

# Conference Papers

## The Future of the House of Lords

'The Future of the House of Lords'

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## **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

The Royal Commission is very pleased to be supporting this conference. My colleagues and I welcome the opportunity to present our thinking directly to such a broad audience. We look forward to the kind of perceptive analysis and constructive criticism that has been a hallmark of the work of the Constitution Unit under Professor Hazell's leadership. I should also like to reiterate the Commission's thanks to the Constitution Unit for providing us with a series of background briefing papers, particularly focused on the experience of second chambers overseas. Many of those papers have since been published separately as Constitution Unit 'briefings' or have appeared in an expanded form in Meg Russell's excellent book. The material we received from the Constitution Unit provided a solid foundation for our own work. Thank you.

Douglas Hurd and Gerald Kaufman, when they speak after lunch, will address two very important themes in our report. The various seminars will give you the opportunity to explore other aspects of the report which particularly interest you. My job is to provide an overview of the Commission's thinking. I do not intend to run through the Commission's conclusions and recommendations in detail. Those of you who have read the report wouldn't gain much; and those who haven't yet read the report can do so at your leisure. We went to some pains to set out the rationale for our conclusions and recommendations as we went along. What I therefore intend to do is to describe the Commission's *approach* to its task and the broad *nature* of its conclusions. I hope that this will give you all enough context to get the most out of the subsequent sessions.

## The Royal Commission's opportunity

The present government came to power in May 1997 with a clear mandate to extinguish the rights of hereditary peers to sit and vote in the House of Lords. There is evidence that they sought to explore the possibility of reaching an understanding with the opposition about the longer term reform of the House of Lords; but the exercise revealed no basis for agreement with the opposition, and probably that there was no consensus within government either. The decision to appoint a Royal Commission was therefore far more than some kind of smoke screen or displacement activity.

Obviously, as the government moved to implement the 'first stage' of Lords reform - the expulsion of the bulk of the hereditary peers - the existence of the Royal Commission enabled them to claim that they were serious about moving on to 'stage two'. But we all felt, throughout the process, that we had genuinely been brought together to exercise our collective judgement on what Sherlock Holmes would call a 'three pipe problem'.

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 important if we did not provide a blueprint to show where those changes should lead. There was therefore both an opportunity and a real incentive to draw up a realistic and workable blueprint for a reformed House of Lords. We were also conscious, however, that some of the best political minds of the twentieth century had already tried - and failed. That is a tribute to the complexity and difficulty of the issues. If there had been an easy answer, someone would have found it long ago.

### **The Royal Commission's approach**

Our approach was to pose three questions:

- what is the purpose of a second chamber?
- what sort of people do you need to enable the second chamber to fulfil that purpose?
- what is the best way of identifying people with the right characteristics?

We immersed ourselves in the issues before we came to draw even preliminary conclusions. We reviewed the available academic literature, drew on the resources of the Constitution Unit and invited submissions from a very wide range of academics, interested parties and those with a knowledge of particular issues. We studied the large volume of written evidence which we received. We initiated a programme of public hearings to ensure that we were exposed to the widest possible range of arguments and analysis.

### **The role of a Second Chamber in the United Kingdom's System of Parliamentary Democracy**

Only then did we begin to look at the overall role and specific functions of the second chamber. We identified four main roles for the reformed second chamber. We agreed:

- that it should bring a range of experience and expertise to bear;
- that it should be broadly representative of the modern United Kingdom;
- that it should provide a formal voice in parliament for the nations and regions of the United Kingdom;
- that it should play a vital role under Britain's unwritten constitution in working with the House of Commons to hold the executive more effectively to account.

Our view of this fourth role reflected the fundamental principle of Parliamentary democracy in the United Kingdom: governments are chosen in accordance with the will of electorate as expressed in general elections to the House of Commons. Governments chosen in that way have a right to govern. They have a mandate to implement their policies. The will of the electorate, reflected in the composition of the House of Commons, must ultimately be decisive. There are dangers and weaknesses in the system, which an effective second chamber can help to remedy, but it would be anti-democratic to reform the second chamber in a way which would enable it to frustrate the verdict of the general election.

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 even 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 gave rise to concern in the second chamber. The second chamber's position is also likely to stimulate media and other public interest, so it can exert a considerable influence even if it cannot ultimately enforce its objections.

### **The broad nature of a reformed second chamber**

This view of the overall *role* of the second chamber has several implications, for its powers and for the characteristics of its members. The most important, all echoed in Meg Russell's book, 'Lessons from Overseas', are:

- first, that the second chamber should have a basis of composition which is distinct from that of the House of Commons;
- second, that it should have sufficient powers to force the government and the House of Commons to take it seriously;
- third, that it should have the perceived legitimacy, and authority, to exercise those powers effectively; and
- fourth, that it should not be possible for it to fall under the control of the government, or indeed of any one political party.

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 control of it. We recommend that the political balance in the reformed second chamber should be set by reference to the proportion of votes cast for each party in the most recent general election. On post-war trends this would produce a situation in which the party of government was usually the largest party and all parties had a fair share of the seats, but in which no one party would ever have an overall majority. The possibility is further reduced by our proposal that there should be a statutory minimum of 20 per cent crossbenchers, or independents, in the second chamber. This recommendation will enhance the second chamber's reputation for independent judgement and thus enhance its legitimacy and its 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 at this point. They argue that by recommending a largely appointed house the Royal Commission has undermined its own arguments and that the 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 inevitably be the case that a 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 regional members was not just to incorporate an elected element in the second chamber. Our aim was to find a valid way of giving the nations and regions of the UK a formal voice in the second chamber, alongside members reflecting other aspects of British society.

## **Conclusion**

There are many more detailed aspects of our report which will repay careful study. I hope I have said enough to show how we see the second chamber's place in Britain's evolving constitution. Our recommendations would contribute to the stability of the present constitutional settlement. We have argued against changes that could only have had a destabilising effect. We have upheld the fundamental principles of parliamentary democracy while making recommendations which should have the effect of improving parliament's ability to hold the executive to account.

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 what we thought the parties wanted. On the contrary, our recommendations are not in line with the views of *any* of the main political parties. Everyone will be challenged to some extent by what we have proposed. What is needed now is for the political parties and others to move forward in implementing our recommendations, even though they may not welcome all of them. If they don't, the risk is that the United Kingdom will be left with a second chamber – and a system of parliamentary democracy – which is less effective than it could be. These are weighty matters. I trust that the present generation of political leaders will have the vision and courage to rise to the challenge.

# 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**

**Total veto:**

- Australia
- Canada
- Germany (bills affecting regions)
- Italy
- Switzerland
- USA

**Delay power only:**

- Austria - two months
- France - around 6-12 months
- Germany (bills not affecting regions)
- Ireland - three months
- Japan - two months
- Spain - two months

However, the formal powers of the chamber tell only half the story.

I am very grateful to John Wakeham for drawing attention to the three elements which I have stated, on the basis of international experience, are essential to the success of a second chamber. These are:

- sufficient powers to make government think again;
- a composition which is distinct to that of the first chamber, and;
- the perceived legitimacy to make use of its powers when necessary.

Sufficient formal powers are thus only part of the equation.

John Wakeham rightly emphasised that the proposed new chamber would have a distinct membership to that of the Commons. The Commission are to be applauded for recognising the importance of this, and in particular for recognising the importance of the upper house not being controlled by any one the political party, and retaining a sizeable independent element. There are examples around the world of second chambers which tend to have the same majority as the lower house, and can thus be controlled by government. The Spanish and Irish upper houses are examples. Chambers such as this do not take a different perspective to the lower house, and cannot realistically ask government to think again. In the Spanish and Irish cases this is not helped in the by the fact that their formal powers are very weak.

The third essential element is for the upper house to have sufficient legitimacy to be able to use its powers. John Wakeham rightly pointed out that it is this which has stopped the House of Lords more often challenging government throughout this century. Obviously it is not desirable to have an upper house which is going to try and block every piece of government legislation. But on the other hand, it is important that when government seeks to pursue policies which are unpopular or badly thought through, the chamber should have the confidence to ask government to think again. The introduction of the poll tax or the abolition of the Greater London Council are examples where the House of Lords might have played this role in the 1980s, and didn't. If the upper house is prepared to make a stand, these arguments will not happen often, but it is a deterrent to government, which must seriously consider the upper house's view. The Royal Commission maintain that the chamber they propose will have sufficient legitimacy to make such challenges. But this gives some cause for concern.

There are few examples around the world of second chambers with significant numbers of appointed members. Despite the Commission's rejection of direct election for the majority of members of the house, this is now the commonest means of composition for upper houses around the world. Examples of chambers which are wholly or largely directly elected include those in Australia, the US, Japan, Italy and Switzerland. Many other countries have

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 or part-appointed chambers. The only Western democracy with a wholly appointed chamber is Canada. The only chambers anywhere with a significant proportion of appointed members are in Malaysia, Swaziland and Algeria.

The Canadian Senate is nominally powerful. It has the power to veto any legislation indefinitely. However, it is widely perceived as illegitimate because it is appointed. Hence its intervention is rare. As in Britain, government has the tendency to cry foul if the unelected chamber tries to stand in the way of the elected one. This attitude is still apparent from the UK government now, despite the removal of the hereditary peers. The question is whether the chamber envisaged by the Royal Commission would be talked down by government in the same way, and whether it could carry the support of the public.

The Commission clearly believe that their proposals, where appointments are controlled by an independent Appointments Commission, and political patronage is ended, would create a sufficiently legitimate house. We have our doubts, and would prefer to see a chamber which was at least half elected. There is no way of knowing which of us is right - only time would tell. However, what we could do is implement Wakeham's proposals for the independent Appointments Commission now, and see what effect that has on the perception of the chamber. This is what we have proposed this week, and I will return to it later.

### **Constitutional Powers**

I now turn to the constitutional powers of the chamber, where we also have some difficulty with the Commission's proposals. The Commission explicitly reject giving the upper house any additional powers over constitutional change.

The UK has undergone massive constitutional change since May 1997: the establishment of the Scottish Parliament, Welsh Assembly, Northern Ireland Assembly and Greater London Assembly, Regional Development Agencies in England, the Human Rights Act, the reform of the upper house itself. Yet any of these new institutions could potentially be altered, or even abolished, by a future government with a House of Commons majority.

This is a highly unusual situation. In most countries such institutions would be entrenched in a written constitution, and amendments to them would require some special procedure. This acknowledges the fact that constitutional reform should not be made lightly, and should have broad support.

In bicameral states the upper house often has a central role in the special procedure to agree constitutional amendments. Here are some examples. In each of these examples - which are fairly typical - constitutional change must either pass a referendum or be approved by the upper house:

#### **Process for constitutional amendments**

Australia	Must be passed by referendum
Canada	Must be passed by provincial assemblies
France	Upper house has veto

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**

	<b>Upper house represents</b>
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 it is 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 than the lower house. In this respect the Wakeham proposals are truly innovative.

Responsibility for achieving this balance is given to the Appointments Commission, which Wakeham propose chooses between 65% and 88% of upper house members. In our view the same objective could be met if the proportion of appointees was lower. But it is through the rules of the Appointments Commission that this representative chamber is achieved.

I will return, to end, to a question I posed earlier. If the Appointments Commission proposed by Wakeham is to create a representative chamber, in which the public has greater

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 end, with the Appointments Commission setting the balance in the chamber on the basis of the last general election, and selecting political nominees. In addition it would create balance in gender, ethnic and regional terms.

The challenge to the government, and the other party leaders, is to set this arrangement in place now, on a non-statutory basis. The Appointments Commission is due to start work in April, so this is the time to act. In this way we can test out the Commission's claim that a chamber appointed on a more transparent basis can win public trust. Meanwhile I'm sure the debate will continue on further reform until the next election and beyond.

# Final Appeal: The Future of the Law Lords

A Shed in Guernsey and the UK's top judges:  
*McGonnell v United Kingdom*<sup>1</sup>, 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 *McGonnell* for chapter nine of the Commission's report.

I will argue that, even without the benefit of the Court's decision in *McGonnell* the Royal Commission was overly optimistic in its conclusions in chapter nine.

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<sup>1</sup> *McGonnell v United Kingdom* (8 February 2000) European Court of Human Rights. Subsequent to the report of the European Commission on Human Rights, report adopted 20 October 1998.

### **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 the hearing of his planning appeal in 1995, had also supervised (as Deputy-Bailiff in 1990) the passage of the island's development plan - on which the decision to refuse McGonnell's application had been based.

*McGonnell* was a case on article 6 § 1 of the European Convention on Human Rights - i.e., whether, 'in determination of his civil rights and obligations', Richard McGonnell received a 'fair and public hearing... by an independent and impartial tribunal established by law.' The Court made clear (Para 51) that this was not a question of whether Guernsey's constitutional arrangements required strict formal adherence to the doctrine of separation of powers, i.e. the separation in all cases of the Bailiff's various functions - but whether on the facts of the case before it there had been a breach of Article 6 § 1.

For our purposes, the Court said:

Any direct involvement in the passage of legislation, or of executive rules, is *likely* to be sufficient to cast doubt on the judicial impartiality of a person subsequently called to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue. (Para 55, emphasis added)

The Court went on to hold unanimously that:

the mere fact that the Deputy Bailiff presided over the States of Deliberation when [the development plan] was adopted . . . is capable of casting doubt on his impartiality when he subsequently determined . . . the applicant's planning appeal. (Para 57)

It was this *personal* involvement, and the fact that the Bailiff in question was the sole judge as to the law in the planning matter, that amounted to the Article 6 § 1 breach.

In a concurrence (which reads more like a dissent) obviously aimed at the UK, Sir John Laws (who sat as an *ad hoc* judge) made it clear that as far as he was concerned it was the *actual* involvement by the Bailiff in questions which gave rise to an Article 6 § 1 breach - *not merely the fact that the office of Bailiff combined judicial with other governmental functions*:

Where there is no question of actual bias, our task under Article 6 § 1 must be to determine whether the reasonable bystander - a fully informed layman who has no axe to grind - would on objective grounds fear that the Royal Court lacks independence and impartiality.

This may be a narrower approach than that taken by the rest of the court.

### **The Decision in *McGonnell* and the Royal Commission's Findings**

The rest of my comments concern the application of the reasoning in *McGonnell* to the Commission's report: *Recommendations 57 and 58 and the Law Lords; Paragraphs 9.11 and 9.12*

*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 (one day) then sat in a case which involved application of the same legislative instrument. This follows if you accept that speaking or voting is at least as problematic as merely presiding over debate of a legislative instrument – the position of the Bailiff in *McGonnell*.

However, a Law Lord who simply sat in the House, or a Law Lord simply by virtue of *ex officio* membership, would not breach Article 6 § 1 if he or she later sat in any case involving legislative measures passed during his or her presence in, or *ex officio* membership of, the upper house. *McGonnell* does not require a strict, formal separation of powers *per se*.

If this is right there are very serious implications, which I will mention shortly. First, I should say I readily acknowledge that there are a number of ways by which the facts in *McGonnell* might be distinguished from any fact situation arising out of the operation of the Appellate and Judicial Committees – starting perhaps with Sir John Laws’ concurrence. Again, due to lack of time I cannot go further on this – I will simply pursue the implications of the above reading of *McGonnell* being correct.

Turning to the potential implications of *McGonnell*. My thanks to the Constitution Unit’s tenacious research assistant, Roger Masterman, who yesterday found out for me that at least the following Law Lords took part in passage of the Human Rights Act 1998: Lords Browne-Wilkinson, Clyde, Hope, and Slynn. In addition, other members of the House who may sit on the Appellate Committee also took part: the Lord Chief Justice, Lord Bingham, a number of retired Law Lords, and Lord Cooke (previously the President of the New Zealand Court of Appeal). On a quick check of Hansard then, possibly a quarter of the Law Lords could be precluded, or at least challenged, from sitting in Human Rights Act cases.

In relation to devolution, Roger found: *Scotland Bill*: Lords Hope, Clyde and Irvine took part. In relation to the *Government of Wales Bill*: the Lord Chancellor voted. In relation to the Scotland Act this is obviously serious – with both of the current Scottish Law Lords potentially disqualified in cases involving that Act.

### **The Lord Chancellor**

As the Royal Commission noted, the *McGonnell* case may have implications for Lord Chancellors – both present and past (who subject to age may still sit on the Appellate or Judicial Committees). Lord Chancellors, like the Bailiff of Guernsey, regularly preside in the House, and may accordingly be precluded from sitting in any subsequent case involving a legislative instrument the passage of which they presided over. The Commission was right – the case does have implications, and one is that the Lord Chancellor should not sit in any case involving interpretation of a statute the passage over which he has presided. Further, he

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*<sup>2</sup> (to which the Commission refers) and *Pinochet (No 2)*<sup>3</sup> 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 Privy Council). The European Court of Human Rights in *McGonnell v UK* maintains that pressure. The *ratio* in *McGonnell* means the heart of the Royal Commission’s findings in relation to the Law Lords (and associatedly the Lord Chancellor) are overly optimistic – there is clearly now a strong case that the top judges should not enjoy *ex officio* membership of a reformed upper house, or that if they continue in membership they should be very careful about when they preside or participate in legislative debates. With October approaching (when the Human Rights Act comes into force), and devolution issues already arising, there is a pressing need not to allow reform in so many other areas of the British Constitution to falter because the implications of constitutional reform for the United Kingdom’s top courts have been neglected. As Robert Stevens noted recently, while in the past this country may have favoured allowing its constitution to grow organically, it may now be time for the organic to give way to the planned.<sup>4</sup>

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<sup>2</sup> *Lockabail (UK) Ltd v Bayfield Properties Ltd* (joined with four further cases) *The Times*, 19 November 1999.

<sup>3</sup> *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte (No 2)* [1999] All ER 577.

<sup>4</sup> Stevens, Robert, ‘A Loss of Innocence?: Judicial Independence and the Separation of Powers’ 19 *Oxford Journal of Legal Studies* (1999) 365, 397.

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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, funded by the ESRC, began in December 1999 and ends in early 2001. The project takes a comparative approach and will consider the functions and design of the top courts in the USA, Canada and Australia, as well as the constitutional courts in Germany and Spain. The final report will then consider what, if any, alteration might be called for in the structure of the UK's top courts.

# The Future of the House of Lords: the Law Lords

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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 good architecture, form needs to follow function. We need to begin by asking 'what does the top court actually do, or what should they do?' Only by being clear about this, can decisions sensibly be taken about a range of institutional and procedural questions, including who should be appointed to sit as judges in the top court. What procedures should the court use (for example, should the court encourage greater third party intervention in cases, such as Amnesty International in the Pinochet litigation?) And whether the top court actually benefits from being attached to the upper chamber of parliament. None of these questions can usefully be answered in the abstract.

My second argument is that we should be cautious about seeing top court reform as a series of technical issues unconnected from the business of modernising the second chamber. One astute observer has noted that 'if you can think about something which is attached to something else without thinking about what it is attached to, then you have what is called a legal mind'. I want to suggest that the future role of the Law Lords is too important to the wider political system to be left to the lawyers. One reason for this is that several functions identified by the Royal Commission as functions of the second chamber are *also*, broadly, functions which we might want a top court to carry out. I've got time to address only three of these roles: making the law; protecting the constitution; and being an institution which binds together the UK.

## Making the law

Everyone now accepts that judges make law, and that the top court has a particularly important role in this respect – though the doctrine of parliamentary supremacy (or what is left of it) means that the courts are not guaranteed the final word. I do not want to engage with the academic debate about whether, when a judge develops the law, the process remains one of adjudication or whether it becomes more like legislation. But there are certainly a significant number of cases each year where the practical question presenting itself to the Law Lords could equally well have arisen by means of a legislative proposal in parliament or in the form of a recommendation in a Law Commission report. To give just one illustration, in *Fitzpatrick v Sterling Housing Association* [1999] 3 W.L.R. 1113, the issues was whether in the Rent Act 1977 the expression 'member of the tenant's family' could apply to a gay man's partner. Lord Nicholls of Birkenhead held:

'... it cannot make sense to say that, although a heterosexual partnership can give rise to membership of a family for Rent Act purposes, a homosexual partnership cannot.

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 a system to be adopted in the UK. The current arrangement is that the Appellate Committee of the House of Lords is a generalist court; at the moment only a small proportion of its case load is litigation about 'constitutional' matters (though these are the cases which often make the news headlines). By my calculation, just nine out of 166 appeals heard during the three year period between November 1996 and November 1999 concerned questions about civil liberties or the powers of public authorities.

Everyone is, of course, predicting a change. With the coming into force of the Human Rights Act in October 2000, more litigants in civil claims and defendants in criminal cases will be relying on arguments about Convention rights in court, and a small proportion of these will end up in the House of Lords. 'Devolution issues' will also be dealt with by the Law Lords, though in the Judicial Committee of the Privy Council rather than the House of Lords; it should be noted that many 'devolution issues' will, in fact, be about human rights.

The Royal Commission recommends that 'an authoritative Constitutional Committee' and also a 'Human Rights Committee' should be set up in the second chamber to scrutinise all legislation for constitutional and human rights implications, partly because this method of proceeding should help avoid later challenges in the courts. One question to be asked is how the methods of work and membership of these parliamentary committees will, in essence, differ from litigation before the Law Lords? If the answer is there is little difference, then perhaps we could instead envisage a pre-enactment consultative role for the Law Lords in their judicial capacity, giving advisory opinions on matters referred to them by the UK

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 commonalities 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 more widely held view seems to be that it is not, and so this would ultimately be a matter for the Scottish Executive and Scottish Parliament.

### **Concluding remarks**

Joined-up government has been put at the centre of New Labour's programme of 'renewal and reform' (see the White Paper *Modernising Government*, Cm 4310):

'Although there are areas, such as foreign and security policy, where effective co-ordination and collaboration are the norm, in general too little effort has gone into making sure that policies are devised and delivered in a consistent and effective way across institutional boundaries for example between different government Departments, and between central and local government. [. . .] Policies too often take the form of incremental change to existing systems, rather than new ideas that take the long-term view and cut across organisational boundaries to get to the root of a problem.'

The challenge for policy-makers responsible for House of Lords reform is to ensure that consideration of the Law Lords forms part of a coherent package of change – not something left for another day (which may never arrive) or, worse still, something that is left to the lawyers.

# **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 conclusive evidence against such an idea was what we heard in Edinburgh from the Scots. Members of the devolved parliamentary institutions are elected for a specific purpose which does not include membership of the second chamber at Westminster.

Of course the dual mandate is a possibility; it exists at the moment between members of the House of Commons and members of the Scottish Parliament. But I think it is flawed in practice. For example, the management of time for someone like Donald Dewar makes it extremely difficult to imagine it as more than a transitory arrangement. I think there is a philosophical difficulty of accountability. Such an arrangement would worsen the English question because it would introduce a new band of legislators from, or on behalf of, the devolved institutions of Northern Ireland, Wales and Scotland able to decide in the second chamber matters for England which English legislators are no longer able to join in deciding for Scotland, Wales and Northern Ireland. Now that is not to preclude what Meg Russell suggested this morning: links between the devolved parliamentary institutions and the second chamber. In our proposals for elected regional representatives these would be people not representing constituencies, but they would have a representative function in general terms - they would be personalities in the nation or region from which they came, and I think it would be something they would want to do, to have roots and to consort with other people exercising political functions in that nation or region.

### **Relations with the House of Commons**

Could I mention here something I've not seen emphasised but which played with a large part in our deliberations? We were struck by the impression which we received from all sections of the parliamentary spectrum of strong opposition in the House of Commons to any arrangements for direct election of regional members to the second chamber which would enable those members to use the publicity and the resources of their local position to out manoeuvre and perhaps eventually replace members of the House of Commons. There is no doubt that this is a deep-seated fear in the House of Commons. It doesn't utter extensively for obvious reasons, but something very much in our minds was that we have to carry whatever we propose through that House of Commons. It seems to me extremely unlikely that any House of Commons, under whatever political majority and regardless of the merits of the fear I have described, would actually vote for a system which appeared to create rivalries for its members where they are most vulnerable. MPs are most vulnerable in their constituencies, and the creation of potential rivals in those constituencies is something which they would, I believe, find ways of preventing. Therefore, that has been a legitimate factor, not widely discussed, in our considerations.

### **Direct Election**

We came across, and included among ourselves, people who had a strong philosophical belief, expressed this morning repeatedly, that the only legitimate form of representation or composition for a second chamber was direct election, certainly for the regions and perhaps more widely. But alongside that, sometimes among the same people, was an equally strong view that we must not replicate the kind of ways in which people reach the House of Commons. To have another chamber which is to the same extent under the domination of

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 from the career patterns of MPs. If the two things became intertwined, we foresaw difficulty. These arrangements were being kept under review. We have three models with three sets of numbers; I don't think any of us felt that these 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 authority than the other. I don't think that this is a self-evident conclusion. We did our best to minimise the difference between directly elected and appointed members.

I believe that in a complex democratic society like ours, the public accepts different kinds of authority as valid. John Wakeham used my example of the NHS this morning and therefore I won't repeat it, except to say it is an example underlining what I believe - that authority derived from personal experience in a particular field could be as respected in the second chamber as authority derived from election. These are many different kinds of authority. I don't myself believe in this mythical debate about the NHS; two speeches follow one after the other - a surgeon speaks 'fresh' from the operating theatre, and a lady speaks from Tyneside knowing the hospitals, doctors, and patients of the North East. I don't honestly think that either kind of authority is illegitimate. Provided the speeches were good ones, the public would accept that both had a place. It is not necessary to say that they are oil and water, and is not necessary to suppose that one has superiority over the other. Authority derived from personal experience in a field could be as respected as authority derived from election. There seems no reason why there should be sourness or confusion within a second chamber so composed, anymore than there was and is in the present House of Lords. Now, there co-exists with different kinds of people and different kinds of authority, different kinds of legitimacy - life peers, elected hereditaries, the bishops and law lords.

### **Elected regional members**

The purpose of our proposals for the elected regional members is twofold. We believe this is the neatest, best way of providing regional representation; it need not be exclusive. There is no reason why the appointments commission, acting locally, should not also make regional appointments, taking regional advice in addition to those who were elected under the process we described. We also had a view which is expressed in the report that there was a case for having a directly elected element in any case. The Commission in part accepted - though not in a majority or even parity - that some degree of the particular expertise or impetus - 'oomph' as it were - that comes from direct election would be valuable in the second chamber. We didn't want the second chamber simply to be a place for respected but politically ineffective dignitaries, and that is one of the two reasons why we made these proposals for elected representation. I think this is important as I think this is what's going to happen.

### **House of Lords Debate on the Royal Commission's Report: 7 March 2000**

The debate yesterday was very varied. A certain line was taken from the front benches of each party, and there was quite powerful artillery behind each, trained on their own front benches rather than anyone else. From Lord Dahrendorf on the back benches came a very powerful speech in favour of total nomination based on his German experience. Lord

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 second chamber should clearly be subordinate, largely nominated but with a minority elected element, with a particular responsibility to represent the regions and we agree there should be a statutory appointments commission.” Following her comments, Lord Strathclyde said “we are likely to want a larger elected element in a reformed house than as proposed by the commission” and then refer to the option for a largely elected house put forward in the Mackay report. Lord Rodgers for the Liberal Democrats talked about the need for a predominantly elected second chamber.

I deduced from these comments that there is a choice now in practice before this country between inertia and the status quo (which I think is actually more uncomfortable for the present government than it expected when it created the status quo), and a mixed chamber. With regards to what is said from the front benches, the forces of inertia are always quite strong. They are usually paraded as forces arguing for different timing, and there is a danger of that. I don't think that either a wholly elected chamber or a wholly nominated chamber will now happen.

## **Conclusion**

The parameters are still very wide - the quotations I've given of the three party spokesmen show a wide difference of opinion within the context of a mixed chamber. There is a lot of argy-bargy about the exact procedure for proceeding, but that I think we need to focus on the elements and balance in a mixed chamber. That is going to be the nature of the discussion among people who will have a responsibility for deciding in the near future. I personally welcome that; our work won't result in total acceptance of everything we propose, but I think its on the right track. If that is so, we will have a chamber drawing on different kinds of authority, which are valid and legitimate in a society like ours. We will also have a representation which will bring together people from the different regions. It will show each that the others are reasonable and have shared values. This will not be decisive against other factors, but it will do something to hold the Kingdom together, and that is itself is a good objective. I hope that our proposals, among other things, will help to achieve that.

# 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 constitutionless, 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 Parliament – then they cannot complain too much of West Lothian anomalies, and other attendant issues, if they have agreed to devolution for others – as their MPs have. West Lothian questions, in any case, are a by-product of *asymmetrical* autonomy arrangements. If MPs wish to resolve West Lothian questions then they should demand, equal home rule, equal devolution or equal federalism all around. But even with asymmetrical devolution, asymmetrical quasi-federalism or full-blown asymmetrical federalism, there is a strong case for a territorial second chamber – both as a mechanism to cement the unity of the state and its components, and to protect the devolved parliaments and assemblies from a House of Commons unschooled in constitutional and territorial politics.

A second chamber based on equal representation of each nation, i.e. Scotland and Wales, and each region, i.e. Northern Ireland and the English regions, would provide such a mechanism. Such asymmetrical representation in relation to population would reflect an agreement that the state combines both self-rule and shared-rule. It would also temper the willingness of the second chamber to block the first chamber's democratic mandate in all matters except those affecting the powers and competencies of territorial governments. A second chamber composed both through equal representation of all nations and regions and a population-based indirect representation of local governments would also make some constitutional sense, especially in the absence of English devolution.

Either would make more sense than the Kafkaesque, or rather Kaufmanesque, canine breakfast offered by this Commission. For the Commission's members to reject asymmetrical representation of nations and regions in relation to population is *doubly* absurd given (i) their commitment to the asymmetrical representation of the Church of England – the only loss-

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 elections by giving citizens a more meaningful task on that day. Instead, the Commission proposes, in all seriousness, to de-legitimise its own small quota of directly elected members by electing them on the same day as the European Parliament. To add insult to injury it proposes that after the first election one third of regions would choose their regional members at the next election, i.e. two thirds would not. A regional resident who stayed put would, in other words, only elect second chamber representatives every fifteen years. If the said denizen was healthy s/he might expect to have such a vote four times in her/his life! Rousseau once said that the English were free only once every seven years; it is the singular cognitive achievement of the Wakeham Commission to extend that period, to make the English and the rest partly free every fifteen years.

The Commission’s Model B would certainly ensure that their second chamber stood no chance of being a threat to the supremacy of the House of Commons, at the price of guaranteeing that the second chamber would continue to be illegitimate and subject to public ridicule.

**Point Five: ‘Sourness and confusion’, Douglas Hurd’s words, would not result from the mixed status of his preferred second chamber.**

Sourness, yes; confusion, no. Douglas Hurd’s defence is remarkable: there would be no more of these attributes than exists as regards today’s chamber of Life Peers and hereditaries! When I first heard his defence I took it to be an elegant joke at the expense of the current Government. It has now dawned on me that the Commission is not having a solemn joke at our expense; its members believe what they say. They believe that a second chamber composed predominantly of appointed members, appointed members whom we are told should earn less and have less access to research than MPs, will have the capacity to scrutinise and act in the manner of the existing second chamber. How very true! But how unnecessary to have a Commission to produce this result.

Free people, however, will not be confused. No sane government would put the Commission’s proposals to a referendum and expect them to pass. No convocation of predominantly Scots, Welsh and Northern Irish politicians and academics would have produced this dish. This is predominantly an English sour dish, a feat of traditional English cooking, but unlike Churchill’s pudding it has a theme, a simple theme – that no serious obstacle should be placed in the path of the House of Commons and its current majority

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 colleagues 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 which will cohere within our constitutional settlement a great deal more than the mess that we have now.

### **Conclusion**

My colleagues on the Royal Commission will remember that now and again I used to say that the way in which our government progressed was through an evolving mess. We are trying to make a reasonably logical contribution, knowing that it will not be the end of the story because the whole history of government in this country shows that it is never the end of the story. Apart from our exchanging in personal compliments, my disagreement with Professor O'Leary is that he and other academics believe that you can have a blueprint for a way a country is governed; you can stamp that blueprint and that's it, it's over, you need never touch it again.

We believe that what we have put forward is not the last word on powers coupled with composition, but we believe that it takes us to a new era, including one of the things that Douglas didn't have time to mention, ending the link for good and all between the peerage and membership of the second chamber. We believe that is a good package - it is not a perfect package, it is not a marvellous package, but twelve people from twelve different directions putting that together seems to me a good start. What I want is to get on with it; I really do not want a situation in which we can have a debate in the House of Lords on the future composition of the House of Lords in which the leader one political party complains that he has not been given enough peers under the patronage system which he wants to get rid of. It seems a funny way of reforming parliament.

## **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 statutory 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

power of the Lords in terms of pressure on authority quite outside legislative powers - in other words, an elected chamber - is of course absent.

### **An emerging *de facto* constitution**

My own view on looking at the Royal Commission report as a whole is that it is a major disappointment. This is for several reasons which I'll explain some of very briefly before we proceeded to some discussion. I think that in my mind it fails to see that a *de facto* written constitution is already emerging and will continue to do so. It has not identified the significance of the big issues which are taking place, in making sure that House of Lords reform is plugged into this, because I'm not optimistic at all that there is going to be any other changes to the House of Lords in the foreseeable future. The House of Lords and changes to it are not an organic process; nothing is going to be done to the House of Lords after this reform for a very long time indeed. I think that you can see this *de facto* written constitution as I refer to it, with the devolution legislation creating this quasi-geographical structure across the United Kingdom, the Human Rights Act, and our relationship with Europe. We are entering into a different era. A *de facto* constitutional court is emerging in the Privy Council - having to adjudicate on clashes of jurisdiction between the Scottish Parliament and the Westminster Parliament, and on the Human Rights Act, the High Court going up to the Law Lords, going through exactly the same constitutional process of judicial review of primary legislation leading to possible declarations of incompatibility.

To my mind the Royal Commission has really failed to rationalise this new 'constitutional settlement' - words actually in the terms of reference - by giving the Lords any enhanced powers with respect to legislation of first class constitutional importance. Again, it seems to me that there is a *de facto* body of very clearly identifiable constitutional law emerging, and it seems to be natural that some special role or some special elevated powers to match that role should be given to the second chamber. This would not be an absolute veto but an extended power. One that can very easily be overridden by a determined government of the day. This government has already overridden the House of Lords on one occasion, and it looks like it might in the foreseeable future. It can easily do that because it can say: 'we are the elected chamber, you are not, so we should be entitled to have our way.'

### **Powers of Delay**

According to the Royal Commission, any extension of the Lords' power would be in breach of its terms of reference. These were, just to remind ourselves, "to have regard to the need to maintain the position of the House of Commons as the pre-eminent chamber of parliament, and taking particular account to the present nature of the constitutional settlement, including the newly devolved institutions, the impact of the Human Rights Act, and developing relations with the European Union." I can see nothing contradictory to the terms of reference at all in suggesting that the second chamber should have an extended power of delay over bills of first class constitutional importance. An extended power of delay of two years or even five years would mean at the end of the day that the House of Commons could always have its own way. It would be pre-eminent on the broad mass of social and economic policy which governments are elected into office to carry out. But the Commission construed very tightly and narrowly that really any extension of its powers was flatly contradictory to the "pre-eminent chamber of parliament", and I must say I found that quite bemusing.

## **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 type of legislation very often can be fairly draconian in terms of increasing restrictions. There is sometimes a habit of levelling rights down as opposed to levelling rights up. It seems to me that this is precisely the type of power that the House of Lords should have; to say yes or no to this type of fast track legislation, particularly when it is a one stop, yes or no, non-amendable measure. I believe that its veto over remedial orders should certainly have changed. I think also, in effect, what is happening is that the Royal Commission is recommending some unravelling of the Human Rights Act. When this legislation was debated at great length in both Houses just two years ago and enacted in 1998, the fact that the Lords would have a veto of remedial orders was part of the package by which that legislation was agreed. The Royal Commission wants to change it to a three month power of delay.

The Royal Commission has done virtually nothing to help redress the increasing imbalance of power between the executive and parliament, a subject about which opposition politicians and political scientists have been seriously complaining for years. It seems to me that the Commons is quite incapable of handling certain big issues in an effective, detached and genuinely parliamentary way, and it would be natural for the second chamber as a more detached body to actually possess the power to seriously hold things up, and if needs be require a general election to be held in between. The power of delay would probably involve a general election being held on the issue to give the government an electoral mandate to carry out the things that otherwise the House of Lords finds obnoxious.

The particular policy areas where I believe new powers for the second chamber are relevant are constitutional affairs, particularly of first class constitutional importance. I won't elaborate on that now, but I can see no major difficulty in defining that and working out some mechanism for deciding over what type of measure the second chamber would have extended powers and which not. It should have extended powers over certain types of human rights legislation which would normally probably be construed of being of a constitutional nature, but it should extend also to these 'quickie' human rights pieces of legislation under the Human Rights Act.

### **Foreign Affairs**

I think it should also extend into area of foreign affairs. We all know that our own parliament is noticeably weak in the area of foreign and international affairs, and the historical explanation for this is our antiquated theory of the Crown Prerogative: our parliament is the only one in the EU that doesn't have any formal mechanism of being part of the ratification process of treaty making, so I think particularly in the area of treaty making there should be some new powers attached. There are improvements on the old Ponsenby rule, which is not really a rule at all, just as government may deposit treaties on the table of the House of Commons and increasingly puts explanatory memorandums to them. I think the powers should be given to the House of Lords, and perhaps the House of Commons too between them, to insist on proper explanations of why particular treaties have been negotiated in a particular way.

I think also there should be an extension of power into nuclear defence and also military involvement overseas. I myself would agree with the following sentiments; "it is where power is exercised by government under cover of the Royal Prerogative that our concerns are greatest. A massive power is exercised by executive decree without accountability to parliament and sometimes even without its knowledge. Treaty after treaty is concluded without the formal consent of parliament; indeed foreign policy as a whole is an area virtually free from democratic control and accountability. Adequate safeguard should be put in place to ensure that if British service men and women are sent into battle, there will be adequate debates over the reasons for that decision. Formal ratification by parliament of executive action in going to war is the absolute minimum that is acceptable in a democracy." I know it is irritating to remind one what one said in the past, but that again was Labour's constitutional reform policy published and agreed in 1993-1994 as presented by Tony Blair to the party conference.

Prerogative powers have somehow slipped entirely off the agenda and I think parliament is particularly weak in this very wide area of foreign affairs and international relations. We don't live in an era where international treaty making is just a matter of military convenience. International treaty making is involved in all parts of our lives today. I think it is particularly odd that there aren't some beefed up powers in this respect, particularly when one thinks that the European Convention on Human Rights is now being incorporated into our domestic law, but the government can unilaterally negotiate an amendment to the European Convention on Human Rights without having to come back to get the formal agreement of its own parliament. It seems to me natural also that the House of Lords should play some elevated role - parliament should be playing some formal roles generally - but I believe on something of such fundamental importance again, something that really is serious in the area of nuclear defence policy, treaty making and military involvement overseas, the element of detachment that you get from the House of Lords should be an important part of that change.

## 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).
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- *Reforming the Lords: A Step by Step Guide*, January 1998 (£5).
- *Reform of the House of Lords*, April 1996 (£15).

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