**LORDS QUEENS SPEEECH DEBATE**

**9 May 2013**

**Lord Bew (McKay report and defamation)**

**Lord Trimble (McKay report and Barnett)**

**Lord Laird (Parades Commission and Ardoyne 2012)**

**1.02 pm**

**Lord Bew:** My Lords, yesterday the noble Lord, Lord Lang of Monkton, in his witty and elegant speech, moved the Motion for an humble Address to Her Majesty. His tone was, for the most part, light and genial. He did, however, refer to one passage in the gracious Speech. He noted the words:

“My Ministers will … work in co-operation with the devolved Administrations”,

and added, rather dryly, that,

“co-operation is a two-way street”.—[

*Official Report*

, 8/5/13; col. 7.]

I take this observation as my starting point.

In March this year, the McKay commission report, or more properly the report of the Commission on the Consequences of Devolution for the House of Commons, was published. The Government had asked the McKay commission in effect to deal with or attempt to solve the vexed West Lothian question posed famously by Tam Dalyell, the MP for West Lothian, in the devolution debates of the 1970s. Tam Dalyell pointed out that, post-devolution, MPs from outside England could help to determine laws that apply in England, while MPs from England would have no reciprocal influence on laws outside England in the policy fields for which the devolved Administrations would now be responsible. Sir William McKay was a distinguished Clerk of the House of Commons from 1998 to 2002, and his commissioners are a most distinguished group. Their answer is an interesting one.

The thrust of the McKay commission report is a suggestion that whenever measures separately affect England, or England and Wales, the voice of England is heard before the final word is spoken by the House as a whole. As Professor Yvonne Galligan, one of the commission’s members, expressed it on “The Thoughtful Scholar” blog, the essence is that,

“we want all MPs to retain the right of final say, while allowing for the voice of England to be heard”.

I am not sure that the West Lothian question is not fundamentally insoluble. As the McKay commission report quite rightly points out, the question predates Scottish issues. It was in fact initially an Irish issue: these questions were discussed between Parnell and Gladstone in the 1880s. They could not resolve the difficulty, the reason lying fundamentally in the fact that they could not define what a purely English question was. I am not sure whether this problem does not still lurk behind what is, in so many respects, a very impressive and interesting report.

However, the report at least signals quite clearly the existence of something: the growing element of an English question in our polity. It is quite disturbing, as your Lordships will see if they look at the commission’s tables of English public opinion, that there is a growing

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impatience with, for example, the level of public expenditure in the devolved Administrations. This is a matter which those of us who live in areas governed by those devolved Administrations, as I do, have to take into consideration. Those Administrations also have to consider a sentiment of growing edginess in English public opinion—perhaps not an explosive edginess, but an edginess that is certainly growing—about what appears to be a double weighting of the political class of Scotland, Northern Ireland or Wales: the sense that, in principle, that political class has its own bailiwick, which cannot be interfered with, but that it can also play a decisive role in the affairs of England. In such a context, it is important not to add any new cause for exacerbation between the devolved Assemblies and the Westminster Parliament. As the noble Lord, Lord Lang, said yesterday, co-operation is a two-way street.

It is precisely for that reason that I have been disturbed by the Northern Ireland Assembly’s decision, as it seems, not to apply but to reject the recent Defamation Bill, which was passed by Parliament. There are very important reasons to be disturbed by this development. Perhaps selfishly, as an academic, I would stress that one of the core elements of that Bill is the attempt to expand the academic freedom of discussion and to protect those who write for peer-reviewed journals. It is very important for university culture throughout the United Kingdom generally that such a protection should be there, for both scientists and those who work in the humanities. It is important for those who work in universities in Northern Ireland, as I in fact do, that such a protection is there for them as well. In the struggle to have good universities, which is fundamental to the economic success of a region such as Northern Ireland, it sends out a bad signal if the local Assembly displays itself as fundamentally indifferent to the tone or substance of academic freedom as an issue.

More profound than that, of course, is the issue on which there has been much recent comment in the press: that Belfast would now become the new libel capital of the United Kingdom, London having lost its previously perceived role as libel capital of the world as a result of the changes in the law. If this were to happen and Belfast became, as the dark joke now has it, a town called Sue, it will place enormous, and I suspect in some way unfair, burdens on the local judiciary. It would send out a signal that again would be disturbing. One of our media lawyers in Belfast, Mr Paul McDonnell, unselfishly made the point than while it would increase his income enormously if this gap and the status quo remained, as envisaged by the Assembly, he would simply regard it none the less as morally unacceptable. He went on to say that,

“investigations in the public interest which concern well-funded entities will effectively be subject to censorship by the back door”.

Censorship by the back door is something which I do not think a devolved Assembly wants to get into or to sanction in any way.

I understand from newspaper reports that the Members of Parliament from Northern Ireland are uneasy about the McKay commission report. I can understand why they might feel that way. MPs from the devolved regions will be very nervous about anything that hints at all at creating a second-class status of MP. It is a

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very sensitive question within the United Kingdom, even though the report itself has tried to deal with it as subtly as it conceives to be possible. However, I quite understand why the Northern Irish MPs are, according to newspaper reports, uneasy and unsympathetic. As the Troubles have receded as a kind of natural focus of obsession for our MPs, the range of interventions made by Members of Parliament from Northern Ireland across the board on different policy aspects in Westminster life has been one of the most refreshing aspects of the work of this Parliament. I understand their unease but, as the noble Lord, Lord Lang, said, co-operation is a two-way street.

It might well be in the interests, at certain points, of the Scottish National Party or Alex Salmond to do things that exacerbate or irritate opinion in the rest of the United Kingdom, but it cannot be in the interests of those who represent Northern Ireland, or the great majority of them at the Westminster Parliament or the majority parties in the Northern Ireland Assembly, similarly to exacerbate opinion in Westminster.

**1.10 pm…**

**1.30 pm**

**Lord Trimble:** My Lords, I will not follow the example of the noble Baroness who has just spoken by referring to the contents of the Queen’s Speech. My attention has been drawn to something that was published a few weeks before the ending of the last Session. I refer to a report that has already been mentioned by the noble Lord, Lord Bew: the McKay report, entitled the “Report of the Commission on the Consequences of Devolution for the House of Commons”. As the noble Lord, Lord Bew, said, that report was sparked largely as a response to the clear sense of grievance among many people in England about how devolution has worked out.

That sense of grievance is very real, and there is substance behind it in that they have seen over the last few years a number of cases of different policies and decisions being taken in some of the devolved areas that have left people in England feeling that things are in some respect unfair. That is a real feeling, and it should be addressed, but I would hope that the McKay commission, in addressing this issue, looked a bit more broadly at the issue in question.

One point to make is that while there have been cases of significant variations in social policy in a devolved area from social policy here, if you look at the broad scope of policy you will find that those differences occur in quite a minority of cases. In all the devolved regions, the same broad scope of social policy that is brought in with regard to England and Wales also occurs in the devolved regions. There are a number of reasons why what is decided on in Whitehall still rolls out into the regions as a whole. One of them is that, as noble Lords will remember, people in some areas complain about policies made on a postcode basis. That concern to avoid the postcode lottery applies just as much to people in Scotland, Wales and Northern Ireland. Their expectations of social policy are set largely by the media. Of course, in the United Kingdom we have a highly concentrated media, so people’s expectations are largely set by the largely Anglocentric, London-based media, and they expect to see the same things happening in their area.

Another factor that one should bear in mind is that the policies brought up by Her Majesty’s Government are policies that evolve within the Whitehall departments, which actually have a greater policy-making capacity than their equivalents in the regions. This is particularly true for the region that I am most familiar with, which is the smallest of them all. Our policy-making capacity was limited. We knew that the folk in London would have a broader range of persons to draw on to draw up the policy. Therefore, the regions, and the public services in the regional areas, tend to look to what is happening

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in the centre. The Arts Council of Northern Ireland, for example, is separate from the Government, but when in the 1990s the Arts Council of England started to focus very much on outreach, community arts and all the rest of it—bingo, the Arts Council of Northern Ireland followed exactly the same patterns and borrowed a lot of its paperwork, such as application forms, from the Arts Council of England. There is, therefore, a tendency in the regions to look to Whitehall for guidance on policy.

That tendency is then reinforced by quite a significant mechanism that is not terribly widely known about, and is not mentioned at all in the McKay report: the joint ministerial councils. JMCs are brought into existence by the Government here in London in order to involve the devolved regions in the formulation of policy—in other words, to get them to buy into the policy that will come from the Whitehall departments. There is no statutory basis for the JMCs; it is simply a practice. However, as so often happens in our case, the way in which things are done matters as much as what is said in the print of legislation.

The third thing, which cuts both ways because as one will see it helps to explain why there are such differences as well as uniformity, is the way in which the Barnett formula operates. Because Barnett relates to increases in public expenditure in England, in effect it finances the regions to carry out the policy determined in England. Increases in funding in England will happen because of the policies that the Government here adopt. Therefore, the money that goes to the regions is the money that is needed to carry out those policies regionally. What went wrong with Barnett, which the Select Committee of this House went into a couple of Sessions ago—I was a member of that Committee, which perhaps helps me in dealing with this—is that it became clear that in a number of cases there was what we called a Barnett bypass: the Barnett formula was not strictly followed, and some regional Administrations were quite adept in persuading London to give them extra money. The most successful at that was Scotland, because the Secretaries of State for Scotland regarded their primary job as making sure that Scotland did better than anywhere else, and they were most effective at it.

The McKay report, interestingly, comments on how it notices that the Members of Parliament for the devolved regions still do not seem to be terribly interested in arguing for more funds for their region. Of course they do not: it was their Secretaries of State who did that. The ordinary Member of Parliament did not need to do it for Wales and Scotland because they were dependent on their Secretary of State. I suppose that to a certain extent we did the same in Northern Ireland. However, leaving aside for a moment the circumstances in which successive Ministers managed to do particularly well for their department, in the broad run of Barnett it is to reinforce the policies that are adopted elsewhere. There is a slight reference to the Barnett formula in the McKay report—I will come back to that in a moment—but had McKay looked more closely at the factors that led to the evolution of policy, it may have given a better result.

At the core of the McKay report is a policy or principle which they put forward as something that

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should underlie the constitutional relationship between London and the devolved regions. Paragraph 109 of the report says:

“Decisions at the United Kingdom level having a *separate and distinct*”—

I note that that is italicised—

“effect for a component part of the United Kingdom should

*normally*

be taken only with the consent of a majority of the elected representatives for that part of the United Kingdom”.

The key issue is the question of having a separate or distinct effect. The question then depends on how you define that.

Noble Lords will also notice that the principle also refers to decisions at UK level. In fact, McKay’s terms of reference do not focus on decisions. McKay was asked to produce a report on legislation. The bulk of the McKay report deals with procedures in the House of Commons with regard to legislation. There is a problem with the way McKay understandably focuses on decisions, because decisions and policy give rise to the sense of grievance. This morphs into the question of legislation. The problem with the notion of separate and distinct is how you define it. In paragraph 136, McKay says that separate and distinct is easier to define in practice than in the abstract. No effort is then made to define it in the abstract. Perhaps one can understand why.

However, the issue has been looked at for decades within our government system. It is a key part of the Barnett formula. Every time a policy evolves from Whitehall departments, or a decision is taken, the Treasury has to take a decision. Paragraph 44 of our report on the Barnett formula states:

“When making spending decisions for a project or event in England the Treasury has to decide whether that expenditure is ‘UK-wide’ or ‘England only’. The decision to categorise spending in England as ‘England only’ requires an exercise of judgment by the Treasury triggering a ‘consequential’ payment through the Barnett Formula to the devolved administrations. By contrast categorising expenditure as ‘UK-wide’ does not trigger a ‘consequential’ payment”.

The report goes on to give examples. The example that it gives of UK-wide expenditure is the Olympic Games. They did not trigger consequentials. The example given by the report of expenditure in England on a national policy was Crossrail. The money is spent in London. It is part of a national policy of providing an effective rail network, so the England-only decision triggers a Barnett consequential.

I am afraid that this gets a little complicated, because while McKay talks about the separate and distinct effect in England that requires special procedures in the other place, under Barnett terminology “England only” triggers a consequential and so is not separate and distinct from England. That is hugely important. Unfortunately there is no discussion of this in McKay. The report makes a couple of references to consequential payments as side-effects of decisions. If it reflected more fully on Barnett and the fact that Barnett consequentials are attracted by decisions that are “England only”, in Treasury speak, it would see that the number of occasions on which procedures to do with things that were separate and distinct in England would be comparatively few and limited.

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As the noble Lord, Lord Bew, said, there is an interesting history to this. It is mentioned in only one sentence in McKay, which refers to the home rule Bills. The noble Lord told us that the problem was just that Parnell and Gladstone could not agree. With respect to him, I should say that the problem was a little wider than that. There were three home rule Bills, and the persons who framed the Bills had to put a provision into them relating to this. They may have had difficulty working out the basis on which they would take a decision, but they had to take a decision. Therefore, in each of the three home rule Bills, a different decision was adopted as to what to do with this sort of problem. I will not go through all of them in detail.

In summary, in the first home rule Bill they decided to solve the problem by not having any Irish MPs in the House of Commons. In the second they decided that that was not a good idea and that they would ignore the problem so that all the Irish MPs would be in the House of Commons. The third home rule Bill was not titled a home rule Bill because the Government of Ireland Act 1920 was intended to apply to all Ireland but was operational only with regard to Northern Ireland. Their basis was, “We’ll have a sort of compromise, but we can’t think of a principle on which to make a compromise so we’ll roughly divide representation of the Irish area in the House of Commons by half. We’ll just give them half the MPs that strictly speaking they’re entitled to”.

None of those decisions involved a clear principle. I am not surprised, because I do not think that there are any issues of principle in dealing with this. The West Lothian issue, created by the flamboyant Member for that area, was a marvellous bit of rhetoric in terms of its argument, but the reality of the situation was that the House of Commons decided that devolution was going to apply not universally but to only three comparatively small areas, for particular reasons that I will come to in a moment.

It is entirely up to our sovereign Parliament to decide that it is going to change the way in which business is done. If it is done in an unbalanced way but Parliament wishes to do it like that, that is entirely within its capacity. When people worry about the relationships between the devolved Assemblies and Parliament, they should bear in mind that they are not talking about the same things. There is only one sovereign Parliament. The devolved Administrations are not sovereign. They have a limited capacity that in no way changes the capacity of the sovereign Parliament, which could, if it wished, legislate for the devolved areas or decide to abolish devolution at any time, in which case we would not need to look at things further. That is the underlying situation.

Before I leave the question of home rule, I will mention one little side-effect. It is another issue that people might like to look at. Between the various home rule Bills, another area that was deeply discussed was the fiscal powers of the devolved Administration. The view of what fiscal powers could be devolved to the Administration changed with each of the three Bills. It got narrower as it went on. I hope that the people who in some Scotland-related areas talk about

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devo-max will look at what was thought about this when those Bills were considered. They will find that the view taken then was that the scope in fiscal matters for what is now called devo-max was very limited. I hope that people will look at that.

My final point is that one of the ironies of the situation is that, at the end of the day, devolution was considered necessary in those areas because of the way in which England, by having 85% of the population of the United Kingdom, had become so dominant that the London-based Administration repeatedly failed to take local circumstances fully into account. Devolution was intended to balance that. It would be hugely ironic and very damaging if, as a result and consequence of devolution, special measures were taken in the House of Commons to see that the representatives of the 15% were further marginalised.

**1.48 pm…**

**2.36 pm**

**Lord Laird:** My Lords, I wish to speak on a topic that causes considerable interest and fear in Northern Ireland, which unfortunately was not dealt with in the gracious Speech. I refer to the inexplicable actions of the Northern Ireland Parades Commission, a body that is answerable to the Northern Ireland Office. Before doing so, I want to acknowledge that my native land of Ulster is considerably different from the one beset by civil unrest of 20 years or more ago. For that I thank Members of this Parliament, past and present, for all their successful work in putting together a peace process that has made a major change to all who live there.

However, a few issues remain, the most serious of which is the activities of the Parades Commission. It was set up to remove from the police the responsibility of regulating parades—a job that it seems to do in an insensitive and ham-fisted way. I refer to one decision in particular as an example of the extremely bad handling of a situation. Last year, in a determination, the commission proposed a position that put the traditional Orange parade, which passes the Ardoyne interface in Belfast, into an impossible place. Let me explain: the Parades Commission received applications for two parades for the afternoon of 12 July 2012. They were from an Orange lodge and the Greater Ardoyne Residents Collective, a cover name for dissident republicans condemned by unionists and Sinn Fein alike. The Ardoyne shops, which is an area of contention, is a line of premises fronting the Crumlin Road. The area behind the shops is strongly republican in character. On the other side at this point, Twaddell Avenue meets the Crumlin Road. This is a residential street that is strongly unionist in character. The area is therefore an interface between the two communities with a long history of sectarian trouble.

I should point out that for 150 years Belfast Orange lodges have held a parade in the city on 12 July to commemorate the Battle of the Boyne. A feature of this event is that many lodges parade from their lodge halls to assembly points and then proceed in procession to a major assembly area in a park or large field on the outskirts of Belfast, where an afternoon of culture and family activity is available to everyone.

Lodges had followed the proposed route at the same time of day for many years and had been praised by the Parades Commission in earlier years for their good behaviour and stewarding. Their application asked for permission to parade up the Crumlin Road in the usual time, passing the Ardoyne shops at some time between 6 pm and 7.30 pm. They sought permission

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to be accompanied by one band. The Greater Ardoyne dissident republican group sought permission to hold a parade in the same area, partly over the same road, from 6 pm until 8 pm. It did not complete any applications to be accompanied by a band.

On 5 July 2012, the Parades Commission determined as follows. The Orange parade must pass the Ardoyne shops by 4 pm at the latest and must be accompanied by a band which must not play music or produce drumbeat in this locality. The republican parade was granted permission to parade along its chosen route from 5.30 pm to 6.30 pm. This ruling brought the time of that parade closer to the traditional Orange one. The commission also specified that the republican parade should not allow excessive loud drumming, an interesting point as it had not applied to bring a band with it.

The hall of LOL 647 lies on the outskirts of Belfast and the only available and practical route to the centre of Belfast is via the Crumlin Road. The parade takes two hours and the first lodges arrive at the assembly point shortly after 12 noon and start to leave the assembly point to go home at 4 pm. The assembly point is at least five miles by road from Ardoyne. In order to comply with the Parades Commission ruling members of the lodge would have to forgo all of the family events in the assembly park and proceed on their way back to the Crumlin Road. They could not walk back in the time available and therefore would have to be transported to Ardoyne by car or bus.

The commission’s decision is seen by most people as very odd indeed. The problem is that it appears to be one-sided. There may be very good reasons for this determination but the reasoning is not available for us to consider. This failure to explain is a major part of the current rise in tension in the province. That is why there is so much confusion and misinformation.

As a result, I would like answers to the following questions. Why did the commission allow two mutually antagonistic parades on the same route within 90 minutes when it is generally agreed that the Ardoyne interface part of the parade was most contentious, bearing in mind that the commission praised the Orange Order in previous years as being well organised and peaceful? Could I be told by the commission why a republican parade should be allowed in a 50/50 interface area at almost the same time on a traditional route used by the Orange Order for over 150 years? The commission not only allowed the lodge to be accompanied by one band, which must remain mute, but did not specify how many bands the republicans, who had not applied for band permission, could bring with them.

I would like the transcripts of the commission’s meetings to be made public. This will allow us to know who attended the meetings and the reasons behind these decisions. I sought this information directly from the commission but was refused. For justice to be done it must be seen to be done and understood. Last year’s determination has set an unfortunate backdrop for this summer unless we can understand the commission’s reasoning and are not forced to view it simply as being anti the unionist section of the population. The solution may be for all determination decision meetings to be open to the public to attend. I call for a total rethink

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on the way the commission operates and even, if necessary, its replacement by a system which could be respected by both sides. I urge the Government not to discount the bad community feeling against the current commission. Things need to change.

I fully accept that the noble Lord, Lord Taylor of Holbeach, with whom I enjoy a good working relationship and who will wind up the debate, is not in a position to answer these questions. While I will, of course, listen to his remarks on the total debate with great interest, I look forward to a detailed response to my questions from the Northern Ireland Office in due course.

**2.45 pm**