

**'WHAT THEN IS TO BE DONE?' THE BRITISH
CONSTITUTION: A SUITABLE CASE FOR FURTHER
REFORM?**

by

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ABSTRACT

The constitution of the United Kingdom has gone through a period of dramatic change since 1997. Reform has affected almost every aspect of government and governance; from devolution, and reform of the upper house, to freedom of information, independence of the Bank of England, and the introduction of the Human Rights Act. Despite its breadth and depth, much of the reform has been piecemeal and lacking an overarching vision. This paper evaluates three key areas of the new constitution: the English question within the devolution settlement, reform of the House of Lords, and finally the question of electoral reform for the House of Commons and other democratic institutions. It analyses the impacts of changes made and offers ways forward that use existing institutional structures within municipal government to devolve power in England, further legitimize and democratize the House of Lords, and proposes further electoral reform.

Keywords: Constitution; Reform; Devolution; Electoral reform; House of Lords; English question

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CHAPTER 1: INTRODUCTION

Current Status

The 2010 election is over, the votes counted¹ and a new government formed. The conclusion of the most competitive UK General Election since 1992 and the first not to result in a clear majority for one party since 1974 has thrown wide open the prospects for constitutional reform. The new coalition government, the first since 1945, is clearly committed to further constitutional reform.² This research paper will evaluate the current position of constitutional reform in the United Kingdom, examining the changes that have taken place during the last thirteen years, and explore the possible options for further needed reforms in the context of current political circumstances.

By 2007, some ten years into the ‘New Labour Project’ in which Tony Blair and Gordon Brown had set out to remodel British politics, society and the constitution, the distinguished Canadian psephologist and political scientist Anthony King argued that, ‘The new British constitution, the small-c constitution actually operating today, is a mess.’³ The word ‘mess,’ he notes, is not intended to be understood pejoratively in this context but rather, merely as a description. He goes on to argue that, even though, ‘there can be few

¹ One of the Six hundred and fifty UK constituencies, the safe Conservative seat of Thirsk and Malton, did not vote until Thursday 27th May, 2010 as the UKIP candidate died during the General Election campaign.

² The coalition agreement makes explicit reference to political reform, including changes to the voting system and to the structure of the House of Lords. “Conservative-Liberal Democrat Coalition Agreement,” <http://www.guardian.co.uk/politics/2010/may/12/lib-dem-tory-deal-coalition>, (Accessed May 12, 2010). The Prime Minister acknowledged the positive changes made during the thirteen years of Labour rule and referred specifically to the need for further political and constitutional reform in his speech in Downing Street after accepting the Queen’s offer to form a government.

³ Anthony King, “What Then Is To Be Done? The Short Answer is: Nothing,” *Democracy: 1000 Years in Pursuit of British Liberty*, ed. Peter Kellner (Edinburgh: Mainstream, 2009): 519.

countries in the world – perhaps there are none – which have within themselves a variety of governing institutions that are based on fundamentally divergent constitutional conceptions,’ there is nothing that should or could be done to put right this situation.⁴

This paper will examine those constitutional conceptions and evaluate to what extent the reforms of 1997 to 2010 that dealt with devolution, the House of Lords, and electoral reform are sufficient, the effects of changes made, and whether further reform is necessary. It seems likely that, as Meg Russell and Guy Lodge have claimed, ‘When the history of the new Labour Government comes to be written, constitutional reform is likely to be regarded as one of the big success stories.’⁵ However, by failing, as Dawn Oliver argues, to offer a compelling or ‘coherent vision of democracy...or good governance...’⁶ they have failed to deal with some of the major problems associated with the old UK constitution and some of the unintended consequences of the reform process they began. This paper then will consider a variety of different options for further reform, evaluate how practical those reform options may be and make recommendations for the best way forward.

Since the election of Tony Blair’s government in 1997, the constitution has undergone seismic reform. From Scottish, Welsh, and Northern Irish devolution, to the creation of a Bill of Rights, through to reform of the Upper House and the creation of a Supreme Court, recent constitutional change has been dramatic and far-reaching. It has been claimed that, ‘Since 1997...Britain has been engaged in a process that seems quite unique in the democratic world – that of converting an uncodified constitution into a

⁴ King, 520.

⁵ Meg Russell and Guy Lodge, “Westminster and the English Question,” *The Constitutional Unit* (2005): 3.

⁶ Dawn Oliver, *Constitutional Reform in the UK.*, (New York and Oxford: Oxford University Press, 2003): 3.

codified one by piecemeal means...⁷ The following constitutional changes, as Vernon Bogdanor⁸ notes have been implemented:

- The constitutional independence of the Bank of England from government with regard to monetary policy.
- Referendums on devolution to Scotland, Wales and Northern Ireland.
- Creating a directly elected Scottish Parliament under The Scotland Act 1998.
- The Government of Wales Act 1998, providing for a directly elected National Assembly for Wales.
- The introduction in Northern Ireland of a directly elected Assembly in the province.
- A referendum on a directly elected mayor and strategic authority for London.
- The introduction of proportional representation for elections to the devolved bodies in Scotland, Wales, Northern Ireland and London.
- The European Parliamentary Elections Act 1999, providing for the introduction of proportional representation to the European Parliament.
- The requirement on local authorities, under the Local Government Act 2000, to abandon the committee system and adopt either a cabinet system, a city manager system or a directly elected mayor.
- The Human Rights Act 1998, requiring public bodies to comply with the provisions of the European Convention of Human Rights and allowing a judge to rule on the compatibility of UK Law in relation to the Convention along with a fast-track mechanism for Parliament to amend or repeal such a statute.
- The removal of all but ninety two hereditary peers from the House of Lords, as part of the first stage of second chamber reforms.
- The Freedom of Information Act 2000.

⁷ Vernon Bogdanor, "Constitutional Reform in Britain: The Quiet Revolution," *Annual Review of Political Science* 8 (2005): 74.

⁸ Vernon Bogdanor, *The New British Constitution*, (New York and Oxford: Oxford University Press, 2009): 4-5.

- The Political Parties, Election and Referendums Act 2000, controlling donations, requiring registration of parties and setting limits on national campaign election expenditure, as well as creating an independent Electoral Commission to oversee elections.
- The Constitutional Reform act 2005, providing for the removal of the Lord Chancellor from being head of the judiciary and speaker of the House of Lords. Removal of the Law Lords from the upper house and the establishment of a Supreme Court.
- The Constitutional Reform and Governance Act 2010 which ended up a much watered down version of the earlier bill as a result of the ‘wash-up’ prior to the election, although it still gave parliament the right to veto treaties and provided for amendments to parliamentary standards⁹

Even this impressive list does not do justice to the full extent of the Labour Government’s efforts to bring about other constitutional reform. Hence, it does not reflect the extensive back and forth that has taken place on further Lords reform nor the move towards some form of electoral reform for the House of Commons to which Gordon Brown committed himself prior to the 2010 general election. As a result of the enormity of the issues involved, this paper will not seek to evaluate much of this reform, nor will it give serious consideration to the impact of the European Union on the British constitution. It will, however, seek to evaluate the impact of devolution, particularly on the governance of England, consider the current status of House of Lords reform, examine some of the issues surrounding voting reform, and analyse options for further reform in all these areas. These areas of reform are particularly important in that they are high up the agenda for the new coalition government and represent, as Oliver has argued, key ‘landmarks’¹⁰ along one of the potential roads flowing from the ‘cross-roads’ that, she claims, the UK constitution is currently at. She goes on to suggest that:

⁹ Bogdanor. *The New British Constitution*, 4-5.

¹⁰ Dawn Oliver, *Constitutional reform in the UK*, (New York and Oxford: Oxford University Press, 2003): 389. Oliver refers to voting reform, reform of the Second Chamber, voting reform for local authorities and further devolution as central to achieving a more effective constitution.

Along one of those roads lies a dynamic, effective, legitimate, responsive, decentralized political system commanding broad public support and trust, holding government to account and securing high-quality legislation...Along the other road – which is the road we are currently travelling along – will lie a weak political system lacking legitimacy, a public that is mistrustful of its politicians, a Parliament that is incompetent at holding government to account...¹¹

By suggesting further reform, building on the changes made during the past thirteen years, the more positive of the two roads described above is the one that hopefully will be taken.

It is in the area of devolution that some of the most swift and significant changes have been made with, as Russell Deacon has argued, change, ‘when it happened, coming remarkably quickly.’¹² The United Kingdom has gone from being an essentially unitary state, to one where power has been successfully devolved to a Scottish Parliament and to assemblies for Wales and Northern Ireland. England, though, is the missing piece of the puzzle, and it is on this ‘English Question’ that this paper will focus, in Chapter Two. Even though Charlie Jeffery is correct that the unitary nature of the old constitution had tended to be over simplified, in that, ‘centralized power was never systematically used to create a territorially uniform state,’¹³ the impact of devolution has been considerable. As Michael Keating has observed, devolution ‘...represents a radical change for the United Kingdom [and] a recognition of deep-seated and historic features of the British state.’¹⁴

Reform of the House of Lords is another area of focus that will be explored in Chapter Three of this research paper. As with devolution, much has been achieved in this area. However, Lords reform has been much more difficult, as Peter Dorey has argued:

¹¹ Dawn Oliver, *Constitutional reform in the UK*, (New York and Oxford: Oxford University Press, 2003): 389-390.

¹² Russell Deacon, *Devolution in Britain Today*. (Manchester: Manchester University Press, 2006): 231.

¹³ Charlie Jeffery, “The Unfinished Business of Devolution,” *Public Policy and Administration* 22 (2007): 92.

¹⁴ Michael Keating, “Reforging the Union: Devolution and Constitutional Change in the United Kingdom,” *Publius, the Journal of Federalism*, 28:1 (1998): 217.

...Intra-party divisions, clearly discernable in the votes held on proposals for reform in 2003 and 2007, coupled with the Labour leadership's determination to defend the primacy of the House of Commons, and the tacit acceptance of the Westminster Model, have ensured that after more than ten years in Office, "stage two" of House of Lords reform is still far from complete.¹⁵

Nevertheless, enormous change has been affected in the House of Lords. There is no longer an inbuilt Conservative majority, and as Michael Parsons, amongst others, has argued:

the House of Lords has unquestionably gained in legitimacy...It has shown it wants to be much more than a simple revising chamber and in recent years has taken on an increasingly important role with regard to civil liberties and constitutional issues.¹⁶

That notwithstanding, as the late Robin Cook noted in 2003, 'I was struck by the fact that there is a real possibility that we could drift into House of Lords reform becoming our parliamentary equivalent of "Waiting for Godot," as it never arrives and some have become rather doubtful whether it even exists.'¹⁷ Seven years later, it is indicative of the troubled path of reform that he could have made exactly the same speech now as then. Clearly, there is much that still needs to be done and this paper will evaluate the current situation and the prospects for further reform.

Finally, this paper will consider the question of electoral reform in Chapter Four. It will evaluate the changes introduced over the past thirteen years and explore likely options and the prospect for further reform. As Rodney Brazier has argued, 'It is difficult to exaggerate the constitutional importance of the voting system which returns Members of

¹⁵ Peter Dorey, "Stumbling through 'Stage Two': New Labour and House of Lords Reform," *British Politics* 3.1 (April 2008): 22.

¹⁶ Michael Parsons, "Reform of the House of Lords," *EREA* 7:1 (2009)

¹⁷ Robin Cook, House of Commons Debates, 6th series, vol.399, col. 152, 4 February 2003

Parliament.¹⁸ He goes on to claim that the current system of election to the House of Commons actively prevents Parliament from either carrying out its role as representative of the people or from effectively holding the executive to account.

Drivers for Constitutional Reform

The UK constitution is certainly unique when compared to those found in most other countries. It is not to be found in a single document or ‘basic law’, rather it is (largely) written down but ‘not in one single document...in a number of Acts of Parliament, conventions, decisions of courts...which govern how [the British] are governed.’¹⁹ A strength of Britain’s unwritten constitution is said to be its ability to continually adapt and evolve in small ways over time. In this context the concerted drive for fundamental constitutional change of the last thirteen years has been truly remarkable.

This paper will argue that change has been substantive but that it cannot, nor will it, represent the culmination of the process. Nevertheless, leaving that argument aside for the moment, that any sort of extensive reform has taken place at all within the context of the previously ‘evolving’ unwritten UK constitution is itself worthy of reflection. It is somewhat ironic that the evolving British constitution had remained largely unaltered for most of the twentieth century with the last major changes driven by the clash between the elected Liberal majority in the House of Commons and the Tory-dominated hereditary House of Lords following the Liberal landslide election of 1906. The result was, “major reductions in the powers of the second chamber enshrined in the Parliament Act 1911.”²⁰ Following that, and

¹⁸ Rodney Brazier, *Constitutional Reform: Reshaping the British Political System*, (New York and Oxford: Oxford University Press, 2008): 43.

¹⁹ Dawn Oliver, *Constitutional Reform in the UK*. (New York and Oxford: Oxford University Press, 2003): 5.

²⁰ Rodney Brazier, *Constitutional Reform: Reshaping the British Political System*, (New York and Oxford: Oxford University Press, 2008): 1.

despite two World Wars, the loss of empire, and prolonged relative economic decline, the uncodified British constitution remained largely undisturbed. Hence, by 1997 reform was long overdue if Britain was to be equipped with a constitution able to deal with the political realities of the Twenty First Century. Such lack of change reflected complete disinterest in questions of constitutional reform on the part of both Labour and the Conservative Party who, between them, were in government for the entire period after the First World War.²¹

Prior to the 1970's neither Labour nor the Conservatives had much interest in constitutional matters. The Conservative Party, as the name implies, wished to preserve the current constitutional arrangements, with the second part of their name, 'and Unionist' making explicit their commitment to maintaining the status quo. Similarly, Labour had viewed constitutional innovation as, at best, an unnecessary sideline, and at worst, a potential obstacle to the social and economic change it desired to implement. Academics such as Jones and Keating (1985) and Bogdanor (1997 and 2001) argued that 'the party's mission was to capture the main institutions of state, not to transform them.'²² Indeed, Bogdanor²³ goes on to argue, in a similar vane to Churchill in 1945²⁴, that a strong central government was essential for Labour to deliver its policies whilst Labour's mistrust of the judges, dating

²¹ Liberals shared power several times during this period but always as junior partners in coalition governments. For example, Liberal ministers held cabinet positions during both World War One and World War Two, as well as being part of the "National Governments" led by Ramsay MacDonald, Stanley Baldwin and Neville Chamberlain during the 1930's.

²² Vernon Bogdanor, "Constitutional Reform in the UK," *Annual Review of Political Science* 8 (2005): 76.

²³ Bogdanor, 73-96.

²⁴ "There can be no doubt that socialism is inseparably interwoven with totalitarianism and the abject worship of the state. Socialism is in its essence an attack not only upon British enterprise, but upon the right of the ordinary man or woman to breathe freely without having a harsh, clumsy tyrannical hand clasped across their mouth and nostrils. (Labour) would have to fall back on some form of Gestapo, no doubt very humanely directed in the first instance." Churchill, June 4th, 1945 in an election broadcast.

back to the Tolpuddle Martyrs in 1834²⁵, made the party wary of any transference of power from parliament to the courts.

Such positions evolved during the 1970's and certainly during the 1980's the Thatcher Government became instigators of government reform in the form of civil service reform (Next Steps Programme²⁶) and the abolition of the metropolitan municipal authorities, although always under the cover of efficiency rather than constitutional reform per se. Labour had also seen the need for reform, as nationalism became a potent threat to its electoral hegemony in Scotland and Wales and also as a direct response to the use of parliamentary supremacy by the Thatcher Government to force through significant structural government reforms, and indeed the way in which the Conservatives had used every available lever of state in order to crush opposition.²⁷

As a result, New Labour, when it came to power in 1997, was elected on a manifesto which promised a truly radical reform of UK government, governance and constitution. However, because of its reactionary foundation it had, in many ways, less in common with Labour's more traditional socialist aspirations and greater affinity 'with realising the aspirations of nineteenth century liberals such as John Stuart Mill toward greater participation and constitutional government...'²⁸ It is against this context that prospects for further reform should be judged. While Labour laid the foundations for a new UK Constitution, it has now fallen to a Liberal Conservative (this is the way the Prime Minister

²⁵ "Tolpuddle Martyrs Museum," www.tolpuddlemartyrs.org.uk/, (Accessed May 1, 2010).

²⁶ History Learning Site, "Civil Service Reforms," http://www.historylearningsite.co.uk/civil_service_reform.htm, (Accessed July 30, 2010).

²⁷ For example, the alleged covert use of the army to support police operations during the miners strike of 1984-85. London Times, "Miners Strike: It was like Civil war," <http://www.timesonline.co.uk/tol/news/politics/article5847315.ece>, (accessed April 24, 2010).

²⁸ Vernon Bogdanor, "Constitutional Reform in Britain: The Quiet Revolution," *Annual Review of Political Science* 8 (2005): 77.

described the coalition in 2010) Government with a Lib Dem Deputy Prime Minister, who has a remit for government and constitutional change, to engender further reform in order to resolve problems with the current constitutional settlement and to provide the framework for stable, equitable and orderly good governance throughout all parts of the United Kingdom.

The need for Further Reform

The absolute need for further reform was brought into sharp focus as a result of the extraordinary public outrage over the publication of Westminster Parliamentary expenses in 2009.²⁹ The complete disconnect that has arisen as a result, between many of those who serve in Parliament and those who are governed by them, and between the people and institutions of government that exist, has brought the current UK constitution, the whole political system and the society it supports to a position of potential near breaking point. For example, it is no coincidence that whilst Britain, unlike most of Western Europe, avoided the ignominy of electing fascists in the 1930's, by the end of the first decade of the twenty first century Britain had, for the first time, elected two members of the racist British National Party in elections to the European Parliament in 2009. Such is the deep malaise within the British constitution which is similarly affecting the very social fabric of society. As Bogdanor has argued, 'the main weakness of the new constitution is that it does little to secure more popular involvement in politics.'³⁰ The result, at least partly, is that the mass of people are deeply unhappy, to the extent of being contemptuous, with both the elites that are elected to govern them, the institutions within which they govern and indeed the whole

²⁹ Daily Telegraph, MP's Expenses, <http://www.telegraph.co.uk/news/newsttopics/mps-expenses/>, (accessed May 1, 2010)

³⁰ Vernon Bogdanor, *The New British Constitution*, (New York and Oxford: Oxford University Press, 2009): i.

structure and fabric of political society. This matters for the future of the United Kingdom. Further, there is a body of research that shows a strong statistical correlation between those MP's with the worst expenses records and the size of majority.³¹ Hence, the safer the seat, the more the incumbent was likely to abuse the potential for excessive expenses, in the sure and certain knowledge that under the current electoral system virtually nothing could prevent success at the polls.

Constitutional reform is simply not like other political reforms in that it sets the ground rules for the way any given society addresses issues of human rights, the nature of democracy, the means by which minorities and geographic and cultural differences are recognised, and finally sets the rules for effective governance. Hence, constitutions hold, 'foundational status...and typically carry considerable symbolic weight. They are not to be tampered with lightly. Constitutions are "meta laws," the rules about the rules'³² and as such, having begun the process of reform it is simply not acceptable to leave half finished a now potentially unstable constitutional settlement.

The question of British constitutional reform is of significance on a number of levels. First, there is a basic tension in the nature of changes undertaken since 1997 between 'reform and evolution' that has left many significant questions unanswered.³³ Further to this is the question of exactly what the reform of the last thirteen years has sought to achieve: Is it a move to create a federated United Kingdom, or simply an attempt to make the unitary

³¹ Mark Thompson, "The Electoral System and the Expenses Scandal Correlation - Legg Update," <http://markreckons.blogspot.com/2010/02/electoral-system-and-expenses-scandal.html>, (accessed June 14, 2010).

³² Richard Simeon, "Constitutional Change: A Framework Analysis" Draft Paper (2009): 6.

³³ Nathalie Behnke and Arthur Benz, "The politics of Constitutional Change between Reform and Evolution." *Journal of Federalism* 39.2 (2009): 214-240.

nature of the Union more effective?³⁴ Jeffery has claimed that, ‘The United Kingdom’s devolution reforms have been above all about democratic renewal³⁵ and yet whilst that may be true of Scotland, Wales and Northern Ireland, it is most definitely not the case for England. Indeed, as Jeffery goes on to acknowledge, ‘[the] echoes of [democratic participation] were paralleled in England by a strong technocratic motivation for regionalisation...’³⁶ However, those echoes of democratic participation died with the defeat of a referendum on the creation of a Regional Assembly for the North East of England in 2004; and further moves towards regional government, and the subsequent extension of English democracy has been aborted.

Such questions matter because the ad hoc nature of reform: rather than effectively addressing these questions of legitimacy and sovereignty for the Union overall has resulted in devolution actually merely displacing legitimacy problems.³⁷ Hence, whilst to a large extent it is possible to argue that Scottish devolution has removed the immediate threat of Scottish cessation from the Union³⁸ there has, ‘‘However...emerged a growing sense...in England that [the devolution] is unfair to the English.’’³⁹

³⁴ Martin Laffin and Alys Thomas, ‘‘The United Kingdom: Federalism in Denial?’’ *Publius: the Journal of Federalism* 29.3 (1999): 89-107.

³⁵ Martin Laffin and Alys Thomas, ‘‘The United Kingdom: Federalism in Denial?’’ *Publius, the Journal of Federalism* 29.3 (1999): 89-107.

³⁶ Charlie Jeffery, ‘‘Devolution and Local Government,’’ *Publius: The Journal of Federalism* 36.1 (2006): 73.

³⁷ A few examples include: Charlie Jeffery, ‘‘Devolution in the United Kingdom: Problems of a Piecemeal Approach to Constitutional Change,’’ *Publius: The Journal of Federalism* 39.2 (2009): 289-313; Martin Laffin and Alys Thomas, ‘‘The United Kingdom: Federalism in Denial?’’ *Publius: The Journal of Federalism* 29.3 (1999): 89-107; Natalie Behnke and Arthur Benz, ‘‘The politics of Constitutional Change between Reform and Evolution,’’ *Publius: The Journal of Federalism* 39.2 (2009): 214-240; ‘‘Liberal Democratic Party, For the People, By the People,’’ *Policy Paper* 83 (2007); Robert Hazell et al., ‘‘The Constitution: Rolling out the New Settlement,’’ *Parliamentary Affairs* 54.2 (2001): 190-205; and Vernon Bogdanor, ‘‘Constitutional Reform in Britain: The Quiet Revolution,’’ *Annual Review of Political Science* 8 (2005):73-98.

³⁸ That in itself is a debatable point. Support for Scottish Independence, as measured by public opinion polls, has remained largely stable at about 33% of the population; however, the current Nationalist led minority administration in Holyrood has a clear and unambiguous agenda for full Scottish independence.

³⁹ Charlie Jeffery, ‘‘Devolution in the United Kingdom: Problems of a Piecemeal Approach to Constitutional Change,’’ *Publius: The Journal of Federalism* 39.2 (2009): 300.

This ad hoc, non-strategic approach to reform has been brought into focus by academics who have examined the issues. Jeffery⁴⁰ refers to the process as one ultimately about democratic renewal, Bogdanor to the creation of a codified constitution through piecemeal reform.⁴¹ Laffin and Thomas have argued the United Kingdom is now on the journey to the creation of a federal union,⁴² while Hazell et al reflect upon the instability and adequacy of the settlement.⁴³ Of course they can all be right, but it is a measure of the confused and piecemeal approach to reform that there is no clear understanding of the purpose and direction of constitutional reform over the last thirteen years.

⁴⁰ Charlie Jeffery, "Devolution and Local Government," *The Journal of Federalism* 36.1 (2006): 57-73.

⁴¹ Vernon Bogdanor, "Constitutional Reform in Britain," *Annual Review of Political Science* 8 (2005): 73-98.

⁴² Martin Laffin and Alys Thomas, "The United Kingdom: Federalism in Denial?" *Publius, the Journal of Federalism* 29.3 (1999): 89-107.

⁴³ Hazell et al. "The Constitution : Rolling out the New Settlement" *Parliamentary Affairs* 54.2 (2001):190-205.

CHAPTER 2: DEVOLUTION AND THE ENGLISH QUESTION

The form of quasi-federalism introduced with the devolution of power from Westminster to Scotland, Wales, and Northern Ireland is both a triumph for pragmatism and a recognition that the wants and needs of Scotland, Wales, and Northern Ireland are different. For the first time, in reality, ‘what Scotland (or Wales, or Northern Ireland) wants becomes different from, or inconsistent with, what the wider UK prioritizes through parallel democratic processes.’⁴⁴ The idiosyncratic nature of the devolution reforms is not necessarily a problem in itself and in many ways is ‘characteristic of a wider trend in constitutional debate in developed democracies.’⁴⁵ Nevertheless, there are significant challenges thrown up by the devolution process in the UK, and it is to these that this research paper will address itself: chiefly, the failure of the devolution process to effect, ‘detailed thought into how to deal, post devolution, with the accommodation of territorial interests within UK-wide interests’⁴⁶ and crucially, the position of England within the United Kingdom. Christopher Bryant is correct that the exclusion of England from the devolution process has not, as yet, caused significant discontent and that, ‘most English identities do not need an English parliament for their articulation;’⁴⁷ however, that is not to say the issues created by the process so far will continue as benignly. As Russell and Lodge have argued,

⁴⁴ Charlie Jeffery, “The Unfinished Business of Devolution,” *Public Policy and Administration* 22.1 (2007): 93.

⁴⁵ Charlie Jeffery, “Devolution in the United Kingdom: Problems of a Piecemeal Approach to Constitutional Change,” *Publius, the Journal of Federalism* 39.2 (2009): 289.

⁴⁶ Charlie Jeffery, “The Unfinished Business of Devolution,” *Public Policy and Administration* 22.1 (2007): 93.

⁴⁷ Christopher Bryant, “English Identities and Interests and the Governance of Britain,” *Parliamentary Affairs* 63:2 (2010): 250.

‘the formidable challenges that devolution has thrown up for the way in which England is governed are not going to go away.’⁴⁸

There are a range of possible outcomes predicated on the current United Kingdom constitutional settlement following Scottish, Welsh and Northern Irish devolution. Such potential outcomes include:

- (1) a maintenance of the current status quo, with the institutional set up, as currently constituted allowed to develop organically;
- (2) the complete disintegration of the United Kingdom with Scotland becoming Independent and Northern Ireland becoming unified with the Republic;
- (3) English votes for English laws;
- (4) An English Parliament;
- (5) Devolution to new English Regional Assemblies
- (6) Devolution to existing municipal governments

This paper will seek to show the necessity of including England within the devolution process. It will not consider the changes necessary to make devolution in Scotland and Wales work better. It will instead focus on the issues related to the ‘problem of England’ and explore why English government was not devolved in parallel with the rest of the United Kingdom, the consequences of that failure, the pressures for devolution in England along with potential problems and resistance to it, and the options for reform. The complete break-up of the United Kingdom, for the present at least, seems a remote

⁴⁸ Meg Russell and Guy Lodge, “Westminster and the English Question,” *The Constitutional Unit* (2005): 3.

possibility as public opinion poll data⁴⁹ suggests support for Scottish Independence remains stable in the low 30's percent and the SNP failed to make any headway in the 2010 general election. Similarly, the prospects for mere constitutional evolution seem equally slim given the presence of reform minded Liberal Democrats in the new government and indeed a Deputy Prime Minister whose sole remit is constitutional and government reform. The other options, this paper will contend, are all viable and will receive consideration in due course.

The United Kingdom of England, Scotland, Wales and Northern Ireland has only existed as a constitutional entity for about 300 years.⁵⁰ The union between England and Wales is the oldest and most well established, with the Laws in Wales Act (1535) making England and Wales united and unifying laws between the two. As Brazier points out, the unification was so complete that, “the word ‘England’ in Acts of Parliament was later deemed to include Wales, a slur which was not removed by statute until 1967.”⁵¹ Further, there was no ‘Secretary of State for Wales’ until 1964 and the legal and bureaucratic systems and elites had been, in reality, completely merged.

Scotland was and is, very different. Formal union did not occur until 1707 whilst Scotland continues to maintain a separate legal, judicial, local government and education system. Unlike Wales, the Scottish nation state was never subsumed by the English. As Prime Minister Tony Blair acknowledged in the 1997 Scottish Devolution White paper, ‘Scotland is a proud historic nation in the United Kingdom.’⁵²

⁴⁹ The New Statesman, “Support for Scottish Independence Falling’
<http://www.newstatesman.com/2009/11/poll-independence-support>, (accessed March 10, 2010).

⁵⁰ Rodney Brazier, *Constitutional Reform: Reshaping the British Political System*, 3rd ed. (Oxford: University Press, 2008): 119.

⁵¹ Brazier, 109.

⁵² Scotland’s Parliament, CM. 3658 (1997), v.

The Irish position is again, somewhat distinct, blighted as it is by conflict, civil war, ‘terrorism’ and insurrection. For the purposes of this paper, the implications of Northern Irish devolution will not be considered, simply because its implications and potential drivers (other than a nationalist resentment towards British – not only English - colonisation) are somewhat separate, to those that affect England Scotland and Wales.⁵³

The question of devolution has been controversial on two main counts. Firstly, it was considered by those opposed to constitutional reform in its entirety to be a first step towards separation and the dismantling of the Union, at least as far as Scotland was concerned. This was similarly the ‘hope’ and stated aim of the Scottish National Party. Thus, as Brazier argues, ‘The [SNP] worked hard at the 1997 referendum for Scottish approval for a Parliament with tax-varying powers as a sort of down-payment on independence – the very process about which the Conservative Party had warned...’⁵⁴ Secondly, by initiating devolution only partially throughout the United Kingdom the Labour government simply ignored the ‘West Lothian Question’ while their failed strategy to support the creation of elected regional assemblies for England has left the problem unsolved and in limbo since 2004.⁵⁵

⁵³ Also, the Northern Irish Westminster MP’s do not take the whip of any of the British political parties and although they can be significant in terms of parliamentary votes when the Government has a small majority, this does not at present seem to cause the same constitutional outrage as the those of Scottish MP’s. This was not the case, however, in the 1970’s when the then Prime Minister, Harold Wilson frequently railed against the influence of Northern Irish MP’s on his minority government. It was the vote of the independent, and previously Labour voting Gerry Fitt in 1979 that brought down the Callaghan Government, in a Vote of Confidence and caused the General Election, that swept Margaret Thatcher to power.

⁵⁴ Rodney Brazier, *Constitutional Reform: Reshaping the British Political System*, 3rd ed. (Oxford: University Press, 2008): 121.

⁵⁵ The first and only referendum on the creation of an elected Regional Assembly took place in the North-east of England in 2004. 78% voted against the idea on a 50% turnout.

While many⁵⁶ have argued that devolution has indeed worked well since its inception, there are a number of possible future hurdles that the current constitutional settlement appears to provide few answers for. One of the most pressing potential problems, following the election of a UK-wide Conservative-led Government in 2010, is the question of legitimacy, particularly for the coalition in Scotland. Further to this, the way inter-governmental relationships will be maintained between ideologically opposed regimes where one partner, the devolved governments, in theory at least, are dependent on the UK wide administration for legitimacy and perhaps in practice more crucially, money may prove to be a further challenge. Similarly, the Conservatives are the unionist party and the minority Scottish National Party led administration in Edinburgh is committed to holding a referendum on full Scottish Independence⁵⁷ even though it would hold no constitutional legitimacy if passed. This is one of the biggest problems caused by the current British constitution. Under its devolved status Scotland has no right to unilaterally vote for independence. However, if it did, would the UK parliament be in a position to prevent this in anything other than a theoretical context?

Nevertheless, the primary issue, in terms of devolution, that this paper will focus on is what needs to be done in order to make the current devolved institutions work in a more equitable way towards England, rather than seeking to consider what might happen were Scotland to seek to secede from the Union. Such a stance is based on the rationale that based upon current evidence support for full Scottish independence remains low (and in

⁵⁶ Academic writing has focused on the ease and smooth transfer of power during the early years of devolution, although most acknowledge that transfer was eased as a result of political control in all parts of the Union, in the first few years, resting with the Labour Party. Further, the fact that the Conservative Party (the most pro Union and anti devolution of the British Political Parties) has now adopted a policy of supporting devolution would suggest that part of the constitutional settlement is, at present at least, settled.

⁵⁷ Scottish Executive, "Referendum Bill, 2010," <http://www.webcitation.org/5jggEjHoR>, (accessed May 28, 2010)

Wales the comparable figure is even lower.) In the unlikely eventuality of any move for cessation, it seems to the author that, Canada has already solved that ‘problem’ and provided a model, for the orderly withdrawal of part of what had previously been a sovereign nation.⁵⁸

The issue of England’s place within a devolved United Kingdom is less clear. As Hazell has argued, “The English Question is a portmanteau heading for a whole series of questions about the government of England”⁵⁹ There are a number of key components to these questions:

1. How should England be governed within the United Kingdom?
2. To what extent England needs a separate and distinct voice within the union in order to rebalance the louder voice of Scotland, Wales and Northern Ireland.
3. Further to this, even with a louder voice within the union, is it enough for England as a whole to remain so dominated by London or is regionalism necessary in order to maintain and support balance? By what means could such balance be restored – an English parliament, the creation of elected regional assemblies, functional regionalism and/or a revitalised and strengthened local government?
4. And finally, do the English actually care? Do they want further reform or are they happy to remain with no separate representation and no share in devolution, but for Westminster to remain in effect the English Parliament but with Scottish, Welsh and Northern Irish members able to vote on English matters?

⁵⁸ Canadian Department of Justice, ‘Clarity Act, 2000,’ <http://laws.justice.gc.ca/en/C-31.8/text.html>, (accessed May 28, 2010)

⁵⁹ Robert Hazell, ed. *The English Question*, (Manchester: Manchester University Press, 2006): 1

Whatever the answer to this last question, England is clearly the gaping hole in the devolution settlement and if the English do not much care at the moment it is at least reasonable to assume they may in the future. Some⁶⁰ do indeed argue that this is acceptable and point to opinion poll evidence showing that most people in England neither care nor are concerned about those imbalances and certainly want nothing to do with regionalism.⁶¹ This is also clearly the view of Bogdanor who has argued, ‘It is often assumed that the provisions for asymmetrical devolution are inherently unstable and that this instability threatens the continued existence of the UK. These propositions, however, need to be argued rather than merely asserted.’⁶² This paper will argue that the structural imbalances are indeed inherently unstable and that, whilst Bogdanor is almost certainly right that at present they do not appear to threaten the survival of the UK, the ‘English Question’ is actually much more about how England is governed rather than the relationship between England and the rest of the United Kingdom. It is this question of governance that may well lead to instability if it is not addressed. Further, just because the English do not want an additional tier of government in the form of regional assemblies it does not mean they do not need a more equitable and balanced devolution settlement. Indeed depending on the way the question is phrased the results regarding the extent to which the English are comfortable with devolution or not vary enormously.⁶³

⁶⁰ This was clearly the view (if largely unspoken) of the last Labour Government which since 2004 had entirely ignored the issue. Similarly, Hazell has argued that although a problem it can best be resolved through functional (i.e. none democratic) regionalism and King is clearly of the view that whilst a ‘mess’ it is a mess that works and should be allowed to evolve.

⁶¹ 72% of English people are opposed to an English Parliament and 68% to regional government. The referendum held in the North East of England in 2004 rejected the proposition to create a regional assembly by 78% to 22%

⁶² Vernon Bogdanor, “The West Lothian Question,” *Parliamentary Affairs*, 63:1 (2010): 169.

⁶³ The English Democrats carried out an opinion poll in March 2005 that showed 67% of English people were against the current constitutional settlement and wanted ‘more equitable’ treatment of England.

Even if the English are currently entirely sanguine about their place in the union, as conflict arises or differences emerge as a result of political differences in administrations north and south of the border, such equanimity may quickly evaporate. As countries like Spain have showed, asymmetrical devolution when confined to the historic nations and ignoring other parts of the country, can spread over time to other regions which had originally showed no interest in such matters. England's voice within the union should be strengthened as well as addressing the question of how England is governed within the union.

The continued existence of the Barnett formula for determining the allocation of government spending between the four parts of the UK is one example of potential unfairness resulting from England's lack of a coherent strong voice in the current devolved settlement. The formula, which dates back to 1978, resulted in spending per head in 2007-2008 being more than one quarter higher in Scotland than in England. In practical terms, post devolution it is one of the reasons why Scotland, 'has the means to pay for free nursing and personal care for the elderly, free eye tests for all...the abolition of prescription charges and free university education, when England has not.'⁶⁴ The problem then is not asymmetrical devolution but rather that the governments of Tony Blair and Gordon Brown excluded England from the process of devolution. As Bryant concludes, 'The omission of England does not constitute an affront to English national identity but with respect to English interests it has perpetuated an old unfairness (the Barnett formula) and introduced a new one (the West Lothian Question).'⁶⁵ Further, resolution of the apparent unfairness of the Barnett formula would not require anything more constitutionally difficult than a

⁶⁴ Christopher Bryant, "English Identities and Interests and the Governance of Britain," *Parliamentary Affairs* 63:2 (2010): 250.

⁶⁵ Bryant, 264.

treasury recalculation. That is not to underestimate the degree of political difficulty in making such a change, but it is worth noting, as Bryant points out, that, ‘Contrary to popular belief...reform or replacement of the Barnett formula requires not a constitutional change...’⁶⁶ Hence, it is reasonable to suggest that the continued existence of the formula is a result of support from the devolved administrations and the lack of a coherent English voice in support of England’s interests.

The degree of imbalance is shown most clearly in relation to the West Lothian Question and is a crucial one for the well being of the British constitutional settlement. Some political scientists, for example Bogdanor, King and Hazell, have argued that in reality it does not actually matter. Indeed Bogdanor has gone so far as to claim that, ‘...since the English remain by far the dominant nation in the UK, and that dominance has been hardly affected by devolution...the West Lothian Question is misconceived. Persisting with it could give rise to grave dangers.’⁶⁷ He goes on to argue that the most likely cause of those ‘grave dangers’ and hence, primary threat to the survival of the UK, would be the English attempting to ‘express their Englishness in full.’⁶⁸ However, most of the evidence⁶⁹, and certainly most of the important evidence, would suggest that Bogdanor et al are mistaken in their dismissal of the West Lothian Question. Indeed, it seems likely that if anything is to encourage the English to ‘express their Englishness in full’ it would be to ignore the

⁶⁶ Bryant, 260.

⁶⁷ Vernon Bogdanor, “The West Lothian Question,” *Parliamentary Affairs*, 63:1 (2010): 169.

⁶⁸ Bogdanor, 169.

⁶⁹ Simeon has argued that because of the significance of constitutions in proscribing the nature of politics and society therein that it is crucial to have a constitution that reflects the values and principles of society. Jeffery has argued that ‘strong centrifugal forces’ are in play as a result of the piecemeal approach to constitutional reform. Brazier has questioned the extent to which the current constitutional settlement ‘will or should last.’ Russell and Lodge reflect on the smooth implementation of constitutional reform but on the new and dangerous anomalies created. Similarly, politicians, and not just those of the ‘right’ have questioned the current constitutional settlement – most recently Vince Cable, Deputy Leader of the Liberal Democrats has argued that the UK is heading for ‘a constitutional crisis’ over devolution.

imbalances that currently exist within the constitutional settlement. Further, the new coalition government in Westminster clearly recognises the problem with the published coalition agreement making clear that, ‘We will establish a commission to consider the “West Lothian question.”’⁷⁰

Prior to devolution, Members of Parliament from all parts of the union met in the House of Commons to deliberate and vote on legislation affecting all parts of the Kingdom equally. As a result of devolution a situation existed in 2008, as Brazier argued, ‘Mr Gordon Brown presides over a cabinet which cannot initiate legislation over a vast range of matters which would affect his Kirkcaldy constituency.’⁷¹ At the same time, he and his forty Labour colleagues from Scotland were able to pass laws and legislation affecting every aspect of life in English constituencies despite Labour polling fewer votes than the Conservative Party in England.⁷² In reality, there is no easy solution to this. Labour’s own strategy, even had it been successfully implemented was flawed, in that the Regional Assemblies proposed would have had far less power than even the Welsh Assembly, never mind those of the Scottish and Northern Ireland Parliaments. It would, therefore, have done nothing to resolve the essence of the constitutional conflict and imbalance that exists at the heart of the current constitutional settlement. Equally, the Conservative proposal of ‘English votes for English legislation,’⁷³ whilst at least logical, seems to cause as many problems as it solves, with the creation of, in effect another grade of ‘second class’ MP’s from the non-English parts of the Union.

⁷⁰ HM Government. *The Coalition: Our Programme for Government*. May 2010.

⁷¹ Rodney Brazier, *Constitutional Reform: Reshaping the British Political System*, 3rd ed. (Oxford: University Press, 2008): 117.

⁷² Labour won 40 out of 59 constituencies in Scotland but polled 0.2% of the vote less than the Conservatives in England. Adam Mellows-Facer, “General Election 2005,” *House of Commons Research Paper* 05/33 (2006): 15-18.

⁷³ Rodney Brazier, *Constitutional Reform: Reshaping the British Political System*, 3rd ed. (Oxford: University Press, 2008): 117.

Devolution has resulted in healthcare, education and other ‘local’ matters being devolved in Scotland and Wales, while in England, Labour MP’s from Scotland continue to have a vote on these matters. Thus, the devolved Scottish Parliament has made Higher Education free for Scottish students whilst those in England are subject to fees as a result of votes cast by Labour MP’s in Westminster, including those elected from Scotland.⁷⁴ Similarly, England has always accepted, largely without discontent, the need to allow its Celtic brethren greater electoral representation and funds for public services than would have been suggested by mere numbers alone in order to maintain Scottish and Welsh support for the union with such an overwhelmingly dominant economically, politically and geographically England. However, it seems completely unreasonable to expect decisions about hospitals and schools in Devon or Hertfordshire, or London or Tyneside, to be made by MP’s who have no personal interest in the effects of the decisions taken.

Scottish, Welsh and Northern Irish Members of Parliament now have a completely different role at Westminster to their English colleagues and indeed more power in England than they do in their respective constituencies. Policy is made in Whitehall for England and, in some areas of policy, the UK as a whole, and Ministers are responsible for said policy even when they are not responsible for policy in the part of the country that has elected them. Similarly, Scottish and Welsh Grand Committees continue to meet in Westminster, even though the policy and department they used to shadow and evaluate has largely been devolved. At the same time there is no such parallel committee in place for England.

In effect then, the West Lothian question, is actually one of reciprocity. It had always been the case that English MP’s voted on purely Scottish matters in the House of

⁷⁴ The Division in the House of Commons showed that enough English Labour MP’s rebelled on this matter to defeat the government without the support of Scottish Labour MP’s – none of whom rebelled.

Commons and Scottish MP's voted on bills that applied only to England and Wales, but post devolution English MP's lost the right to do this in Scotland whereas Scottish MP's continued to often determine the outcome of sometimes controversial legislation. In the immediate aftermath of devolution this was not considered a major problem – the Government had an enormous majority of MP's both north and south of the border. However, such potential short sightedness is now coming back to haunt the devolution process. In a number of previous elections, the Conservatives have won in England but been deprived of a majority in the United Kingdom. For example, in 1950, the Conservatives won two more seats than Labour in England but were seventeen seats behind them nationwide; in 1964 they similarly won sixteen more seats in England but were thirteen seats behind Labour across the United Kingdom, while in February 1974, the Tories had four seats fewer than Labour overall while being ahead by thirty one in England. What is different now from those earlier times is that currently Scottish MP's have power over English matters that English (and indeed Scottish) MP's do not have over Scotland. It is unfair and clearly so.

Such a position is clearly untenable. As the former Prime Minister John Major argued in 1994 when Labour's devolution proposals were first published:

Surely it would not be possible for Scottish MP's to come to Westminster and vote on policies affecting health and education in England, Wales and Northern Ireland. To do so would destroy the natural justice that balances our Parliamentary Constitution. And what would be the position if some future Labour Government had a majority of ten seats at Westminster but a majority of thirty seats in Scotland on which their national majority rested? And then suppose those thirty MP's could not vote on some issues at Westminster. What constitutional chaos would flow from that?⁷⁵

He was right then and he is still right today.

⁷⁵ Conservative Party press notice 823/94, 2 Dec 1994

Solutions

There are four widely discussed solutions to the anomalies of the current constitutional settlement's treatment of England. Hazell is right to argue that, 'there is no logic in the process of devolution that requires the English to have devolution too.'⁷⁶ However, the problem is unlikely to go away, and is on balance, more likely to become buffeted by 'strong centrifugal tendencies'⁷⁷ while the failure to, 'review and renew the purpose of the union since devolution'⁷⁸ is a significant factor in its potential destruction.

An English Parliament

The English Democrats support devolution within the United Kingdom to England and the creation of an English Parliament, something which would potentially push the United Kingdom towards a more federal structure. This idea is also supported by the Campaign for an English Parliament although it has, so far, found very little favour amongst the English. Opinion polls suggest support for such a solution is tepid to say the least with 20% supporting the idea in 2007⁷⁹. Similarly almost all academic writing dismisses the concept as structurally impossible.

Nevertheless, the proposal, superficially at least, appears to have some merit. It would certainly provide a potential solution to the core issue of inequity in the current devolved constitutional settlement, affording England the same rights and power as other parts of the Union something that opinion polls have suggested is a matter of concern to the

⁷⁶ Robert Hazell, "The English Question" *Journal of Federalism* 36.1 (2006): 37.

⁷⁷ Charlie Jeffery, "Devolution in the UK: Problems of a Piecemeal Approach to Constitutional Change" *Publius, the Journal of Federalism* 39.2 (2009): 289.

⁷⁸ Jeffery, 305.

⁷⁹ ICM, "What England Thinks About Britain," <http://toque.co.uk/witan/poll/files/npoll109.pdf>, (accessed June 1, 2010).

English.⁸⁰ Further it would provide the opportunity to move the English parliament from London and reduce the absolute dominance of the city on the rest of the country. That notwithstanding, a truly federated UK, based, for example, on the Canadian model is in many respects simply not feasible. England as a whole unit constitutes more than eighty percent of the entire population of the UK and is the driving force in terms of economic wealth and growth. Were there to be an English Parliament, with the same powers as the currently constituted Scottish Parliament, it would almost certainly assume greater authority and power than the Federal Parliament because as a parliament representing 80% of the constituent parts of the country it would be dominant. This clearly would not work. Russell and Lodge amongst others have argued that, ‘there are a good many reasons to be sceptical of the idea, not least the overwhelming size of the parliament in comparison to its neighbours and therefore its likely clout in the federation.’⁸¹ Even allowing for the fact that the United Kingdom Parliament as constituted in the past clearly allowed English domination, it would be even more obvious and offensive to other parts of the union were an English parliament to be constituted now. No federation can operate successfully where one of its units is so clearly dominant. As Bogdanor has shown, ‘There is no federal system in the world in which one of the units represents over 80 per cent of the population, the nearest being Canada where 35 per cent of the population live in Ontario. Federal systems in which the largest unit dominates do not in general survive.’⁸² In the creation of post-war West Germany it was deemed necessary to divide the previously and destructively dominant Prussia into five distinct states in order to avoid such a concentration of power. With the

⁸⁰ ICM, ‘What England Thinks About Britain,’

<http://www.toque.co.uk/witan/modules/news/article.php?storyid=27>, (accessed June 1, 2010).

⁸¹ Meg Russell and Guy Lodge, ‘Westminster and the English Question,’ *The Constitutional Unit* (2005): 28.

⁸² Vernon Bogdanor, ‘The West Lothian Question,’ *Parliamentary Affairs*, 63:1 (2010):169.

defeat of English Regional Government in referendum in 2006, no such solution appears feasible for England today.

Further to this, support for the creation of an English Parliament is both a fringe player both of the elite and masses. There is no ‘heavyweight’ political support for such an idea and ‘An English Parliament is not seriously on the political agenda, and will never get on the agenda until serious politicians begin to espouse it.’⁸³

English Votes for English Laws

The Conservatives have advocated a policy of English votes for English laws whereby only English MP’s would be able to vote on legislation pertaining to England. Again, superficially such a solution appears attractive. It is popular, apparently, and somewhat bizarrely, even more so in Scotland than England with a YouGov poll in 2004 showing 66% of English and 78% of Scottish voters favoured limiting the rights of Scottish MP’s to come to Westminster and vote on policies affecting health and education in England, Wales and Northern Ireland.⁸⁴

The Conservative proposal for English votes for English bills, although apparently popular, actually attracts a number of apparently intractable problems, not least that it would create different classes of Member of Parliament. Further, it was rejected as a solution both by Gladstone in the 19th Century, in the context of Irish Home Rule and the ‘In and Out’ solution, concluding that ‘It passes the wit of man,’⁸⁵ whilst a similar solution was dismissed by the Kilbrandon Royal Commission on the Constitution in 1973. Objections are from technical, political and constitutional levels. Technically, drafting legislation would become

⁸³ Robert Hazell, ed. *The English Question*, (Manchester: Manchester University Press, 2006): 224.

⁸⁴ Hazell, 14.

⁸⁵ Vernon Bogdanor, *Devolution in the UK*, (Oxford: Oxford University Press, 2001): 30.

significantly more difficult and it is hardly a simple task now. For example, the extent of territorial jurisdiction is not always immediately obvious. For example, the Higher Education Bill, 2004,⁸⁶ included the following:

- (1) Subject to subsections (2) to (4), this Act extends to England and Wales only.
- (2) The following provision also extends to Scotland and Northern Ireland
 - (a) part 1
 - (b) Section 42
 - (c) Sections 43,44,47 and 48, and
 - (d) This Section and Section 50.
- (3) Subsections (1), (2), and (5) of Section 39 also extends to Northern Ireland.
- (4) Any amendments or repeal made by the Act has the same extent within the UK as the enactment to which it relates.

This was hardly the most complex legislation ever to go before Parliament and certainly is a simple document in comparison to the, for example, Human Embryology and Fertility Act passed in 1990,⁸⁷ and yet, English votes for English laws would have presumably made it necessary to have at least four separate bills instead of just one. It would have been relatively simple to have countrywide votes in Committee Stage on individual clauses but voting on the Third Reading either to approve or throw out the entire Bill would have been impossible under Conservative proposals. Further to this, it is not even as simple as to draft better legislation or having new certification as to where legislation should apply. As Kilibrandon argued:

⁸⁶ HMG, “Higher Education Act 2004,” http://www.opsi.gov.uk/acts/acts2004/ukpga_20040008_en_1, (accessed April 21, 2010).

⁸⁷ HMG, “Human Embryology and Fertilisation Act 1990,” http://www.opsi.gov.uk/acts/acts1990/ukpga_19900037_en_1, (accessed April 21, 2010).

The ability to vote could not depend simply on whether the matter at issue related to a reserved or transferred subject. Any issue at Westminster involving expenditure of public money is of concern to all parts of the United Kingdom since it may affect the level of taxation and indirectly affect the level of a regions own expenditure.⁸⁸

Politically such a solution would require more votes and even more complex whipping arrangements as well as significant implications for Labour and the Liberal Democrats who historically have greater support in Scotland and Wales than the Conservatives. Equally, as the Unionist party, such a position is intellectually difficult for the Conservatives to justify whilst they studiously ignore their policy in relation to votes on Welsh only bills, which Conservative MP's continued to vote on despite the party having little, and at times no, representation in the Principality.

Constitutionally, the policy would make an already 'messy' constitutional settlement into one that was completely incomprehensible. It raises questions, so far unanswered, about the nature and role of UK-wide Members of Parliament within the union, brings into question the continued existence of the Union itself and builds on the already unequal powers of MP's. English MP's have already found their power devalued in terms of their ability to vote on Scottish affairs and rather than resolving that, this solution merely extends the problem to Scottish MP's too, resulting in a further unravelling of the constitutional settlement with potentially far reaching conclusions. Further, if taken to its logical conclusion, only London MP's should vote on bill affecting London, a position that would certainly begin to threaten the existence of the union.

⁸⁸ Robert Hazell, ed. *The English Question*, (Manchester: Manchester University Press, 2006): 247. Here region means Scotland, Wales and Northern Ireland

English Regional Government

Labour and the Liberal Democrats have argued the solution to the English question lies in increased devolution and the creation, where supported by the population, of English regional government. Originally the plan was to introduce elected Regional Assemblies with powers even more limited than those of the Welsh Assembly, however, since the defeat in referendum of a regional assembly for the North East in 2004 such plans have been dropped. This resounding defeat, in what was considered the most pro regional governance part of the country, can probably be regarded as the definitive end of moves towards democratic regional government in England. Nevertheless, there has unquestionably been an increase in functional regionalism with the number and importance of government QUANGOS⁸⁹ increasing exponentially over the past thirteen years. Such functional regionalism has covered planning, economic development, housing, health and social services, the arts and sport⁹⁰ and as Keating argued, ‘The new institutions...have certainly helped to reshape politics and the articulation of interests, although not in a consistent manner.’⁹¹ Labour had no clear plan to amend the undemocratic nature of these institutions and despite Gordon Brown’s stated aim of encouraging a ‘national debate’⁹² on the constitution when he came to power in 2006, nothing much has been heard on this particular subject since then.

Other Solutions

Other solutions to the problem include reducing Scottish and Welsh representation at Westminster to comparable numbers proportionally to the English along with introducing

⁸⁹ Quasi-Autonomous Non-governmental Organisations

⁹⁰ John Tomaney and L Humphrey, ‘Regional Governance in North East England,’ *CURDS* 1 (2002)

⁹¹ Robert Hazell, ed. *The English Question*, (Manchester: Manchester University Press, 2006): 153.

⁹² Hansard, House of Commons debate, 3 July 2007.

some form of proportional representation to Westminster elections. Both measures would alleviate the impact of the issue by reducing the extent to which Labour dominance in Scotland and Conservative dominance in England would transfer into actual seats in Westminster, however, the actual constitutional ‘problem’ would remain unresolved.

The Best Way Forward

This paper will suggest that one way forward is a solution that has been mostly ignored by all the main parties and to a large extent by academic literature. The key to the solution, is to accept the asymmetrical nature of the devolution settlement and some of the inherent imbalances that implies but to address the question of how England is governed.

As Bogdanor suggests the most important issue is:

How can England resolve the problem of over-centralised government which the Scots and the Welsh have answered through devolution? How can England come to be better governed so that the regions furthest from London...secure more attention to their needs.⁹³

In reality, the solution is not a new, but very old, and hence, one that potentially overcomes the lack of political will for radical further change whilst at the same time providing a practical and pragmatic solution to the imbalance in the current constitutional settlement. The status quo may well prove inherently unstable and difficult to maintain in the long term and yet there is no desire amongst the English for another tear of government in the form either of an English Parliament or of English Regional Government. Amongst the mainstream political parties in Britain the Liberal Democrats are probably closest to a solution with their focus on devolution in its widest form. In reality there is no need for the creation of additional structures to the governance of England, local government in the form

⁹³ Vernon Bogdanor, “The West Lothian Question,” *Parliamentary Affairs*, 63:1 (2010):159.

of Counties, Districts and Metropolitan Councils have existed in some form or other since the nineteenth century.⁹⁴ Devolution then is the key to the solution of the English question, but to a level of government that already exists – municipal government.

Most of the academic literature, and political debate, has completely ignored this potential solution to the English Question. Robert Hazell in his definitive book, *The English Question*, published in 2006, devotes only five or six, somewhat dismissive pages out of two hundred and sixty to the potential for local government to act as a solution to the problem. In many respects this is not surprising. Local government in England has long been a mere political football, unloved and dismissed by elite and mass alike and largely subordinate and passive in its approach to policy and government. Nevertheless, local government does have the potential to give political power back to the English on English matters. As Hazell concedes:

Ever increasing levels of centralised control, through process such as the Comprehensive Performance Assessment and an increasing use of hypothecated grants and minimum funding levels, emphasise the degree to which government policy is still, and will continue to be delivered through local government.⁹⁵

Hence, even in its current enmeshed state, local government matters and delivers. In exactly the same way that power over policy and implementation was given to the Scottish Parliament, so political power could and should be devolved to local government in England. Bogdanor, in his most recent published paper acknowledged such a solution when he argued:

The remedy then would seem to lie in renewed attention to localism. If therefore, it is to be believed that England suffers from over-centralised and remote government, the cure is likely to be found, not

⁹⁴ County councils were created by the Local Government Act 1888 largely taking over the administrative functions of the unelected county courts of quarter sessions.

⁹⁵ Robert Hazell, ed. *The English Question*, (Manchester: Manchester University Press, 2006): 190.

in the creation of regional assemblies but in the strengthening of local government...⁹⁶

Clearly it would be necessary to reform and to place the powers devolved to these authorities on a constitutional footing. It would be helpful, in terms of simplicity, voter understanding and hence accountability, to continue the now twenty year process of creating single tier municipal governance in all parts of England and it will be necessary to reform the financial basis for the provision of municipal government services. Currently, around 80% of local government revenue comes in the form of direct grants from Westminster and the centrally administered and determined Business Rate.⁹⁷ As a result, councils are kept in a financial straight jacket. This was not always the case and largely stems from Margaret Thatcher's desire to centralise power in Westminster during the 1980's and to alleviate the political consequences of the ill thought out and politically disastrous 'Poll Tax' of the late 1980's. Were municipal authorities given back devolved power over education and healthcare provision (powers similar to those held by the Scottish Parliament) and given the ability, via a local Income tax – the explicit policy of one of the partners in the new coalition government (with a concurrent cut in national rates of income tax) to raise more of the revenue for the provision of local services at the local level, the essential constitutional problem of English affairs being controlled by non-English institutions could be relatively easily and simply resolved.

Hazell⁹⁸ dismisses the concept by referring to practical difficulties associated with control of Regional Development Authorities (RDA's) and Tourism Boards, and of issues

⁹⁶ Vernon Bogdanor, "The West Lothian Question," *Parliamentary Affairs*, 63:1 (2010):167.

⁹⁷ East Sussex County Council, "Overview of How Local Government Finance Works," <http://www.eastsussex.gov.uk/yourcouncil/finance/guide/overview/default.htm>, (accessed July 30, 2010).

⁹⁸ Robert Hazell, ed. *The English Question*, (Manchester: Manchester University Press, 2006): 191.

surrounding economies of scale. These are clearly important issues, worthy of further debate, however, if it is democratic accountability that is regarded as the key question here and not how local government could or should work together to manage a regional tourist board, then the argument does somewhat miss the point. Of course there are issues with local autonomy and accountability, and with economies of scale and differential levels of service, just as there are issues with a university student from Lamberton in Scotland not paying university fees whereas someone living twenty miles away in Berwick does have to pay such fees. Clearly it would be potentially difficult if significantly different standards of healthcare were to result from decisions taken at a local level. Nevertheless, the risks associated with this are potentially exaggerated and ignores the fact that control of schools has been devolved to local government since 1947⁹⁹ and that devolved decision-making structures have existed within the ostensibly National Health Service since the creation of Regional Health Authorities in the 1960's. As Scott Greer argued with regard to the NHS in its first few decades, "The crucial aspect of the English NHS was the autonomy left to these local organisations over their operation...in reality there is very little evidence of central control."¹⁰⁰ In any case, there is no logical reason why neighbouring local authorities could not band together to manage and run overarching bodies such as RDA's in exactly the same way that they already do to run Police Authorities and Fire Authorities. Further, the regional structure currently used in the NHS could be reformulated with both central and local government representation, hence, allowing for flexibility and some regional variation in service whilst maintaining the UK wide structure that existed prior to Scottish devolution. Clearly it would be unworkable to have vastly different healthcare policies in place in

⁹⁹ HMG, "Butler Education Act 1944," <http://www.parliament.uk/about/living-heritage/transformingsociety/livinglearning/school/overview/educationact1944/>, (accessed May 17, 2010).

¹⁰⁰ Robert Hazell, ed. *The English Question*, (Manchester: Manchester University Press, 2006): 201.

different parts of England, but as is already the case, the NHS provides different standards of service in different parts of the country¹⁰¹ and this solution would at least give locally elected representatives some control over the direction of services in their area. Since the current NHS is entirely unrepresentative of local needs, at least this way there is some democratic accountability.

Such reform would require a leap of faith by the Westminster parliament, although certainly no bigger a jump than that already taken by Messrs Cameron and Clegg in forming a coalition government. Equally, by addressing the question of reform of local government finance, giving power and real fiscal responsibility to local government much of the risk in such a project could be mitigated. Margaret Thatcher was quite right that local government in the 1970's was unaccountable to those that paid for their services because under the old rating system only 20% of people actually paid the tax. However, the inherent unfairness of the poll tax where everyone paid the same meant that in reality central government was forced to carry more of the weight of local expenses turning municipal authorities into a mere distribution pool for central government largesse. The result as Hazell argues, has been 'ever increasing levels of centralised control...'¹⁰²

Such a position is not sustainable. Giving local authorities and, therefore, local people and communities real power over education, healthcare, social services and the like while reducing its dependence on central government for revenue would greatly increase local accountability and English power over English matters. It fits with the stated aims of both parties in the governing coalition and also, potentially, allows central government to pass on to others some of the politically difficult decisions on levels of government

¹⁰¹ "Postcode Lottery," <http://nhspostcodedelottery.blogspot.com/>, (accessed April 9, 2010).

¹⁰² Robert Hazell, ed. *The English Question*, (Manchester: Manchester University Press, 2006): 190.

expenditure. An equalisation grant, along the lines of the Canadian federal government transfer to the provinces¹⁰³ would enable all authorities to start from the same baseline, whilst individual authorities, accountable to their electorate (the majority of whom would actually pay local taxation) would ensure devolution and real local accountability.

The English do not want another tier of government. It is not practical to make the United Kingdom a federation and there is no political will for dividing England up into its ancient and now largely meaningless historical component parts. There is though real affinity with the part of the country that people live in and this applies as much to the great cities as it does to the market towns and counties. People from Devon clearly regard themselves as English, but they are also quite aware of the fact that it is Devon they live in and not neighbouring Cornwall or Somerset.¹⁰⁴ Similarly, there is fierce local pride amongst those who come from and live in Leeds or Manchester, or Newcastle upon Tyne along with a long history of local governance and devolved power. Indeed the city of Newcastle upon Tyne, like most of the 'great' cities can trace its Royal Charter and Lord Mayor back to the reign of King John (1199-1216) and for most of the intervening period it was the municipal authority and not the parliament in Westminster that had most power over local and distinctly English matters. There is little reason why this historical position cannot be restored and England given back the power that it has ceded to Westminster and hence, to Scotland, Wales and Northern Ireland. Equally, the functional regionalism that has been a feature of English governance for the past thirty years is inherently undemocratic and yet, appears unlikely to be reversed. Devolution of power to municipal government with representation on the regional QUANGOS governing institutions such as the NHS would,

¹⁰³ GOC, "Equalization Program," <http://www.fin.gc.ca/fedprov/eqp-eng.asp>, (accessed May 7, 2010).

¹⁰⁴ Michael Leyshon, "Exeter Geographer helps generate sense of belonging," <http://www.exeter.ac.uk/news/research/title,52812,en.html>, (accessed February 17, 2010).

as was noted earlier, allow the UK constitution to take the road to 'a dynamic, effective, legitimate, responsive, decentralized political system commanding broad public support and trust, [and] holding government to account'¹⁰⁵

¹⁰⁵ Dawn Oliver, *Constitutional reform in the UK*, (New York and Oxford: Oxford University Press, 2003): 389-390.

CHAPTER 3: HOUSE OF LORDS REFORM

The current status of the House of Lords is indicative both of the success of constitutional reform over the past thirteen years and the problems faced by those who argue further change is necessary and worthwhile. It has been argued that the last government failed to offer a compelling or ‘coherent vision of democracy...or good governance...’¹⁰⁶ This can be understood as a failure to have an overall narrative underpinning the reform programme of the past thirteen years. In fact, although the reform that did take place during the previous administration was significant, it failed to live up to the potential of what was promised in 1997 as a result of this lack of vision. As with devolution, although much has been achieved, many necessary reforms still remain, if the objectives of the original reform process are to be achieved. In 1999 the House of Lords Act provided for the removal of all but 92 hereditary peers, and as a result the Second Chamber became an almost entirely appointed House. However, the planned ‘second stage’ to elect the House never came, despite Labour’s manifesto pledge that the removal of hereditary peers was ‘the first stage in a process of reform to make the House of Lords more democratic and representative.’¹⁰⁷

Nevertheless, this first stage of reform has had significant and far reaching effects, particularly with regard to the question of the purpose and role of the Upper House in a bicameral democracy. In the past, the House of Lords’ power could be summed up as the following: to revise; to question; to ask the elected chamber, where necessary, to think again;

¹⁰⁶ Dawn Oliver, *Constitutional reform in the UK*, (New York and Oxford: Oxford University Press, 2003): 3.

¹⁰⁷ Labour manifesto 1997 quoted in Vernon Bogdanor, *Devolution in the UK*, (Oxford: Oxford University Press, 2001): 143.

but rarely to obstruct or actively prevent the passage of legislation. As a result of the recent reforms, however, this view may now be changing. Statistics clearly reinforce this sense of changing purpose of the House of Lords. In 1978/79 the last Labour government was defeated only eleven times by the House of Lords, fewer even than Margaret Thatcher's governments which were on average defeated 14.4 times per year. This, despite the in built Tory majority is perhaps not surprising in that Labour in its last year in office in 1978/79 had lost its Commons majority and therefore, was largely conciliatory in its legislative approach, whereas the Thatcher Government was proudly radical and in many instances, its legislative programme, found little genuine support amongst the 'great and good' of the Conservative hereditary peers. However, since 1999 the Government has been defeated, on average 46.5 times per year¹⁰⁸ and the House of Lords has been more willing to push the government into submission, repeatedly defeating it, for example, over the right to trial by jury, than has the chamber in previous parliaments. The nature of the role of the House of Lords has then clearly begun to change and this has happened for a number of reasons.

First, the Conservatives have lost their majority in the upper House and indeed have gone from being the single largest grouping to the third largest, with both Labour and the Crossbenchers now larger in number. Further to this, no party now has a majority, a concept that Bogdanor argues, 'seems to have become an accepted convention.'¹⁰⁹ As a result, as Russell has shown, 'The current chamber...is far more proportional than its predecessor, and now more or less reflects the balance of votes cast at recent general elections.' At least prior to 2010 with the new government 'threatening' to create hundreds

¹⁰⁸ House of Commons Library, "Government defeats in the House of Lords" *SN/PC/03252*, (May 2009)

¹⁰⁹ Vernon Bogdanor, *Devolution in the UK*, (Oxford: Oxford University Press, 2001): 157.

of new peers in order to force through its legislative programme, as necessary¹¹⁰. It seems reasonable to argue that with proportionality and balance comes potentially a sense of greater legitimacy.

Another consequence of stage one reform is that the bulk of peers are now appointed, while the role of the Prime Minister has been reduced to that of appointing working peers from his own party, confirming nomination for retiring senior public servants and sending to the Queen the names of those nominated by the other party leaders. The major scrutiny of all these nominations is undertaken by the independent Appointments Commission, created in 2000, which also now nominates crossbencher peers, something that was hitherto within the power of the Prime Minister. Hence, the Prime Minister's patronage is severely limited to nominating members of his own party and determining the actual total number of new peers to be created. Again, the result is potentially a sense of legitimacy. Indeed as Bogdanor has claimed, 'Peers now conceive of themselves as more legitimate than their pre-1999 predecessors.'¹¹¹ Hence, as Russell has argued, 'Removal of the hereditaries has already boosted the chamber's assertiveness, which makes the government's life more difficult...'¹¹² All this leads directly into a further consequence, that of the growing challenge to the Salisbury Convention, which prevents peers, by convention, from challenging any legislation that flows directly from a manifesto commitment on which the party in power was democratically elected. Such a convention was only necessary when one party, the Conservatives had a majority in the upper House and the Government of the day was non

¹¹⁰ Guardian, "Will the Liberal-Conservative Coalition dare create over 100 life peers?" <http://www.guardian.co.uk/politics/blog/2010/may/17/liberal-democrat-conservative-coalition-new-life-peers>, (accessed May 17, 2010).

¹¹¹ Vernon Bogdanor, *Devolution in the UK*, (Oxford: Oxford University Press, 2001):

¹¹² Meg Russell, "House of Lords Reform: Are We Nearly there yet?" *Political Quarterly* 80 (2009):

Conservative. As Lord McNally, the Liberal Democrat leader in the Lords argued, the convention was designed to,

protect the non-Conservative government from being blocked by a built in hereditary-based majority in the Lords. It was not designed to provide more power for what the late Lord Hailsham rightly warned was an elective dictatorship in another place against legitimate check and balance by this second Chamber.¹¹³

Pressure on the Salisbury Convention has become even stronger as a result of the formation of a coalition government with a programme that was not formally put to the British people in an election.

The role of the House of Lords has also changed because of the larger move from, ‘a political to a law-based constitution...where the role of the courts or Supreme Court, is greater than in a constitution based on politics.’¹¹⁴ Clearly with the removal of the judicial function from the House of Lords and the creation of a United Kingdom Supreme Court that process towards a law-based constitution has begun. Oliver puts it most succinctly when she claims, ‘the role of the judiciary has expanded in the last twenty years or so and it will continue to do so as a result of devolution, the Human Rights Act, and a growing awareness of the constitutional importance of the many cases that the courts are called upon to decide.’¹¹⁵

Nevertheless, and despite the progress made, problems still remain. As Meg Russell argued in 2009, the reform of the upper house is hugely complicated and, ‘There have been so many twists and turns...since 1997 that these alone could fill an article.’¹¹⁶ Nevertheless, the key issues were admirably summarised in the Government White Paper of July 2008 – An

¹¹³ Vernon Bogdanor, *Devolution in the UK*, (Oxford: Oxford University Press, 2001): 159.

¹¹⁴ Dawn Oliver, *Constitutional Reform in the UK*, (New York and Oxford: Oxford University Press, 2003): 89.

¹¹⁵ Oliver, 107.

¹¹⁶ Meg Russell, “House of Lords Reform: Are We Nearly there yet?” *Political Quarterly* 80 (2009): 119.

Elected Second Chamber – which set out many of the options regarding legitimacy, role and composition of, and, how to maintain independence and the expertise of independent ‘crossbencher’ peers. As the paper concluded,

Although differences between the parties exist on some of the details, there is broad consensus that current arrangements do not reflect as well as they could the needs of a twenty first century democracy. All, or at least the majority, of those people who sit in the second chamber of the country’s legislature should be there because the citizens of the country have elected them.¹¹⁷

Thus, while reform has been most difficult to achieve in the area of composition of and method of selection for membership of the House of Lords, further reform is required because the current hybrid nature of the Lords appears to defy logic and satisfies no one. The continuing hereditary peers were and are, if not an anachronism, then certainly a constitutional oddity, in a twenty first century democracy. Similarly, the Bishops of the Established Church sit and continue to hold influence. For example, they were recently effective in persuading the House of Lords to prevent right-to-die reform – against the will of 82% of voters.¹¹⁸ Similarly, they helped engineer an exemption in the equalities bill to allow religious employers to discriminate against gays and others, even though Churches run a third of all schools and increasing numbers of state-financed services, from hospices to care homes and day centres. Equally, religious schools were allowed to opt out of most sex education. It seems unlikely that, without the presence of the Bishops in the House of Lords, organised religion would have had quite such success in ensuring its very particular voice was heard with such clarity in parliament. Even though such legislation required approval from the Commons, the dictates of parliamentary time often persuade the

¹¹⁷ HMG, *An Elected Second Chamber*, Cm7438, (July 2008)

¹¹⁸ Dignity in Dying, “New survey shows overwhelming support for assisted dying,” <http://www.dignityindying.org.uk/news/general/n231-27-jan-2010-new-survey-shows-overwhelming-support-for-assisted-dying.html>, (accessed May 17, 2010).

government of the day to accept amendments from the Lords that they would not ordinarily support. As it is, the United Kingdom is the only western developed country with theocracy in its law making, despite the fact that fewer than one in ten of British citizens regularly attend services of the Church of England and only about half actually consider themselves to be ‘Anglicans.’¹¹⁹

There are a number of issues which remain to be resolved prior to the successful culmination of Lords reform and the potentially controversial nature of those questions may well explain the decision of the new coalition government to establish a committee to look into the matter and report back by December 2010. It was the question of election versus appointment that was largely responsible for the failure of stage two reforms during the past ten years. As Russell argued, ‘This was what sank the Royal Commission’s report, and the government’s second, third and fourth White papers. It was the sole focus of both rounds of parliamentary votes.’¹²⁰ However, she now concludes that, ‘Finally this issue appears to be resolved’¹²¹ with all parties now supporting a largely or wholly elected house. Nevertheless, new obstacles now have to be overcome.

Not least amongst these new difficulties is the type of election to be used for the upper house. Whilst all parties have indicated they want a ‘hung’ upper house and one that reflects the balance of votes cast at recent general elections, the Conservatives said, in response to the most recent White Paper on House of Lords Reform that they would, ‘strongly resist any move to introduce an electoral system based on proportional

¹¹⁹ UK International Student, “People and Culture,”

http://uk.internationalstudent.com/study_uk/living_uk/people_culture.shtml, (accessed May 17, 2010).

¹²⁰ Meg Russell, “House of Lords Reform: Are We Nearly there yet?” *Political Quarterly* 80 (2009): 120.

¹²¹ Russell, 121.

representation.’¹²² This is crucial in that any other system of election would potentially result in a majority for the government creating a mere mirror image of the Commons and hence, a rubber stamping second chamber, or a majority for the opposition and hence the potential for parliamentary gridlock. Nevertheless, the coalition agreement and terms of reference for the committee examining further Lords reform makes clear: ‘Proposals will be brought forward for a reformed second House that is wholly or mainly elected on the basis of proportional representation.’ Clearly the Liberal Democrats have won the argument here, at least at this stage of the process and prospects for further reform have passed another potential hurdle.

There are other areas of House of Lords reform that are potentially problematic. Russell has shown that,

the argument over the electoral system is the most important illustration of a key point. While much of the past decade has been spent arguing about a central principle – that of election versus appointment – there are other principles which are equally important...[these] could be enough to scupper reform.¹²³

The decision of the new government to leave further Lords reform to a committee which will report in December is perhaps indicative of some of the tensions that now exist within the coalition on this matter.

A further issue still to be resolved is whether the chamber should be wholly or only partly elected, and if partly nominated would those peers be crossbenchers or also include some party nominations too. The presence of independent members is certainly something that appears to be welcomed by the public with Russell showing that, ‘This factor was considered important to Lords legitimacy by 83 per cent of respondents in a recent survey

¹²² Russell, 121.

¹²³ Russell, 120.

commissioned by the Constitution Unit.¹²⁴ However, in the most recent vote, in the House of Commons an entirely elected second chamber was the most popular option achieving a majority three times that achieved on the vote for an 80 per cent elected house. Nevertheless, a new House of Commons is now elected and further progress will have to wait until December, and probably later, bearing in mind the heavy legislative programme the government has unveiled in its Queen's Speech on 25 May 2010.

The composition and form of election are clearly the greatest challenges to successful further reform, however, they are not the only ones. Length of terms for peers, the continued presence of twenty six Church of England bishops and setting out the exact nature and extent of powers of the House of Lords are all potentially stumbling blocks to successful further reform. Equally, the attitude of the Conservative 'senior' partner in the coalition will be crucial. David Cameron has apparently told his peers that, 'Lords reform is a "third term issue"¹²⁵ whilst the Liberal Democrats would clearly regard it as more of an immediate issue. As Tony Blair showed with voting reform in the first term of his government, just because an issue features in the Queen's speech and a committee is set up to investigate and report on possible solutions, it does not guarantee that reform will actually occur.

This paper will argue that, as with devolution and resolution of the English Question, House of Lords reform needs to be viewed as part of a wider narrative that takes into account the purpose and objectives of reform: increased accountability for the executive, devolving power to the lowest practical level within the confines of maintaining good governance and ensuring greater democratic accountability for those with power.

¹²⁴ Russell, 121.

¹²⁵ Ibid, 124.

Further House of Lords reform and resolution of the ‘English question’ can be most easily resolved when done so in the context of electoral reform. Hence, the main problem with reform over the past thirteen years has not been that it has failed per se but that it has been, as Jeffery has argued, “piecemeal...poorly co-ordinated...[and] idiosyncratic.”¹²⁶ This research paper believes that a structured and strategic approach to reform is necessary and one that harnesses electoral reform as the glue that holds the entire reform process together.

A largely elected second chamber needs to be elected by a different format, at a different time and for a different period of service than that used for the House of Commons. Against this background the prospects for further reform are potentially positive, with the Liberal Democrat Deputy Prime Minister having overall responsibility for constitutional and government reform and a clear commitment to reform along the lines of those supported by the Liberal Democrats receiving time in the Queen’s Speech.¹²⁷

On this basis a largely elected second chamber, elected by proportional representation and with an independent selection panel to oversee the appointment of crossbench independent peers, all elected or appointed for a significant period of time, at least ten years, is an appropriate means of forwarding the reform agenda. It would enable the creation of a very different second chamber to the House of Commons and enable the House of Lords to act as a credible revising chamber with the legitimacy to stand up to the House of Commons, on occasions, but without seeking to supercede the supremacy of the Commons or to create gridlock in the legislative process.

¹²⁶ Charlie Jeffery, “Devolution in the UK: Problems of a Piecemeal Approach to Constitutional Change” *Publius, the Journal of Federalism* 39.2 (2009): 289.

¹²⁷ HMG, “Queens Speech, 2010,” <http://www.number10.gov.uk/news/topstorynews/2010/05/queens-speech-2010-3-50297>, (accessed May 26, 2010).

The complexity and difficulty of reforming second chambers makes explicit the need for urgent action and for the process to result in clearly codified limits to the powers and rights of both chambers of parliament. A wide array of competing political forces often ally themselves and result in apparently contradictory positions being taken. For example, as Peter Dorey has noted, ‘...Labour MP’s who want to abolish the House of Lords also fear that democratisation will enhance the legitimacy of the Second Chamber, and so often find themselves reluctantly endorsing a non-elected Second Chamber as the lesser of two evils.’¹²⁸ Equally, Peter Riddell in the Times argued in 2008, ‘The solution to the long-term future of the House of Lords is always after the next election, and has been for a century.’¹²⁹ If further reform is to happen it will almost certainly have to happen within the first eighteen months of the coalition government’s coming to power. After thirteen years of the ‘parliamentary version of Waiting for Godot’¹³⁰ it is possible to be hopeful that stage two of the House of Lords reform might now be possible.

¹²⁸ Peter Dorey, “Stumbling through stage two: New Labour and House of Lords Reform,” *British Politics* 3.1 (2008): 22.

¹²⁹ Quoted in Meg Russell, “House of Lords Reform: Are We Nearly There Yet?” *Political Quarterly*, 80:1 (2009): 125.

¹³⁰ Michael Parsons, “Reform of the House of Lords,” *EREA* 7.1, (2009)

CHAPTER 4: ELECTORAL REFORM

Electoral systems are vital, not just because they are the glue that hold democratic constitutions together. They also matter because the very different ways in which they translate votes into seats can dramatically alter the outcome of elections. This paper will judge possible electoral reform against the criteria of fairness, stability and accountability. As well, this paper will address three central questions: to what extent does a system result in the votes cast translating into representation for the body in question, is it likely to cause political instability at the executive level, and does it enable voters to hold their elected representatives and the executive government to account?

Popular support for electoral reform is difficult to gauge. As the Independent Commission to review Britain's experience of PR voting systems noted,

The public has contradictory attitudes to electoral systems. Public views...vary depending on how the questions are asked. Surveys have shown that, while more people believe it is important to have a clear winner than a fair result, at the same time more prefer to have two or more parties in government than just one.¹³¹

What is clear from this is that electoral systems have a potentially impossible job in reconciling all the different requirements of them. That notwithstanding, and accepting that perfection is not possible, the current system of election, particularly in relation to the House of Commons is broken and needs to be reformed.¹³² Hence, the argument for electoral reform needs to be made, if only briefly.

¹³¹ Independent Commission into Britain's Voting Systems, "Changed Voting Changed Politics," *Constitution Unit* (2003).

¹³² For an excellent summary of the inadequacies of FPTP see Phil McCarvill's, "Devising an Electoral System for the 21st Century: The Case for AMS," *IPPR*, (2010).

This argument can perhaps, best be made by considering some comparative examples of electoral systems that show clearly the significant impact different electoral systems can have on the way votes are translated into results. In 1948, the National Party of South Africa won power for the first time and began to implement its policy of apartheid. It proceeded over the following forty years to develop a policy of racist segregation with devastating consequences for the country and its people¹³³. The National Party won the election of 1948 with an eight seat majority in parliament even though it polled only 41% of the vote as opposed to 51% for the United Party. Over the following two elections, held in 1953 and 1958, a similar phenomenon occurred. The United Party won the popular vote and the National Party won most seats in Parliament.¹³⁴ A similar disproportionate electoral system was used in Queensland, Australia until 1992 and helped keep John Bjelke-Petersen in power from 1968-1987, despite the opposition party regularly ‘winning’ the popular vote and often by substantial margins.¹³⁵

It is reasonable to argue that had a more proportional system of election been used in both these cases, very different governments would have been elected and radically different policies would have been pursued. Further to this, electoral systems are not simply about electing a government. In a parliamentary system like the UK’s its purpose is also (primarily) to elect a parliament that will hold the executive to account. As Oliver has argued, ‘Despite recent reforms, it seems unlikely that the House of Commons will be able to strengthen its own scrutiny function in relation to government for as long as the electoral

¹³³ Nelson Mandela, *Long Walk to Freedom*, (Little Brown and Co. London, 1995)

¹³⁴ Dan Berman, “Apartheid was helped by a twisted electoral system,” <http://www.fivethirtyeight.com/2010/05/apartheid-was-helped-by-twisted.html>, (accessed May 22, 2010).

¹³⁵ Queensland Department of Justice, *Behind the Ballot Box: The Story of Queensland Electoral System*. Brisbane, (Department of Justice, 1979).

system produces disproportionately large majorities.¹³⁶ Thus, electoral systems matter both in terms of the creation of an executive and in the ability of parliament to hold that executive to account.

In the UK, the electoral system used for electing the House of Commons, First Past the Post, has historically, broadly speaking, represented the popular will of the electorate, even if it has not supported the ability of MP's to hold the government to account. However, the correlation between votes cast and MP's elected began to break down in the final decades of the Twentieth Century. Until the 1970's, Britain clearly operated within a two party system and apart from 1951¹³⁷, the party winning the popular vote formed the government. Since February 1974, and the rise in support for the Liberal Party (subsequently the Liberal Democrats) and nationalist parties in Scotland and Wales, the electoral system, first past the post, has increasingly failed to represent the views of a significant minority of voters. In 1951 the combined Labour and Conservative share of the vote was 96.8 per cent, by February 1974 that had fallen to 75.1 per cent and in 2010 was 65.1 per cent. However, Labour and the Conservatives continued to dominate parliament with a combined strength of 86.6 per cent of MP's in the current parliament. Hence, widely differing numbers of votes were required to win parliamentary representation depending on the way those votes are concentrated around the country. Thus, in 2010 it took approximately 20,000 votes to elect a DUP MP to parliament, about 34,000 to elect a Conservative or Labour MP and over 100,000 to elect a Lib Dem. Worse, the Greens despite polling 286,000 votes elected only one MP while UKIP with its near one million votes failed even to achieve that. The current system is perverse in its idiosyncrasies and has

¹³⁶ Dawn Oliver, *Constitutional Reform in the UK*, (New York and Oxford: Oxford University Press, 2003): 202.

¹³⁷ In 1951 Labour polled 13.9 million votes and the Conservatives 13.7 million. The Conservatives returned 321 MP's and Labour 295.

failed, in this instance, even to deliver that which its proponents argue is its greatest feat – stable majority one party government. Despite polling two million votes¹³⁸ more than Labour, the Conservatives are twenty seats short of a majority of one in the House of Commons and forty seats short of a workable majority;¹³⁹ whilst the Liberal Democrats won only a third of the seats that their 24 per cent of the vote would suggest they are entitled to. The failure to reform the system of election to the House of Commons is probably the greatest indictment of the Labour government’s failed approach to constitutional reform. Matthew Flinders has argued that the Blair Government lacked a clear plan for constitutional change and was plagued by an over cautious approach to reform.¹⁴⁰ The result has been on the one hand, far reaching reform in many areas and yet at the same time opportunities missed. As David Marquand has claimed:

It is very British, this revolution. It is a revolution without theory. It is the messy, muddled work of practical men and women, unintellectual when not positively anti-intellectual, apparently oblivious of the long tradition of political and constitutional reflection of which they are heirs, responding piecemeal and ad hoc to conflicting pressures – a revolution of sleepwalkers who don’t quite know where they are going or why.¹⁴¹

Electoral reform is essential in reforming the UK constitution. The current system for counting votes in the United Kingdom varies and is dependent on where a person lives and what election they are voting in. Again, New Labour has begun the process and as Oliver argued, ‘Important aspects of elections have been on the modernization agenda of the Labour Party since it came to power in 1997.’¹⁴² As a result the way votes are counted in any

¹³⁸ Fully eight percentage points more.

¹³⁹ In the 2005 General Election, Labour polled only 750,000 more votes than the Conservatives and yet had a majority over the Conservatives in the House of Commons of 157 seats and an overall majority of 66.

¹⁴⁰ Matthew Flinders, “Constitutional Anomie,” *Political Studies Association*, (Annual Conference, April 2008).

¹⁴¹ David Marquand, “Populism or Pluralism? New Labour and the Constitution,” *Mishcon Lecture, UCL*, (1999).

¹⁴² Dawn Oliver, *Constitutional Reform in the UK*, (New York and Oxford: Oxford University Press, 2003): 131.

given election is as a direct result of when the election and body it is supporting was created. Hence, elections to the devolved assemblies are by proportional representation as are, although in a purer form, elections to local government in Scotland. Elections to the European Parliament, as a result of pressure from the European Commission, are also by a form of proportional representation, although the 'party list' system used gives significant power to political parties rather than voters to choose their actual representative. All other elections in the United Kingdom are carried out under the First Past the Post system for geographical 'wards' for local government and 'constituencies' for Westminster. Hence, elections to bodies created during the last thirteen years, or which are for a parliament outside the UK, are carried out under varying forms of proportional representation (Scottish local government being the exception to this rule), and elections to institutions with a longer pedigree are still counted using FPTP.

Such a hybrid approach using different counting systems depending on the type of election potentially offers a solution to the myriad of issues and problems thrown up by the current British constitutional settlement. As the Independent Commission into Voting Systems noted, 'A system which suits devolved legislatures in Scotland or Wales...is not necessarily relevant for Westminster.'¹⁴³ Oliver has argued similarly in favour of using different methods of election for different institutions. She claims that STV at the local and devolved level would result in, 'a more cooperative and less adversarial style and a more responsive government'¹⁴⁴ while accepting that, 'no system of proportional representation...is likely to be introduced for the House of Commons for many years, if at

¹⁴³ Independent Commission into Britain's Voting Systems, "Changed Voting Changed Politics," *Constitution Unit* (2003): 117.

¹⁴⁴ Dawn Oliver, *Constitutional Reform in the UK*, (New York and Oxford: Oxford University Press, 2003): 146.

all.¹⁴⁵ That would certainly seem to be the view of the Liberal Democrat leadership which has accepted that the most it can expect from the current parliament is a referendum on the rather less than proportional Alternative Vote system. Nevertheless, such a system is likely to have increased minority party representation at Westminster¹⁴⁶ and hence, make coalition government and political cooperation more likely. There are advantages and disadvantages to all methods of counting votes and this paper is not going to deal with those questions in any depth here. But it can offer a pragmatic solution to the institutional malaise that is the current constitutional settlement, and using different electoral systems for different types of elections seems to provide an opportunity for progress.

Using STV for elections to the House of Lords and to English local government seems in many ways the best way forward. It enables the maintenance of smaller constituencies and wards than would be possible with party list PR systems, and, hence keeps the link to local representation that would otherwise be lost and which has traditionally been considered vital for any system of election used in the UK. Indeed, the terms of reference for the Jenkins Commission on the Voting System for the House of Commons were explicit that there should be, ‘a maintenance of a link between MP’s and geographical constituencies.’¹⁴⁷ Equally, the political culture in Britain tends to result in parties fighting all available seats in an election so the potential risk of parties attempting to manipulate results by limiting the numbers of candidates in any given area may well be exaggerated. Finally, STV is now firmly established as the method of electing Scottish municipal government and it seems logical to extend this system where appropriate. As the

¹⁴⁵ Oliver, 147.

¹⁴⁶ BBC, “Would the Alternative Vote changed history,” http://news.bbc.co.uk/2/hi/uk_news/politics/8506306.stm, (accessed June 1, 2010).

¹⁴⁷ Roy Jenkins, “The Report of the Independent Commission on the Voting System,” <http://www.archive.official-documents.co.uk/document/cm40/4090/terms.htm>, (accessed July 12, 2010).

Jenkins Report argued, ‘STV is sometimes considered particularly suitable for local government...’¹⁴⁸ That is not to acknowledge the problems that exist with STV, and its potential benefits, such as reduced party control over which candidates are elected, can be exaggerated. Nevertheless, as the Electoral Reform Society has argued, ‘STV offers voters the best and most effective choice.’¹⁴⁹

A key problem with the current constitutional settlement is the inequitable treatment of England and a suggested solution is to transfer greater power to existing (though reformed) local government institutions. Such a solution, without reform of local government finance would, in many ways, make the situation worse in that local government would merely be a cypher for central government largesse and there would be little democratic accountability for the decisions made. The frequent objection to local government in the 1970’s and the primary motivating factor in the Conservative’s Community Charge was that local councillors were not representative of the interests of those who paid for the services provided by that level of government and were as a result frequently profligate and inefficient. The Community Charge was clearly a social and political disaster and yet the system of local government finance that replaced it has, in effect, reduced local autonomy to the point that, England is governed under ‘ever increasing levels of centralised control...’¹⁵⁰

Equally, it is a virtually certain fact that under First Past The Post a majority of local authorities will almost certainly remain under the control of one party, and the same party

¹⁴⁸ House of Commons Library. *Voting Systems: The Jenkins Report*. 98/112 (1998): 77.

¹⁴⁹ Electoral Reform Society, “Systems Guide,” <http://www.electoral-reform.org.uk/article.php?id=48>, (accessed July 12, 2010).

¹⁵⁰ Robert Hazell, ed. *The English Question*, (Manchester: Manchester University Press, 2006): 190.

sometimes for decade after decade.¹⁵¹ This is not good for democratic accountability either with all the inherent problems of corruption and inefficiency that always stem from one party rule. This issue has been most clearly thrown into sharp relief with recent events in Doncaster, which Labour has controlled without exception since 1917 and the leader of council and his closest colleagues have been convicted of corruption. Similarly, Buckinghamshire County Council has been in Conservative control for more than a century, and there is some evidence of inefficiency and lack of democratic accountability as a result.¹⁵²

The new government has already shown a desire to return some autonomy to local government,¹⁵³ and in this context, a logical next step would be to devolve real tax raising power to local government and introduce a system of proportional representation for local government in England and Wales, along the lines of the Scottish model – i.e. the Single Transferable Vote. It could be introduced over a multi ward system that would maintain strong local accountability (approximately 1 councillor per 9,000 electors in a 6 or 9 member ward), ensure parties were forced to work together to resolve local issues and end one party rule that has so blighted the decision making process at the municipal level. This would not be such a dramatic change in that most of English local government is already based on multi-member wards, electing three councillors to a given geographic area. The problem, in terms of accountability, is that as a result of first past the post, each of the elected councillors usually represents the same political party and hence, one-party control of a

¹⁵¹ PPS, “Local Authority Political Control Database,” <http://www.ppsgroup.co.uk/pdf/PPS-Local-authority-political-control-database.pdf>, (accessed June 1, 2010).

¹⁵² Buckinghamshire achieved only 2 or 3 stars between 2005 and 2008 for ‘value for money.’ Audit Commission, “Buckinghamshire County Council,” <http://cpa.audit-commission.gov.uk/STCCScorecard.aspx?5704SC=PI&5704SO=asc&msc=s&taxID=101299&aibID=10000382&lsvt=False&aibName=Buckinghamshire%20County%20Council&faibID=0>, (accessed June 3, 2010).

¹⁵³ Mark Pack, “Freeing up Local Government Finances,” <http://www.libdemvoice.org/freeing-up-local-council-finances-details-published-19929.html>, (accessed May 26, 2010).

particular local authority, often for decades, ensues. Further to this, as a result of reform to local government in the last ten years most authorities are now run on a cabinet basis with all parties on council represented within the cabinet. Proportional representation would simply end the ability, in most cases, of a single party to win all the votes in that cabinet ensuring that decisions made were more representative of the collective community's policy preferences. Local government would once again have real power, and crucially, local electors would, for the first time, have real control over those in power.

With regard to the second chamber at Westminster, the new government has agreed to the use of a proportional system of election, something that would greatly reduce any likelihood that, as an elected body, it will seek to usurp the power and authority of the Commons. As Oliver has argued, 'The House of Lords has in principle the same powers as the House of Commons...'¹⁵⁴ Such potential issues could be sidestepped by codifying within a written constitutional document the exact role of the second chamber. By implementing a system of proportional representation for election to the upper house it would ensure no single party ever had an absolute majority amongst its members. Further, by maintaining a small number of non-elected crossbencher peers, the opportunity even for a coalition of two parties to carry a majority in the Lords would be curtailed. Such a solution would give the chamber the authority of democratic accountability and the expert knowledge that a primarily revising chamber needs. The continued existence of appointed cross benchers would also help to maintain the supremacy of the Commons by giving it the ultimate authority of being the only completely elected chamber. The system of proportional representation used for electing the second chamber matters in terms of increasing electoral accountability, and whilst no system is perfect, using the Single Transferable Vote method

¹⁵⁴ Dawn Oliver, *Constitutional Reform in the UK*, (New York and Oxford: Oxford University Press, 2003): 191.

potentially gives the greatest power to voters and reduces the power of parties to manipulate how those results transfer to representation.

The 2010 general election has completely transformed the status of electoral reform in the UK for the House of Commons. As Phil McCarvill has claimed,

The 2010 general election result has put electoral reform centre stage and dealt a potentially terminal blow to the First Past the Post (FPTP) system. This is not simply due to a perpetuation of the age-old distortions which invariably reward Labour and the Conservatives and penalise the Liberal Democrats: it is also because FPTP has not delivered a decisive election result.¹⁵⁵

Following that indecisive election result the new Liberal-Conservative coalition agreement has made clear that it ‘Will bring forward a Referendum Bill on electoral reform, which includes provision for the introduction of the Alternative Vote in the event of a positive result in the referendum...’¹⁵⁶ While McCarvill and others¹⁵⁷ have argued that the Additional Member System is preferable both to AV and STV, in reality the only likely prospect, in the immediate term, is that which is proposed by the government.

Thus, although the Commons is likely to see electoral reform,¹⁵⁸ any move towards a distinctly more proportional system seems extremely unlikely in the near future. It has been suggested amongst some Liberal Democrat and Labour commentators that a Labour MP might move an amendment during the passing of the referendum bill to include the option of STV on the ballot. However, even were such an amendment to be moved, it is unlikely

¹⁵⁵ Phil McCarvill, “Devising an Electoral System for the 21st Century: The Case for AMS,” *IPPR*, (2010).

¹⁵⁶ HMG, “The coalition: Our programme for government,” (May 2010).

¹⁵⁷ Not least Lord Alexander who was the dissenting voice on the 18 Jenkins Commission which proposed AV plus as the preferred choice for electoral reform to the House of Commons

¹⁵⁸ Anthony Well, “The AV Referendum Question,” <http://ukpollingreport.co.uk/blog/archives/2755>, (Accessed July 30, 2010).

that there would be a majority for such an idea in the current house.¹⁵⁹ Hence, AV is probably the best that can be hoped for. Whilst it would not be proportionate it would probably result in increased electoral success for minority parties, ensure each MP has majority support within their constituency and, hence will at least pass some of the criteria used in this paper to evaluate electoral systems. Similarly, even allowing for the likelihood that, in 1997 the Alternative Vote would probably have increased further the size of the Labour majority in the House of Commons,¹⁶⁰ John Curtice has shown how First Past the Post and similarly therefore, AV, has become less likely to produce majority government. ‘The hung parliament that occurred after 6 May was no one-off aberration. Rather, it was the result of three long-term changes in the electoral map of Britain.’¹⁶¹ He goes on to argue that all of the electoral forces that enabled the current electoral system to deliver one party majority government are weakening and hence, ‘None of these conditions now hold with sufficient force to ensure that hung parliaments could not become a regular feature in Britain even if the first past the post system were to be retained.’¹⁶²

Even were that not the case, in the context of the other reforms being proposed in this paper, a less than proportional House of Commons may be judged, in the short term, acceptable in that all the other democratic institutions would be proportional. Hence, in many ways the House of Commons could continue largely as it is at present, although with further devolution of power, this time to English local government and a reformed and re-invigorated largely proportional second chamber to maintain balance. This scenario would

¹⁵⁹ Mark Thompson, “Will Labour Campaign for AV,” <http://markreckons.blogspot.com/2010/05/will-labour-campaign-for-av.html>, (accessed June 6, 2010).

¹⁶⁰ Independent Commission into Britain’s Voting Systems, “Changed Voting Changed Politics,” *Constitution Unit*, (2003): 118.

¹⁶¹ John Curtice, “Parliamentary Brief. The Last Post,” <http://www.parliamentarybrief.com/2010/05/the-last-post#all>, (accessed June 1, 2010).

¹⁶² *Ibid.*

also encourage, even a single party government with a majority in the House of Commons to compromise and reach consensus. The introduction of AV will be a further step forwards in that at least each member of the House of Commons will be elected by a majority of the people voting in any given constituency. However, such a reform will almost certainly not be sufficient in the medium term. It seems difficult to defend, other than for short term pragmatic reasons, any system of election to the House of Commons that is as disproportionate as first past the post and AV are. Hence, some form of proportional system should be considered in the future to complete the process of making all electoral systems more proportionate. This will become potentially more viable once, or rather if, the concept and effectiveness of coalition government becomes established and accepted by the body politic.

Under the proposals for further reform outlined here, the House of Commons would continue to have responsibility for overall national UK policy decisions including setting national tax rates, and military and foreign policy, reviewing and verifying European Union legislation, and in holding government ministers to account. If the rest of the elected institutions of state were elected proportionally, there would be no inherent need at this stage for this, the ultimate decision making body to be so elected. Hence, the direct constituency link could be maintained under AV,¹⁶³ the government (perhaps a single political party) of the day would continue to hold a majority in the Commons but would have to take into account the views of other parties in order to get its legislation through the upper house. Equally, many of the crucial day to day decisions about issues directly pertaining to citizens would be taken at a level closer to them and in authorities run, almost

¹⁶³ This link is often cited as one of the key arguments in favour of FPTP and was the main reason why the Jenkins Report on the Voting System in 1999 suggested an 'Alternative Vote Plus' model for electoral reform.

by course, through coalition and negotiation between different political parties and ideologies.

CHAPTER 5: CONCLUSION

Massive constitutional change has been instigated during the last thirteen years and much of it has been positive in its impact on the way the country is governed. Nevertheless, this research paper has shown that the current constitutional settlement in the UK remains something of a 'mess' and that this mess takes shape in a number of different forms – potential instability, inequity between different parts of the Union and lack of overall vision. This has resulted in incomplete reform and an inability to deal effectively with the consequences of reform – both expected and unexpected. Hence, further reform is required to put right some of these issues. As Oliver argued, 'It is important to bear in mind that there has been no master plan or coherent programme for reform...either in the changes introduced under the Conservative administration from 1979 to 1997, or since Labour came to power in 1997.'¹⁶⁴ As a result, often unintended consequences have left the constitution potentially unstable with significant questions ignored and unanswered. The current constitutional settlement is potentially unsustainable. Further, it fails crucially in terms of 'equity.' As Simeon has argued, 'Constitutions are about much more than simply setting out the rules of the political game. They are also statements of fundamental values about human rights, about the nature of political community.'¹⁶⁵ Hence, constitutions matter; the 'quasi federal',¹⁶⁶ 'unfinished',¹⁶⁷ and 'unstable'¹⁶⁸ new British constitution matters because it undermines those 'fundamental values.'

¹⁶⁴ Dawn Oliver, *Constitutional Reform in the UK*, (New York and Oxford: Oxford University Press, (2003): 3.

¹⁶⁵ Richard Simeon, *Constitutional Change: A Framework Analysis*, Draft Paper (2009): 5.

¹⁶⁶ Vernon Bogdanor, "Constitutional Reform in Britain: The Quiet Revolution," *Annual Review of Political Science* 8 (2005): 73.

The British constitution needs further reform precisely because the current settlement is potentially too unstable to survive. Prior to 1997, the British constitution was unique in that it was, as Dicey argued, an ‘historic’ constitution – not just old but, ‘original and spontaneous, the product not of deliberate design but of a long process of evolution.’¹⁶⁹ As Sidney Low claimed, while ‘other constitutions have been built...that of England’s [sic] has been allowed to grow.’¹⁷⁰ That is no longer the case. It has now, as a result of reform since 1997, been ‘built.’ To continue the imperfect metaphor, in some instances the reformed UK constitution is so lacking in clearly thought through design that it may not stand without further structural support and foundational redevelopment. As Hazell argues, ‘Comparative federalism would suggest the union (between England, Scotland, Wales and Northern Ireland) is highly unstable’ and the ‘Quasi-federal solution, devolution of the smaller nations on the Celtic fringe, leaves a gaping question: What about England?’¹⁷¹ Similarly, reform of the House of Lords has been effectively stalled at stage one with progress towards a more democrat chamber suffering significant set backs whilst electoral reform for the Commons has only become an agenda item again during the past few months. The question of electoral reform for English local government has been and remains completely off the political grid.

In many ways such failings despite the enormous strides forward are hardly surprising. Peter Dorey has argued that, ‘the absence of a consistent philosophical or

¹⁶⁷ Charlie Jeffery, “The unfinished Business of Devolution,” *Public Policy and Administration* 22 (2007): 92.

¹⁶⁸ Robert Hazell, “The English Question,” *Publius, the Journal of Federalism*, 36. 1 (2006): 37.

¹⁶⁹ Vernon Bogdanor, “Constitutional Reform in Britain: The Quiet Revolution,” *Annual Review of Political Science* 8 (2005): 73.

¹⁷⁰ Sidney Low quoted in Vernon Bogdanor, *Constitutional Reform in Britain: The Quiet Revolution. Annual Review of Political Science* 8 (2005): 73.

¹⁷¹ Robert Hazell, “The English Question,” *Publius, the Journal of Federalism*, 36. 1 (2006): 37.

ideological approach to constitutional reform has meant that the approach of all twentieth-century Labour governments to this issue was characterised by caution and minimalism.¹⁷² Whilst it may be unfair to accuse the Blair and Brown governments in quite such terms it is certainly reasonable to argue that the lack of an overarching coherent vision for reform has hindered the progress made.

This paper proposes an overarching and coherent approach to some of the constitutional reform issues that need to be addressed. Under a new and reformed constitutional settlement, power would be shared much more equitably than it is at present. The English, through devolution of power to their municipal government would have somewhat similar powers¹⁷³ devolved to them as the Scottish have through their devolved Parliament. All these institutions would be elected via a form of proportional representation giving real power to voters to choose exactly which individual as well as which party they want to represent them. The political parties themselves would be forced to compromise and work together in order to achieve policy goals. Policy on issues from garbage collection through to education, health, and social services would require consensus and cross party agreement. Further to this, because all these institutions have to operate within budgets for which they are responsible, and which they have power to change via devolved tax raising mechanisms, they would wield both genuine power as well as be truly accountable to the communities they represent. Monolithic organisations like the NHS, already effectively broken up from the former British NHS into a Scottish, and Welsh and English NHS, would be made even more accountable to the people they served. Just as local government has input into regional fire services, so they could determine the priorities for healthcare services

¹⁷² Peter Dorey, *The Labour Party and Constitutional Reform: A History of Constitutional Conservatism*, (Palgrave Macmillan New York, 2008): 379.

¹⁷³ Although clearly not the power to pass primary legislation.

for their local area. There would be clear democratic control over the running of the services that have direct impact on peoples' lives on a daily basis.

Similarly, the House of Lords, losing the last vestiges of its aristocratic inheritance, would become a genuine revising chamber, broadly democratic and representative of the different regions and countries that make up the United Kingdom. Again, through the form of proportional representation suggested here – the Single Transferable Vote – voters would have potential power over the individuals elected rather than just voting for a single candidate selected by a party. Individuals who represented the best interests of their community and took occasionally independent lines from their respective parties would almost certainly be rewarded by voters, as is frequently the case in the US Senate. The result would be a revising chamber, full of the talents and with the mandate to be independent from the executive and Prime Minister, where necessary.

Underpinning all of this further reform would be changes to the voting system for local government in England, the House of Lords and the House of Commons. By ensuring those elected to local government were more representative proportionally to the votes cast, local councillors would be forced to work across party lines, the political culture would begin to change and councillors and councils would be genuinely accountable to their electorates for the decisions they made. Similar change would occur within the House of Lords and the House of Commons: the introduction of a proportional system for election in the Lords would literally end the concept of a 'job for life' whilst the slightly more proportional system on offer for the Commons would encourage co-operation and coalition building. Further, as reform took root so a move to a more proportional system of election may prove possible. As a result, the culture, nature, and operation of politics in Britain should begin to change potentially enabling a rebuilding of trust between politicians and those who elect them.

In order to hold all this together it would almost certainly be necessary to create a formal constitutionally-entrenched document that could be enforced by the courts, setting out the various powers of the differing levels of institutions. This would complete the process of the Blair and Brown governments and give ultimate authority over the constitutional settlement to judges in the Supreme Court. No longer would the House of Commons, in effect, be entirely supreme. Nor would it be able as it has during the past thirteen years, to pass whatever laws it has wished, with the collusion of the House of Lords. Indeed it is worth noting that since it came to office in 1997 the last, ostensibly 'progressive,' Labour Government has, abolished Habeas Corpus and many other individual rights and freedoms enshrined since the Glorious Revolution or even Magna Carta. What this suggests most strongly is that those who govern us, even those who are philosophically progressive in outlook, are inclined to pursue power and increase their level of control. Hence, a constitution that limits and contains that power within constraints that force dialogue and genuine co-operation can only be for the good.

This last Labour Government like the Conservative Government before has shown that Lord Hailsham was right, in 1974 when he compared a majority British Government to an elected dictatorship. The rights and freedom of the British may not be entirely safe with parliament alone, indeed by its very nature the concept of parliamentary supremacy means the people are subservient (unlike the US) to that parliament. A Supreme Court with constitutional power is not always the ideal, but in constitutional reform there are few absolute ideals and many compromises and accommodations. Thus the solution proposed here of devolving power to English local government does not replicate the system and nature of the Scottish parliament; for example, Scotland will still be able to speak with a

single voice whilst the English may continue to speak with up to 300 separate and sometimes disparate voices. Nor does it completely solve and eliminate the English Question. It does however, continue the asymmetrical approach to devolution in the UK begun by New Labour in 1997, offering a pragmatic course for reducing the unfairness of the current constitutional settlement and shifting power from the UK Parliament to the English themselves.

The time for a coherent constitution underpinned by a clear vision of democracy and accountability is now. There is an opportunity with the election of a Liberal Conservative Government to balance the constitutional settlement between all four contingent parts of the Union and to add to and improve the constitutional reform process begun by new Labour in 1997.

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