

JUSTICE ANNUAL LECTURE 2001 : 'THE EVOLVING CONSTITUTION'

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Viewed in retrospect, the half century which followed our victory in 1945 was a period of unusual constitutional quiescence. The powers of the House of Lords were, it is true, further curtailed by the Parliament Act 1949, and the House was given a blood transfusion by the Life Peerages Act 1958. Fifty years of devolved government in Northern Ireland were brought to an end, for reasons unhappily all too familiar, by the Northern Ireland (Temporary Provisions) Act 1972. The Greater London Council was established by the Local Government Act 1963 and abolished by the Local Government Act 1985. The European Convention was ratified in 1951 and a right of individual petition granted in 1966. Many former colonial territories became independent states, mostly within the Commonwealth, with their own, usually entrenched, constitutions. But most of these changes were seen as events of political rather than constitutional significance, if seen as significant at all. None of them aroused the passion, or made the impact on the public, or gave the sense that fundamental features of the constitution were at stake, which characterised the struggle over the House of Lords' powers in the early years of the century, or the long battle over Irish Home Rule from 1883 onwards, or the campaign to enact the great Reform Act of 1832. It seems plain, looking back, that the change of greatest constitutional significance during the period was our accession to the European Economic Community by the European Communities Act 1972, but at the time this was seen by most, and perhaps

offered to the public, more as a political and economic change than a constitutional one.

It may be this long period of inertia which contributed, in part at least, to the flood of constitutional legislation released by the Blair government after the 1997 election. The Prime Minister himself, still in opposition, described this as “the biggest programme of change to democracy ever proposed”,¹ and a more objective commentator, Professor Robert Hazell, has described Labour’s constitutional reform programme as “the major achievement of their first term”.² To have enacted 11 statutes of constitutional significance, in some cases major significance, in the first legislative session of the new Parliament is indeed a striking record – an exercise on which, perhaps, only a fresh and energetic government, unconstrained by long experience of office, would ever have embarked. But the process of constitutional change is by no means complete, as the government itself would be the first to assert. So it is perhaps a good moment to think a little about the constitution as it evolves, in a neutral, objective, unprescriptive and, at this stage, necessarily tentative way.

With reference to reform of the House of Lords the government has more than once asserted that “there is no intention to begin from first principles”.³ One can understand the opposition response in the Lords: “Can that really be true? After all, where else would one begin?” But one can also

¹ Speech to Labour Party Conference, 4 October 1994.

² *Unfinished Business: Implementing Labour’s constitutional reform agenda for the second term*, (May 2001), Constitution Unit (UCL). In preparing this lecture I have relied very heavily on the admirably accurate, comprehensive and objective publications of the Constitution Unit (hereafter “CU”).

³ Cabinet Office briefing quoted by Lord Strathclyde, HL Hansard, 21 June 2001, col. 52, repeated by the Leader of the House in a letter to *The Times*, 24 August 2001.

understand that we have to start from where we are. Even the fathers of the American republic who gathered in Philadelphia to prepare the constitution of the United States did not have a clean sheet of paper before them.⁴ The sheet before us has 1000 years of history written on it.

But it is surely salutary, in considering any change or proposed change, to bear in mind the first principles which underlie, or should underlie, the constitution of a modern, liberal, democratic state governed by the rule of law such as we aspire to be. For first principles are by definition basic principles and provide a touchstone – not a conclusive test, but a touchstone – in deciding whether a reform or proposed reform points in the right direction or a wrong one.

Any interested and reasonably intelligent citizen could no doubt amuse him - or her - self by formulating the first principles which should underlie our constitution. I shall myself put forward three such principles, accepting of course that additional and probably better principles could be formulated. Mine may provoke dissent, or qualifications other than those I shall myself make. They may on the other hand strike everyone as obvious and platitudinous beyond endurance: if so, I am unabashed since it is in the nature of a first principle to be obvious and platitudinous. Let me state these, as I hope unstartling, principles.

First: decisions affecting the life and activities of the citizen should generally speaking be made at the lowest level of government consistent with

⁴ See, for example, *The Federalist* no 15 (Hamilton): *The Insufficiency of the Present Confederation to*

economy, convenience and the rational conduct of public affairs. This is plainly akin to the European principle of subsidiarity. But I am not sure that the notion of subsidiarity applies at any level below that of the member state, and in any event this expression has acquired certain nuances which are irrelevant for present purposes. So I shall call this “the devolutionary principle”.

Secondly: the legislature should broadly reflect the opinion of voters, including those in a significant lawful minority. I shall call this “the representative principle”.

Thirdly: the laws of the land should be justly administered by judges and magistrates who are and are seen to be separate from and independent of both the legislature and the executive. I shall call this “the principle of judicial independence”.

I would like, inevitably briefly, to touch on some aspects of these principles in the context of our evolving constitution.

(1) The devolutionary principle

While there is endless scope for argument about the application of this principle – what powers should be devolved and to what level? – I doubt if any rational person would challenge the principle as such. It would be obviously absurd if the central government were to concern itself with (for instance) local

refuse collection, and equally absurd – although it is not so long since certain local authorities declared their areas to be nuclear-free zones – if (say) foreign policy and defence were not conducted by the central government. So the problem is where to draw the line, or lines. The devolutionary principle as I have expressed it is, I think, the ethical principle which underlies any federal or quasi-federal structure, and it recognises what I take to be a fact of political life: that the further removed from the citizen a government is, the more bureaucratic and out of touch with local problems the citizen tends to perceive it to be. The usual British perception of the not very swollen bureaucracy in Brussels illustrates the point.

It would seem clear that the devolutionary principle provides the rationale of the Government of Wales Act 1998, the Scotland Act 1998, the Northern Ireland Act 1998 and – although it is somewhat different – the Greater London Authority Act 1999. The bodies established by these Acts are still of course in their infancy, and I shall not attempt to summarise the differing and complex statutory provisions which govern them, a task already admirably done under the auspices of the Constitution Unit at University College London.⁵ I would make four points.

First, in each of Scotland, Wales, Northern Ireland and London the representative body is elected for a fixed term of four years, subject in Scotland and Northern Ireland to earlier dissolution on a two-thirds vote of members. This provision contrasts with the five-year maximum which obtains at Westminster. Of the 15 governments which have completed their terms

⁵ *The State and the Nations* ed R. Hazell (2000, CU).

since 1945, only five have run for approximately five years and in these cases the government in power at the end of that time either lost (as in 1964, 1979 and 1997) or won with a greatly reduced majority (as in 1950 and 1992). Of the governments which served a term of around four years, five were comfortably re-elected. One possible inference – there are others – is that after about four years the public want an opportunity to vote again. If so, a fixed four-year term subject to earlier dissolution on a vote of no confidence would offer a possible solution.

Secondly, the parliament in Scotland and the assemblies in Wales, Northern Ireland and London are elected under a system of proportional representation, although the form of PR used in Northern Ireland is different from that in Scotland, Wales and London. I take these provisions to reflect what I have called the representative principle. The predictable effect of PR was to reduce the prospect of one-party government. In Scotland it has led to a coalition, in Wales to a minority administration at risk if its opponents combine against it. In Northern Ireland, coalition is a cardinal feature of the devolved settlement. Disraeli's much-quoted observation that "England does not love coalitions", if accurate at all, should now perhaps be read rather literally. It may be that the practical operation of the devolved bodies, elected by PR, will yield lessons applicable to Westminster elections: the government's intention is to review the working of the new systems in Scotland and Wales and then assess whether changes might be made.⁶

⁶ *Labour Party Manifesto* (2001).

Thirdly, in neither Scotland nor Wales have the devolved institutions enjoyed a trouble-free début. In both countries they have been the subject of strong media criticism. In both, as polls show, the expectations of the public have been disappointed. But in neither country has the devolved administration shown itself to be a compliant tool of Westminster or Whitehall. The Scots took an independent line on tuition fees, and made a more generous settlement for teachers' pay. The Welsh threw off the leadership of a man seen – rightly or wrongly – as insufficiently independent of central government, and negotiated a grant outside the Barnett formula to match EU structural funds. The Mayor of London has taken his own line – right or wrong – on the future of the underground. There has been strikingly little strife between the parties. And, perhaps most significantly of all, the sense of public disappointment in Scotland and Wales has led, not to calls for the whole devolutionary experiment to be scrapped, but for increased powers to be granted to the devolved institutions. A similar plea has been heard in London. On present evidence – and I here leave aside Northern Ireland, as a special case – it would seem more likely that the devolution settlement will be extended than that it will be revoked or wither away.

My fourth point is this. Dicey's opinion was that federal government tended to be weak, conservative and legalistic.⁷ He would, I think, have expected the quasi-federal system which we now have to show the same characteristics. It is much too soon to judge whether it will. But it may be that government founded on a cross-party consensus will prove to be strong.

⁷ *The Law of the Constitution* (5th ed) at pp 162, 164, 166.

Early indications do not suggest undue conservatism. And we have to hope that the system is not discredited by objectionable legalism.

What then of England? Stands England where she did? The questions are pertinent, since England has been described as “the gaping hole in the devolution settlement”⁸ and the present arrangements in England as “inherently unstable”.⁹ Further change in the regional arrangements for England has been described as “inevitable”.¹⁰

One manifestation of the English problem, as it has been called, is at Westminster. In the light of the devolution settlement the over-representation of Scotland and Wales becomes harder to justify. The future of the territorial secretaries of state has become problematical.¹¹ There is an obvious lack of symmetry in an arrangement which prevents English MPs voting on a large range of matters devolved to Scotland but permits Scottish MPs to vote on the same matters relating to England. It is even more asymmetrical that while the people of Scotland, Wales and Northern Ireland, accounting between them for 15% of the population of the United Kingdom, enjoy the benefit of devolved institutions, no similar benefit is enjoyed by the 85% of the population who live in England. The point has been made that if Scottish, Welsh and Northern Irish MPs were to be denied, or were by convention to abjure, the right to vote

⁸ R. Hazell, *An Unstable Union: Devolution and the English Question*, State of the Union Annual Lecture (CU) 11 December 2000, at p 7.

⁹ John Mawson *Whitehall, Devolution and the English Regions*, July 2000, quoted by Hazell in *An Unstable Union* at p 7.

¹⁰ By Lord Dearing, quoted by Hazell, *An Unstable Union*, at p. 7.

¹¹ R. Hazell, *Three into One Won't Go: the Future of the Territorial Secretaries of State* (CU), March 2001.

on purely English legislation, a government might have a majority in the British but not in an English Parliament.¹²

It may be – I express no view – that some of these problems are more theoretical than practical. Constitutional arrangements which develop organically tend to be asymmetrical but may still work. For 18 years a government with nothing approaching a majority in Scotland legislated for Scotland, and I recall no protest by English MPs. If on a matter dear to English voters, applying only to England and opposed by a majority of English MPs, legislation was carried by Scots, Welsh or Northern Irish votes, there would no doubt be an outcry and a demand for change, but the parliamentary arithmetic would not seem to make that a very likely event, for the foreseeable future at least. The more interesting, and still open, question is whether the time is coming when a greater measure of devolution should be extended to the English regions.

Here, there has been change. In 1994 there were established Government Offices in eight artificially created English Regions: the North-East, the North-West, Yorkshire & Humberside, the East Midlands, the West Midlands, the South-West, the East of England and the South-East. Their essential function was to represent central government locally, particularly in the fields of transport, the environment, employment, and trade and industry. The Labour Party, in its 1997 manifesto, proposed to establish Regional Development Agencies in the eight regions, to co-ordinate economic development, help small business and encourage inward investment. This

¹² Mark Sandford and Paul McQuail, *Unexplored Territory: Elected Regional Assemblies in England*

was duly done under the Regional Development Agencies Act 1998. The boards of RDAs now comprise around 13 members drawn from local authorities, the private sector, education, trade unions and regional quangos.¹³ It was also proposed in 1997 to establish regional chambers to co-ordinate transport, planning, economic development, bids for European funds and land use planning. It was recognised that the demand for elected regional government varied across England, but “in time” legislation would be introduced to allow the people, region by region, to decide in a referendum whether or not they wanted elected regional government. Arrangements for elected regional assemblies would be made only where clear popular consent was established.

In the event, regional chambers (or “regional assemblies” as they style themselves) have been set up. They have between 35 and 117 members, a majority of whom are elected local authority representatives and about one-third drawn from business, trade unions, voluntary organisations and other interests.¹⁴ They have been designated under the Regional Development Agencies Act 1998, which obliges the RDAs to take account of their comments on the RDAs’ Regional Economic Development Strategy. But the regional chambers’ statutory existence has been described as “slim” and their budgets as inadequate, even for the discharge of their limited functions,¹⁵ and there has as yet been no referendum to test the state of public opinion in any of the regions. The people of England have not spoken yet. But they have, it seems, begun to murmur.

(CU), July 2001 at p. 32.

¹³ John Tomaney, *The Regional Governance of England*, in *The State and the Nations* (ed. R. Hazell), at p. 127.

The Campaign for a North East Assembly was founded in 1992 to campaign for directly elected regional government. After the 1997 election a North East Constitutional Convention, chaired by the Bishop of Durham, was set up, in conscious imitation, as one would suppose, of the constitutional convention which the Scots set up in 1988 to prepare the way for Scottish devolution. It is perhaps unsurprising that the North East should emerge as the pioneer of administrative devolution to the regions, being the area furthest from London and closest to Scotland. And it has the strongest of all motives: a sense of grievance at the allocation of public expenditure. As Lord Barnett, the author of the formula which bears his name, has pointed out:

“In the north-east, GDP per head was 13 percentage points below Scotland in 1997, but government expenditure per head was not higher – it was 19 percentage points lower.”¹⁶

But the North East does not stand alone. Constitutional conventions have also been set up for the North West, Yorkshire, the West Midlands, the South West and Cornwall. So far, the constitutional conventions from the North East and the North West have published proposals for elected assemblies.¹⁷ The North West propose regionalised representation in the House of Lords.¹⁸

“England”, it has been said, “is the space where everything is still to play for”.¹⁹ But do the people want to play? No one can yet be sure. Any attempt to introduce elected regional assemblies would plainly be futile and

¹⁴ Tomaney, *op cit.*, at p. 129; sandford and McQuail, *op. cit.*, at pp. 30, 62.

¹⁵ Sandford and McQuail, *op. cit.*, at p. 30.

¹⁶ Quoted in Hazell, *Intergovernmental Relations: Whitehall Rules OK?*, in *The State and the Nations* (ed. Hazell) at p. 178.

¹⁷ Sandford and McQuail, *op. cit.*, at p. 31.

¹⁸ *Ibid.*

self-defeating unless there is a clear popular demand. And such a demand must show a reasoned justification, whether in terms of enhanced local democracy, or improved economic management, or on other grounds. A recent report by Mark Freedland and Paul McQuail has authoritatively examined the wide range of issues to be considered and resolved.²⁰ At this stage I would venture only three tentative conclusions:

(1) it appears that the level of interest in and enthusiasm for elected regional assemblies varies considerably from one region to another. But

(2) the somewhat artificial boundaries of the regions as currently drawn do not necessarily raise an insuperable objection. It is of course true that none of the English regions is, like Scotland and Wales, a historical entity, the successor to a nation. But that is true of some of the regions now exercising devolved powers in our largest European neighbours, France, Germany, Spain and Italy.²¹ It is even more true of those oblong states which fill much of the American Mid West, more or less arbitrarily drawn but over time engaging the loyalty of their citizens. The boundaries of the South West region are nonetheless a source of controversy. It has been pointed out that Moreton-in-Marsh on its eastern extremity is closer to Newcastle-upon-Tyne than to Land's End at its western extremity. A Cornish constitutional convention is already in being. If Cornwall itself does not become a region, somewhat more than 20,000 Cornish persons may wish to know the reason why. But if it does, what has become of regionalism? Cornwall on its own

¹⁹ Hazel, *An Unstable Union: Devolution and the English Question*, at p. 7.

²⁰ *Unexplored Territory: Elected Regional Assemblies in England*.

²¹ Sandford and McQuail, *op. cit.*, at pp. 39, 54.

would be a small region. At present, the population of the least populous region (the North-East, at 2.6 million) is something over a quarter of that of the most populous (the South-East, at 8 million). But disparity between the size of regions is not necessarily a conclusive objection. The ratio of the smallest to the largest region in Germany and Spain is 1:25, in France 1:15, in Italy 1:50.²² There is also, in Europe, a very wide divergence between the proportions of total public expenditure which is controlled by the regions, from 2% in France to 25% in Germany and Spain.²³ Thus

(3) if there were to be effective devolution to the regions, a very wide range of choices would have to be made, not only concerning boundaries (although these would doubtless be the subject of controversy) but also and more importantly concerning powers, numbers, relations with existing organs of local government and, above all, the overriding questions of how the regional administrations would be financed and what, if any, tax-raising powers they would have.

(2) The representative principle

I defined this to mean that the legislature should broadly reflect the opinion of voters, including those of a significant lawful minority. *The Report of the Independent Commission on the Voting System* (“the Jenkins Commission”) pithily expressed the same principle:

²² Sandford and McQuail, *op. cit.*, at pp. 40, 37.

²³ *Ibid.*, at p. 39.

“Fairness to voters is the first essential. A primary duty of an electoral system is to represent the wishes of the electorate as effectively as possible.”²⁴

The main qualifications to the principle are familiar. Those elected should exercise their judgment in the interests of their constituents and not act as mandated delegates. It is reasonable to require a certain level of support before parliamentary representation is achieved, to avoid the proliferation of small, perhaps single-issue, parties. Representation may properly be denied to those adopting non-democratic methods. I do not think these qualifications are controversial.

Since the House of Commons is the central institution of our democracy, one would perhaps expect the system employed for elections to it to be closely based on the representative principle. Whether the simple majority system used for elections to Westminster – unlike elections to the devolved institutions and the European Parliament – gives fair effect to the principle is of course very controversial, and (as already noted) the subject of deferred decision.

Those who advocate change to a more proportional system draw attention to a number of anomalies and disproportionate results yielded over the years. In 1945 the Labour Party obtained 12 million votes and won 393 seats. In 1950 that party won 1 ¼ million more votes but won 78 fewer seats. In 1951 it won its highest ever percentage of the poll and its

²⁴ CM 4090-1, October 1998, at p. 2, para. 6.

highest ever number of votes. The Conservatives won a quarter of a million fewer votes but gained a majority of 26 seats over Labour. In February 1974 the Conservatives had an advantage of 0.7% - a quarter of a million votes – but won fewer seats than Labour. But the main losers were the Liberals, who won more than half as many votes as Labour (6 million) – amounting to 19% of the vote – but only 2% of the seats. In October 1974 the Liberals suffered again: their 5.3 million votes were more than half those of the Conservatives, but yielded 13 seats against the Conservatives' 277. In 1983 the 25.4% of the vote won by the Alliance achieved only 3.5% of the seats. In 1997 the Labour Party won 63.6% of the seats with 43.2% of the vote, the Liberal Democrats 7% of the seats on 16.8% of the vote. In Scotland, Wales and almost all the major provincial English cities Conservative representation was eliminated, despite the winning by the party in these areas of 1.8 million votes, 17% of the total. In the general election this year, Labour won 62.7% of the seats on 40.8% of the UK vote.

Those who resist change to a more proportional system suggest, no doubt rightly, that any voting system may on occasion yield an anomalous result. But they would claim that the simple majority system now operated has the virtue of yielding clear outcomes, which make for strong government by a single party and the avoidance of coalitions paralysed by internal dissension and the need for compromise. The Jenkins Commission, reviewing the history of the last 150 years, has questioned that contention. For 43 of those 150 years Britain has been governed by an overt coalition. In addition there have been 34 years in

which the government of the day was dependent on the votes of another party or parties. For another nine years the government of the day, while commanding a majority, nonetheless enjoyed so narrow a majority as to give it no certainty of success in the division lobby. Thus in only 64 out of the last 150 years has a single-party government enjoyed undisputed command over the House of Commons.²⁵ Any decision on the appropriate voting system must, I need hardly say, be a matter of political and democratic, not legal, decision. Whether the quality of government during that period of 64 years was so markedly superior to that during the balance of 86 as to justify the present system will be a proper matter to consider when making that decision.

The House of Lords in its historic hereditary form paid little respect to the representative principle. So it is not surprising that the preamble to the Parliament Act 1911 should have indicated an intention to substitute a popular for a hereditary chamber, although recognising that such a substitution could not “immediately be brought into operation”. Eighty-six years later, in 1997, the Labour Party in its manifesto undertook to end the right of hereditary peers to sit. This was to be the first step in a process of reform to make the House of Lords “more democratic and representative”. The House of Lords Act 1999 largely achieved the first of these objectives. The second awaits accomplishment. A star-studded Royal Commission on the Reform of the House of Lords, chaired by Lord Wakeham, has reported.²⁶

²⁵ *Op. cit.*, at p. 13, paras. 45-47.

As it now stands, the House of Lords has a number of features which make it unique, or if not unique, unusual, in comparison with second chambers elsewhere. I draw attention to ten such features.²⁷

(1) It retains a hereditary element. Only the upper houses in Belgium and Lesotho, and the single chambers in Zimbabwe and Tonga, have this feature.²⁸ There are now only 92 hereditary members of the House of Lords. But this is not an insignificant number. There are, after all, only 100 members of the United States Senate.

(2) Although, pursuant to the 1999 Act, the nominal membership of the House has been drastically reduced from its former total of nearly 1300, its current membership of around 700 is exceptionally large, both absolutely and relatively. Of 20 second chambers considered by Meg Russell in her superb study *Reforming the House of Lords: Lessons from Overseas*, none is as large.²⁹ The Italian Senate, with a membership of around 326, comes closest. Ours is also one of only three countries (the others are Kazakhstan and Burkina Faso) where the second chamber is bigger than the first.³⁰ This point is the more striking since some consider the House of Commons itself to be unduly large: the late Sir Robert Rhodes James, for example, with his long experience both as clerk and member, considered that the membership of the House of Commons should not

²⁶ *A House for the Future* CM 4534, January 2000.

²⁷ I have derived immense benefit, and have relied heavily, on Meg Russell, *Reforming the House of Lords: Lessons from Overseas* (CU) OUP, 2000.

²⁸ Russell, *op. cit.*, at p. 30.

²⁹ *Ibid.*, at pp 26-28.

³⁰ *Ibid.*, at p. 25.

exceed 500.³¹ If the House of Lords were half the size of the current House of Commons, it would still be the largest second chamber in the world.³²

(3) There is no minimum age for membership (other than the former age of majority), no term of office and no retirement age. Many second chambers have a minimum age of 30 or more.³³ In most the members serve for a specified term, often longer than in the first chamber. In Canada, where senators do not serve for a specified term, there is a retirement age of 75.³⁴

(4) In contrast with members of almost all other second chambers, members of the House of Lords are effectively unpaid, nor do they enjoy the administrative support made available, for instance, to French and Australian senators.³⁵

(5) Apart from 92 surviving hereditary peers, all members of the House of Lords have been appointed (26 of them, of course, as lords spiritual). In no western industrialised country except Canada is such reliance placed on appointment. Most second chambers are very largely filled by election, whether directly or indirectly.³⁶

³¹ “Some Thoughts on Parliamentary Reform”, in *Constitutional Reform in the United Kingdom: Practice and Principles* (Centre for Public Law, University of Cambridge).

³² Russell, *op. cit.*, at 296.

³³ Russell, *op. cit.*, at p. 33.

³⁴ Russell, *op. cit.*, at p. 32.

³⁵ Russell, *op. cit.*, at pp 116-117. Members of the German Bundesrat are not paid as such, but already receive salaries as ministers of the Länder which they represent.

³⁶ Russell, *op. cit.*, at pp 29-31.

(6) While members of the House of Lords are drawn from all parts of the United Kingdom, the House is unusual in its lack of any formal representation of the constituent territories of the nation. The United States Senate, giving equal representation to Wyoming with under half a million inhabitants and California with nearly 30 million is perhaps the classic example of territorial representation. Here, with the disappearance of Scottish representative peers, territorial representation may even be said to have diminished.

(7) Traditionally, as is well known, one party in the House of Lords enjoyed a permanent majority. Despite the changes made, more peers continue to take the Conservative whip than any other, although Labour and Liberal Democrat peers together outnumber Conservative peers, and the number of cross-benchers is significant. It is not unusual for a government to be able to rely on a majority in the second chamber: Ireland and (when the senate is newly elected) Italy and Spain provide examples.³⁷ But only in France does one find an upper house structurally biased in favour of politically conservative forces: the French Senate has never had a socialist majority.³⁸

(8) While very many former MPs become members of the House of Lords, there has in the past been effectively no traffic in the other direction. This has been so in Canada also, but contrasts with the practice

³⁷ Russell, *op cit.*, at pp 69, 80.

³⁸ Russell, *op. cit.*, at pp 63-64, 80.

in, for example, Ireland, Germany and Australia where the second chamber may serve as a stepping-stone to the first.³⁹

(9) Although other upper houses, such as the Irish and Australian senates, include cross-bench or independent members, in none are these as numerous or as potentially influential as in the House of Lords.⁴⁰ The 160 odd cross-bench members of the House of Lords include people of acknowledged authority in a range of different fields, and can on occasion determine the outcome of contentious issues.

(10) The bishops and law lords who currently sit in the House of Lords have, to my knowledge, no counterpart in any second chamber elsewhere, certainly not in any developed country.

Although supplied with information on second chambers elsewhere, the Wakeham Commission concluded that these were too different from our own to offer any general lessons or guidance.⁴¹ It is of course true that constitutional organs which have grown up in one country cannot be crudely transplanted to another without a high risk of rejection. But overseas experience can, as I think, be valuable, not in offering a blueprint for a reformed second chamber in this country but as suggesting certain do's and don'ts to inform, in however general a way, the course of debate on the future shape of the chamber. I would tentatively proffer a series of seven propositions.

³⁹ Russell, *op. cit.*, at pp 91-96.

⁴⁰ Russell, *op. cit.*, at p. 96-98.

⁴¹ *Op. cit.*, at pp 10-11, paras 1.4, 1.5.

(1) The second chamber should not be in a position to challenge the dominance of the first. In our case there is in my view no risk of this, for three reasons. First, the House of Lords may only delay legislation for a year: there is, I think, no move to lengthen this period, which may in practice, depending on the parliamentary timetable, mean very little delay.⁴² Secondly, the House of Lords' powers in relation to financial legislation is even more limited. Since supply is the lifeblood of government, this is a potent fetter. Thirdly, and most importantly, it is the House of Commons which makes and unmakes governments. The prime minister must command a majority in the Commons, not the Lords. A vote of no confidence in the Commons is fatal, in the Lords not. Political power will continue to reside in the Commons and, as a result, political talent will be concentrated there. The spotlight of media attention will continue to focus on the Commons, not the Lords. It is not, I would suggest, necessary to deny democratic legitimacy to the Lords to preserve the constitutional dominance of the Commons.

(2) The second chamber should not replicate the first. In Italy the senate is elected at the same time as the lower house, on a somewhat similar basis, and enjoys the same powers. It has been described as "almost a carbon copy".⁴³ Not surprisingly, it is perceived to contribute little to the system save delay.⁴⁴ Thus the Lords should complement and not duplicate the work of the Commons, and its primary role must be to review and revise draft legislation. The Jenkins Commission observed

⁴² Russell, *op. cit.*, at p. 266.

⁴³ Russell, *op. cit.*, at pp 36, 59, 121.

⁴⁴ *Ibid.*, at 226.

that “legislation is not very effectively scrutinised in the House of Commons”.⁴⁵ Many would agree. Free from constituency duties, members of the House of Lords are well placed to perform this very important task. This is not to say that the House of Lords should not seek to hold governments to account and debate general issues, but governments are most effectively held to account in the house of which all but two or three cabinet ministers are members and debates in the Lords, however high their quality, do not usually attract very much public attention.

(3) The Wakeham Commission recommended that

“The reformed second chamber should be so constructed that it could play a valuable role in relation to the nations and regions of the United Kingdom whatever pattern of devolution and decentralisation may emerge in future.”⁴⁶

International experience would strongly endorse that conclusion. The most effective and well-respected second chambers are those where the territorial link is strongest (as in Germany, pre-eminently, and the United States); the least effective and worst regarded are those where the territorial link is weakest (as in Ireland and Canada). The unsettled and probably incomplete state of our devolutionary process poses obvious problems in deciding how to give an influential voice to the nations and regions. That such a voice should be given is in my view indisputable.

⁴⁵ *Op. cit.*, at p. 4, para. 14.

(4) International experience suggests that if a second chamber is to earn the respect of the public it must be, and be seen to be, democratic and representative. This points towards a process of election, whether direct or indirect. The clearest example of an appointed second chamber is the Canadian Senate, to which members are effectively appointed by the prime minister.⁴⁷ For this among other reasons it is not a popular body.⁴⁸ Proposals for its reform were first made within seven years of its creation, and have continued ever since.⁴⁹ The Wakeham Commission have supported the principle of election, advancing three models under which 65, 87 or 195 members would be elected in a house of around 550 members.⁵⁰ This would represent an elected element of 12, 16 or 35 per cent. A chamber with any elected element would no doubt (in the language of the 1997 manifesto) be “more democratic and representative” than the existing chamber, but one has to question whether a house with at most one-third of its members elected would be seen by the public, or would in truth be, either democratic or representative. The question whether the composition of the reformed chamber should give more direct effect to the representative principle is perhaps the most fundamental of all the questions to be resolved in coming months.

(5) The Wakeham Commission recommended that

⁴⁶ *Op. cit.*, at pp 59, 183, para 6.5 and Recommendation 25.

⁴⁷ Russell, *op. cit.*, at pp. 53, 89.

⁴⁸ *Ibid.*, at pp 91, 225

⁴⁹ *Ibid.*, at pp 229-231

⁵⁰ *Op. cit.*, at pp 122-127, 188-189, paras. 12.26-12.42, Recommendation 76.

“The reformed second chamber should not be capable of being dominated by any one political party . . .”⁵¹

Experience in this country and France would support that conclusion. It is also unsatisfactory if the government of the day can almost always rely on a majority in the second chamber, as in Ireland, Canada and newly elected senates in Spain and Italy. It is those chambers which can and do on occasion challenge the government of the day, as in Australia, which earn the greatest public respect. Where members are elected, this points towards a different electoral cycle, different terms, different constituencies and different electoral procedures.

(6) Most second chambers have between a third and a half as many members as the first.⁵² Even if reduced to around 550 members, as the Wakeham Commission recommend, the House of Lords would in international terms remain very large, both in relation to the House of Commons and absolutely. I am not sure the question of size has been adequately addressed. Some 250 peers have been appointed in the last four years, many of them (fairly enough) to lessen the government’s numerical disadvantage. When a change of government occurs, the incoming government may in turn wish to strengthen its representation. There is the risk that the house could again swell to unmanageable proportions.⁵³ Closely linked with the question of size is the question of pay, administrative support and accommodation. The crucial question,

⁵¹ *Op. cit.*, at pp 102, 187, para 10.25, Recommendation 67.

⁵² Russell, *op. cit.*, at pp 26-28.

⁵³ *Ibid.*, at p. 327.

perhaps, is whether the country's best interests will be served by a relatively large body of part-time, more or less unpaid members or by a smaller body of more or less full-time, paid and administratively-supported members.

(7) The Wakeham Commission recommended that

“The reformed second chamber should contain a substantial proportion of people who are not professional politicians, who have continuing experience in a range of different walks of life and who can bring a broad range of expertise to bear on issues of public concern . . .”⁵⁴

The presence of some such members up to now has generally been seen as a source of strength. Whatever the ultimate constitution of the chamber it seems desirable that there should continue to be this element. The Appointments Commission recommended by the Wakeham Commission and now in operation should provide an adequate guarantee of quality, integrity and balance.

(3) The principle of judicial independence

I turn thirdly, and necessarily briefly, to my third principle, the principle of judicial independence.

⁵⁴ *Op. cit.*, at pp. 100, 186, para. 10.18 and Recommendation 63.

While the British constitution does not, quite obviously, provide for the separation of legislative and executive authority, it does (save in two respects) provide for an absolute separation of judicial from legislative and executive authority. The two exceptions are, of course, the Lord Chancellor, who is a member of all three branches of government, and the law lords, who are members of two.

The constitutionally anomalous role of the Lord Chancellor has been recognised for many years. Jeremy Bentham waxed polemical on the subject.⁵⁵ But criticism has become increasingly strong in recent years. It is directed not to the Lord Chancellor's roles in the legislature and the executive, in which respect he differs from no other minister, but to his combination of these with his judicial role, that of head of the judiciary.

This role (as distinct from the Lord Chancellor's role as the minister responsible for his department and the court service) has four main practical manifestations. The first is a purely judicial role: although he is nominally the senior judge of the Court of Appeal and the Chancery Division, this role is in practice confined to the appellate committee of the House of Lords. It is a role which has come under increasing pressure over the last 30-40 years, partly because of increasing demands on the Lord Chancellor's time and attention, which prevent him devoting significant tracts of time to judicial business, and partly because of a growing readiness to question the impartiality of the Lord Chancellor in

⁵⁵ *Draught for the Organization of Judicial Establishments*, Works IV 381.

any case bearing, however remotely, on the interests of government. It seems perhaps unlikely that these pressures will lessen.

The second manifestation is as the appointer of judges, a task which would probably not, without constitutional safeguards, be entrusted to a “pure” member of the executive. This role also is under pressure. Changes have already been made. Further changes have been widely canvassed. I hope that any further changes will take account of what I regard as the wise words of Alexander Hamilton, writing in *The Federalist* with reference to judicial and other appointments under the proposed United States constitution:

“Premising this, I proceed to lay it down as a rule that one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices than a body of men of equal or perhaps even of superior discernment.

The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them.”⁵⁶

⁵⁶ No. 76: *The Appointing Power of the Executive*; and No. 78: *The Judiciary Department*.

Hamilton of course required the co-operation of the Senate as a check upon “a spirit of favouritism in the President”,⁵⁷ but it is a long time since any Lord Chancellor was accused of favouritism, political or otherwise.

The third manifestation is the Lord Chancellor’s role as, in practice, the sole disciplinary authority in relation to judges. This again is not a role which could, without constitutional safeguards, be entrusted to the executive. The net result is to spare us the complicated and time-consuming procedures to which many other countries are obliged to resort.

The fourth manifestation is the most elusive but the most important of the four. It is the Lord Chancellor’s role as the guarantor, at the highest level of government, of the values of the legal system and the rule of law. The Lord Chancellor’s seniority, the lack of any possibility of his preferment and his peculiar identification with the judiciary enable him to perform this role with a degree of authority which no other minister could hope to enjoy. It may be thought by some that in our benign and well-ordered democracy there is no need for such a watchdog. I counter with James Madison’s enduringly pertinent observation in the Virginia Convention in June 1788:

“I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachment of those in power than by violent and sudden usurpations.”

⁵⁷ *The Federalist*, No. 76.

If the office of Lord Chancellor is to be reformed, and pressure for reform undoubtedly exists, I hope that attention will be paid not only to the anomalies to which the office is subject but also to its strength and virtue in our constitutional system.

Lastly, the law lords. The Wakeham Commission concluded:

“There is no reason why the second chamber should not continue to exercise the judicial functions of the present House of Lords.”⁵⁸

This was no doubt a reasonable conclusion for the Commission, considering the shape of a reformed chamber, to reach. But it does not address a more fundamental question, whether it is desirable that the House of Lords or a reformed second chamber should exercise judicial functions at all. Montesquieu did not think so:

“. . . there is no liberty if the power of judgment be not separated from the legislative and executive powers.”⁵⁹

Hamilton agreed:

“These considerations teach us to applaud the wisdom of those States who have committed the judicial power, in the last resort, not

⁵⁸ *Op. cit.*, pp. 93, 186.

⁵⁹ *L'Esprit des Lois*, vol I.

to a part of the legislature, but to distinct and independent bodies of men.”⁶⁰

These points, however valid when made, scarcely reflect the reality of our present position. The law lords are for all practical purposes a distinct and independent body of men, and despite the duality of their role liberty seems, by and large, to have survived tolerably well. Our existing arrangements, if not unique, are certainly highly unusual, but singularity is not in itself an argument for change if the system works satisfactorily. Those who favour change (who include me, but not a number of my colleagues and not, to my knowledge, the government) do so for two main reasons. The first is that the institutional structure should reflect the practical reality. If the appellate committee of the House of Lords is, as for all practical purposes it is, a court acting (subject to some derogations) as the supreme court of the United Kingdom and as such entirely independent of the legislature, it should be so established as to make clear both its purely judicial role and its independence. The present position can mislead the ill-informed. When, for example, the Pinochet case was appealed to the House of Lords some foreign observers mistakenly thought that the issue had ceased to be a judicial and had become a political one.

The second is a practical reason. As a committee of the House, the accommodation, resources and facilities made available to the law lords are determined by the House authorities. In some respects these

⁶⁰ *The Federalist*, No. 81.

facilities are excellent; in others they are certainly not. I doubt if any supreme court anywhere in the developed world is as cramped as our own. This is not the product of spite or malevolence or public parsimony. It is the result of an acute shortage of space available to the House of Lords in the Palace of Westminster and a wholly understandable precedence given by the House authorities to those who manage and work in the legislative chamber. The House of Lords is, after all, a branch of the legislature, and not a court. The needs of legislators come first. This is, as I say, understandable and, from the point of view of the House, not unreasonable. What is unreasonable, as I would suggest, is that decisions directly affecting the administration of justice at the highest level should be made by those who have no responsibility, and no primary concern, for the proper functioning of our supreme court. In the end it seems likely that the pressure on space will be decisive: not for the first time, constitutional reform may be the child of administrative necessity.

In conclusion, I would apologise for the over-indulgent length of this discourse. But only half-heartedly. For these are important, topical and long-term issues, bearing on the future of our nation. They deserve our attention. Our constitution neither is nor should be static and immobile. The challenge is not to avoid change but to direct it. As Jefferson observed,

“Laws and institutions must go hand in hand with the progress of the human mind . . . We might as well require a man to wear the

coat that fitted him as a boy, as civilized society to remain ever under the regime of their ancestors.”