitating a veto. At the same time, there would be political pressure on non-English MPs to abstain on votes not affecting their constituencies.

- Gover and Kenny have suggested several new mechanisms that could also be adopted to strengthen the representation of English interests⁶³:

- Territorially-constituted pre-legislative scrutiny committees – Certified legislation could be committed to committees whose membership comprises solely of English (or English and Welsh) MPs.

⁶³ Daniel Gover and Michael Kenny, 'Finding the Good in EVEL: An evaluation of English votes for English Laws in the House of Commons' (Centre for Constitutional Change 2016) p37

- An English Grand Committee – a committee consisting of only English MPs. This could debate the merits of a bill at second reading and pass non-binding consent motions.

Beyond the legislative process, it could have the capacity to question ministers and receive ministerial statements. Furthermore, it could conduct general debates relating to English issues. Because of the large number of English MPs, it may not be practical for an English Grand Committee to meet in the Westminster Hall antechamber. There would need to be parliamentary time available for the Committee to meet in the House of Commons. A means would have to be found to accommodate this.

- An English Affairs Select Committee – a select committee, but with a cross-cutting remit so that it would not duplicate the work of other select committees.



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