

The Crisis of the Constitution

*The General Election and the Future
of the United Kingdom*

Vernon Bogdanor

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OF THE UNITED KINGDOM*

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PART 1

The Constitution Returns

Who governs Britain? That is the question being put to the voters on 7th May. But there are other questions lurking in the background, constitutional questions. The first of them is – how is Britain to be governed in an era of party fragmentation in which the electoral system either fails to yield a single-party majority government; or, if it does yield such a government, that government is one that enjoys little more than just over one-third of the popular vote.

The second and even more fundamental question is – will there remain a Britain to be governed, or will the election give a further push to those forces in Scotland calling for separation. The general election could raise a large question mark both over the first past the post electoral system with its natural concomitant, single party government, but also over the very future of the United Kingdom. As we shall see, these two issues – the electoral system and the Scottish Question – are 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 has been quite unexpected. The Prime Minister – and no doubt many others too – hoped

that the referendum held on 18th September last year, would end the debate on independence. Indeed, David Cameron said after the referendum that the issue of independence had now been 'settled for a generation or – perhaps for a lifetime.' That has not happened. Instead, there has been a wave of support for the Scottish nationalists. The SNP, despite losing the referendum, has enjoyed a huge increase in its membership from around 25,000 to around 90,000. Membership of the Scottish Labour and Conservative parties, by contrast, is thought to be under 20,000. Current opinion polls indicate that the SNP may be poised to win many of what have hitherto been regarded as safe Labour seats in the west central belt of Scotland and that it could become the 3rd largest party in the general election. If that happened, it would fuel demands for a second referendum. To keep Scotland within the Union will require exceptional reserves of sensitivity on the part of the Unionist parties, 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, however, would be held, not immediately, but 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. The referendum would be held, therefore, not immediately but by the end of 2017. Contrary to what is often suggested, the Prime Minister did not, in his speech, talk of 'renegotiation' nor of new 'opt-outs'. He did not at that time argue for a special dispensation for Britain, but a new 'general settlement' for Europe as a whole. Interestingly, the principles of this proposed 'settlement' did not, in January 2013,

include anything about immigration. Since then, however, the Prime Minister has spoken of reforms to immigration, at least some of which would require treaty change. The issue of Britain's relationship with the European Union, therefore, is bound to play a prominent part in the election campaign.

In addition to the Scottish problem and the European problem, there is also a human rights problem. In October 2014, the Conservative Party produced a document entitled, 'Protecting Rights in the UK'. This proposed repeal of the 1998 Human Rights Act, and its replacement by a British Bill of Rights which would replicate some of the rights in the European Convention of Human Rights but curtail others. In addition, judgments of the European Court of Human Rights would in future be deemed advisory only and of no binding status in UK law. To permit implementation of these proposals, the British government would seek to re-negotiate its membership of the Council of Europe. But, if these negotiations were unsuccessful, the government would propose that Britain withdraws from the European Convention.

These two problems – the European problem and the human rights problem – impinge on the Scottish problem. They could affect the future of the Union with Scotland. 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. In Northern Ireland the consent of both Unionist and Nationalist communities would probably be needed. So a vote to

leave the European Union against the wishes of the Scots could provoke a constitutional crisis.

The human rights problem also impinges on the Union with Scotland, and it impinges, in addition, upon the constitutional settlement in Northern Ireland – the Belfast Agreement of 1998. This 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 curtailment of 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. 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, 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. In practical terms, it would probably be necessary 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.¹ 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 there were to be different standards of

1 See Geoffrey Marshall, 'Canada's New Constitution (1982): Some Lessons in Constitutional Engineering', in Vernon Bogdanor, ed, *Constitutions in Democratic Politics*, Gower 1988.

human rights in different parts of the United Kingdom – with the exception perhaps of the special situation of Northern Ireland. 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 separatists.

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

As if all these problems were not difficult enough, Britain faces, in addition to the Scottish, European and human rights questions, 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 resurrected the English Question. This Question has come on to the political agenda in reaction to proposals for further devolution to Scotland.

Although the outcome of the referendum on Scottish independence was a comfortable 55 to 45 majority against independence, 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 represents a Scottish constituency and was perceived by many Scots as speaking for Scotland.

This promise was, however, made without consulting the House of Commons, 533 of whose MPs in a House of 650, represent English constituencies. Conservative MPs protested that they would not support further powers for Scotland unless something

was 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. A Cabinet committee was set up under William Hague, the Leader of the House of Commons, to consider various options by which English opinion might be mollified.

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 is the anomaly in the devolution settlement. This, many in England argue, puts her at a disadvantage at Westminster. For devolution has transformed Britain into a multinational state. How in that multinational state can England defend her 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.²

The English Question in fact comprises two questions. The first is the West Lothian Question, named after the MP who

2 See Ben Wellings, *English Nationalism and Euroscepticism: Losing the Peace*, Peter Lang, 2013.

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.

The United Kingdom therefore faces an English as well as a Scottish problem.

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'.³

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.

3 Cmnd. 5460, 1973, para. 531.

What alternative solutions are possible? The Cabinet committee established under William Hague in the aftermath of the Scottish referendum came up with three possible options to resolve the English Question, all of which involve changes in parliamentary procedure.

The first and most radical option was 'English votes for English laws'. This would entail that MPs representing non-English constituencies would be excluded from voting on English domestic legislation. The policy of 'English votes for English laws' has in fact been the official policy of the Conservative Party since 2001, and it was reiterated by David Cameron in the immediate aftermath of the Scottish referendum.

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.

For it would mean that, whenever a government depended upon Scottish MPs for its majority, as could happen if a Labour government, dependent on Scottish votes, were to be elected in 2015, the Commons would become bifurcated. 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. There would 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. A bifurcated government would undermine this principle.

The second option put forward by the Hague committee was that all English legislation should be sent to an English Grand Committee, with membership proportional to the strength of the parties in England. The Liberal Democrats, believing in proportional representation, have proposed that such a Grand Committee be based not on party strengths, but on the strength of the *votes* cast for the parties in England so as to get the principle of proportional representation recognized in the procedures of the House of Commons. Under the proposal for an English Grand Committee, 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, analogously perhaps to the position 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 an English Grand Committee, therefore, is, so its supporters believe, perfectly compatible with the conventions of parliamentary government.

But the analogy with minority government 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 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 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. Moreover, the English Grand Committee would in effect seek

to legislate on matters such as health and education, which have revenue-raising implications, even though it would not have control over taxation. No government would agree to alter taxes for policies with which it fundamentally disagrees. 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.

The third and final option put forward by the Hague committee, was based on the report of the McKay Commission in 2013. This proposed that, while all MPs should continue to be able to vote on all legislation, the votes of English and non-English MPs should be separately recorded, and there should be a convention that 'English' legislation should only be passed by a majority of English MPs. This convention would have no statutory force, but a government might be seriously embarrassed were it to seek to pass 'English' legislation with the aid of the votes of MPs representing non-English constituencies. This third option was sympathetically received by Sadiq Khan, the Shadow Justice Secretary, and so it may, unlike the other two options, achieve all party support.

The English Question has become even more complex as a result of the report of the Smith Commission, established by the government to give concrete form to the promise made by the party leaders in the wake of the Scottish referendum to give more devolution to Scotland. In its report, the Smith Commission proposed to devolve control of income tax rates and bands to the Scottish Parliament. This report has been broadly accepted by the government in its draft legislation, 'Scotland in the United Kingdom: An Enduring Settlement, Cm. 8990, January 2015'.

It is obviously right to end the asymmetry by which the Scottish Parliament enjoys wide spending powers but only very limited taxation powers. Such a system provides an incentive for Scottish

grievances. For the Scots can argue that any deficiencies in Scottish public services are due to the parsimony of London. If the bulk of Scottish revenue comes from London, it is all too easy to argue that, if only London were more generous, the Scottish education or health systems would be in a better state. That a government should be responsible for raising the revenue to match its expenditure is, surely, a fundamental tenet of good administration. Since local authorities can raise their own revenue in the form of the council tax, it is highly anomalous that a body representing the Scottish people lacks major sources of revenue.

But the Smith Commission report perhaps went too far. To propose that control of income tax be vested in the Scottish Parliament is hardly logical since income tax is used to pay for reserved matters such as foreign affairs and defence as well as devolved matters such as health, education and housing. In no federal system known to me is income tax as a whole devolved. The general pattern is for there to be shared control of income tax and that would have been the sensible solution.

Were Scotland to be given full control of income tax, she would in fact be placed in a difficult position. For, as part of the United Kingdom, she would remain in a monetary union, but she would no longer be in a fiscal union since tax rates in Scotland and in England would become different. One only has to look at the problems of the Eurozone to appreciate how damaging a monetary union without a fiscal union can be. Indeed, the argument that a monetary union could not work without a fiscal union was one of the most powerful of those deployed by Unionists in the Scottish referendum campaign.

But the Smith Commission report poses dangers, not only to Scotland, but to the stability of parliamentary arrangements at Westminster. When the report was published, the Prime Minister argued that, if

its recommendations were implemented, the case for English votes for English laws would become 'unanswerable'. But a government, dependent on Scottish MPs for its majority, would become impotent if it could not secure passage of its budget. A government in this position would no longer be able to govern. Moreover, with income tax devolved to Holyrood, Scottish MPs would no longer be able to vote on the main tax paid by their constituents. Their role at Westminster would be drastically restricted, and they might fear that they were being steered towards exit from Westminster. The Smith Commission urged that all MPs should continue to be able to vote on the budget. Would it be possible in future to have a Chancellor of the Exchequer representing a Scottish constituency were he unable to vote on income tax matters?

Proposals for 'English votes for English laws' and for an English Grand Committee in effect create an English Parliament, albeit an English Parliament within Westminster rather than as a separate institution. The natural corollary, drawn by Bernard Jenkin MP, Chairman of the House of Commons Public Administration Select Committee in a letter to 'The Times' on 16 September was that there should also be 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. Scottish MPs would be excluded from most Westminster business and excluded from the position of Chancellor of the Exchequer. The creation of an English Parliament with an English Prime Minister, therefore, is hardly compatible with retaining the Union with Scotland.

A fundamental assumption behind proposals for English votes for English laws is that it is easy to separate English matters from Scottish. Yet, even if all control of income tax were devolved to Scotland, the bulk of Holyrood's revenue would still come from Westminster. This means that any variation in spending on an English service such as health would have a knock-on effect in Scotland. Suppose that there is a cut on health spending in England. The block grant to Scotland would then be correspondingly reduced since it is fixed as a percentage of English expenditure. That is bound to be the case since England is the dominant part of the United Kingdom; and it explains why Scots MPs must continue to vote on what seem to be English issues. As the Royal Commission on the Constitution concluded in 1973, 'Any issue in Westminster involving expenditure of public money is of concern to all parts of the United Kingdom since it may directly affect the level of taxation and indirectly influence the level of a region's own expenditure.'⁴ There are, therefore, no specifically 'English' domestic matters involving public expenditure.

Furthermore, it would not be at all easy for the Speaker to determine precisely which bills were 'English' and which were not. Some bills contain clauses which provide for changes in one area of the United Kingdom only, but other clauses which provide for changes in other areas also. For example, most of the 2004 Higher Education bill providing for top-up fees in universities, applied just to England and Wales. But, with respect to Wales, the bill provided that the National Assembly for Wales could decide for itself whether to introduce top-up fees in Wales – in the event, the National Assembly decided not to do so. It would be unclear whether English votes for English laws would have had the effect of excluding Welsh MPs. In addition, part 1 of the bill as well as clauses 42, 43, 44, 47, 48 and 50, extended to Scotland and Northern Ireland as well as

4 Cmnd, 5460, para. 813.

to England and Wales. Would MPs from Scotland and Northern Ireland, therefore, be brought back in what a Scottish Labour MP, George Foulkes, called a kind of 'legislative hokey-cokey' to vote just on these particular clauses.⁵ But, even more fundamentally, the bill as a whole would have indirect effects in Scotland. For the introduction of tuition fees for universities in England would mean greater reliance on private funding for English universities. This would have the effect of reducing the block grant to Scotland. The Scots, therefore, had a significant stake in the outcome. Perhaps it was for this reason that the SNP, which has a policy of not voting on 'English' matters decided to vote on the bill, and voted against it, because of its implications for higher education in Scotland.

The Speaker would be placed in a very difficult position in deciding which bills and which parts of bills were 'English' and which were not. It is even possible that his decision could come to be questioned in the courts. The new procedures would no doubt provide that the Speaker's decision could *not* be questioned in the courts; and there is an analogy in the Parliament Act of 1911 which specifically provides that the decision of the Speaker as to whether a bill is or is not a money bill cannot be questioned in the courts. But the 1911 Act was passed in a period when there was much greater deference towards the Speaker than there is today; and the courts are more suspicious today than they were in 1911 of granting any public authority an unrestricted discretion which cannot be reviewed. It is by no means certain, then, that Parliament would be successful in excluding the courts from decisions as to whether a bill or part of a bill were truly 'English'.

But there is an even deeper reason why English votes for English laws is misguided. It is a separatist proposal, whose effect would

5 In an opposition day debate on the idea of English votes for English laws, House of Commons Debates, 21 January 2004, vol. 416, col. 1394.

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 has 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 the Scottish and English systems of government together, not to separate them. Sadly, the Smith Commission proposals would have the opposite effect. If implemented, they would be in danger of giving Scottish separatists through the back door what they failed to gain through the front door in September’s referendum.

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 when she resisted Home Rule, with disastrous consequences.

It is in any case a fallacy to believe that the English voice is not heard at present. Of the 650 constituencies represented at Westminster, 533 are English. England remains the dominant nation. She has no need to beat the drum or blow the bugle. If she does, the devolution settlement will be strained to breaking point. The existence of the United Kingdom rests on restraint by the dominant nation. Unionists, therefore, should continue to be guided by Disraeli’s famous dictum that England is governed not by logic but by Parliament.

PART 4

Decentralisation in England

The English Question can, however, be alleviated, though not fully answered through political reform. 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. The rest of England, however, has much less leverage. This is 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, and which – with the exception of Liverpool – have rejected directly elected mayors. These cities claim that they face social and economic problems every bit as serious as those of Scotland, but lack the political leverage to ensure that Westminster does something about them.

The problems of the cities can be alleviated by decentralisation in England, not to new regional authorities, for which there is little demand, but to local government. There is a developing consensus, spearheaded by Lord Heseltine for the Conservatives and Lord Adonis for Labour, for decentralisation to England, and in particular fiscal decentralisation to local authorities, perhaps grouped together into city regions. Fiscal decentralisation would allow local authorities to keep a proportion of their tax receipts from property taxes, decentralise the business rate, and perhaps also remove the constraint on council tax increases.

The difficult, however, with a policy of decentralisation is that local authorities in England are 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. A precondition for successful decentralisation 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 decentralisation.

Public attitudes towards decentralisation 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, recently, there were problems with alleged Islamic infiltration of schools in Birmingham, parents were not mollified by being told to consult local councillors or officials. They demanded that ‘the government’ put things right. It is understandable, then, 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 decentralisation 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.

In addition, care needs to be taken to ensure that decentralisation does not undermine 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 *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.

The principle of territorial equality, while constraining the extent of devolution, need by no means entail centralisation. But we do need to ask ourselves 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 decentralised. For Unionism has a social and economic dimension as well as a constitutional one. If decentralisation 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, can be expected 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 in the run up to the general election. This problem arises from the social changes that have transformed the two party system of the 1950s into the multi-party system of today. 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 MPs who did not belong to the Labour or Conservative parties. 57 of these were Liberal Democrats.

Today the evidence from opinion polls indicates that in England, there are, for the first time ever, five parties with over 5% support in the polls – Conservatives, Labour, Liberal Democrats, UKIP and the Greens; in Scotland, with the SNP, there are six parties with over 5% support. Multi-party competition on this scale is quite unprecedented. We face a totally new electoral situation.

In consequence of the development of a multi-party system, the chances of one party securing an overall majority in the 2015 general election are small. Indeed, there is already much talk of how a new government is to be formed if no single party achieves an overall majority. Will there be another coalition, a minority government, or a minority government supported from outside by a confidence and supply agreement? The precise political colour of the next government may not be known until some time after the general election. It could depend as much upon the complex vicissitudes of negotiations after the election as it does upon the actual votes secured by the various parties.

On the day before the 2010 election, in an interview with the *Independent*, David Cameron said that in a hung parliament, 'the decisions that really matter to people are taken behind closed doors. Instead of people choosing the government, the politicians do.'⁶ The government and its policies come to be decided after the votes are counted. The election is no longer the sole determinant of who is to form the government. The party composition of the government is decided in post-election negotiations. The Conservative/Liberal coalition which came to power in 2010 was of course in part an outcome of the arithmetic of the election result; but it was not determined by it. Furthermore, no elector was given the opportunity of consenting to the coalition or withholding her consent. So, with a hung parliament, the function of general elections alters. Instead of directly choosing a government, the election alters the power relations between the parties thereby affecting the relative strengths of the parties in post-election negotiations. There come to be two stages not one in the formation of a government. The first is the election, the second the post-election negotiations. A series of hung parliaments would introduce a system of indirect election in place of the direct

6 'Fourth Debate', *Independent*, 5 May 2010.

election of governments. It would fundamentally alter the working of British politics. There is an obligation upon the parties to adapt to this new situation. If the government that is formed after a hung parliament is to be in accord with the canons of democracy, the parties must tell the voters *before* rather than after the election, both with whom they would consider forming a coalition, or supporting by a confidence and supply agreement, and also which items in their manifestoes are negotiable and which are not.

But, even if the 2015 does not result in a hung parliament and, contrary to most predictions, a single party succeeds in winning an overall majority, the government that emerges is unlikely to be based on the support of more than 35% of the voters. It would then be a government that nearly two-thirds of the voters have opposed. No government since 2001 has gained the support of 40% of the voters. In 2005, Labour, although winning a comfortable majority of 66 seats, gained just under 36% of the vote. A single-party majority government, therefore, if it comes about, will not exemplify the principle of majority rule, but of rule by the largest minority, a minority amounting to just over one-third of the voters.

One 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 2010, only one third of MPs represented a majority of those who voted in their constituency; 433 MPs did not. That is the largest percentage of MPs elected on a minority vote since the 1920s, when the party system was also in flux. Moreover, not one MP since 1997 has secured the votes of a majority of the electorate in her constituency. In 1997, just 14 MPs enjoyed such a majority, while in the heyday of the two-party system, in 1951, there were 214.

The Conservative Party has proposed that no trade union 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, and all but 16 of the MPs elected in 2010 illegitimate, since the other 634 MPs failed to secure the support of 40% of the electors in their constituency.

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.'⁷ In 2010, 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, a sister party to the Liberal Democrats, which succeeded in winning its first 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, remained the fourth party in Scotland. In the South West of England, by contrast, the electoral battle was between the Liberal Democrats, the majority party in the region, 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. In 2015, much of the competition in east coast seats will be 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, they entered the general election of 2010 without a single seat in the large cities of the Midlands, the North or Scotland.

7 Brian Harrison, *Seeking a Role: The United Kingdom 1951-1970*, Clarendon Press, 2009, p. 425.

They were totally unrepresented in Birmingham, Bradford, Edinburgh, Glasgow, Leeds, Liverpool, Manchester, Newcastle, Nottingham and Sheffield; and, although the Conservatives won 97 seats in the 2010 election, these cities still stubbornly refused to return a single Conservative. It is frequently 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.

In consequence of this fragmentation, the 2015 general election will be fought not primarily on a national basis but within regional enclaves. The government which results will probably not only be formed on just over one-third of the popular vote, but will probably also be forced to rely upon a narrow basis of regional support, largely confined to particular areas, rather than enjoying a national mandate. That will make it more difficult to achieve the ideal of 'One Nation' to which all parties pay lip service.

The first past the post system penalises not only minor parties, but also major parties in areas where they are weak. In the south of England outside London, for example, Labour in 2010 won one in six of the votes but just 10 out of 84 seats; while in Scotland, it was the Conservatives who won one in six of the votes. But they won just one out of the 59 seats. This has led many to conclude erroneously that the Conservatives have no support north of the border. Distorted representation makes the country appear more divided than in fact it is. It exaggerates the contrasts in political behaviour between the cities and the countryside and between England and Scotland. It exacerbates the West Lothian problem because it exaggerates the imbalance in strength between the Labour and Conservative parties in Scotland. It therefore threatens the very unity of the country. In the 2010 general election, Labour won 41 of Scotland's 59 constituencies on 42% of the Scottish vote, the Conservatives one seat on 17% of the

Scottish vote. A proportional system would have given Labour 24 seats and the Conservatives 10. Proportional representation, therefore, would alter the dynamics of the conflict between England and Scotland and make it far more manageable.

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. In a multi-party system, it does not work. 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 in 2015 if, as is likely, the electoral outcome seriously misrepresents opinion, either by installing a Prime Minister supported by just one in three of the voters, or by failing to give fair representation to a minor party such as UKIP, which could win over 10% of the vote, but hardly any seats. Such an outcome could threaten the legitimacy of the system.

The first past the post electoral system no longer yields majority rule either at national nor 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 her 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 decentralisation 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 and decentralisation 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, Shadow Foreign Secretary, called for a Scottish Convention to consider

the future of the Scottish constitution similar to that of the 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 the terms of reference 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. Britain, after all, remains one of just three democracies, together with New Zealand and Israel, without a codified constitution. It is, after all, difficult for us to reform our constitution in a

sensible manner if we are not sure precisely what it is. It was said, over a hundred years ago, that our constitution was based not on codified rules but on tacit understandings, but that ‘the understandings are not always understood.’⁸ That remains to some extent true today. Is it 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. In addition, we would be told, some of the rules had not been written down at all – these were called conventions. 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 possibly have been acceptable in the past when Britain was a more homogenous and deferential society. It would 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, when there is a break in their development, either a revolution or a colony achieving independence. Britain has lacked 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

8 Sidney Low, *The Governance of England*, T. Fisher Unwin 1904, p. 12.

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, 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* tending to uphold the status quo. 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 whatever the outcome of the general election.

Vernon Bogdanor, January 2015

The Crisis of the Constitution

The General Election and the Future of the United Kingdom

Vernon Bogdanor

Who governs Britain? That is the question being put to the voters on 7th May. But there are other questions lurking in the background, constitutional questions, that are the subject of this pamphlet. The first of them is – how is Britain to be governed in an era of party fragmentation in which the electoral system either fails to yield a single-party majority government; or, if it does yield such a government, a government, it is likely to be a government enjoying little over one-third of the popular vote.

The second and even more fundamental question is – will there remain a Britain to be governed, or will the election give a further push to those forces in Scotland calling for separation. 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. Vernon Bogdanor discusses both the problems and possible solutions.

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 this important subject.

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