

Reforming an Unelected Upper House: The Strange Rebirth of the House of Lords

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Dr Meg Russell
The Constitution Unit
Department of Political Science
University College London
meg.russell@ucl.ac.uk

My presentation focuses on the case of the British House of Lords, which – like the Canadian Senate – remains unelected, but which was reformed by the Labour government in 1999 to remove the majority of hereditary peers.

Despite the frustration of reformers wanting to see an elected House, and the claims by some at the time that the 1999 reform would weaken it, the chamber has been unexpectedly strengthened by this reform. My paper reflects on why this is, and on the implications for our understanding of how bicameralism works. It also briefly reflects on where the debate leaves Britain, and mentions some of the other lessons Britain might provide in thinking about reforming an appointed house.

The House of Lords and the 1999 Reform

The House of Lords is one of the oldest parliamentary chambers in existence. It developed from the council called together to advise the monarch as long ago as the thirteenth century and, save for 11 years of abolition following the English civil war in 1649, has been continuously in existence.

The chamber has, however, evolved over time. While the Lords used to be the more influential of the two, the House of Commons gradually became the primary chamber, particularly as the franchise widened in the 19th century. A Prime Minister was last drawn from the Lords in 1900. In 1911 the left-wing Liberal government formally reformed its powers – largely removing its veto and reducing this to a power of delay.¹ In 1949 the post-war Labour government reduced the delaying power further from roughly two years to one, but despite the party's visceral dislike of the chamber, which comprised largely hereditary peers, no action was taken on its composition. In 1958 a Conservative government introduced life peerages, allowing members to be appointed without passing the titles to their offspring. Most new members appointed after this date were appointed as life peers.

By the time Labour came to power in 1997 the House of Lords included 759 hereditary peers and 477 life peers. The party remained committed to reform of the Lords, and its election manifesto promised it would remove the hereditary peers as a first step to creating a 'more democratic and representative' second chamber. A bill was published in 1999 to implement the first stage of reform, and a Royal Commission was established to consider the options for the second stage.

The bill passed, with one amendment – a compromise whereby 92 hereditary peers would remain until the next stage of reform.² The Conservative Party in particular claimed that Labour had no intention of moving to the second stage and that it was simply using reform to seek political

advantage. Of the hereditary peers that took a whip, 301 were Conservatives and only 19 were Labour.³ This political imbalance was always quite openly and understandably a motivation for Labour to reform the House. The compromise by which some hereditary members remained allowed the Conservatives to retain some of their own most active members. Nonetheless, when parliament resumed for a new session in November 1999, 655 hereditary peers had been expelled. 666 members remained, the great majority of which were life peers, plus the 92 hereditaries and a small number of Law Lords and Bishops.⁴ The House was much smaller, but still wholly unelected, and could certainly be considered only partially reformed.

As the detractors predicted, the second stage of reform still hasn't been reached, despite a plethora of initiatives the extent of which might surprise even world-weary Canadians. The Royal Commission reported in 2000, and the next year there was a government white paper which was widely rubbished and never resulted in a bill.⁵ A joint committee of both Houses was then established and its report was followed by a series of inconclusive parliamentary votes.⁶ A further white paper followed in 2003, since when there has been a further joint committee, a further white paper, and a further set of parliamentary votes.⁷ I'll return to some of these later, but suffice to say that despite all of them, and more besides, there's been no concrete reform since 1999.

The Unexpected Impact of Reform

The expectations on both sides of the political divide were therefore that the 1999 reform would produce a tamer chamber, presenting fewer obstacles for the Labour government. This seemed logical given that it removed primarily opposition peers. But the result has proved to be the opposite: the Lords seems to have been significantly strengthened by the 1999 reform.

Despite the effects of the 1911 and 1949 Parliament Acts, the chamber retains considerable formal powers. It can delay most bills for around a year, though it retains a veto over the roughly a third of government bills which initiate in the Lords. It also has a veto over secondary legislation. These powers could be a significant constraint on government if they were regularly used. But the Lords' peculiar composition meant that by convention its powers were used with extreme caution. The most famous convention was the 'Salisbury' convention, agreed following Labour's landslide election victory in 1945. At the time Labour had only 16 members of the House of Lords, and Conservative peers conceded that the chamber shouldn't block bills mentioned in the election manifesto, for which the government could claim a mandate. Even beyond this, however, there was a general acceptance that the elected house should be able to get its way.

All the evidence is that since 1999 the Lords is acting more assertively with respect to government legislation.⁸ In that period it's defeated the government over 350 times. Although the Lords did regularly defeat Labour governments in the past, it's now less likely to back down when it finds itself at odds with the House of Commons. When disagreements arise bills must shuttle back and forth, and conventionally the Lords would give up if the Commons insisted on its position. But Lords insinuations are becoming more common.⁹ The government is now regularly giving in to the Lords, or making major policy concessions. Many of the defeats on which the Lords 'wins' are on civil liberties issues – defending trial by jury, protecting the rights of asylum seekers, or limiting executive power in the so-called 'war on terror'. But there have also been important changes in other areas. For every Lords defeat there will be many other cases where the government makes concessions first, to avoid a defeat. So the evidence is that the Lords is having a very significant impact on policy.

Why is this happening, given that the 1999 reform removed many opposition peers and the chamber remains unelected? Well, it's clear that the peers who remain feel more legitimate, and therefore more confident to challenge government. A survey of peers that we conducted in 2005 found 78% believed the chamber was 'more legitimate' following its reform.¹⁰ This opinion was most widely held amongst Labour peers, at 88%. And it's not just the peers who feel this new sense of legitimacy. A similar survey of MPs found that a majority, and 75% on the Labour side, believed the Lords to be more legitimate following its reform.¹¹

Where does this feeling of legitimacy come from, given that the chamber remains unelected? There are two short and simple answers and several more complex and important ones. One short answer is that the government announced during the reform debates that removal of the hereditary peers would make the chamber 'more legitimate'.¹² This is the official Labour line. But it's also objectively true, albeit starting from a low base, since clearly the presence of hereditary legislators was anachronistic, and their removal ended the least defensible element of the system.

These reasons alone, however, are hardly enough to imbue the peers with great confidence to extract concessions from a popularly elected government. The key factor is that the reform fundamentally altered the party balance in the chamber. The two main parties are now relatively evenly matched, with the balance of power held by the third party - the Liberal Democrats - and independents. Indeed since 2005 the Labour Party has been the largest party.¹³ The chamber is therefore permanently 'hung', which gives the third party significant bargaining power, as the independent members tend to vote in quite small numbers.¹⁴ Crucially, given the 'first past the post' system which we - like you - use for our House of Commons, the party balance in the Lords now more closely reflects general election vote shares than does the lower House. In 1997 and 2001 the Labour Party gained overwhelming majorities in the House of Commons on well under 50% of the vote, and in 2005 it won comfortably on just 35% of the vote.

This situation has put the old conventions governing the House of Lords under strain, and makes the Liberal Democrats, who have always favoured proportional representation, question instead the legitimacy of the House of Commons. The party's leader in the Lords has referred to the Salisbury convention (whereby the Lords doesn't block manifesto bills) as 'the last refuge of legislative scoundrels'.¹⁵ And its former leader in the Commons made clear after the 2005 general election, just after Labour had become the largest party in the Lords, that he considered the convention outdated, as it related to 'absolutely different political circumstances'.¹⁶ The government's concern was demonstrated by its establishment of a joint parliamentary committee specifically to look at Lords conventions, which reported last November.¹⁷ The government originally asked it to look at codifying the conventions, but the committee was forced to conclude that codifying conventions is a 'contradiction in terms', since by definition these must remain 'flexible and unenforceable'.¹⁸ Last month their flexibility was further demonstrated when the Lords blocked a piece of secondary legislation for only the second time since 1968.

Our survey of peers found widespread belief that there were circumstances where it was justified to block elements of government bills. Even with respect to manifesto bills over 90% of peers agreed with this if such measures lacked public support. In fact a majority of MPs agreed with this too, as did two-thirds of the public, in a poll we commissioned just after the 2005 election. The fact that MPs, and particularly the public, think it justified for the peers to use their blocking power, further acts to boost their confidence. Meanwhile the balance in the chamber, with no government majority,

means the opposition parties are well placed to use that power when they believe they have public opinion on their side.

So the main explanation for why the chamber is becoming more assertive is a feeling of legitimacy linked to its new party balance. But there's one further factor that's worth mentioning. It's been traditional when there are clashes between the chambers for the government to argue that the Lords should desist because it isn't elected, and should defer to the elected House of Commons. However, this sounds increasingly hollow coming from a government which, after ten years in office, has yet to introduce a bill proposing elections. Cumulatively these factors, and indeed the government's declining popularity, have boosted the position of the House of Lords.

Lessons for Bicameralism

What does this little story tell us about the dynamics of bicameralism? It tells us that it's possible to reform an unelected second chamber and make it stronger and more effective, without introducing elections. It tells us that legitimacy matters, but that it isn't necessarily found where you think. And it tells us that party balance is extremely important.

In short it tells us that we may have misunderstood what it is that gives a second chamber strength. It's generally assumed that elected second chambers will be strong, whilst unelected ones are likely to be weak, due to legitimacy problems. In his well-established taxonomy of bicameral systems Arendt Lijphart tells us that '[s]econd chambers that are not directly elected lack the democratic legitimacy, and hence the real political influence, that popular election confers'.¹⁹ The Canadian and British second chambers, both seen as weak and unelected, are cited in support of such a thesis, as is the directly elected and powerful Australian Senate.

The Lords certainly confirms that legitimacy is important. Lijphart's two main dimensions used to determine the strength of a country's bicameralism are strong formal powers and a distinct composition from the first chamber. The Lords had both of those historically and yet was weak in de facto terms. Consequently I've previously criticised Lijphart for not making legitimacy more explicit in his schema.²⁰ But now the effects of our recent reform are becoming clearer, I'm also critical of the automatic conflation of legitimacy with election. In fact I've always suggested, in line with Weber, that what matters is *perceived* legitimacy. And recent events suggest that a chamber can be seen as legitimate, at least to a certain extent, even where it isn't elected.

Lijphart also focussed in terms of distinct composition primarily on patterns of territorial representation. But the British case underlines the importance of party balance – both in giving the chamber the incentive to challenge the government, and also the legitimacy to be able to do so. The first is an obvious point. It was echoed by the Canadian experience during the period 1984-90 when the government lost its majority in the Senate and it was anything but weak – despite its appointed basis. The second point is more subtle – that party balance can help bestow legitimacy on an upper house, even when it's unelected. This is particularly true in Westminster systems like ours, where single party governments can form on a minority of the popular vote. Of course the system that has cemented such an arrangement over the last 25 years is the Australian one, where proportional representation for the Senate resulted in the balance of power being held by minor parties and independents. But the recent ending of this situation when the Howard government won a slim Senate majority, has seen the chamber decline in influence. So the Canadian and British second chambers can be strong, despite being appointed, and the Australian can be weak, despite being directly elected.

In order for bicameralism to make sense, it must be based on distinct logics of representation, which are complementary but both also credible. The British system was historically based on one of the oldest logics of all – that of representation of different class interests. It was an elite second chamber. Around the world the federal logic has become the more popular and credible one in recent years. In formal terms the Lords continues to be based on an elite, or perhaps meritocratic, principle – the appointment of the great and the good. But in fact the representation of parties is central. We've long had a convention, unlike the Canadians, that Prime Ministers appoint from parties other than their own, and it's now accepted by all sides that no party should have a majority in the second chamber. In fact all serious reform proposals are based on the principle of proportionality. We may therefore be developing a new logic of representation ideally suited to Westminster systems – that the lower house is based on the representation of electorates, which can result in single party majorities, while the upper house is based on party proportionality. We know from Australia that that provides two competing logics with credibility. But British experience shows that in a Westminster system a proportionally representative upper house has attractions to the public even if it's unelected.

Prospects for Further UK Reform

In the UK the changes resulting from the 1999 reform have the potential to be far-reaching, and aren't yet fully understood. The former House of Lords presented only a very limited obstacle to government. Parliament now seems to be significantly strengthened with respect to the executive, and the third party, in particular, has gained a new negotiating strength. Despite single-party government, the system is therefore now more pluralistic than the old Westminster model, and thus to a far greater extent bicameralism could be seen to be doing its job.

But Lords reform remains very much on the political agenda, as the second part of Labour's 1997 promise hasn't been met. Despite the changes we've seen, the chamber is still generally considered 'unreformed'. In many ways it still looks the same – it has the same name, rules and rituals. And to many on the Labour side it still feels the same – the Lords used to defeat Labour governments, and it continues to do so with greater ferocity. So thanks to broken promises, image problems, Labour tribalism and genuine desire for democracy, there are numerous pressures for Lords reform.

Options for election have been much discussed in recent years. The Royal Commission proposed a mixed chamber, with a minority of members elected and a majority appointed, as did the government's white paper of 2001. But both were widely criticised for their timidity. In 2003 the House of Commons had free votes on Lords composition, based on seven elected/appointed options proposed by a joint committee. All seven, from all-elected to all-appointed, were rejected, and both the main parties proved completely split on the issue.²¹ Opinion is polarised between those supporting democracy for the upper house, and those fearing this would give it even greater strength. The position of the doubters was boosted recently by the report of the joint committee on conventions, which concluded that 'If the Lords acquired an electoral mandate ... their role as the revising chamber, and their relationship with the Commons, would inevitably be called into question'.²² The present Lords may be more assertive, but it's still not using its formal powers to anything like their full extent.

This February the government produced its fourth white paper on Lords reform. This sought to offer a compromise to supporters of election and of appointment: a 50/50 House. Perhaps unsurprisingly this proved to please no-one. The white paper was debated last month, with the two

chambers of parliament again offered free votes on a range of composition options, and both roundly rejected the 50/50 proposal.²³ But the Commons did produce a surprise by voting 337 to 224 in favour of an all-elected House. In contrast the Lords voted for an all-appointed one. The Commons vote can't be taken at face value, however, as many known opponents of election supported it in the lobbies. This was a tactical move, following the earlier more narrow vote for an 80% elected House.²⁴ An 80% elected House is more dangerous for the opponents of reform, as it allows government room for compromise so might actually be implemented. An all-elected House is far less likely: it raises the spectre of a powerful and party-dominated chamber, requiring the expulsion of both the independent members and the Bishops. Even if ministers were prepared to contemplate such a bill – which they won't – it would put them on a collision course with the Lords. Britain therefore remains a long way away from further reform. What's quite possible instead is that we'll see a Conservative government, which will for the first time face regular defeats by Labour and Liberal Democrat peers in the House of Lords. At this point, if it hasn't happened already, the British may finally wake up to the extent that their upper house has changed.

Options for Reforming an Appointed House

Given that reform in Canada also remains uncertain, I thought it would be useful to end with some examples informed by the extensive debates in Britain about reform to an appointed House. As I've said we've also had much discussion about elections. We've discussed term limits, where the general consensus is for 12-15 year terms, probably non-renewable – to promote independence from the whips and discourage constituency work. It's also been widely suggested that a bar be put on members departing the House and standing for the House of Commons for several years. I'm happy to discuss any of that in questions. But having suggested that election isn't the only way of strengthening a chamber, Britain probably has more uniquely to contribute on thoughts for an appointed House.

It's important to emphasise that there's already a lot of difference between the Lords and the Canadian Senate. In some ways you're ahead of us: the cap on the size of the chamber, requirement for territorial pluralism, and retirement aged 75. We don't have any of those. But we also have things that you don't – a long tradition of appointing a sizeable proportion of independent members, of which there are now over 200, and a convention of the Prime Minister appointing from parties other than their own.

There are significant imperfections in this system. Despite the conventions, Prime Ministerial discretion remains extensive. The Prime Minister continues to decide how many members are appointed, when, and the balance between different party groups and independents. There's now an expectation of rough proportionality, but that can't be enforced. However, there have been both some important changes in recent years and some important recommendations for the future. First, in 2000 an independent House of Lords Appointments Commission was created.²⁵ This vets Prime Ministerial appointees for propriety. It also actually selects independent members: it advertises, shortlists and interviews, as for a senior job or other public appointment.²⁶ All proposals in recent years which have envisaged retention of some appointed members have proposed that more power be given to the Commission, and that it be put on a statutory basis. The Royal Commission suggested that it have complete control over all appointments, with responsibility for picking party members as well as independents. It and subsequent government proposals have recommended that the statute establishing the Commission sets down a formula for the mix between the parties based on vote shares in general elections – so cementing proportionality. The government hasn't accepted the principle that the Commission should pick all party members, but has now accepted that it could

select from longlists provided by the parties.²⁷ Given the ongoing controversy in Britain about peerages for party donors it's quite possible that a future Prime Minister – who could be in place in as little as a month's time following the imminently expected departure of Tony Blair – will want to give up patronage powers and hand greater discretion to the Appointments Commission. If this happens it would further strengthen, in small but important ways, the legitimacy of our appointed House.

Conclusion

I'm not sure whether the British case is encouraging or not in a Canadian context. My key conclusion that a chamber can be made significantly more effective without introducing elections may offer comfort to those of you who still see the arrival of democracy for the Senate as a distant prospect. Others who believe that election is essential to creating a modern chamber on the other hand may find my comments not only counterintuitive, but perhaps even positively unhelpful.

It's not my intention to conclude that election is either a good or a bad thing, though there's certainly a principled argument to be had about the place of democracy in the making of a parliament. But my point is that in pragmatic terms there are other factors – in particular the matter of party balance, but also what kind of election and what kind of appointment – that may be equally important to a chamber's behaviour and its relationship with the public, and therefore to bicameralism's ability to effectively do its job.

¹ The preamble of the Act also promised to create 'a Second Chamber constituted on a popular instead of hereditary basis', but this was never brought into effect.

² These represent 10% of the total plus some office holders. See D. Shell, 'Labour and the House of Lords: A Case Study in Constitutional Reform', *Parliamentary Affairs* 52(4): 429-441 (2000).

³ These figures exclude the 119 hereditary members who had either not taken the oath or were on leave of absence. Of the remainder, 217 sat on the Crossbenches and 22 as Liberal Democrats.

⁴ 26 Bishops and Archbishops of the Church of England sit by right in the House. The 'Law Lords' are senior judges who are appointed to form the UK's highest court of appeal, but this group is about to depart the chamber due to the creation of a new Supreme Court.

⁵ *A House for the Future*, London: Royal Commission on the Reform of the House of Lords, Cm 4534 (2000); *The House of Lords: Completing the Reform*, London: Lord Chancellor's Department, Cm 5291 (2001).

⁶ *First Report*, Joint Committee on the Reform of the House of Lords, Session 2002-03, HL 17, London: House of Lords (2002); I. McLean, A. Spirling and M. Russell, 'None of the Above: The UK House of Commons votes on reforming the House of Lords' *Political Quarterly* 74(3), 298-310 (2003).

⁷ *Constitutional Reform: Next Steps for the House of Lords*, CP14/03, London: Department for Constitutional Affairs (2003); *Conventions of the UK Parliament*, Joint Committee on Conventions Report of Session 2005-06, HL 265-I (2006); *The House of Lords: Reform*, CM 7027, London: The Stationery Office (2007).

⁸ In this section I draw on research conducted by the Constitution Unit which was funded by the Economic and Social Research Council (ESRC) under grant RES-000-23-0597.

⁹ In the 2001-05 parliament the Lords insisted on its position on 17 different bills. By comparison during the 1974-79 Labour government the Lords insisted on its amendments on only four bills, and during the whole Labour period 1964-70, it insisted only once on an amendment.

¹⁰ A total of 396 peers responded, representing 57% of the House. For full results see M. Russell and M. Sciarra, 'Legitimacy and Bicameral Strength: A Case Study of the House of Lords', Paper to 2006 Conference of the Political Studies Association specialist group on Parliaments and Legislatures, University of Sheffield. Available at: <http://www.ucl.ac.uk/constitution-unit/research/Parliament/house-of-lords.html>.

¹¹ This research was funded by the Leverhulme Foundation and the ESRC. There were 197 replies received, representing a response rate of 30%.

¹² Leader of the House of Lords Baroness Jay, House of Lords Hansard, 14 October 1998, Col. 925.

¹³ For up to date figures see:

http://www.parliament.uk/directories/house_of_lords_information_office/analysis_by_composition.cfm

¹⁴ See see M. Russell and M. Sciara, 'Why does the Government get Defeated in the House of Lords?', Paper presented to the Political Studies Association Conference, University of Reading, 2006. Available at:

<http://www.ucl.ac.uk/constitution-unit/research/parliament/house-of-lords.html>

¹⁵ Lord McNally, House of Lords Debates, 6 June 2005, c.760.

¹⁶ See comments of Charles Kennedy, House of Commons Debates., 17 May 2005, cc. 50-51.

¹⁷ See above at note 6.

¹⁸ Ibid, p. 73; p. 79.

¹⁹ A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. New Haven: Yale University Press (1999), p. 206.

²⁰ See M. Russell, *Reforming the House of Lords: Lessons from Overseas*, Oxford: Oxford University Press (2000).

²¹ For a breakdown and analysis of the votes see McLean, Spirling and Russell, *op. cit.*

²² *Op. cit.*, p. 76.

²³ This was the least popular option in both Houses, rejected by 418 to 155 in the House of Commons and 401 to 46 in the House of Lords – despite the Prime Minister's support. See House of Commons Hansard 7 March 2007; House of Lords Hansard 14 March 2007.

²⁴ By 38 votes: 305 to 267. Ibid.

²⁵ www.lordsappointments.gov.uk

²⁶ Formally the Commission makes recommendations to the Prime Minister, who in turn makes recommendations to the Queen. But in both cases approval is in practice always given.

²⁷ See the 2007 white paper at note 6.