Parliamentary representation at Westminster and devolution: from the "in and out" to EVEL

Introduction

On 13 July 2021, the House of Commons voted to rescind the English Votes for English Laws (EVEL) standing orders. This result, a victory of Gove (the Chancellor of the Duchy of Lancaster and allegedly a strong proponent in recent months for repealing the offending standing orders) over EVEL brought to end the most recent attempt to use the procedures of the House of Commons to tackle the complexities of Parliamentary representation for devolved territories within the UK Parliament.

For as long as there have been debates about devolution, there have been questions about what devolution should mean for the rights of MPs from the affected areas. These questions have emerged as a result of the Westminster Parliament's dual-hatted role as a Union-wide legislature as well as a sub-state legislature for the various constituent parts of the UK. While this dual-hatted role was less obvious when Westminster served as the domestic legislature for all of the constituent nations of the UK, it became more problematic with asymmetric devolution which has carved out Westminster's role in some, rather than all, parts of the UK.

This article will offer a retrospective look at the six year experiment in EVEL, starting with an examination of the history of the debate about parliamentary representation post-devolution, noting the different attempts which have been made to resolve the West Lothian Question (and its predecessor Question – which one might dub the Belfast West Question), before looking at how EVEL became Conservative Party policy and why the EVEL experiment ended after six years with the repeal of the respective Standing Orders.

The history of debates about devolution and parliamentary representation

As the Cabinet Office's Constitution Unit highlighted in 1975, in the context of devolution proposals to Scotland and Wales, "it is often argued that devolution (particularly legislative devolution) should entail either a restriction of voting rights or a reduction in the number of MPs at Westminster".[1]

When this issue first arose in the late nineteenth century, in the context of the first Irish Home Rule Bill, Gladstone's initial response was to remove parliamentary representation from Ireland entirely. This was despite the fact that Westminster would retain responsibility for matters like foreign affairs and would continue to tax Irish citizens – in sum, taxation without representation.[2] The Bill's defeat and the reaction to its proposed disenfranchisement of Irish electors, resulted in Gladstone's Second Home Rule Bill initially including the "in and out clause". An idea rejected as unworkable by Gladstone, who suggested such a scheme "passes the wit of man", the "in and out clause" would have seen Irish MPs limited to voting on

[1] The National Archives (TNA), CAB 198/533: Bantock to Elridge, 6 Nov. 1975; A. Evans, "Devolution and Parliamentary Representation: The Case of the Scotland and Wales Bill 1976-7" 37(2) (2018) *Parliamentary History* 278.

[2] J. Mitchell, "Devolution", in, D. Brown, R. Crowcroft and G. Pentland (eds.), *The Oxford Handbook of Modern British Political History* (Oxford: OUP, 2018), p.177.

"imperial matters" and barred from voting on matters relating to Great Britain. The impracticality of the scheme led to it being removed from the final Bill. Instead, the Bill proposed reducing Ireland's representation at Westminster from over a hundred MPs to 80.[3]

This latter approach – reducing the numbers of parliamentarians – was the safest response to the issues prompted by devolution, even if it did not provide a full or wholly satisfactory response to the democratic imbalances mentioned earlier. It was a response followed in the aftermath of the Government of Ireland Act 1920 which saw Ireland partitioned and the creation of a new polity, Northern Ireland. As a result of the introduction of an extensive model of devolution to Northern Ireland, the 30 MPs who were elected in 1918 from the six counties of Ulster that went on to form Northern Ireland were reduced to a total parliamentary representation of 13 members (reduced further to 12 after the 1948 Redistribution of Seats Act).

However, this did not close off entirely a debate about the ability of those members to influence policy affecting other parts of the UK. This Belfast West question (in the days when that seat returned Unionist MPs) emerged after the 1964 General Election won by Harold Wilson's Labour Party. Wilson had won the election by the narrowest of margins, and his plans to nationalise the steel industry were bitterly opposed by the Conservative opposition, as well as by a small number of his own MPs. Complicating matters further were Ulster Unionist MPs. Ulster Unionists had swept the board at the election in Northern Ireland, winning all twelve seats, and, critically for Wilson, they took the Conservative whip at Westminster.

Faced with a potentially influential block vote from the Ulster Unionists on a policy which would only apply in Great Britain and not Northern Ireland, Wilson asked his Attorney General, Sir Elwyn Jones, to, explore an "in-and-out" solution. Elwyn Jones came to the same conclusion that Gladstone had reached at the end of the nineteenth century: that an "in and out" arrangement was much too complicated.[4] In the end, a snap election in 1966 gave Wilson a substantial victory and the majority needed to carry through his programme of reform.

While Elwyn Jones examination of the issue may have given Ulster Unionist MPs a reprieve, the issue of parliamentary representation would soon re-emerge, in an even more significant way, in the context of proposals for Scottish and Welsh devolution in the 1970s.

In 1969, Harold Wilson's government established a Royal Commission on the Constitution to examine the question of devolution to various parts of the UK (as part of a much broader and ill-defined remit). The Commission took until 1973 to conclude its work, producing an official and a minority report. Of importance to this discussion, was the majority report's prescient observation that "if legislative devolution were to be [established in] selected regions [of the UK] only, a problem would arise over the level of representation of those regions in the House of Commons compared with that of regions which did not have legislative assemblies of their own."[5]

Indeed, this issue featured prominently from the outset of the 1974-79 Labour Government's entanglement with devolution. In 1975, shortly after the Government had produced detailed proposals for Scottish and Welsh devolved assemblies in its White Paper

[3] V. Bogdanor, *Devolution in the UK* (Oxford: OUP, 1999), p.30.

[4] See: G. Walker and G. Mulvenna, "Northern Ireland Representation at Westminster: Constitutional Conundrums and Political Manoeuvres" 34(2) (2015) *Parliamentary History* 238-242.

[5] Royal Commission on the Constitution 1969–1973, Vol. I, Report, Cmnd. 5460 (1973), para. 811.

Our Changing Democracy, a group of Conservative MPs (including Douglas Hurd and Nigel Lawson) tabled an Early Day Motion in the House of Commons insisting that "any devolution of power from Westminster to a Scottish Assembly must be accompanied by a commensurate reduction either in the scope or the voting rights of Scottish Members at Westminster or in their number".[6]

The newly elected Leader of the Opposition, Margaret Thatcher also highlighted the question of territorial representation post-devolution in her speech during the Scotland and Wales Bill's second reading in 1976, calling for the issue of Scottish and Welsh representation post-devolution to be referred to a Speaker's Conference. Scottish (and to a lesser extent Welsh) over-representation was mentioned by a number of MPs during that Second Reading debate. During this debate, Tam Dalyell also queried, in a portent of his later, more famous, contributions, whether it was "any more tolerable that 50 or 35 Members of Parliament should cast votes on subjects for which they are not responsible than should 71 of them?"[7] This line of questioning, which Dalyell would continue to pursue, would become known as the "West Lothian Question".

This issue would continue to dog the Callaghan Government, eventually resulting in the Scotland Act 1978 (separate legislation was brought forward for Scottish and Welsh devolution after the failure of the Scotland and Wales Bill) being amended to include the following provision:

> "(1) Subject to subsection (2) of this section, if, following the first meeting of the Scottish Assembly, a Bill to which this section applies has been passed by the House of Commons but there would not have been a majority in support of the Bill if there had been excluded from the members who voted in the division of that House on the question that the Bill be read the second time all those representing parliamentary constituencies in Scotland, that Bill shall be deemed not to have been read the second time unless after the next fourteen days on which the House has sat after the division took place that House confirms its decision that the Bill be read the second time." [8]

Had the Scotland Act 1978 been brought into force, this would have been a softer "think again" model of English Votes for English Laws. Crucially, it would not have come into effect without the approval of the House of Commons via a resolution, and while it would have imposed a cool-off-and-think-again period in the event that a Second Reading of a Bill which did not relate to Scotland but which would otherwise fall within devolved competence had been passed based on Scottish votes, it would not have prohibited Scottish MPs from voting as part of the re-confirmation of Second Reading vote. Nor would it have impacted on any of the later stages of a Bill's passage through Westminster.

The story of how EVEL times came to Parliament

[6] TNA, CAB 198/450: Eldridge to Bantock, 3 Nov. 1975.
[7] HC Deb (Hansard), 13 December 1976, col. 1058.
[8] Scotland Act 1978, s.66.

How EVEL came to pass

On 22 October 2015, the House of Commons voted by a margin of 312 votes to 270 to amend the Standing Orders of the House and to establish a system of English Votes for English Laws (EVEL). The new Standing Orders represented the culmination of over a decade of thinking and support within the Conservative Party for EVEL, a stance that emerged after the party's historic defeat at the 1997 General Election and the subsequent establishment of devolution in Scotland and Wales.

Relatively swiftly after 1997, it was the Conservative Party which made the running with proposals for resolving the West Lothian Question. In 2000, the Commission to Strengthen Parliament, established by the party's then Leader William Hague, proposed a process whereby Bills certified as English or English and Welsh-only by the Speaker would go through exclusively English/English and Welsh-only Second Reading, Committee and Report stages, before then having a Third Reading where all MPs could participate and vote. The Party's 2001 General Election manifesto appeared to pledge the party to a maximalist version of EVEL, promising that

> "when Parliament is discussing something that affects the whole of the United Kingdom, all MPs should vote. But only English and Welsh MPs will be entitled to vote on Government Bills relating to England and Wales. And English MPs alone will vote on the remaining laws which apply exclusively to England".[9]

A similarly strong commitment was included in the party's 2005 General Election manifesto, which included a pledge that

> "exclusively English matters should be decided in Westminster without the votes of MPs sitting for Scottish constituencies who are not accountable to English voters. We will act to ensure that English laws are decided by English votes."[10]

That the number of MPs from Scotland had been reduced, as a recognition of devolution, for that election onwards (the number of MPs from Scotland fell from 72 to 59) did not seem to deter the Conservative Party from its support for EVEL.

After his election as Conservative Party leader in 2005, David Cameron appointed the former Chancellor and perennial leadership contender, Ken Clarke to head up a Democracy Task Force. The Task Force's report in 2008 included proposals for a system of EVEL. The Task Force's proposals would have seen Bills certified as "English" go through Second Reading as usual with the whole House being asked to vote, but they would then go English only Committee and Report stages, before concluding with Third Reading stage that again included the entire House. According to the Task Force, "it would give both sides an incentive to bargain" and ensure that legislation had to be acceptable to both a majority of MPs as a

[9] Conservative Party (2001). *Time for Common Sense*, p.44.

[10] Conservative Party (2005). *Are you thinking what we're thinking? It's time for action – Conservative election manifesto 2005*, p.22.

whole and English MPs.[11] By the time of the 2010 General Election, the Conservative manifesto's commitment to EVEL appeared to have moderated somewhat. Rather than the more strident rhetoric of the 2001 and 2005 manifestos, the 2010 manifesto instead pledged to "introduce new rules so that legislation referring specifically to England, or to England and Wales, cannot be enacted without the consent of MPs representing constituencies of those countries".[12]

Following the inconclusive results of the 2010 General Election, a coalition government was formed between the Conservative Party and the Liberal Democrats. The coalition's Programme for Government included a commitment to "establish a commission to consider the 'West Lothian question'".[13] This commission, chaired by a former Clerk of the House of Commons, Sir William McKay, was appointed in early 2012 and was tasked with considering,

> "how the House of Commons might deal with legislation which affects only part of the United Kingdom, following the devolution of certain legislative powers to the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales".[14]

The McKay Commission, when it reported in 2013, proposed a response to the West Lothian Question that was built around the following principle:

> "Decisions at the United Kingdom level with a separate and distinct effect for England (or for England-and-Wales) should normally be taken only with the consent of a majority of MPs for constituencies in England (or England-and-Wales)."[15]

The Commission proposed that this principle should be endorsed by the House of Commons in the form of a resolution and it would then be supplemented by a number of changes to Standing Orders. While the Commission was clear that MPs from outside England "should not be prevented from voting on matters before Parliament", they nonetheless suggested a "menu of proposed adaptations to parliamentary procedures to hear the voice of England". These included "an equivalent to a legislative consent motion (LCM) in Grand Committee or on the floor before second reading", use of a "specially-constituted public bill committee with an English or English-and-Welsh party balance" (which the Commission argued was the minimum needed as an effective means of allowing the voice from England (or England-and-Wales) to be heard).[16]

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[11] Conservative Democracy Task Force (2008), *Answering the Question: Devolution, The West Lothian Question and the Future of the Union*, p.1.

[12] Conservative Party (2010), *An invitation to join the Government of Britain: The Conservative Manifesto* 2010, p.84.

[13] HM Government (2010), *The Coalition: Our Programme for Government*, p.27.

[14] The McKay Commission (2013), *Report of the Commission on the Consequences of Devolution for the House of Commons*, p.5.

[15] The McKay Commission (2013), Report of the Commission on the Consequences of Devolution for the House of Commons, pp.8-9

[16] The McKay Commission (2013), *Report of the Commission on the Consequences of Devolution for the House of Commons*, pp.5, 65-68.

Disagreements between the coalition partners meant that the issue had initially seemed to slip off the radar, until it re-emerged a year later in the aftermath of the 2014 Scottish independence referendum. The final stages of the referendum campaign had seen the leaders of the main Unionist parties pledge, in the infamous "vow", further powers for the Scottish Parliament. Yet, the morning after the No vote, the Prime Minister took many by surprise when he declared that, alongside a Commission to develop proposals for implementing the vow (and a process to take forward additional powers for the then National Assembly for Wales), "the question of English votes for English laws – the so-called West Lothian question – requires a decisive answer".[17]

Implementing EVEL was therefore a prominent feature of the Conservative Party's 2015 manifesto, with the party promising "to give English MPs a veto over English-only matters, including on Income Tax – answering the West Lothian Question".[18] Indeed, these proposals formed part of a campaign which seemed to be fought on the basis of "Who Governs England?"[19]

Making sense of EVEL

EVEL represented a substantial addition to the total Standing Orders of the House of Commons (they constituted some 10% of the total Standing Orders of the House). The EVEL Standing Orders established a system whereby for Government proposed legislation, the Speaker of the House would be tasked with certifying prior to Second Reading whether a Bill either in whole, or in part, applied solely to England or to England and Wales and would otherwise fall within devolved competence. For Bills certified as wholly English only, the Bill would be sent after second reading for its Committee Stage to a public bill committee consisted solely of English MPs. Otherwise, Bills which had provisions which were certified as English or English and Welsh only would proceed as usual through Second Reading and Committee and Report stages.[20] After the Report Stage, the Speaker would re-certify any such Bill and if it still contained English/English and Welsh only provisions then it would be referred, following Report Stage, to a Legislative Grand Committee where English and/or English and Welsh MPs would need to provide their consent (in a manner that aped Legislative Consent Motions in the devolved legislatures) for the applicable provisions. On such consent being granted, the legislation would then have its Third Reading.

Amendments from the House of Lords would also be certified by the Speaker prior to consideration in the Commons, where amendments engaged EVEL they required a double majority (of both English/English and Welsh MPs and the House as a whole) to be accepted.

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[17] HM Government (19 September 2014), Scottish Independence Referendum: statement by the Prime Minister, *https://www.gov.uk/government/news/scottish-independence-referendum-statement-by-the-prime-minister* [accessed 1 June 2021].

[18] Conservative Party, *The Conservative Party Manifesto 2015*, p.69.

[19] A. Evans, "David Cameron has dusted down the 1974 playbook" (22 April 2015), *The Staggers: New Statesman*, *https://www.newstatesman.com/politics/2015/04/david-cameron-has-dusted-1974-playbook* [accessed 1 June 2021].

[20] EVEL also included provision for English, Welsh and Northern Irish only votes in relation to Finance Bills (reflecting the greater level of fiscal devolution to the Scottish Parliament).

The double majority requirement also existed for secondary legislation which was also subject to the EVEL process.

EVEL also included a number of stages which were purely hypothetical during the regime's brief existence. These were the reconsideration and consequential consideration stages. The reconsideration stage would have kicked into effect had consent been refused by the legislative grand committee. This stage would have required the Speaker to again certify the Bill in question, following recertification a further round of Legislative Grand Committee consideration would have taken place. Where a Bill was purely England only, if this stage saw consent refused for the Bill in its entirety then the legislation would fall. However, where only certain English/English and Welsh only provisions of certified Bills continued to be refused consent then those parts of the Bill would be removed and the rest of the legislation would proceed to the next phase. This next phase, consequential consideration, was intended as a tidying up stage to allow for any modifications to be made so that the remaining provisions of a Bill which had been partially blocked at Reconsideration phase, made sense. Then the Bill could proceed to Third Reading.

The victory of Gove over EVEL: from suspension to repeal

The Covid-19 pandemic led to a number of procedural changes and innovations at Westminster. One of those was the decision taken on 22 April 2020 to suspend (as part of the introduction of remote voting for "hybrid proceedings") the EVEL Standing Orders. While aspects of the House of Commons' response to Covid would change over time, with the experiment in remote voting lasting only until the end of May 2020 when the House rose for the Whitsun recess, EVEL would remain in procedural purgatory.[21]

On 16 June 2021, *The Times* reported that the Chancellor of the Duchy of Lancaster, the Rt Hon Michael Gove MP had put forward to the Cabinet proposals to scrap EVEL. According to the paper, Gove's proposed repeal was based on Unionist concerns about the impact of EVEL, including that it undermined the status of Scottish MPs and risked posing a barrier to a Scottish MP ever becoming Prime Minister. As the piece notes, these were longstanding arguments against EVEL deployed by opponents of the policy.

The Times also quoted a "Whitehall source" who argued that "abolishing EVEL would reaffirm the fundamental constitutional principle that we are one United Kingdom, with a sovereign parliament comprising members elected on a basis of equality, representing every community in the land, able to make laws for the whole kingdom." [22]

The direction of travel was confirmed by the Leader of the House of Commons, the Rt Hon Jacob Rees-Mogg MP when he appeared before the Procedure Committee on 28 June 2021. When asked about the report in *The Times*, Rees-Mogg noted that the EVEL standing orders had been suspended for over a year "without any loss of effectiveness to the way the House operates, any loss to the constitution or any loss to MPs' ability to represent their

[21] See: S. Priddy, The coronavirus timeline: Measures taken by the House of Commons, House of Commons Library (26 May 2021), *https://commonslibrary.parliament.uk/house-of-commons-coronavirus-timeline/* [accessed 1 June 2021].

[22] P. Maguire, O. Wright and K. Andrews, "Scottish MPs could vote down English laws in Michael Gove's attempt to save Union", *The Times* (16 June 2021), *https://www.thetimes.co.uk/article/scottish-mps-could-vote-down-english-laws-in-michael-goves-attempt-to-save-union-s5mkpgrtd* [accessed 16 June 2021]

constituents". He went on to claim that, in retrospect, "it is very hard to see that EVEL has served any useful purpose in the whole time that it has been in the Standing Orders", and suggested that the level of complexity entailed in the Standing Orders was "quite high […] for a procedure that has not had an effect on our business once in the time in which it has been available". Unsurprisingly, he then went on to confirm that the Government was "of the view that EVEL is no longer a necessary process within the House of Commons, irrespective of the pandemic".[23]

Conclusion: the end of EVEL (for now?)

The introduction of EVEL had sparked noise and fury from many across the political spectrum.[24] Yet it was repealed without the House dividing for a vote and after a debate which ran for slightly less than an hour. Why did EVEL experiment come to an end? The Standing Orders had been widely regarded as complex; the political arithmetic at Westminster since their introduction in 2015 had meant that substantial parts of the Standing Orders never kicked into effect; and those that did made no difference to the overall outcome of votes (as the party with a majority of seats at the UK level also had a majority of English MPs).[25] EVEL may not have had the dramatic impact that some opponents had once feared of a bifurcated Parliament, but, as Jacob Rees-Mogg's comments to the Procedure Committee highlight, it produced negligible outcomes at a significant cost in terms of procedural complexity and cumbersomeness.[26]

None of these weaknesses with EVEL is new or surprising. However, what has changed since the advent of the Standing Orders has been a pandemic which necessitated the suspension of EVEL (and thus provided an opportunity for a rethink of its operation) and what appears to be the emergence of a new statecraft within the current UK Government. Indeed, while Covid-19 may have paralysed EVEL, it is arguably "muscular unionism" which finished the job.

EVEL was the product of a long gestation within a Conservative Party which had been consigned by the electorate to become an essentially English party. Since 2015, the Conservative Party has managed to re-emerge as a political presence in Scotland (becoming the official opposition at Holyrood after the 2016 devolved elections) and while the party lost seats north of the border at the 2019 UK General Election – it was not wiped out. A more noticeable presence in Scotland, alongside a strong contingent of Welsh Conservative MPs, has resulted in a Conservative Party which is less Anglo-centric than when EVEL was being formulated as party policy.

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[23] House of Commons Procedure Committee, Oral evidence: Procedure under coronavirus restrictions, HC 212, Monday 28 June 2021, Q526.

[24] For criticisms of the EVEL Standing Orders see: House of Commons Public Administration and Constitutional Affairs Committee, *The Future of the Union, part one: English Votes for English laws*, Fifth Report of Session 2015–16, HC 523, 2016; HC Deb 22 October 2015, Vol 600, cc.1159-1258.

[25] D. Gover, and M. Kenny, "Five Years of EVEL", UCL Constitution Unit blog, 23 October 2020, *https://constitution-unit.com/2020/10/23/five-years-of-evel/* [accessed 2 June 2021].

[26] For detailed analysis of how EVEL has operated since 2015, see: D. Gover and M. Kenny, "Answering the West Lothian Question? A Critical Assessment of 'English Votes for English Laws' in the UK Parliament" 71(4) (2018) *Parliamentary Affairs* 760-782 and Gover and Kenny's website charting EVEL: Project EVEL: *http://evel.uk/* [accessed 1 June 2021].

The key thrust of "muscular Unionism" appears to be a reassertion of the relevance and significance of the instruments of the central state as pan-Union institutions. This strategy (most recently seen in the enactment of the United Kingdom Internal Market Act 2020), reinforced by the self-interest of non-English Conservative MPs, a number of whom had called for EVEL to be scrapped, appears to run contrary to the spirit of EVEL. As one Conservative MP put it during the debate on repealing the EVEL Standing Orders,

> "EVEL diminishes the standing of non-English MPs and by extension, non-English Ministers. It also clouds the perception of our British Parliament, hinting at an English Parliament with non-English MPs strapped on. But that is something we are not."[27]

The purpose of the new statecraft would seem to be to emphasize the pan-Union significance and reach of institutions like the Westminster Parliament, not to accommodate procedures and measures which focus on the second of Parliament's two hats: that of an English legislature.

So EVEL is dead, but that does not mean that the West Lothian Question, or the long running debate about parliamentary representation post-devolution, has been laid to rest. While the current administration has a large UK-wide, and an even larger English, majority in the House of Commons, there is no guarantee that future governments will enjoy both or either. There may come a point in the near future where decisions made in relation to England are carried on the back of non-English votes. EVEL may have been an opaque, complex set of procedures, but surveys have consistently suggested that the principle commanded widespread popular support in England.[28] Indeed, there may come a point where people or politicians, perhaps a party which in opposition has become particularly Anglo-centric, may seek to return to the question of how decisions which only affect England should be decided at Westminster.

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[27] HC Deb 13 July 2019, Vol. 699, col. 324.

[28] See: A. Henderson and R. Wyn Jones, *Englishness: The Political Force Transforming Britain* (OUP: Oxford, 2021).