

## The Scottish and Welsh elections: a trial run of PR

### *Francis Bennion relates the Jenkins recommendations to the May 6 vote*

Lawyers are obviously deeply concerned with the composition of the law-making body. The Jenkins report on proportional representation<sup>1</sup>, published on 25 October last, is therefore of keen interest to readers of this journal. This interest is increased when one grasps the fact, not immediately obvious, that the Government is using the forthcoming devolution elections on May 6 as a tryout for Jenkins. In this article I first examine the Jenkins proposals in some detail and then go on briefly to consider their relationship to the Scottish and Welsh elections.

### The Jenkins Commission

The Commission consisted of only four people in addition to Lord Jenkins of Hillhead. These were Lord Alexander of Weedon QC, Chairman of the National Westminster Bank, Baroness Gould of Potternewton, a one-time dispensing chemist who is now a Government whip, Sir John Chilcot, a former assistant private secretary to Lord Jenkins, and Mr David Lipsey, a journalist. The wording of their terms of reference was inelegant and vague-

"The Commission shall be free to consider and recommend any appropriate system or combination of systems in recommending an alternative to the present system for Parliamentary elections to be put before the people in the Government's referendum. The Commission shall observe the requirement for broad proportionality, the need for stable government, an extension of voter choice and the maintenance of a link between MPs and geographical constituencies."<sup>2</sup>

This is elliptical. The phrase "broad proportionality" presumably relates to the ratio between the number of votes cast for candidates of a particular party and the number of that party's resulting MPs. The intended meaning of "an extension of voter choice" is obscure.<sup>3</sup> The Commission's findings are summed up as follows-

"The Commission's central recommendation is that the best alternative for Britain to the existing First Past the Post System [FPTP] is a two-vote mixed system which can be described as either limited AMS [Additional Member System] or AV [Alternative Vote] Top-up. The majority of MPs would continue to be elected on an individual constituency basis, with the remainder elected on a corrective Top-up basis which would significantly reduce the disproportionality and the geographical divisiveness which are inherent in FPTP."<sup>4</sup>

The report received wide media coverage and I need not go further into the detail of the recommendations here. The omissions in it relate to fundamentals. For example one cannot reach sensible conclusions on the best voting system for elections to the House of Commons without first deciding on the basic function of an MP. This the Commission mentions but

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<sup>1</sup> *The Report of the Independent Commission on the Voting System* Cm 4090-1.

<sup>2</sup> *Report*, page v.

<sup>3</sup> What the Commission thought it meant appears near the end of this article.

<sup>4</sup> *Report*, page 50 (paragraph 1).

does not discuss in detail.<sup>5</sup> I will attempt a description of the MP's individual and collective functions.

Individually, an MP *represents* his or her constituents in Parliament. From that point of view there seems nothing wrong with the present FPTP system under which the candidate with the most votes gets elected, always bearing in mind the constitutional requirement that the MP must represent all constituents equally whichever way they voted in the election (or even if they did not vote).<sup>6</sup>

Collectively, MPs form a representative *assembly* from whom ministers are chosen, whose majority vote underpins the government, and which forms a constituent of the bicameral legislature. From the collective point of view there may (or may not) be something wrong if the distribution of party allegiances among MPs does not broadly reflect the party distribution of votes cast at the election.

Before enquiring which of these perhaps mutually inconsistent aspects should prevail over the other I must mention a further element.

## **The party manifesto**

Nowadays each party puts before the voters at a general election a campaign document known as a manifesto. This is a detailed statement of the policies it promises to pursue if it forms the next government. Usually, each party's manifesto is markedly different from those of the others. In theory electors decide how to cast their vote according to which manifesto they prefer, since preferences for the individual characteristics of the candidate are nowadays largely irrelevant except in the rare Tatton-style case.<sup>7</sup> In practice most voters are guided by the potted versions of the party manifestos presented by whichever media outlets they favour.

To test the effect of the manifesto suppose that at a general election there are three main parties contending. Call them respectively the Progressives, the Innovators, and the Modernists. Each has its manifesto, and each manifesto is distinctive. This is a realistic scenario, and the Jenkins Commission should have dealt with it. However it did not so much as mention the party manifesto, or the salient considerations I have just described. What should it have said about them?

The voter should be able to trust that if say the Innovators form a government then that government will go on to implement the Innovators' manifesto. So the voting system should be geared against a coalition. If the system does produce a coalition what will have happened? The answer is that *after* the general election has taken place, and all the votes have been counted, the politicians will have got together in what used to be called smoke-filled rooms. There will have been wheeler-dealing. At the end the nation will be obliged to accept a government it never voted for. Let us suppose it is an Innovators/Modernists coalition.

What will be the operative manifesto of this patched-up coalition government? It will necessarily be a hotch-potch. Which elements will be picked from the Innovators' original manifesto and which from that of the Modernists is anyone's guess. The resultant Innovators/Modernists combined manifesto will be a product of hard bargaining, on the terms of which the electors will not be consulted. That cannot be democratic.

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<sup>5</sup> It is mentioned at *Report* page 3 (paragraph 10).

<sup>6</sup> The Commission accepts that this requirement exists: *Report*, page 3 (paragraph 11).

<sup>7</sup> In the 1997 election the Conservative candidate for Tatton, Neil Hamilton, was discredited and many Conservatives apparently voted for the Independent.

We are told that "the near unanimous opinion which was expressed to the Commission in its consultative hearings around the country was a distrust of any electoral system which increased the power of party machines".<sup>8</sup> The Commission acknowledges that its recommendations will increase the likelihood of coalitions (and therefore the power of party machines) but says it does not "recoil with horror" from this, arguing that coalitions are capable of providing effective and decisive government.<sup>9</sup> This may be true, but how can it be *democratic* government? The above arguments show the essentially undemocratic nature of an electoral system that produces coalitions as a matter of course.

## What is fair?

The heart of the argument lies in the question of what is a "fair" result. Predictably in view of its terms of reference, the Jenkins Commission takes this for granted. Without argument, it adopts the Paddy Ashdown line that to get what he irritatingly calls "fair votes" you *must* have proportional representation and not FPTP. It is irritating because it papers over some real problems. The irritation is increased when we find the Commission sneering unjustly that fairness is a concept "to which the upholders of FPTP do not appear to attach great importance".<sup>10</sup> Yet in the same breath the Commission admits that fairness in representation is a complex concept.

To examine this question of fairness let us assume that the election discussed above was held under a system whereby proportionality ruled and the number of MPs of each party corresponded to the votes cast for candidates of that party. Suppose the respective percentages were: Progressives 40%, Innovators 35%, and Modernists 25%. There would be no guarantee that any voter would get the manifesto they had voted for. Indeed it is almost certain that none would, for there would inevitably be a coalition government. How can that be "fair"?

Now suppose the same proportion of votes was cast under FPTP. The proportion of MPs might then be: Progressives 60%, Innovators 30%, and Modernists 10%, so the Progressives form the incoming government and it is their undiluted manifesto that gets adopted. This is assumed by the Commission (without argument) to be "unfair". Is it?

Some of the complexities involved in attempting an answer arise from the fact that the duties of MPs, even of the government party, are not restricted to implementing the winning manifesto. Many constituents' problems have nothing to do with the manifesto, and would be the same whichever government was in office.. The House of Commons is a collective body with a long history, and its members share a broadly common viewpoint and interest on many matters both national and international. Party manifestos, though fundamentally different from one another, do overlap in certain respects. Some points are common, even though presented in different ways. All parties, for example, want to see the National Health Service flourish.

To do them justice, the Commission did set out a number of the arguments in favour of FPTP.<sup>11</sup> These are not however presented as countervailing against the unexplained "unfairness" of that system. It is indeed often said by political commentators to be "unfair" for a party to be able form a government on a minority of the votes cast, but is that really so? One would have welcomed detailed argument from the Commission on this point. In its absence I suggest there may here be a misunderstanding of the very nature of the voting process. If three different and mutually inconsistent propositions are submitted for decision by vote it is very likely that there will not be an overall majority for any single one of them. This is neither

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<sup>8</sup> *Report*, page 2 (paragraph 7).

<sup>9</sup> *Report*, page 37 (paragraph 120).

<sup>10</sup> *Report*, page 26 (paragraph 85).

<sup>11</sup> See *Report*, page 5 (paragraphs 19 and 20).

"fair" nor "unfair". It is the result purely of arithmetic, and it makes no sense to say that the losing votes are "wasted".<sup>12</sup> They are not wasted at all, for they have contributed to the decision. That is what voting is all about.

Yet is it not in the last analysis unfair that in the 1997 election many thousands voted Conservative in Scotland and Wales yet the party obtained not one seat in either country? It seems so on the face of it. The Commission say it is unfair because "the voters do not get the representation they want"<sup>13</sup> Is this true? Or is not the actual constitutional position that each Conservative elector in Scotland and Wales is at present represented at Westminster by the constituency MP they actually got? Is it not an inevitable consequence of the practical need for one only of the manifestos to be adopted that many electors will be represented by an MP of another party? If MPs are conscientious does this really matter?

I suggest that the real question is not one of "fairness" but political wisdom. It is whether in the light of the facts of arithmetic it is wiser to have (a) a voting system recognising the likelihood that the electorate will be presented with three or more inconsistent manifestos, and accepting that there is nothing better available than to recognise the integrity of each manifesto and adopt in its entirety the one which gets more votes in a majority of constituencies (resulting in a one-party government), or (b) a voting system that in such circumstances leads to two or more of the manifestos being broken down and partly amalgamated *after* the election (resulting in an undemocratic coalition).

## Valuing preferences

As the Jenkins Commission say, the question of proportional representation has become more pressing with the growth in recent years of support for a third party.<sup>14</sup> The solution it recommends poses a further undiscussed question, which I will end by examining briefly.

The Commission's proposal is that in addition to 85% of constituency MPs elected by AV, there should be an additional 15% of "top-up" MPs. A sample ballot paper is given, indicating a "constituency vote" and a "second vote".<sup>15</sup> For the first, the voter is told: "Rank the candidates in order of preference (1 for your preferred candidate, then 2, 3 etc.). Rank as many candidates as you wish."

This is what the Commission think is meant by increasing voter choice. Instead of just casting one vote in the time-honoured manner for the desired candidate, the elector is to be invited to list the candidates in the order of his or her preference. If no one candidate gets an overall majority the candidate with least votes is eliminated and his or her second preferences added to the votes of the others. This process goes on until a candidate with an overall majority emerges. That is how AV works. The Commission say it guarantees that the eventual winner will have the "acquiescence" of a majority of voters.<sup>16</sup> Here lies the nub.

The big unexamined question about AV is this. Under the Commission's recommendation, a voter's second preference would carry the same weight as a first preference, and so on. Is this right? The Commission does indeed refer to this question.<sup>17</sup> However it is not discussed, much less answered. I would answer it by saying that a second preference should *not* be

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<sup>12</sup> As the Commission do: see *Report*, page 39 (paragraph 131).

<sup>13</sup> *Report*, page 2 (paragraph 6).

<sup>14</sup> *Report*, pages 7 to 8 (paragraph 28).

<sup>15</sup> *Report*, page 61.

<sup>16</sup> *Report*, pages 26 to 27 (paragraph 85).

<sup>17</sup> ". . . it is necessary to acknowledge the argument that the second or subsequent preferences of a losing candidate, if they are decisive, are seen by some as carrying less value (and even as arising almost accidentally) . . .": *Report*, page 25 (paragraph 81).

accorded the same weight in the voting process as a first preference, and so on with third and subsequent preferences. It ought not to have the same degree of potency to say "this is the candidate I am reluctantly prepared to accept if I can't have the one I prefer" as it has to say "this is the one I truly want".

## **The May 6 elections**

Section 1(1) of the Scotland Act 1998 baldly says "There shall be a Scottish Parliament". The section goes on to say that one member of the Parliament shall be returned for each constituency under "the simple majority system" (in other words FPTP) at an election held in the constituency and that members of the Parliament for each region shall be returned under "the additional member system of proportional representation" (AV). This is not Jenkins simpliciter but a clumsy amalgamation. The Government of Wales Act 1998 sets up the National Assembly for Wales and introduces PR for elections to that body also.

The first elections for both bodies are to be held on May 6 and some things are already clear. One is that the new system has aroused puzzlement and confusion among the electors. The Times reported that in Glasgow Govan the Liberal Democrat candidate Aslam Khan was spending all his canvassing time explaining the voting system rather than selling his party's policies. The writer concluded-

"The opinion polls suggest that no single party will have an overall majority in Scotland. That changes the whole climate in which the election will take place. It could mean a seat for parties like the Greens, who have never been represented nationally before. It will ensure the return of the Conservatives, who were wiped out last time around. And for the tactical voter, the system will require a crash course in Higher maths."<sup>18</sup>

A similar situation obtains in Wales. We must await the detailed results, but the signs are that the May 6 elections will amply confirm the misgivings expressed above regarding the system proposed by Lord Jenkins, or any like system of proportional representation.

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<sup>18</sup> Magnus Linklater in the Times, April 15 1999.