

“IF IT ISN‘T BROKE...”

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Every discussion of the future of the Lords seems to start from the same premise. Even the critics make no significant proposal for change in the role, powers or expectations of the House. For all the talk of reform, there’s scarcely ever a word of criticism of what the Lords actually do, or of the way in which they do it. On the contrary, indeed – the House is perceived as an unique and indispensable component of our democratic legislature

“Something important is being said about democracy when the *only* legislative chamber to perform the functions that people expect – deliberation, revision, improvement – contained not a single elected politician”.² So said the late Hugo Young, shortly before his death, about the performance of Parliament on the hotly contested Anti-Terrorism Bill of 2001. Exactly the same could be said of a dozen Bills since then.

By contrast, the Commons have largely abandoned their law-making role. Sharply guillotined time-tables are now the order of the day. The verdict of one observant parliamentarian, Andrew Tyrie MP, speaks for itself: “It is unlikely that much would be lost”, he has written, “if Standing Committees were abolished altogether”*.³

¹ *Chancellor of the Exchequer (1979-83), Foreign Secretary(1983-89) and Deputy Prime Minister(1989-90)*

² *Guardian, 18 December 2001*

³ *Mr Blair’s Poodle, Centre for Policy Studies, 2000, p51*

Whether in scrutiny of legislation or in penetrating, well-mannered policy debates, the Lords' membership can, and does, deliver a huge diversity of independent-minded expertise. A typical NHS debate, for example, featured two Deans of Medical Schools, a dentist, a former GP, two Consultants, Professor of Nursing, the President of Mencap and former director of Age Concern.⁴ Almost any other subject would normally attract a comparably qualified cast.

Unlike the Commons, the Lords cannot – by a “no confidence” motion - get rid of the Government. But nor can the Government – by calling a General Election – get rid of the Lords. So they have to, and do indeed, take each other very seriously. The frivolously labelled “ping-pong” procedure (of passing a controversial question to-and-fro between the two Houses) is anything but a game. The Government is being obliged, by this process, to judge just how far the Commons can be expected to accept the considered opinion of the other House.

It is important to understand that it is opposition expressed by “the Upper House” in this way that provides far and away the most effective – indeed almost the only – means of challenging the incestuous partnership, which generally subsists between the Executive and the whip-dominated House of Commons (Quintin Hailsham's “elective dictatorship”).

What is the distinctive character of the Lords, which enables the House to exercise such authority? This springs from two features. First, the convention – quite recently evolved and respected by all parties – that no single party (and least of all the Government) should have a majority in that House. And second, the fact that no membership of the House of Lords is dependant upon election. Hence the much greater independence even of party members.

⁴ *Hansard, House of Lords Debates, 21 November 2001*

Yet still the case continues to be made for replacing some or all of today's appointed peers with elected members. For what reason? No-one suggests that this will enable the Lords to work more efficiently, more wisely, more effectively or more cheaply (on the contrary – the average MP costs the taxpayer about five times as much as an average Peer).

Nor does anyone suggest that the impressive diversity of experience and expertise that is to be found in the present House could possibly be matched, if peers were required, in the words of one "reform" group of MPs, "to subject themselves to the electoral process". The Wakeham Commission, which examined the alternatives some seven years ago, concluded that elections "seldom deliver results which are gender-balanced, or provide appropriate representation for ethnic, religious or other minorities". Moreover, they are "unlikely to produce members who are able to speak directly for the voluntary sector, the professions, cultural and sporting interests and a whole range of other aspects of society".

So we come now to consider what is probably the central argument, namely that the current Upper House lacks "legitimacy" – and can, therefore, be easily disregarded, particularly by ministers – simply because of its unelected basis. There are two answers to that simple proposition, which require separate consideration.

First it is necessary – however controversial it may seem at first sight – to challenge the presumption that legislators who are chosen by universal suffrage are to be regarded as enjoying (either themselves or through the Government which they support) a monopoly of instant and unchallengeable authority. There are, and have always been, good reasons to hesitate before accepting that proposition. One of these was well expressed, at the time of enactment of the "Great" Reform Act of 1867 (Disraeli's "Leap in

the Dark”), by none other than the great Walter Bagehot himself: “I can conceive of nothing more corrupt”, he said, “than that two combinations of well taught and rich men should compete for the support of the working man and promise to do as he likes, if only he will tell them what it is”. This nineteenth century perception of the hazards of what we might now call focus group politics – of a democracy which prefers to be fed and not led – may be seen as offering good reason for an all-elected legislature to be prompted, even obliged, to have second thoughts about some of its decisions.

More recent experience suggests that the electorate may themselves be coming to share that view. The late Robin Cook, himself no slouch in the championship of democracy, drew attention⁵ (not long before his death) to “the remorseless erosion of esteem for Parliament among the electors”, identifying as “the most visible measure of disaffection...the alarming drop in turnout...” and spelling out “the disconnection between electors and elected”. We should not, therefore, be surprised by a later comment of Peter Riddell’s that “representative democracy is on the defensive, if not on the retreat”.⁶

The second reason for challenging the crude perception that the House of Lords, as at present constituted, “lacks legitimacy” is that it fails entirely to take account of the huge changes made, over the last hundred years, in the once hereditary Chamber, which the Asquith government pledged itself, in 1911 to make more democratic.

First, in 1958, came the invention by Harold Macmillan of life peerages. More than 1000 such creations since then have heavily diluted the (“non-democratic”) aristocratic flavour of the then House. Even more decisive in shifting the balance of the

⁵ *The Independent*, 18 July 2003

⁶ *The Times*, 8 January 2004

arguments have been the changes made by the Blair government since 1997.

Most important has been the removal of the great bulk of the hereditary peers. Out of some 652 who were there in 1997, only 92 have been allowed to remain – and then only for life. This major change instantly, and decisively, disposed of the three most “undemocratic” features of the former House: heredity is no longer a passport to membership; there is no longer a (permanent) hereditary majority; and most important of all, no longer an in-built Tory majority.

One other significant change has taken place in the last nine years – and this too with all-round consent. No-one has challenged the Prime Minister’s appointment of some 156 additional Labour life peers (alongside a smaller number from the other parties – 109 in all) so as to give Labour, for the first time ever, about the same total membership as the Conservatives.

The House has thus been totally transformed. Neither major party now has more than 30 per cent of the membership. The remaining 40 per cent consist of Lib-Dems or Cross-benchers. Theirs are generally the crucial votes that determine the outcome.

Party arithmetic is far from being the only factor that counts. For one other significant feature of today’s House is the growing independence of judgment – in any case an instinctive consequence of expertise and experience, even for peers who are party members.

No longer dominated by a majority of backwoods’ hereditaries, the Lords have (as Baroness Margaret Jay, then Leader of the House, predicted when she was expelling the hereditaries) been gaining confidence. In the four years 1997-2001 the Government suffered 169 defeats in the Lords – and in the six years 1999-2005

(most of the hereditaries were expelled in 1999) the figure was as high as 293. A significant number of these defeats were of course, reversed in the Commons – but of those suffered in the last six years almost four out of ten have survived on to the statute book. The most dramatic display of growing Lords’ confidence came on the Prevention of Terrorism Bill 2005: a total of 18 government defeats, one by a majority of 187 votes (including those of a former Labour Lord Chancellor, Lord Irvine, and Attorney General, Lord Morris of Aberavon). This division would have been lost by the Government even without a single Conservative having troubled to vote! It is worth noting that the great majority of government defeats since 1997 have been inflicted on those issues, which are of the greatest general interest – namely the guarantees of our freedom under the law.

One very useful consequence of this more frequent exercise of power by the Lords has been the consequent opportunity to measure reactions to the change not just by the general public but also by members of both Houses of Parliament. Surveys conducted under the direction of Dr Meg Russell and published by UCL’s Constitution Unit⁷ offer some important insights. A majority of both Houses (including three-quarters of Labour MPs) and of all groups of voters now agree that the House of Lords has grown in legitimacy as a result of the (far from insignificant) changes already made.

When it comes to the Lords blocking a Bill (or part of it) a majority of the Commons (and of Labour MPs), 80 per cent of the Lords and two-thirds of the public think it legitimate for the Lords to block a Bill which has little support. A large majority of peers (including 70 per cent of Labour peers) believe that the Lords has had a valuable impact on policy in recent years – and no more than

⁷ *Papers presented to a seminar in the House of Lords, 12 December 2005; and M. Russell and M. Sciara, “The House of Lords in 2005: A More Representative and Assertive Chamber?”, The Constitution Unit, U.C.L., February 2006*

22 per cent even of Labour peers (only 8 per cent of the whole House) believe that the formal powers of the House of Lords are too great.

Some people will, I dare say, have been surprised by what these figures tell us about the present membership of the Lords. For my part I find them strikingly indicative of the openness of mind with which most of my colleagues (on all sides of the House) approach most questions.

For when one speaks in today's Lords chamber, with the built-in Tory (and hereditary) majority removed – on whatever the issue – one is very conscious of the presence of an unpompous, and generally rather expert, jury of one's countrymen (and women) – mainly sitting on the crossbenches. One has the feeling that, more even than most of the rest of the House, they embody the largely non-partisan instincts of the great bulk of our population. I feel as though I am addressing a national jury.

Yet interestingly enough, when one comes to evaluate the relationship between this House and “the other place” – the House of Commons – there is really no doubt about the balance of authority. The Lords (although addressing each other like members of a jury) are really closer, in that context, to playing the role of the trial judge. For it is for the Lords to distil the technicalities, to analyse the evidence as objectively as possible, to clarify and present the important issues (on some occasions not just once, but two or three times) for final decision by the other House. There can be no doubt that, at the end of the day, it is for the Commons to have the last word.

This is the critical balance that would inevitably – indeed deliberately – risk being disturbed, if the Lords too were to be elected, so that *both* Houses might plausibly claim equal

legitimacy. As a consequence, the risk of gridlock between the two Houses would certainly be seriously increased.

This has been identified, even by those who favour elections to the Lords, as involving a possible claim by the Upper House to “too much” legitimacy. This in its turn leads to proposals for curtailment of the power of the Lords, which would, as the surveys show, be opposed by members of all parties in that House. This is yet another illustration of the risk of unintended consequences. So-called reforms all too often destroy the balance of arrangements, which have for years before been satisfactorily handled in accordance with well-understood conventions.

It is perhaps worth contemplating, for a moment, one other possible consequence of providing for the election of some members of the Lords. The idea springs from the work of those who conduct the Hansard Society’s annual audit of political engagement. For this points to the spread of what can only be described as “voter fatigue” – the kind of reaction, which has delivered increasingly low polls in elections and referenda alike. Dr Declan McHugh has pointed out, for example, that elections to the boards of new NHS Foundation trusts in 2004 saw failures even to register more than a small fraction of potential voters – and, in the case of the Bradford Trust, for example, an actual poll of less than one per cent!⁸ If people are becoming, as seems possible, disenchanted with the whole electoral process, it may not be very profitable to multiply their opportunities for ignoring the process. If elections to the Lords – organized, quite probably on the basis of a list system – were to suffer in this way, it would be yet another means of reducing the authority of an institution that seems today to be functioning with growing confidence. Who knows?

⁸ *The House Magazine*, 27 February 2006

This is not, of course, to argue that no changes are necessary in present arrangements. If elections are to be ruled out, then there is a clear need to ensure the integrity and efficiency of each and every aspect of the nomination procedures. The “cash for peerages” row has underlined this need – by showing just how easily the reputation of a well-established institution can be tainted by isolated examples of misbehaviour. Fortunately, for this problem too, sensible proposals had already been made by the Wakeham Commission.

The central proposition is that *all* nominations for the Lords should be made through, and vetted for propriety by, a clearly independent, statutory Commission – itself accountable to Parliament. The size and political balance of the House of Lords, which the Commission should have to deliver, would need to be clearly indicated. So too the need for diversity (and a fair regional spread) of membership.

Although the political balance would need to take some account of shifting electoral figures, I should not myself expect the general shape to be very different from the present. Certainly arrangements would need to be made for a substantial but gradual reduction of the total membership, from the present “high” of 724. This should involve the establishment of an orderly, but flexible, “retirement” scheme, to take effect over a period of years.

Several other questions, which have been reviewed many times, would need to be resolved. For example, notwithstanding the soon-to-be-established independence of the Supreme Court, I should myself still like to see the continuing presence of (preferably all) retired “Law Lords”. So too I should see a continuing role for some of the Anglican bishops, alongside comparable representatives of other churches and other faiths.

But I should not expect to see any significant change in either the functions or the powers of the Lords. Nor, I think, would more than a handful of colleagues in the House. If there is so much, and such widespread, contentment with those and other aspects of present arrangements, why not a similarly respectful approach to all the rest?

If it isn't broke, why fix it? Why on earth not leave well alone?