Conference Papers

The Future of the House of Lords

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Contents

Introduction

The Royal Commission on the Reform of the House of Lords published its report on 20 January 2000. The 12-member Commission, chaired by Lord Wakeham, was charged with making proposals for the long-term reform of the House of Lords, following the removal of the hereditary peers from the chamber in 1999.

On 8 March the Constitution Unit held a conference at Church House, Westminster, which was sponsored by the Royal Commission. The purpose of the conference was to discuss the Commission's proposals. Several members of the Commission were in attendance, and some of them addressed the conference. Other speakers included academics, politicians, journalists and representatives of non-government organisations.

The conference ran for a full day, and included both plenary sessions and workshops. This briefing brings together the main plenary speeches.

Opening Address: The Royal Commission's Thinking

The Rt. Hon Lord Wakeham DL

Chairman of the Royal Commission on Reform of the House of Lords

Introduction

In fact, when the Prime Minister asked me if I would chair the Commission, I made two conditions: that the purpose of the exercise was indeed to come up with a workable and widely acceptable solution; and that the membership of the Commission would be conducive to achieving that. The Prime Minister immediately agreed. I was therefore confident from the outset that we had a real opportunity to lay the foundation for successful long-term reform of the House of Lords. I was also conscious that failure was not an option. The 'stage one' reforms were going ahead anyway. The House of Lords was bound to change quite significantly. There was a serious risk that the country would lose something rather

The reformed second chamber must therefore *add value* to the United Kingdom's system of parliamentary democracy, but without having a rival source of authority to that of the House of Commons. The House of Commons – and the government – derives its authority from its democratic mandate. The reformed House of Lords must derive authority from a range of sources without relying exclusively or evenly largely on the authority that derives from election. And it must play its part in a way that accommodates and acknowledges the decisive political role of the House of Commons.

There are, as I have said, dangers and weaknesses in the present system of parliamentary democracy in the United Kingdom. The executive is perhaps over mighty. Formal or judicial controls are virtually non existent. Party discipline, particularly in the House of Commons, is very strong and the party whips have an armoury of weapons at their disposal for ensuring party loyalty. This is reinforced by the fact that politics is nowadays a full-time occupation. MPs are professional politicians, dependent on their parties for their continued livelihood and for preferment. The House of Commons finds it increasingly difficult to balance its twin functions of sustaining a government in office and holding it effectively to account.

There are countervailing tendencies. The Human Rights Act will strengthen the position of the individual vis a vis the state. Devolution and the extension of local democracy in London, perhaps other major conurbations and, possibly, in the English regions, will bring power closer to the people. But in our view there remains a vital role for the second chamber of parliament in helping to exert a degree of restraint on the government of the day.

The second chamber's role should not be to confront or override the government and the House of Commons but to *challenge* them to justify or reconsider their positions. Where this leads the government or the House of Commons to have second thoughts, legislation or other government business is improved. Where the government, with the support of the House of Commons, ultimately disagrees with the second chamber, so be it. It is their right to exercise such judgements and at least they will have been forced to confront the issue that

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The case for having a membership which is distinct from that of the House of Commons has several features. It avoids any element of competition, either between the two houses or between individual members of each house. A different set of viewpoints can be brought to bear on the consideration of public policy issues.

The second chamber needs sufficient power that it will be taken seriously. Gerald Kaufman will return to this issue later today. Suffice it to say that our proposals will leave the country with a moderately powerful second chamber, capable of exerting a significant influence on primary and secondary legislation and the general development of public policy. Apart from the rare and exceptional circumstances in which the Parliament Acts may be brought into play, the positive approval of the reformed House of Lords will still be required for every piece of primary legislation.

The fundamental weakness of the former House of Lords was that it lacked legitimacy and authority. Because its members were there by birth or as a result of more recent Prime Ministerial patronage they were often forced to pull their punches. The personal distinction of many members and the quality of the arguments they deployed often countered that disadvantage, but in general the House of Lords in recent decades has lacked the confidence to stand up for what it thought was right. Our recommendations would produce a second chamber that would have much greater authority and self confidence.

The ability of the Conservative Party effectively to dominate the House of Lords throughout the twentieth century was another cause of its lack of perceived legitimacy. It is a fundamental recommendation in our report that no one party should ever again be able to dominate the second chamber. Meg Russell's book draws attention to the significance of this issue. A chamber that could be dominated by the party of government would become a mere rubber stamp. A chamber that could be dominated by the opposition would become a source of constitutional conflict. Either way, it would become an extension of the political battlefield in the House of Commons and the political parties would try every trick in the book to gain controc(an t wovery trickp/nstiand up for wh-1.36.36the politic)]TJ21.2404 0 TD0.0009 Tc0.2026 Tw[(al effectiveness.

Why not a largely elected second chamber?

Many people who have been sympathetic to much of the analysis in our report part company with us .36this point. They argue that by recommending a largely appointed house the Royal Commission has undermined cks own arguments and36.36the reformed house should have at least a majority of elected members if it is to have the authority and legitimacy to act as a real restraint on the executive. But it would ably be the case 36.36a second chamber that sought to challenge the House of Commons on the basis of its electoral mandate would lose.

As I said at the beginning, it would be anti-democratic to suggest anything else. In any event, none of the political parties would support it and the House of Commons wouldn't vote for it.

The reformed second chamber will have to rely on other sources of authority. We believe these should include:

the extent to which the members of the chamber are broadly representative of the society they seek to serve;
the breadth of experience and range of expertise they possess;
their individual personal distinction;
the quality of the arguments they bring to bear; and
their ability to exercise an unfettered judgement, free from partisan political control.

These qualities cannot be reliably delivered through any system of election. Those who would be willing to stand for election, or are likely to be successful in elections, are bound to be pretty well committed to a political party already. They would certainly be dependent on the political parties to secure election. Elections to the second chamber would therefore result in an extension of the power of the party machines, which is the very opposite of what most people want. Any system of election to the second chamber would also be unlikely to produce people who were broadly representative of British society or who possessed the necessary range of expertise and of experience outside the relatively narrow world of politics. Crucially, they would lack the ability to exercise an unfettered judgement on the issues confronting them. A further consideration is that it is difficult to see MPs voting for a largely elected second chamber: they will not want to create electoral rivals and give them a national political platform.

Of course the members of the Royal Commission were unanimous that there should be a significant minority of 'regional members' in the second chamber, chosen in a way which reflects the balance of political opinion within each of the nations and regions of the United Kingdom. We are delighted that the government agreed with this conclusion, to the extent of announcing – on the day our report was published – that it had finally accepted the principle of having a minority of elected members in the second chamber. A substantial majority of the Commission favoured a model in which 87 'regional members' would be directly elected, by thirds, at the time of each European Parliament election. But the crucial point to bear in mind is that our motive in recommending regi

Finally the recommendations in our report are politically realistic, workable and achievable. We were not interested in producing a report that would gather dust in a pigeonhole. Our recommendations take full account of the positions of all the main political parties and others with a significant interest in the second stage of Lords reform. But that does *not* mean that we trimmed our report in accordance with w

The Wider Context and Second Chambers Overseas

Meg Russell

Senior Research Fellow, The Constitution Unit

My role here today is to provide a broader context for the discussions of the Wakeham report, in the light of international experience and second chambers overseas. Given the length and detail of the Commission's report - and the existence of around 60 second chambers around the world - this will necessarily be highly selective in 20 minutes. I would like to thank John Wakeham from saving me one job - that of plugging my book. I hope he will forgive me if I am not quite so uncritical of his report, which is what we are here to discuss.

What I would like to do is concentrate on three themes which are going to come up later in the day, and get my comments in early. These themes are:

the powers of the second chamber;
the links between the chamber and devolution, and;
the representation in the chamber of previously under-represented groups.

These themes enable me to touch on many of the key elements of the Royal Commission's report. They obviously exclude others, such as the role of the chamber in human rights or European scrutiny, religious representation in the chamber, the relationship between the chamber and the government, and the electoral system which the Commission proposes to use for elected members. However, all of these issues are discussed in our new briefing, a *Commentary on the Wakeham Report on Reform of the House of Lords*, which was published this week and is included in your delegate packs.

Powers of the Chamber

So, first, the powers of the chamber. I would like to look at two things: first, the powers of the chamber over ordinary legislation, and second, its powers over constitutional change.

Powers over Ordinary Legislation

The Royal Commission proposes that the formal powers of the upper house remain largely unchanged after reform. That means, broadly, that the chamber would be able to delay ordinary legislation for one year, and financial legislation for one month, before these bills could be passed by the lower house alone.

Looking at second chambers overseas, we can see that these powers are moderate. The table shows that there are several upper houses - such as those in Canada, Australia and the US, which have a veto power over government legislation. In other words, legislation cannot be passed without the consent of the upper house. But on the other hand there are many second chambers which can delay legislation for only a few weeks.

Power of the upper house over ordinary bills

chambers which are indirectly elected, by members of local or regional government. These include France, Germany, Austria, India and South Africa. There are thus very few places where we can look for examples of appointed

Germany	Upper house must pass by 2/3 majority
Ireland	Must be passed by referendum
Italy	Upper house must pass by absolute majority
Japan	Upper house must pass by 2/3 majority
Spain	Upper house must pass by absolute majority
Switzerland	Must pass upper house, else referendum
USA	Upper house must pass by 2/3 majority, plus states approval

The Royal Commission's proposals leave Britain out of step with the rest of the world in terms of constitutional protection. We believe that the Royal Commission should have given the upper house powers to protect central elements of the constitution. The chamber can already block an extension to the life of a parliament, and the Commission propose that this power be entrenched. There are obstacles to going further, which the Commission spell out in their report. But we believe these are surmountable.

The Upper House and Devolution

Turning away from powers, the other big question is the link between the upper chamber and devolution. The Commission were explicitly asked to address this in their terms of reference, and their main response is the inclusion of what is described as a 'significant minority' of elected members, representing the nations and regions. Representation of regions, provinces or states is now the commonest form of representation in second chambers around the world. Some examples are given in the table below.

The benefits of giving representation to sub-national units in parliament is that it helps to bind parts of the nation together. Representatives of the nations and regions bring their concerns to the national table, and also take home an understanding of national decision-making. Such arrangements are commonly found in federal states but apply also in countries, such as Italy and Spain, which have devolved assemblies without being federal. This is now one of the core functions of upper houses around the world.

Representation of territorial units in upper house

	Upper house represents
Australia	States
Canada	Provinces
Germany	Länder
India	States
Italy	Regions
South Africa	Provinces
Spain	Provinces, Regions
USA	States

Experience from overseas shows that it is important for the design of the upper house to keep up with devolution. If it doesn't, this can lead to dissatisfaction with the upper house, and calls for reform. Not binding the regions to the centre can also exacerbate the fragmentation of the state. But if this happens, it becomes more difficult to reform central institutions. This is why is it important to get it right at the start. Spain provides a cautionary tale. Here

devolution has spread from three regions to cover the whole of the country, over 20 years. The regions are powerful, and some seek independence from Spain. Yet the supposedly 'territorial' upper house has only 20% of members representing the regions. The Wakeham proposals have 12%, 16% or 35% of upper house members representing the nations and regions of the UK. We could be walking into the same trap.

It is interesting that the Commission's report notes, "we were told at our public hearing in Newcastle, people in the regions would not regard someone selected for their region by a London-based Appointments Commission as being an adequate substitute for someone selected by their region". However, this anomaly is not dealt with in their proposals. In Canada, members of the upper house nominally represent the provinces, but are appointed from the centre. This causes immense frustration, and it seems likely that the same problems may arise here, if Scottish members are appointed from London.

This problem, like the problem of perceived legitimacy, could be dealt with by increasing the proportion of elected members in the chamber. The most effective way of doing this would be to take the Commission's highest number of elected members - 195 - but reduce the number of appointed members. A second chamber of with 195 appointed members, 390 members in total, would still be the largest in the world.

Representing the Under-represented

Finally, I turn to a subject to be dealt with in an afternoon seminar - that of representing interests which are currently underrepresented in parliament. Here I give wholehearted praise to the approach taken by the Royal Commission, who have based their proposals firmly around the principle of a representative house.

In particular the Commission proposals aim to ensure that the upper house includes:

- members with a wide range of experience, knowledge and backgrounds
- at least 20% of members not aligned to one of the three main parties
- at least 30% women (and 30% men), moving towards gender balance
- a fair ethnic balance
- a fair regional balance

In each of these cases - except regional balance - we can say that these criteria are not met currently in the House of Commons. In all but the inclusion of independent members they are not met currently in the House of Lords. Neither are they met in any second chamber overseas of which I am aware. Indeed second chambers are generally more male than first chambers because they include 'elder statesmen', although they frequently include representatives of professions more broadly

confidence, why don't we move to this solution now? The government is in the process of setting up an Appointments Commission, but this will have very limited powers. The Prime Minister will retain control of the balance between the parties in the chamber, its overall size, and the Labour nominees. The other party leaders would retain power over their nominees. Under the Wakeham proposals all of this would e3669p[(Und-ogovernment is in t.9d(ovw2]TJ-2118 TD0.

Final Appeal: The Future of the Law Lords

A Shed in Guernsey and the UK's top judges: McGonnell v United Kingdom[1], the Law Lords and Lord Chancellor

Richard Cornes

Senior Research Fellow, The Constitution Unit, University College London

Opening Comments

The Royal Commission reported on 20 January 2000. On 8 February 2000, the European Court of Human Rights handed down its judgement in *McGonnell v UK* - a case from Guernsey about the conversion of a shed into a dwelling by Mr Richard McGonnell. I am going to discuss Chapter 9 of the Royal Commission's Report, dealing with the Appellate function of the House of Lords, the Law Lords and Lord Chancellor in light of the 8 February *McGonnell* judgment. That judgment changes the context within which the Appellate function of the House of Lords and the positions of the Law Lords and Lord Chancellor should be considered. On one reading it may even be a bar to a significant number of the Law Lords sitting in Human Rights Act or devolution cases.

The Judicial Function - Should the Royal Commission have considered the question of the UK's top courts more generally?

The Royal Commission received submissions discussing the establishment of a new, separate top court for the UK. Other submissions argued against the Commission making any significant recommendations about the structure of the top courts (the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council) – notably those from the Law Lords themselves. The Commission in its report does not make any statements about the structure and operation of the UK's top courts. In this it was clearly right – it was, after all limited to a consideration of Law Lords and Lord Chancellor's work in the Appellate Committee. The overlap of judges, with the Law Lords sitting on both the Appellate Committee and the Judicial Committee of the Privy Council means no serious review of the Appellate Committee could, or should, be undertaken without also considering the structure and operation of the Judicial Committee as well. And that would be a task for another Royal Commission in itself.

With that caveat in mind, was the Royal Commission safe in the conclusions and recommendations it did make? At their base is the conclusion on page 93, that, 'there is no reason why the second chamber should not continue to exercise the judicial functions of the present House of Lords.' The rest of this presentation addresses:
1 – the *McGonnell* decision, and
2 – the implications of

Richard McGonnell's Packing Shed: What is *McGonnell v UK* About?

McGonnell v United Kingdom was a challenge to a decision to refuse planning permission to convert a packing shed into a house. McGonnell's argument before the Strasbourg court was based on the fact that the Bailiff of Guernsey, who presided over his hearing of his planning appeal in 1995, had also supervised (as Deputy Bailiff in 1990) the passage of the statutory e pcGonnell's Pppelicaton tad abeen ased M

and the Lord Chancellor. Recommendation 57 is the key finding in relation to the Law Lords – i.e.; that there is no reason why the Lords of Appeal should not continue to have *ex officio* membership of any new second chamber. Recommendation 58 concerns the appointment process, which I do not have time to go into.

The Law Lords

My suggestion is that there is an argument that *McGonnell* means this: A Law Lord who speaks or votes on a legislative instrument would probably breach Article 6 § 1 if he or she

should not sit in any other case where the government might be said to have an interest – a restriction, as I will note shortly which Lord Irvine has publicly acknowledged.

Recommendation 59 – Guidelines on when Law Lords will take part in debate, vote and which cases they will sit on

For reasons of time I do not intend to address the issues raised in the *Lockabail*[2] (to which the Commission refers) and *Pinochet (No 2)*[3] case (all to do with bias, actual or apparent), and what those cases may say about what should go into any guidelines. Recommendation 59 stated that, 'the Lords of Appeal should set out in writing and publish a statement of the principles which they intend to observe when participating in debates and votes in the second chamber and when considering their eligibility to sit on related cases,' and can only be viewed as a piece of good governance advice – it is in the interests of maintaining confidence in the integrity of the courts that their impartiality is transparently credible. If recommendation 59 is taken up then it would be prudent to consider just what *McGonnell* does mean for the Law Lords and Lord Chancellor, and then draft guidelines accordingly.

So far as at least the current Lord Chancellor is concerned, he has stated that he would not sit in 'any appeal where the government might reasonably appear to have a stake in a particular outcome.' (House of Lords debates, 17 Feb. 1999, Column 736). That formulation may meet the *McGonnell* standard – though whether it does in practice will depend on how the Lord Chancellor interprets the test on a case by case basis. One reading of *McGonnell* certainly suggests there may be very few cases there the Lord Chancellor can sit.

Concluding Remarks

The Human Rights Act, the devolution Acts, all of 1998, and House of Lords reform have all previously raised questions about the functions, structure and operation of the UK's top courts (the Appellate Committee of the House of Lords, and the Judicial Committee of the

Andrew Le Sueur of the UCL Laws Faculty and the author are engaged in a research project examining the United Kingdom's top courts, the Appellate and Judicial Committees This research,

The Future of the House of Lords: the Law Lords

Andrew Le Sueur

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Introduction

Most of the important questions about modernising the work of the Law Lords fell outside the Royal Commission's terms of reference. I want to consider some of the issues which will need to be considered by any further inquiry specifically charged with examining the United Kingdom's top court.

I have two arguments. The first is that, as in go

> Where sexual partners are involved, whether heterosexual or homosexual, there is scope for the intimate mutual love and affection and long-term commitment that typically characterise the relationship of husband and wife. This love and affection and commitment can exist in same sex relationships as in heterosexual relationships. In sexual terms a homosexual relationship is different from a heterosexual relationship, but I am unable to see that the difference is material for present purposes. As already emphasised, the concept underlying membership of a family for present purposes is the sharing of lives together in a single family unit living in one house.'

This was said only a few months before the current parliamentary debates about the repeal of legislation which prohibits the promotion of homosexuality as a 'pretended family relationship'. The basic point I make is that the top court is, and will surely continue to be, a major public institution which (admittedly using the stylised forms of legal debate and judicial decision-taking) engages in law-making in social, political and economic controversies. Certainly, expectations seem to be changing and rising. The Oxford sociologist David Robertson has recently written that 'a political court is required to give leadership to a nation, to make its legal system more than a technical solution mechanism'. Seen in this light, the Law Lords are, or need to be, more than an ordinary court.

Protecting the constitution

The Royal Commission identified protecting the constitution as one of the roles of the second chamber. Many countries have established specialist constitutional courts, separate from the general court system for this purpose. One question facing any future inquiry into reform of the Law Lords is whether it would be desirable or possible (in a country without a codified constitution) for such an system to be adopted in the UK. The current arrangement is that

Parliament (something that the law officers may do in relation to enactments of the Scottish Parliament).

An institution that binds the Union together?

After lunch Lord Hurd will ask 'can the second chamber bind the Union together'; a similar question may be asked about the top court. There are three distinct legal systems within the UK: England & Wales form one; Northern Ireland another; and Scotland a third. Each of the three legal system has its own appellate courts; in most situations there is a possibility of a *second* appeal to the House of Lords. What may be important about the top court is that it is one of the national institutions common to all three legal systems. A shared court may help foster a sense of national unity and political integration by finding commonalties in the rules and principles of judge-made law in all parts of the UK. It would, surely, be surprising if courts in Edinburgh and Newcastle were able to come to different conclusions on issues such as whether a man should be able to recover damages for the cost of bringing up a child conceived after a failed vasectomy (see the recent case of *McFarlane v Tayside Health Board* [1999] 3 W.L.R. 1301). The logic of a UK Parliament enacting legislation which applies in all parts of the UK may also require a top level court, for whole of the UK, with the capacity to ensure uniform interpretation of statutes.

The ideal of a court for the whole UK is not at the moment given full, practical effect; and it is also a contentious ideal. In most situations, there's the possibility of a second appeal from the Scottish courts to the House of Lords in civil matters — but not in criminal cases. Any inquiry into reform of the top courts will have to grapple with this anomaly. One argument is that the UK's top court should be given jurisdiction to hear Scottish criminal appeals — particularly because many statutory offences are the same north and south of the border, and questions under the Human Rights Act now often feature in Scottish criminal appeals and it's desirable that the UK as a whole develops coherent case law in this new field. There is, however, a different view which is that the difference between Scottish civil and criminal appeals could be ended by removing the House of Lords' jurisdiction over most, or more, civil matters. Some commentators have doubted the capacity of a top court, composed predominantly of judges trained in English law, to develop Scottish law appropriately. Implementing change on Scottish appeals to the House of Lords, one way or the other, raises the technical question whether such initiative is a 'reserved matter' under the Scotland Act;

The challenge for policy-makers responsible for House of Lords reform is to ensure that

Can the Second Chamber Bind The Union Together?

The Rt. Hon Lord Hurd of Westwell CH CBE

Introduction

I'd like to tackle the subject mentioned, but like all politicians I'd like to end on something a little bit wider. I think we had a very significant debate in the House of Lords yesterday, barely reported in the newspapers this morning. This debate set some parameters, and I'd like to say a word or two about where I think that leaves the discussion.

On the question of binding the kingdom together, The Royal Commission's terms of reference asked us to take account of the devolved institutions in place in the UK. They didn't define a problem and they didn't set a goal: we had to do that for ourselves. We therefore set ourselves the task of seeing whether, in the arrangements proposed for the second chamber, we could ease or improve the working of devolution as it now stands, and do something to hold together the Union by providing for regional representation within it.

The English Question

Of course, one big problem stares at us all out of the present state of devolution which we did not tackle because we could not, and that is the 'english question'. Four-fifths of the people in this Kingdom live in England, yet no English institution is in being or in immediate prospect of being, which could wield powers comparable to those devolved to Scotland, Northern Ireland and Wales. There is a very real question here, which at the moment is an academic question suitable for discussion in this kind of forum but might become, relatively soon, a critical political question. The real question here concerns the legitimate method of approving policy and legislation for England.

All kinds of suggestions were put forward for tackling the problem; regional English assemblies, or an English parliament, or directly elected mayors - and these should be discussed. I'd hoped that when I sat on the Mackay Commission set up by William Hague, and when we started on the Wakeham Commission that we might find some answer in the second chambers to this problem, but we did not; we found ways in which it could be made worse, and we tried to avoid those ways. In my view, no discussion of constitutional reform now can be complete without the facing the gap which is no longer the West Lothian question but is the English question. I believe unless this is faced fairly soon on an all-party basis, we shall be in considerable difficulty. My personal view is that the English question will have to be solved at Westminster, better sooner than later - but in the Commons rather than the Lords.

A Federal Constitution?

Having accepted that we on the Royal Commission couldn't solve the English question there are different ways in which we could have set about the way in which we defined our task. One of them was raised this morning; we could have recommended that in some way members of the devolved parliaments and assemblies should be brought into the second chamber and Westminster, either themselves or persons whom they nominated. We

examined this possibility and heard evidence about it. In my own mind, certainly the

party machines in the selection and election of candidates, and therefore the coming forward of people who have to be acceptable to those machines before the public hears about them, was something that people repeatedly said was not what was wanted.

People wanted to reconcile these two considerations: an enthusiasm for direct elections and a dislike of the way direct elections would operate under present systems. People wanted a system in which the parties selected - but only the wise and the good, and the independent minded. This idea of a different system - operated by the existing political parties, but confined to the virtues of the independent, individual minded in the selection of candidates - seemed to us unreal. It is unreal - it wouldn't happen, and there's a real danger that when you go down this road you will find as your candidates people who have wished to, but have failed to enter the House of Commons, or intend to do so in the near future. Again, one can say that these are not considerations which should have been in our minds; they are too practical. But we decided from the beginning that we had to be practical, and that ideas and fears - prejudices maybe - which were real, had to be taken into account because we wanted to produce a report which was actually actionable.

The Three Models

As a result of our terms of reference, our genuine desire to have regional representation, and the considerations I have mentioned above, we decided to recommend that a minority of members of the second chamber should be chosen by regions. They should be chosen on as different a basis from the House of Commons as we could devise; namely a different electoral system, a different geographic basis, a different degree of independence, and different terms of service.

We produced three models: A, B and C. Model A provided for indirect election based on reading through the single vote cast for a member of parliament at a general election, with models B and C proposing direct elections but with varying numbers. A substantial majority of us favoured model B. It seemed to that majority that the process of regional representation needed to be based on actual votes cast by actual citizens for that purpose, if it was to be accepted as democratically valid.

The proposal that these elected regional representatives should sit for 15 years has been criticised this morning, but it was aimed to provide the members with an independence and with a feeling that they were not at the beck and call of the party machines from which they might have emerged. Similarly, they would not be re-electable, so there was no question of being subservient to local party, and they would not be eligible for election to the House of Commons for a further 10 years. We aimed to separate the career patterns of members of the second chambers form the career patterns of MPs. If the two things became intertwined, we foresaw difficulty. These arrangement were being kept under review. We have three models with three sets of numbers; I don't think any of us felt that there numbers were sacred. As the report says, and as Lady Jay commented yesterday in the House of Lords, these numbers would probably be adjusted. In my view, this would be upwards, but that one cannot say in the light of experience.

A mix of elected and appointed members

We took serious account of the argument, put forward with force at one time by Professor Bogdanor and others, that the two types of members in this dual system would not mix. It was suggested that the two types of elected and appointed members would not rub along happily. Government, or public opinion, or the media might fasten on one, and suppose it treated more legitimate and more superior in auth

Norton of Louth from the Conservative side made very similar points aimed at his own front bench, and Ivor Richard on the Labour side proposed, contrary to the instincts of his front bench, that there should be a two-thirds elected body. We had powerful voices on both sides for total nomination, or total election and two-thirds election.

However, the front benches are actually the ones who, from now on, are going to give impetus to the discussion. I was very glad to hear Lady Jay say that "we agree that the

Response: Can the Second Chamber Bind The Union Together?

Brendan O'Leary

Professor of Political Science, London School of Economics & Political Science

Introduction

I was asked to evaluate the Royal Commission's proposals with respect to territorial representation of the nations and regions of the UK. My judgement of these proposals is highly conventional, i.e. I regard them, like most of the Commission's text and its CD, as second-rate, intellectually insular, and uninformed by serious comparative analysis. Indeed they are even uninformed by a close reading of the evidence submitted to the members of the Commission. As you can tell, I have exercised the right of an Irishman in England to be rude. And last, but not least, the proposals are undemocratic, both in their reasoning, and in the methods used to justify and to produce them. For instance, why was there no proper survey of citizens' views on what kind of second chamber they would prefer? Canvassing the wit and wisdom of Gerald Kaufman is no substitute for democracy or social science. Douglas Hurd's defence is that the proposals are 'practical'. Institutional ship-wrecks are often caused by self-styled practical men who reject intelligent design. This particular vessel is ship-wrecked at birth, and will, I trust, never be launched. Perhaps that is what Douglas Hurd means by 'practical'.

I am going to make five points:

Point One: Constitutional protection of the rights of devolved governments and local governments are necessary features of a modern and authentic liberal democracy.

Last month the House of Commons and House of Lords, within one week, suspended the Northern Ireland Assembly – and in so doing unilaterally broke a public treaty obligation of this state under international law. The present House of Lords did not seriously scrutinise, let alone veto, this step – which violated the will of the people of Ireland, North and South, expressed in two referendums. The UK Parliament may have believed it was acting from the best of motives – though that can certainly be debated – but it acted without any serious scrutiny of the constitutional consequences. Its action ripped apart the constitutional negotiating of the last ten years – breaking the UK's commitment to the principles of consent and the recognition of the Irish people's right to national self-determination, North and South. No UK parliamentarian can now look an Irish republican in the face and say that a united Ireland *will* occur if there is local majority consent, because any such promise, like every other element of the Good Friday Agreement, is now vulnerable to the constitution-less, bull-headed, infinitely revisable dogma of parliamentary sovereignty. A state which lets its parliament break international law, over-ride a referendum, and suspend a popularly elected assembly – without its assent - desperately needs mechanisms to protect its territorial governments from its 'Peelite' and arbitrary centre. Will the Wakeham proposals provide such mechanisms? The answer is an obvious 'No'.

Point Two: Any serious comparative political analysis suggests, worthwhile, effective, consequential and meaningful second chambers are fundamentally territorial in composition – whether they be second chambers directly or indirectly elected in either federal, union or unitary systems.

Meg Russell's excellent book, *Reforming the House of Lords: Lessons from Overseas,* which the Commission's members have praised but obviously have not read or digested, makes this point lucidly. Conversely, redundant, weak, second-rate chambers are predominantly non-territorial, and predominantly appointed. That is what Gerald Kaufman, Douglas Hurd, John Wakeham and others have proposed, albeit in three so-called models. None of them are models informed by a plan. Each is a proposed gerry-build, the addition of a weak democratic pump to the plumbing of an oligarchic Georgian house. To continue the metaphor each so-called model is justified solely on the grounds that it is compatible with an English Heritage listing. The Wakeham Commission's second chamber, on any of its so-called models, A, B, or C, would have only a minority of elected representatives of the nations and regions. These elected representatives would expressly be seen just as voices *from* the nations and regions. They would not be charged with protecting the constitutional rights and interests *of* the nations and regions, or speaking for them.

Point Three: The 'English question', which so concerns Douglas Hurd, is largely a matter for the English to resolve.

If the English choose not to demand or avail of devolution – either through regional assemblies or an English [illegible]

making national institution still deemed worthy of public subsidy; and (ii) their commitment to the disproportional representation of appointed members who will be there as a result of the deliberations of a quango.

Point Four: Model B, which Douglas Hurd and his colleagues have said 'a substantial majority of us' favour, is a most risible construction and, if it is the function of academics to speak truth to power, then we must say that this is a nonsense.

It would provide 87 elected regional members, i.e. about fifteen per cent of a second chamber envisaged as being no less than 550 strong. The regional members would be elected at each European Parliamentary election – thereby ensuring a low turn-out. Had the Commission designed a second chamber which was fully elected, effective and equitable – a triple E Senate – it might have been able to raise the derisory turn-out for European Parliamentary

party in exercising the absolute sovereignty of past monarchs. Such is the cooking of practical people. If you are serious democrats, you should send it back to the manager of the restaurant.

How Powerful Should the Second Chamber Be?

The Rt. Hon Gerald Kaufman MP

Member, Royal Commission on the Reform of the House of Lords

Introduction

I was flattered to play something of a walk-on role in Professor O'Leary's remarks, and he did remind me of a statement by a great fellow countryman of his, Bernard Shaw, who, in the *Maxims for Revolutionists* accompanying *Man and Superman* said: "he who can, does, and he who cannot, teaches." What we have heard is an academic analysis, flawless in its logic. The problem is that we are dealing with real government, and real government has elements of logic, elements of emotion and elements of compromise, and that its the *only* way in which government is able to operate. We are talking about two parliamentary institutions, because they work together at the House of Common and the House of Lords, which have been evolving over centuries and which continue to evolve today. We have a bill before the House of Commons now which is going to alter the franchise for the House of Commons still further, one hundred and sixty eight years after the 1842 Reform Bill, and it will not be the last time that the House of Commons' franchise is altered.

The Constitutional Settlement

The present constitutional settlement with regard to the relationships between the House of Commons and the House of Lords was amended substantially 90 years ago, when the Lloyd George budget failed to pass and for the first time the absolute powers of the House of Lords over legislation were ended. They have been amended since on a number of occasions, they will continue to be amended. We recommend that they be amended still further in a way which in our opinion will strengthen the role of the second chamber. The idea that we were called upon, or even if called upon would have responded, by agreeing to put forward a blueprint that would freeze the way in which we govern ourselves for perpetuity is only something that somebody with a piece of graph paper (or its equivalent on a computer) would put forward. What we are looking at is the real way in which government works and what the Royal Commission was seeking to do was to see how we could assist in making the real way that government works work better. We came upon a number of flaws and we decided to address ourselves to those flaws. Professor O'Leary, Douglas Hurd whose analysis I agree with totally, and the rest of us all agree that things are not good enough today.

Relations with the House of Commons

What we wanted to do in the Commission is to find a way of having a powerful second chamber, indeed a more powerful second chamber, which would not involve itself in a perpetual clash with the House of Commons. Even if we took a different view about the role of the House of Commons, we worked to terms of reference which began with the words: "having regard to the need to maintain the position of the House of Commons as a pre-eminent chamber of parliament". Even if we had wanted to propose a different balance

between the two Chambers it would have been pointless to so because our report would not have made the headway that it is making. Yesterday in the House of Lords we had the Leader of the House Margaret Jay, and the leader of the Conservatives, Lord Strathclyde, both agreeing to proceed, although they had serious differences at this point. Whilst not necessarily accepting or rejecting every single recommendation of more than a hundred that we have in our report, they nevertheless wanted to proceed - and they wanted to proceed on the basis of our report.

Scrutiny of government

We were very keen, and I think that my colleges on the Commission who are present here today will confirm that I personally was very keen, to strengthen the House of Lords as a body which scrutinises the work of the government and holds it to account. It should require the House of Commons on occasion, and when appropriate, to think again. What we have at the moment because of this half-way house that exists, is a house that uses powers - often powers that we believe were insufficient - but whose composition makes it impossible for anyone to take it seriously for long. It really is simply not acceptable to have as a house of parliament a chamber overwhelmingly composed of people who are there through Prime Ministerial patronage, together with a remnant of hereditaries. That is why one of the things we did in order to legitimise the enhanced powers and the enhanced role that we put forward for the new second chamber was to remove entirely any Prime Ministerial say in what the size of the chamber should be, and indeed in saying who goes there. This Prime Minister, with a majority of hundred and eighty - or I think one hundred and seventy eight now since earlier this week - will no longer be able to invite people to go to the second chamber or send them there after consulting with the Queen: that would be a very great advantage.

The legitimacy of the second chamber

Professor O'Leary in answering one of the questions talked quite rightly about the need to reflect the social composition of the population more accurately, or more relevantly. We do not necessarily have that in the House of Commons because every member arrives there by chance as a result of selection, and would do under a different system of election - would under proportional representation. Therefore there is no doubt that women and members of the ethnic minorities are seriously under-represented in the House of Commons. One of the things we wanted to do in order to enhance the legitimacy of a second chamber with an enhanced role and enhanced powers was to give it a far wider spectrum, and we therefore took the view that a second chamber which was no longer dependant upon Prime Ministerial patronage should not derive itself automatically from the political class.

The House of Commons derives from the political class and it does a job of a certain kind - inadequate in many ways, but nevertheless it does the job that it is called upon to do. The point of looking at this second chamber was to see if we could find a legitimate way of giving enhanced power to a house of parliament which was more representative and which did not derive from the political class. What any advocate whatsoever, of total election or predominant election, cannot possibly deny, is that the political class would play a predominant role; the parties would choose the candidates. It may be that, as it is with Denis Canavan in Scotland, that here and there an independent would get through, but overwhelmingly the parties would choose the candidates and the candidates would get there

and either they would cleave to the party manifesto on which they were elected, or else they would defy the party members manifesto, in which case should selection come more frequently than the fifteen years that we suggest, they'd be kicked out. What we wanted to do, before giving the house the role that we believe it should have, was to give it a legitimacy, but a different kind of legitimacy than that arising simply out of the political class which believes that it has stranglehold on the way this country is governed.

No majority in the second chamber

So what did we propose? We first of all proposed - this was in line with views of the government White Paper, but we arrived at it independently - that there should never be a majority for any given party. Under election, even proportional representation, you couldn't rule that out. We also said that the basic powers that have accrued to the House of Lords since the Lloyd George budget should not only be retained but enhanced. First of all, the ability to refer to legislation back to the House of Commons and force it to think again, and therefore force the governing party to think again, must survive. But we went further - there is in theory a power of veto by the present House of Lords over a government prolonging its life, as the war-time government did in the ten year parliament 1935 to 1945; but this was done with the consent of the House of Lords. In order to prevent that legislation being amended, we wanted the relevant legislation enhanced by a totally blocking mechanism which could prevent any government ever again from prolonging the life of the House of Commons unless the second chamber consented to it. That immediately is an enhancement, a total blockage of the power of the House of Commons to prolong its own life unilaterally.

Secondary legislation

We had a long discussion, many long discussions, over secondary legislation. Before I get to that could I just say that we also discussed the question of the Parliament Acts and whether they should govern legislation which came first from the House of Lords. We decided not to, and therefore the position in which a government which wants to change the basis of jury trials couldn't do it through a bill that started in the House of Lords - as this government did. We have a Number Two Bill coming from the House of Commons this week. We would give the second chamber a far greater legitimacy in doing that because it wouldn't be a second chamber based upon retired members of parliament, or other worthies who got there because they caught either Mr Blair's or Mr Major's or Mrs Thatcher's or whoever else it was, eye.

We decided that amending the power of total veto over secondary legislation would encourage the second chamber to send more secondary legislation back. And looking at the history of the House of Lords veering way from vetoing secondary legislation, we believe that that amendment would be a greater power for the second chamber.

The second chamber and Europe

We recommend much greater powers with regard to our relationship with Europe. At present the House of Lords has got a committee structure which deals admirably with European legislation. Nevertheless, the House of Lords has got the time and, under the kind of composition that we recommend, the expertise, to hold government to account. We therefore recommend a power of the second chamber to summon ministers, including House

of Commons ministers, *before* ministerial councils to receive the view of parliament, and *after* ministerial council to be held to account for what they do.

The constitution and human rights

We also advocate new committees on the constitution and human rights. People put to us the idea that there should be certain legislation which is constitutional legislation, and which would have a Speaker's certificate similar to the one for money bills now, but we found the problem of defining that was far greater than defining a money bill and therefore we decided not to recommend that. Nevertheless, bringing ministers from either chamber to the second chamber; giving the chamber greater powers relating to secondary legislation; entrenching the power of the second chamber over primary legislation; all these make a second chamber

Response: How powerful should the Second Chamber be?

Professor Robert Blackburn

Professor of Constitutional Law, King's College London

Introduction

Thanks to Gerald Kaufman. I would like to congratulate Gerald Kaufman on a very suave and professional job with his deputy chairmanship of the Commission. I would also like to congratulate Gerald on the wonderful book he wrote quite some time ago now, on how to be a minister. I always recommend it to my first-year Constitutional Law students; the bit in the book I particularly like is where he describes a disease called 'ministerialitis' - newly appointed ministers rather like being in a position of power, they get used to being driven around in large black cars and get elevated ideas of their own self-importance, whereas in another politician's view, Norman St John Stevas, they are in fact a bunch of jumped up MPs. The great thing about the House of Commons is that it is a bear pit and it brings ministers down to earth with a bump - the rough and tumble of politics is what the House of Commons does best.

However, there are some things that the House of Commons does extremely badly. I think in particular, it is very bad at protecting constitutional rights and human rights. Also, on any big politically sensitive issue it is more likely to be the case that the party lines will be drawn, and the automatic government majority in the House of Commons will simply back the executive.

The Commission's recommendations

If I can just pull together how I perceive the Royal Commission's recommendations on powers as basically, no enlargement of its law making powers. The Royal Commissioners construed any extension at all as being contrary to its terms of reference. It has not attempted to build upon the Lords veto over a prolongation statute to add any other major subjects. The Royal Commission suggest some redrafting in the power of the one year delay contained in the Parliament Act, but of course the 1911 Act itself was never intended to be used towards the powers of the Lords itself.

Over statutory instruments it recommends a sifting committee in scrutiny reserve procedures, which are a good idea I think, but it actually reduces the Lords' powers from an absolute power of approval or rejection to a power of three months delay. No other powers are really dealt with in the Royal Commission report, so it is more or less exactly the same: reducing powers over statuary instruments and tightening up the veto over the prolongation statute because it was badly drafted in the first place.

Generally speaking, it is a status quo, which really amounts in terms of powers to a form of disguised unicameralism. The House of Lords does not really have any power to insist that the government goes away and comes back with different proposals. The Royal Commission recommends some procedural changes to facilitate its influence, in particular the constitutional Committee. The reform which would have done most to enhance the

Bill of Rights

As regards facilitating or preparing the way for likely future developments, the Royal Commission is deliberately blinkered. It decided that rather than see things how they might be, or second guess them or look what is likely to happen, they look at exactly the status quo. The present process toward a more codified body of constitutional law, it seems to me, will undoubtedly gather momentum. Labour and Liberal Democrats may change their minds on earlier declared policy objectives, but only a few years ago Labour and its major constitutional reform policy documents presented by Tony Blair at the party conference, promised an entrenched Bill of Rights. I won't cite from it but I've got it here; it refers to incorporation of the ECHR as a necessary first step, but says it is not a substitute for our own written Bill of Rights.

The implications of that are considerable, and if we are going to have a Bill of Rights then presumably we need some special amending procedures or some special derogating procedures. Now you may say that this is all just fun and games and never to be achieved, but I don't think that's true. These proposals really are on the horizon - just a few years ago the Labour Party conference backed this. It was the first step towards the constitutional Bill of Rights. The Northern Ireland Human Rights Commission is right at this minute preparing a Bill of Rights for the region. They started this consultation process immediately, so a UK-wide statement of citizens rights and responsibility is not so far away, but again the second chamber in the vision of the Royal Commission has completely shied away against any future development by just looking at the status quo.

I think the Royal Commission report is really quite shocking in actually recommending that the approval of the House of Lords will no longer be required for remedial orders under the Human Rights Act. According to the Royal Commission, the present position of the consent of both houses is required before such measures become law, is to be replaced simply by a three month period of delay. Remedial orders, for those of you who are unaware, are fast track, one stop, yes or no, non-amendable measures for dealing with human rights issues and laws - whether Strasbourg's Court of Human Rights has found the UK to be in violation of the ECHR, the European Convention of Human Rights, or our own court might issue a declaration of incompatibility. The subjects of these pieces of legislation are really of a fundamental importance.

Human rights is about balancing the fundamental rights of the individual with the administrative interest of the state, and this

The Constitution Unit and the House of Lords

The Constitution Unit has carried out a wide range of research into the House of Lords and its reform, and published a number of briefings in this area. There is also a new book by Meg Russell, published by Oxford University Press. The Constitution Unit acted as advisers to the Royal Commission, providing eight out of the twelve research papers which they commissioned. These publications are amongst those listed below:

Reforming the House of Lords: Lessons from Overseas, Oxford University Press, January 2000 (£16).

Commentary on the Wakeham Report on Reform of the House of Lords, February 2000 (£5)

Representing the Nations and Regions in a New Upper House, July 1999 (£5).

Second Chambers Overseas: A Summary, May 1999 (£8).

Second Chambers: Resolving Deadlock, May 1999 (£5).

Second Chambers as Constitutional Guardians and Protectors of Human Rights, May 1999 (£5).

Reforming the Lords: The Role of the Law Lords, June 1999 (£5).

Reforming the Lords: The Role of the Bishops, June 1999 (£5).

A Transitional House of Lords: Rebalancing the Numbers, May 1999 (£5).

A Directly Elected Upper House: Lessons from Italy and Australia, May 1999 (£5).

'Democracy Day': Planning for Referendums on PR and Lords Reform, March 1999 (£5).

A Vocational Upper House?: Lessons from Ireland, February 1999 (£5).

An Appointed Upper House: Lessons from Canada, November 1998 (£5).

Reforming the Lords: A Step by Step Guide, January 1998 (£5).