

Lords Reform: Principles and Prospects

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I'd like to start by thanking Baroness Ashton for inviting me to give this talk, and thanking all of you for coming. It is a great privilege to be asked to speak in this series of lectures, in the distinguished company of Professor the Lord Norton of Louth and Professor Bogdanor. I hope that you will feel I have something useful to contribute.

What I want to do is answer three questions about reform of the House of Lords. First, what does our knowledge about the House of Lords, and about bicameralism overseas, tell us are the important principles when considering reform? Our recent debates have become very fixated on one principle - that of what proportion of the chamber should be elected. But are there other equally or more important principles to which we should pay greater attention? Second, what do our knowledge about the House of Lords and bicameralism elsewhere tell us about what would happen if we moved, as was implied by the votes this year in the House of Commons, to a largely or wholly elected upper house? And third, what do these things, and our experiences to date, tell us about the prospects for reform and what might actually be achievable?

So the first question relates to the key principles that should guide us in making decisions about the future of the upper house, and particularly about its composition. The principle that has dominated debates in recent years has been that of the need for democracy, and the proportion of the upper house that should be elected. The first significant intervention in this debate post-1997 was made by the Royal Commission, which proposed a largely appointed house but with a minority elected element. Its report was long and detailed, but it was this single point that attracted most attention. Many responded by saying that in a modern democracy it was inappropriate that elected members should form only a minority, and a campaign began to grow for a largely or wholly elected House. Shortly after I began working for Robin Cook in 2001 the government produced a white paper proposing a minority elected house, but this was widely rubbished. The question of what proportion should be elected therefore became the centre of debate, as demonstrated by the inconclusive parliamentary votes in 2003 when the Commons rejected all seven composition options put in front of it. This focus has continued, with the most recent White Paper seeking to reach a compromise at 50% elected, and the votes this March resulting in the Commons choosing 80 or 100%. This is now the basis on which it is assumed the government will go forward, and which both opposition parties have said they broadly support.

The principle of democracy and election is undoubtedly critical, and it's not surprising that it has dominated debates. But there are other principles too, which may be equally important. Central to these is the need for the second chamber to be distinct from the first if it is to add anything to the system of government. This is a well-established principle amongst those studying bicameralism,

and I know is one which Professor Bogdanor concentrated on at some length in his talk. The obvious point is that the benefit of bicameralism is its ability to bring different opinions to bear, allowing policy options to be examined from different angles and helping ensure that certain points of view are not overlooked. If the two chambers are too similar this is unlikely to happen, and the central justification for bicameralism is lost.

Before those of you who are opposed to election get too excited, I'm not going to use this principle to rule out the prospect of a largely or wholly elected house. Many people have done, but I think this is too simplistic. It's quite possible to construct a model of a largely or wholly elected house which differs substantially from the House of Commons, precisely because there are other dimensions that matter aside from election alone.

Probably the centrally most important dimension in modern party-dominated parliaments like ours is that of party balance. It is this that will determine voting outcomes most of the time. So if the governing party, or parties, had a majority in the upper house it would be far less effective. This is widely appreciated, and all the main parties have agreed that there should be no single party majority in the Lords. The importance of this principle has also been demonstrated by recent developments. The removal of the hereditaries in 1999 made the chamber feel more legitimate and assertive. But the reason for this was not simply the departure of its most anachronistic group of members, but the impact this had on party balance. In the old chamber voting was unpredictable and many members didn't attend, but it was fair to describe it as a Conservative-dominated house. This helped account for why it was considered illegitimate. In turn it helped account for the Salisbury convention for example. In the new chamber the Conservatives are no longer dominant, and no party can win a vote without the support of others. This puts the Liberal Democrats, in particular, and the Crossbenchers, in a pivotal position. The change in party balance has therefore boosted the chamber in two important ways: first, it has made it feel more legitimate; and second, it has created the political circumstances in which it more often wants to use its powers.

Professor Bogdanor, in his talk, emphasised the need for there to be two alternative principles of representation reflected in the two chambers of parliament for bicameralism to make sense. I wholeheartedly agree with him, and would furthermore point out that these alternative principles have to be able to command support in a modern democratic system. Putting it another way, they have to provide two competing sources of legitimacy both of which are sustainable. The old logic of class representation which underpinned bicameralism in many European states therefore doesn't qualify. The logic of regional representation may do in federal states, but as Professor Bogdanor has suggested may have difficulty working here. This, he concludes, leaves us with a problem.

It is here that I part company with Vernon, and I have told him so, though I haven't yet convinced him. Because I think we may have already found a different logic of representation, and it may be reflected in the current House of Lords. In international terms Britain is unusual in continuing to elect its lower house by a majoritarian electoral system. Everywhere else in Europe, except France, proportional representation is used, and majoritarian systems are now being phased out in some Commonwealth states. The 'majoritarian' and 'consensus' systems are recognised by political scientists as two alternative logics of government.¹ What we have in the UK post-1999 is a

¹ A. Lijphart, (1999). *Patterns of Democracy: Government forms and Performance in Thirty-Six Countries*. New Haven: Yale University Press.

mixture between the two, with a majoritarian system in the lower house based on the principle of equal representation of small territorial constituencies, and an essentially proportional system in the upper house albeit unelected. This is, in my view, a healthy system, which creates a kind of 'best of both worlds'. Although we don't have elections for the Lords I think we could say that there is an important logic of representation developing, which is that no party should have an overall majority and the share of seats should be broadly proportional to the way that people vote. Indeed ironically, the party balance in the current chamber more closely reflects the way people vote than does the party balance in the House of Commons. The inclusion of the independent Crossbenchers makes the proportionality slightly untidy, but could be seen to represent the growing number of people who have no strong allegiance to any one party, or who do not vote at all.

This principle of proportionality could apply in an elected house just as it currently applies in appointed one. Indeed it has been a common theme in most serious recent proposals about House of Lords reform. So we now have two principles - that of election and that of party balance, which form two independent dimensions. But because the world is complex there is a danger of muddling them up. Vernon spoke about the Australian and Canadian Senates as comparators, and here again I think he got it slightly wrong – though he is in good company with other distinguished scholars. The Australian Senate is directly elected, uses proportional representation, and is generally seen to be strong. The Canadian Senate is wholly appointed, tends to have a government majority, and is generally seen to be weak. Although the two have similar formal powers the Canadian Senate, like the pre-1999 House of Lords, rarely uses them. The common fallacy is to assume that the Australian Senate is strong because it is elected, and the Canadian Senate weak because it is appointed. But there is clearly an alternative explanation. In fact the Australian Senate gains much of its strength from the fact that it is generally a 'no overall control' chamber, where the balance of power is held by minor parties and independents. Its proportional membership, alongside its election, gives it legitimacy, and these Senators tend to negotiate outcomes that reflect public concerns. The Canadian Senate, in contrast, rarely uses its significant powers principally because it has a government majority. As I detail in my book, in a rare period when the Senate was controlled by the opposition in the 1980s it did use its powers and blocked several key bills. Indeed, returning to Australia, the famous constitutional crisis of 1975 occurred when the opposition party managed to gain an overall majority in the Senate: a clearly dangerous situation. In contrast, over the last two years the Howard government has enjoyed a Senate majority – the first time a government has done so since the early 1980s. The result? The seemingly strong Australian Senate has been neutered. Fewer bills are being sent to committee, fewer amendments are being made, and virtually no critical committee reports are being published.² What I conclude from this is that party balance is at least as important as whether a chamber is elected or appointed, indeed almost certainly more so. If I were forced to choose between one principle and another I would certainly choose a no overall control appointed chamber over one elected by first past the post.

I've concentrated on that principle at some length because I think its so important, and to illustrate the general point that there can be other dimensions that really matter. But there are also other principles of great importance. For example, the principle of long terms of office. Appointment for life is the ultimate long term of office, but it is very common in bicameral systems for members of the upper house to serve longer terms than members of the lower house, usually two or three times

² See http://democrats.org.au/campaigns/senate_watch/

as long. This principle has also been supported by many in debates about Lords reform. Alongside long terms of office generally goes the proposal that membership of the chamber should be renewed in parts, perhaps with half or a third of members elected or appointed at any one time. This is also common in overseas parliaments. The combination of these principles has important consequences. First, that members of the upper house have a longer perspective than their lower house counterparts. In particular it avoids all members being gripped at the same time with concerns about a coming election. Second, that there is a continuity of membership so that the culture of the house is maintained and it is never full of new and inexperienced members. Third, and connected my earlier point, an elected house chosen in parts would be less subject to sudden swings in public opinion and so far less likely ever to be dominated by one party. The same is true of an appointed house with party balance based on election results.

Another related principle, which is far more disputed, is whether members of a reformed second chamber should be subject to renewable or non-renewable terms. For some people its a basic democratic principle that elected members should be subject to recall by the public. How, these proponents argue, can members be held accountable to the electorate if they never have to face them again? Robin Cook felt this, and it was something that we argued about on several occasions. The counter argument simply takes a different view of the merits of accountability in the context of a second chamber. First, there is accountability to party leaders and the party machine. Although party leaders clearly have a great deal of control in our current system of appointment to the House of Lords, one benefit is that once you've been appointed you never have to face reappointment, so you can behave relatively independently. An element of independence would therefore be lost if reappointment or re-election were part of a new system. The second element of accountability is to the electorate, which is the principal concern of those who support re-election. But in our modern system this accountability tends to be demonstrated above all else through constituency work, which takes up a great deal of time of members of the House of Commons. It also takes up a great deal of time of members of the Scottish Parliament and Welsh Assembly, even where they represent large regional constituencies. This was unexpected when the devolved institutions were constructed, but demonstrates how entrenched the culture of constituency representation is in the British system.³ For all the benefits of constituency work, I think it would be very detrimental if this culture spread into the House of Lords, where members have traditionally been able to focus on other parliamentary priorities. Furthermore it would probably lead to a ramping up of constituency activity in the House of Commons, due to inter-party competition between members of the two houses at the regional level. This is what has happened between list and constituency members in the devolved institutions. It may be impossible to completely avoid such difficulties in an elected house, but the best way of minimising them would be to prevent re-election. In addition, as the Royal Commission and others have suggested, members departing the upper house should be barred for some time from standing for the House of Commons. This would avoid the kind of problems I saw in Ireland, where the Senate has become a training ground for aspiring MPs.

So to me, based on what I've seen here and overseas, long terms of office, continuity of membership, non-renewable terms, and inability to stand immediately afterwards for the House of Commons are all essential principles in a composition package for a reformed upper house. As

³ See J. Bradbury and J. Mitchell, (2007). 'The Constituency Work of Members of the Scottish Parliament and National Assembly for Wales: Approaches, Relationships and Rules'. *Regional & Federal Studies*, 17 (1), 1359-7566.

I've already said, the proportionality principle is also critically important. All of these can be delivered with either an elected or appointed house. All of them were given due credit by the Royal Commission, and all were reflected in the government's most recent White Paper, despite its different approach to the principle of election. But in negotiating a reform package, some compromises may have to be made. This is difficult because we may all hold some principles very dear, but we don't agree on which. For example, I'm on record as being sympathetic to the principle of elections for the upper house. This was one conclusion in my book, and is something that Robin Cook fought very hard for. But when the 2001 White Paper was being drafted, there was a last-minute change which I thought completely wrong. The paper had suggested terms of office of 10 or 15 years for elected and appointed members, with elections happening on a staggered basis. Suddenly, in the final draft, a proposal appeared that all elected members might be chosen together, on general election day. To my mind that would have been disastrous. I would have parted company with the reformers on this point, or similarly if somebody had suggested elections be on a majoritarian rather than proportional basis. So what I'm saying is that while we've spent a lot of time discussing the principle of election there are all kinds of other things that matter at least as much, and these may be equally problematic.

This of course means that the agreement reached in March is a lot more fragile than it looks. But before I turn to the prospects for reform, I'd like to turn briefly to the second question which is what the impact of a largely or wholly elected house would be, if we chose to have one. Of course, needless to say, this is all contingent on these other factors. But having said how important they are, I'd like to leave them to one side for just a moment.

International experience has something to teach us about the powers of elected and unelected chambers. There are many elected second chambers around the world, and their powers differ widely. At one extreme are the US and Australian Senates, which have absolute veto powers. At the other are the Austrian and Spanish Senates which can delay bills for only a couple of months. These kinds of simple factual observations were made by the government in its response to the Joint Committee on Conventions following its statement that an elected upper house would 'bring into question' the current conventions. But there's rather more to it than that. As I've already emphasised it's not just a chamber's formal power that matters. The power it asserts in practice depends on other factors including its party balance and the esteem in which it is held, as demonstrated by the greater willingness of this House over recent years to use its powers. And it also depends on even more fluid things such as culture, history and traditions.

So what would happen if here, in Britain, we exchanged the House of Lords for a largely or wholly elected house? Let's assume that all else remains the same, so the party balance in the chamber is roughly as it is now, it continues to include independent appointed members, there are long terms of office, and so on. Returning to my point earlier we would have the same two competing logics of representation that we have now - one majoritarian chamber and the other proportional - with the simple difference that the proportional chamber was underwritten by election. Some have suggested that such a chamber would claim to be more legitimate than the House of Commons. This is possible, but whether it was considered so would essentially be an argument about the competing merits of two different electoral systems. The first past the post system under which we have long been governed is a perfectly defensible system. It is based on each elected member being the representative of their own local area, chosen as a result of winning more votes in a local

contest than any other candidate. The House of Commons is the aggregation of all these local decisions, and the party that can command a majority there gets to govern. A proportional system used for the upper house, probably based on regional party lists, would also have a clear and defensible logic. That is that seats in the chamber should be shared proportionately between parties according to how votes are cast. Although the Commons is often criticised for its lack of proportionality, this is a different logic and has never been the basis on which it is chosen. There are, quite simply, different merits of these different kinds of electoral systems, and which you favour is determined by which characteristics you choose to value most.⁴

So if the second chamber was largely or wholly elected we would probably enter a period of sustained debate about the competing legitimacy of different electoral systems. This is essentially the situation in Australia, where people speak of ‘mandate wars’, with the governing party claiming a mandate despite being elected on a minority of the vote, while the parties holding the balance of power in the Senate claim a mandate to oppose certain legislation. Who would win this argument in Britain is open to question. If the second chamber continued to include some appointed members, and was elected in parts so it never had a wholly fresh mandate, this would obviously strengthen the hand of the House of Commons. But on the other side, it seems clear that the argument about proportionality has gained significant strength in recent years.

A key question is where the main political players would be in this debate. The most predictable position, and an important one, is that of the Liberal Democrats. Because of their commitment to proportional representation, they have long questioned the legitimacy of the electoral system for the House of Commons. Since they gained a pivotal position in this House, they have strengthened their assertions. For example last year Simon Hughes stated that ‘the government may have a majority of members in [the House of Commons] but it has a lower share of the vote than any majority government since 1832. It [therefore] has no justification for complaining that the House at the other end of the corridor should not do its job’.⁵ The Lib Dems favour elections to this House, obviously by a proportional system, and this would entrench their pivotal position. With an elected mandate, Lib Dem members of the second chamber (and probably members of other smaller parties) would surely further strengthen their claim, reminding the public of the government’s relative weakness if it was elected on a minority of the vote. In short, they would seek to undermine, with added vigour, the perceived legitimacy of the electoral system for the House of Commons.

Would they succeed? This is unknown, and depends on the position taken by other actors and the response of the media. The governing party, be it Labour or Conservative, would of course be inclined to defend the system by which was elected. But on the Labour side there are many doubters about the electoral system. If Labour found itself in opposition it would no doubt find common cause with Liberal Democrats in the second chamber to defeat a Conservative government, and many would claim that this was justified if it had been elected on, say, 40% of the vote.

⁴ For a discussion see A. Blau (2004). ‘Fairness and Electoral Reform’, *British Journal of Politics and International Relations*, 6: 165-81.

⁵ House of Commons Hansard 13 March 2006, col. 1259.

So I believe there is no doubt that the second chamber would seek, at least at times, to make greater use of its powers if it were largely elected. Would this matter? This really depends on the view you take about the proper role of the second chamber. I think it's perfectly defensible to say that the second chamber should have more power, and that the government should have to negotiate with a wider range of forces in order to get its legislation. There are downsides of this position, of course, but it is certainly defensible. This is essentially the situation that exists in Australia, which is obviously a stable and prosperous democracy. But there is a little nagging doubt. The extent to which the reformed Lords won the legitimacy argument would depend on the extent to which a stout defence could be made of first past the post. In Australia the electoral system for the House of Representatives is also stable, and there is no major movement to replace it with proportional representation. The supremacy of the House of Representatives is culturally well entrenched, despite the strong elected Senate. Here, in contrast, I think it's possible that the majoritarian system for the House of Commons would not survive under such sustained attack. Many of course would celebrate this if it meant the downfall of first past the post and its replacement by a proportional system. But the irony is that the two chambers would at that point become politically identical. This, as I cautioned earlier, is highly undesirable. So I personally find an Australian-style democracy quite attractive, and indeed think we are beginning to approximate one, but in its full form it's possible that it simply wouldn't be stable here. The only way to guard against instability would be for all parties to sign up explicitly to a settlement where the lower house continued to be elected on a majoritarian basis, which I very much doubt they would.

That was a bit of futurology, about where we could end up if we take a particular course. I'd like to end with futurology of a more immediate kind, by asking my last question, about the prospects for reform. Moving away from the principled to the pragmatic, what can really, honestly, be achieved?

I'm a lot less convinced than I used to be that large-scale reform is possible. At one level if Robin Cook couldn't do it, with his brain, what hope is there for anybody else? But more seriously, we've had an intense decade of debate about reform from which to learn, as well as being able to draw on older historical examples.

The current position is that the Commons has voted for an 80 or 100% elected house, but that can't be taken at face value for a number of reasons. First, the vote for a wholly elected house was clearly influenced by tactical voting. Anybody who's followed this debate over recent years would be able to spot some very unlikely names going through the division lobby in favour of an all elected house. This was clearly a spoiling tactic because the 80% elected option, which had already passed, was seen as dangerous. But even the 80% elected option looks pretty wobbly. The most obvious difficulty is that the Conservatives supported this position, but at the same time said that they were opposed to proportional elections. They haven't said what their alternative is, but if it's not proportional many in the pro-election camp would oppose it - quite rightly in my view. Once this factor is taken into account, the majority of 38 for an 80% elected house doesn't seem so decisive. Meanwhile, there is much disagreement on some of the other issues I mentioned, such as length of terms and non-renewability, so there are many ways in which a reform bill could fall apart. And I haven't even touched on the whole issue of powers, which the government is now inclined to open up. Suffice to say that there have been many controversial bills in the last century on House of Lords reform, but none have succeeded that deal with both composition and powers.

The only precedent we have, and it's not one that any government would wish to follow, is that of 1968. Even without tackling powers, I think a composition Bill would have such complexity, and so many controversial elements, that we could find ourselves in a similar situation.

The lesson from the past hundred years or so is that large-scale House of Lords reform doesn't happen. What does happen, sometimes, is small-scale reform on narrow points which are in practice unarguable. This certainly applies to the removal of the veto in 1911, the addition of life peers in 1958, and the removal of most hereditary peers in 1999. Furthermore, each of these reforms was seen at the time as inadequate and long overdue, but in retrospect was enormously important. Indeed all of them (even the removal of the veto) have proved in practice to strengthen the Lords.

Taking this, rather happier, precedent, what are the small unarguable points now? The most obvious is the position of the hereditaries. This is not a matter of the merits of the individuals concerned, but of the principle of how they enter the chamber. In our 2007 survey of members of the House we asked whether the remaining rights for hereditary peers to sit should be ended. Over 70% of members believe that they should. The most anomalous element of the current system is the by-elections, and the simplest change would just be to end them. Whether this is accompanied or not by giving all sitting hereditaries life peerages is less important.

Second, there are obviously serious questions about the appointments process for party members to the House. The 'cash for peerages' fiasco damaged Downing Street as well as damaging the reputation of this House. Our survey found that 91% of peers favoured putting the House of Lords Appointments Commission on a statutory basis. This is obviously desirable, but isn't really the main point. The biggest problem is that the Prime Minister continues to determine how many members are appointed to this House, when they are appointed, and the party balance between them. This, it seems to me, is totally unjustifiable. Furthermore, it is something of an albatross, as it can get the prime Minister in trouble. All major proposals that have envisaged party appointments continuing have sought to give control over these matters to the Appointments Commission, usually with party balance set according to some proportionality formula. A change of this kind could be introduced now if the Prime Minister chose to do so, by him simply surrendering his patronage powers. He could also choose to give the Appointments Commission some discretion over the choice of party appointees by requiring them to choose from 'longlists' provided by the parties. Such arrangements might initially be non-statutory, and could always be backed up by legislative change at a future date.

These are all changes that are difficult to argue with, and could be passed as the next interim steps to whatever the final destination of the House of Lords is thought to be. Like other 'interim steps' they might last decades, or we might be surprised and find they only lasted months. Either way, there seems to me a strong pragmatic case for making them. They would all, gently, enhance the reputation of the chamber.

If this is my conclusion, it is a bleak one? I've suggested that major reform is difficult and the best we can hope for is probably small steps. But lamenting our inability to proceed with wholesale reform is to ignore the importance of the reform that's already happened. As I've suggested, the Lords is a very different place to what it was pre-1999. It's far more confident, it's far more

plural, it's given new power to the third party and other actors to influence and negotiate outcomes, and it's having an important influence on policy. The 1999 reform has therefore changed the dynamics of British politics in important ways. Although its assertiveness has grown, the Lords continues to hold back from outright confrontation due to its lack of direct democratic mandate. A well-designed elected chamber might be stronger, but in many other ways would seek to emulate what we have now.

I'm end on a point that may seem trivial – having, I hope, convinced you that I am able to think about bigger things. As I say, the Lords has changed in some fundamental ways since 1999, but this remains almost invisible to the outside world, as the image of the chamber has not changed to reflect the new realities. No media story about the Lords is the complete without a picture of the assembled ranks of peers in ermine, taken from the day of the Queen's Speech. We never see views of the working House of Lords that exists for the rest of the year. This simply perpetuates the image that the chamber is unreformed. I know this is something that the Lord Speaker and others are trying to tackle, through persuasion, with the media. But – at the risk of sounding like a trivial moderniser – the image won't go away until it no longer exists. Far from being an easy little reform, changing the Queen's Speech would probably be a monumental task. But this, like the other things I've mentioned, could do a lot to boost the image of the House, and make it clear that it is a functional, useful, 21st century institution.

Lords Reforms since 1900. The House of Lords at the start of the twentieth century was an overwhelmingly aristocratic and, at least in principle, powerful and institution: The composition of the House was virtually the same as it had been for centuries, comprising the hereditary peers and 26 senior bishops of the Church of England. The only change had been the limited introduction of law lords in 1876. Except in respect of tax and spending, its legislative powers were equal to those of the House of Commons. With regard to tax and spending, it could not initiate or amend bills, though it Lords reform has been a key goal for the Lib Dems, and its failure raises coalition tensions. Nick Clegg said the coalition agreement was a contract between the coalition partners and the Conservatives had broken the contract by not honouring the commitment to Lords reform. What will the Lib Dems do now? Mr Clegg says his party will withdraw its support for boundary changes designed to cut the number of MPs from 650 to 600 and equalise the size of constituencies- a Conservative manifesto pledge. Constitutional reform is never easy at the best of times. This is not the best of times, with the many consequences of an economic crisis the overwhelming concern of voters. More importantly, major changes to the constitution can be introduced only from a position of unambiguous strength. Nick Clegg is not about to make his attempt to climb the political equivalent of Mount Everest from such a position. The recent past provides a warning. When he was made Leader of the House in 2001, Robin Cook was determined to reform the Lords, regarding it as his defining mission. He got nowhere in far more propitious circumstances. There were fewer economic distractions and Labour had won a landslide, at least theoretically pledged to reform the upper house.