



RESEARCH PAPER 99/7
28 JANUARY 1999

The House of Lords Bill: **Lords reform and wider constitutional reform**

Bill 34 of 1998-99

The *House of Lords Bill* is due to have its second reading debate on 1-2 February. This Paper is one of a series which provides Members with briefing on the Bill, and on the wider issues surrounding Lords reform.

This Paper concentrates on the place of Lords reform within the present Government's extensive programme of constitutional change. Research Paper 99/5 deals more directly with the Bill and the proposals for the 'transitional' House of Lords ('stage two'), and Research Paper 99/6 focuses on options for longer term Lords reform, including the proposed Royal Commission ('stage two'). Developments in the run-up to, and since the 1997 general election are summarised in Research Papers 97/28, 98/85 and 98/105, and, generally, are not reproduced in the present series of Papers. Research Paper 98/104 and the Appendix to Research Paper 99/5 provide relevant statistics on the House of Lords and its membership, and Research Paper 98/103 examines the legislative role of the House. The House of Lords Information Office and Library both provide a range of relevant information in the form of Papers and on the Parliament website. See also the Bill's Explanatory Notes, *Bill 34-EN*.

Barry K Winetrobe

HOME AFFAIRS SECTION

HOUSE OF COMMONS LIBRARY

Recent Library Research Papers include:

List of 15 most recent RPs

98/110	Water Industry Bill Bill 1 [1998/99]	03.12.98
98/111	Employment and Training Programmes for the Unemployed	07.12.98
98/112	Voting Systems: The Jenkins Report	10.12.98
98/113	Voting Systems: The Government's Proposals (3 rd revised edition)	14.12.98
98/114	Cuba and the Helms-Burton Act	14.12.98
98/115	The <i>Greater London Authority Bill: A Mayor and Assembly for London</i> Bill 7 of 1998-99	11.12.98
98/116	The <i>Greater London Authority Bill: Transport Aspects</i> Bill 7 of 1998-99	10.12.98
98/117	Water Industry Bill (revised edition) Bill 1 [1998/99]	10.12.98
98/118	The <i>Greater London Authority Bill: Electoral and Constitutional Aspects</i> Bill 7 of 1998-99	11.12.98
98/119	Unemployment by Constituency - November 1998	16.12.98
98/120	Defence Statistics 1998	
99/1	The <i>Local Government Bill: Best Value and Council Tax Capping</i> Bill No 5 of 1998-99	08.11.98
99/2	Unemployment by Constituency - December 1998	13.01.99
99/3	Tax Credits Bill Bill 9 of 1998-9	18.01.99
99/4	The <i>Sexual Offences (Amendment) Bill: 'Age of consent' and abuse of a</i> position of trust [Bill 10 of 1998-99]	21.01.99

Research Papers are available as PDF files:

- *to members of the general public on the Parliamentary web site,*
URL: <http://www.parliament.uk>
- *within Parliament to users of the Parliamentary Intranet,*
URL: <http://hcl1.hclibrary.parliament.uk>

Library Research Papers are compiled for the benefit of Members of Parliament and their personal staff. Authors are available to discuss the contents of these papers with Members and their staff but cannot advise members of the general public.

Users of the printed version of these papers will find a pre-addressed response form at the end of the text.

Summary of main points

Note: Issues highlighted in bold type are discussed in detail in this Paper. Other issues are considered in the companion Research Papers 99/5 and 99/6.

- The Government is committed, as stated in the 1997 election manifesto and in this session's Queen's Speech, to reform of the House of Lords as presently constituted. This reform programme is intended to be a staged process, rather than a single, 'big bang'.
- The *House of Lords Bill* seeks to implement 'stage one', the removal of hereditary peers from membership of the Upper House, and their consequential 'enfranchisement' in House of Commons elections. The Bill is very short, but as a 'constitutional measure', it is intended to have 2 days for second reading, and its committee stage wholly on the floor of the House. As it has been introduced in the Commons, it is eligible for enactment through the *Parliament Acts* procedure if necessary.
- To counter accusations that the resulting House will be composed wholly of nominated peers, the Government has set out certain principles for party balance, and will establish an *Appointments Commission*, as a non-statutory advisory NDPB ('quango'). It will conform to the 'Nolan appointments principles', will nominate non-party peers and take over the scrutiny of possible party-nominated life peers from the Political Honours Scrutiny Committee. There are no plans to alter the powers or functions of this 'transitional House.'
- The Government are minded to accept a Lords amendment, proposed by the Cross-bench Convenor, Lord Weatherill, which would retain 91 hereditary peers in the transitional House (75 in proportion to party balance elected by the parties; 14 'office-holders' selected by the House, and the Lord Great Chamberlain and Earl Marshal), but only if the Bill and its sessional legislative programme are not unreasonably obstructed.
- **As part of the 'stage two' process for further reform of the second chamber, a Royal Commission has been appointed, to be chaired by Lord Wakeham. Its terms of reference require it to retain the primacy of the Commons and to take account of other constitutional changes, such as devolution and the *Human Rights Act 1998*.** It is to examine the role and function of a second chamber, and the method(s) of composition to fulfil them, and is to report by 31 December 1999.
- The Lords Spiritual and the Law Lords are to remain unaffected by the 'stage one' process. The Government are keen to maintain an independent, non-party element, as provided by the Cross-benchers and others. The Royal Commission may examine issues such as the name of the reformed second chamber, and retention or otherwise of the link between the honour of a peerage and membership of the House.
- **Lords reform is a key element of the Government's constitutional reform programme, not only for its intrinsic importance but also as a way of underpinning and binding the other elements of that programme. This could be achieved by some form of territorial representation, perhaps through the devolved (and regional bodies) themselves. Any second chamber, especially one building on the practices and expertise of the present House, could have an important role in constitutional matters generally, and human rights in particular.**

CONTENTS

I	The British constitution and its development	7
II	The government's constitutional reforms: a coherent programme?	11
	A. Recent discussion	12
	B. Announcement of the Lords reform proposals	20
III	The Royal Commission on Lords reform	22
IV	The second chamber in a new constitutional settlement	25
	A. Territorial considerations	26
	B. Constitutional and human rights considerations	32
	Appendix: The terms of reference of the Kilbrandon royal commission on the constitution	35

I The British constitution and its development

Constitutional reform¹ has been a major theme in British politics in recent years, and especially since the May 1997 general election. The general issues surrounding the constitutional debate were examined in Research Paper 96/82, *The constitution: principles and development*, 18 July 1996. This present Research Paper simply seeks to update the subject in its overall perspective, especially in the context of House of Lords reform, and the proposed royal commission. It examines, for example, the current debate over whether the present Government's programme of constitutional change is a coherent package or not.² It does not seek to provide full briefing on each and every item of the Government's programme, as they have been enacted or proposed.³

The major parties set out their views on constitutional reform in their 1997 general election manifestos:⁴

▪ ***Labour:***

We will clean up politics

- End the hereditary principle in the House of Lords
- Reform of party funding to end sleaze
- Devolved power in Scotland and Wales
- Elected mayors for London and other cities
- More independent but accountable local government
- Freedom of information and guaranteed human rights

The Conservatives seem opposed to the very idea of democracy. They support hereditary peers, unaccountable quangos and secretive government. They have debased democracy through their MPs who have taken cash for asking questions in the House of Commons. They are opposed to the development of decentralised government. The party which once opposed universal suffrage and votes for women now says our constitution is so perfect that it cannot be improved.

Our system of government is centralised, inefficient and bureaucratic. Our citizens cannot assert their basic rights in our own courts. The Conservatives are afflicted by sleaze and prosper from secret funds from foreign supporters. There

¹ In this Paper, and its companion Research Papers on the *House of Lords Bill*, 'reform' denotes, as in the commonly-used terms 'constitutional reform' or 'Lords reform', change generally, not necessarily change for the better.

² See, for example, R Hazell, "Westminster: squeezed from above and below" (esp pp 113-116) and "The new constitutional settlement", chapters 7 and 10 of his *Constitutional futures*, February 1999 (forthcoming)

³ Members are referred to the particular Research Papers produced on these various issues, details of which are set out in the current issue of *CAPRI*, our Constitutional and Parliamentary Research Index

⁴ The extracts relate to general statements of approach and not to detailed, itemised proposals

is unquestionably a national crisis of confidence in our political system, to which Labour will respond in a measured and sensible way.

▪ ***Conservative:***⁵

The constitution

Alone in Europe, the history of the United Kingdom has been one of stability and security. We owe much of that to the strength and stability of our constitution - the institutions, laws and traditions that bind us together as a nation.

Our constitution has been stable, but not static. It has been woven over the centuries - the product of hundreds of years of knowledge, experience and history.

Radical changes that alter the whole character of our constitutional balance could unravel what generations of our predecessors have created. To preserve that stability in future - and the freedoms and rights of our citizens - we need to continue a process of evolution, not revolution.

Conservatives embrace evolutionary change that solves real problems and improves the way our constitution works. In recent years we have opened up government, devolved power and accountability, and introduced reforms to make Parliament work more effectively. It is that evolutionary process that we are committed to continue.

And:

We do not believe there is a case for more radical reform that would undermine the House of Commons. A new Bill of Rights, for example, would risk transferring power away from parliament to legal courts - undermining the democratic supremacy of Parliament as representatives of the people. Whilst this may be a necessary check in other countries which depend upon more formalised written constitutions, we do not believe it is appropriate to the UK.

Nor do we favour changes in the system of voting in parliamentary elections that would break the link between an individual member of parliament and his constituents. A system of proportional representation would be more likely to produce unstable, coalition governments that are unable to provide effective leadership - with crucial decisions being dependent on compromise deals hammered out behind closed doors. This is not the British way.

We have demonstrated we are not against change where it is practical and beneficial. But fundamental changes which have not been fully thought through - such as opposition proposals on the House of Lords - would be extremely damaging. We will oppose change for change's sake.

⁵ In her memoirs, Margaret Thatcher recalled that in 1982, when setting up a number of party policy groups, "we dropped the idea of a group on 'constitutional reform' because I felt that there was really nothing of note to say on that subject": *The Downing Street Years*, p 282, 1993

- ***Liberal Democrat:***

REFORMING POLITICS

Our aim: To restore trust in British politics.

The problem: People know that British politics isn't working. Their politicians have lied to them, their Parliament has become tainted by sleaze and their government is out of touch and doesn't listen.

Our commitment: Liberal Democrats will modernise Britain's outdated institutions, rebuild trust, renew democracy and give Britain's nations, regions and local communities a greater say over their own affairs.

Our priorities are to:

- Restore trust between people and government, by ending secrecy and guaranteeing people's rights and freedoms.
- Renew Britain's democracy, by creating a fair voting system, reforming Parliament and setting higher standards for politicians' conduct.
- Give government back to the people, by decentralising power to the nations, regions and communities of the United Kingdom.

As the Parliament proceeds, and more of the constitutional reform package is brought forward into legislation, or implemented following enactment, many of the theoretical issues which have been widely discussed inside and outwith Parliament will need to be addressed in practical, administrative terms. Not all these matters require legislation; some may result from institutional reorganisation within government, Parliament, devolved bodies, courts and elsewhere. Other changes may be more informal, resulting, intentionally or otherwise, from new or revised conventions and practices.

Examples of the various, mostly administrative, responses to constitutional change are growing daily, including, for example:

- ***Human rights:*** creation by the Home Office of a Task Force to assist with implementation of the Human Rights Act 1998⁶, and the proposed establishment of a parliamentary joint committee.⁷

⁶ "Jack Straw Announces Task Force On Human Rights Bill" *Home Office PN* 419/98 21 October 1998

⁷ HC Deb vol 322 c 604, 14.12.98; "Margaret Beckett Announces Plans To Increase Individual Rights And Make Government More Open", Cabinet Office PN, CAB 265/98, 14.12.98

- ***Devolution/Northern Ireland:*** creation of new intra- and inter-governmental structures and mechanisms, such as the British Irish Council, the Joint Ministerial Committee,⁸ concordats, the new Devolved Administrations Department of the FCO, and so on. Also consideration of parliamentary procedure at Westminster post-devolution.⁹
- ***Devolved bodies:*** implementation of the operational procedures and practices of the devolved bodies. See, for example, on the Welsh Assembly, the report to the Welsh Secretary of the National Assembly Advisory Group, August 1998, and the ongoing work of the statutory Standing Orders Commission,¹⁰ and on the Scottish Parliament, the report to the Scottish Secretary of the Consultative Steering Group.¹¹

The more 'behavioural' or 'cultural' changes that will be produced by the current constitutional changes will not be solely dependent on formal statutory or administrative change. New relationships under devolution between citizens and their elected representatives, citizens and public officials, elected representatives and officials of the various tiers amongst themselves will depend to a large degree on the perceptions of the various participants as to changes in relative centres of power and influence as well as on formal structural changes. In the Parliamentary context, this will have an effect, for example, on the distribution of 'constituency casework' between Westminster and devolved Members.¹²

Also of political interest will be the ways in which the Westminster Parliament will address the new parliamentary realities, with new distinctive patterns of business affecting the three devolved territories, and, possibly a more sensitive issue, between them and England. This is the famous 'West Lothian Question', or, in a wider context,

⁸ HL Deb vol 592 28.7.98 c1487 (Baroness Ramsey of Cartvale). See further on the BIC and the JMC chapter 29 of J Osmond ed., *The National Assembly agenda*, IWA, 1998, which quotes an unnamed senior Cabinet Office official as stating that the purpose of the JMC is "to head off trouble before fires break out and end up in the rafters, or in constitutional terms, in the law courts. It will enable proper negotiations to take place before the UK government has to use the 'nuclear option' of overriding a decision by a devolved Assembly" (p 355). The Welsh Office issued guidance to its civil servants which emphasised that staff of the National Assembly would continue to be part of the unified home civil service, and that inter-departmental mobility would be encouraged, suggesting rather an 'imperial' role for a unified civil service within a quasi-federal state (*Devolution and the civil service: summary of staff guidance*, February 1998, Dep 6124). It is interesting to note that the Prime Minister's announcement last July of the restructuring of the Whitehall centre did not appear to refer to the impact of constitutional change on the civil service

⁹ This is currently being examined by the Procedure Committee. See, for example, the Leader of the House's memorandum to the Committee late last year. The 'cultural/behavioural' changes which may develop within Westminster are considered below

¹⁰ See M James, "The Assembly at work", in J Osmond, *op cit*

¹¹ *Shaping Scotland's Parliament*, 15.1.99

¹² This is further complicated by the dual-Member nature of the composition of the new devolved bodies (which might extend in future to the Commons itself if some form of PR such as that suggested in the Jenkins Report is ever adopted). See Research Paper 98/112

what is often described as the 'English Question' or 'English' dimension.¹³ For example, the Leader of the House announced recently that the Standing Committee on Regional Affairs may be revived:¹⁴

Mrs. Beckett: The Government have been considering the means of improving the way in which Parliament can debate the affairs of the English regions. I shall shortly be submitting a memorandum to the Modernisation Committee inviting it to examine the possibility of reviving and adapting the Standing Committee on Regional Affairs already allowed for under the Standing Orders of the House.

Another key cultural factor may well arise in the context not just of devolution, but more so in relation to human rights legislation, that of the growing influence of the courts and judiciary in constitutional adjudication. The perception of the growth of what may be loosely described as a 'rights culture', hitherto not as central a feature of our constitutional arrangements as is the case elsewhere, could have profound implications for the traditional British constitutional system, especially in the two fundamental notions of 'separation of powers' and of 'Parliamentary sovereignty'.¹⁵ These issues were discussed in relation to last session's *Human Rights Bill* in Research Paper 98/27, section I.

II The government's constitutional reforms: a coherent programme?

Note that this section concentrates on what may be described as the 'domestic' constitutional agenda, and does not deal in detail with the extremely important European dimension in constitutional development. Much of that issue is considered in Research Paper 98/78, *EMU: the constitutional implications*, 27.7.98, and related Papers on EMU and on EU matters generally.

¹³ See Research Paper 98/3 for a discussion of these issues in the context of Scottish devolution

¹⁴ HC Deb vol 323 c 238w, 14.1.99. See also the Business Question by Jim Cousins that day, cc 446-7

¹⁵ More correctly, the legislative supremacy of Parliament. This will continue to be a major issue in the European context, as is sovereignty, in its wider political context. See, for example, Research Paper 98/78, *EMU: the constitutional implications*, July 1998. In his recent inaugural lecture, Professor Robert Hazell, Director of the Constitution Unit, said: "These developments will hammer several more nails into the myth of parliamentary sovereignty. I don't think the myth will ever die - it is too powerful a totem for that -but sovereignty will be further eroded, by forces from above and below.... We are seeing the power of nation states squeezed from above by the forces of globalisation, and in Europe by the onward march of the EU; and now we will see Parliament squeezed from below, with the creation of other parliaments within the UK. Parliament will have to get used to sharing power with these rival institutions, and will have to adapt to survive: Westminster may need to develop a gearbox or two to bolt on to the legislative sausage machine. Taken together this decentralised, more pluralist, more legally controlled system will amount to a new constitutional order." (*Reinventing the constitution: can the State survive?* CIPFA/ *Times* lecture, Nov 1998)

For example, one connection which has been made by some is the danger, as they see it, (either through Government neglect, or even, deliberate policy) of domestic decentralisation, through devolution and regionalism, undermining the cohesion of the UK, and turning the country into more separate units which may be incorporated or absorbed into some form of federal 'Europe of the regions'. In a statement accompanying the recent launch of the Conservatives' 'Battle for Britain' campaign, Liam Fox said: "We know that, for some members of the Government, devolution and the break up of England is part of a long standing ambition to submerge Britain into a single European state."¹⁶

A. Recent discussion

In recent months, Ministers and others have begun explicitly to link reform of the House of Lords with the overall package of constitutional change being enacted by the Government, such as devolution and possible changes to the voting system for House of Commons elections. For example, opening the two day debate on Lords reform last October, Baroness Jay of Paddington said:¹⁷

We think it right to consider the next longer term steps in the context of the other constitutional changes which are taking place. Establishing an effective and appropriate second Chamber for the next century needs proper deliberation--deliberation which includes, for example, the impact of devolution within the UK, of changing relations with European legislators, and also perhaps of changed methods of voting in this country

The Government recognise that the broader constitutional settlement is both relevant and complicated. It will take time to bed down and assess. For those reasons we want to build on our manifesto proposal for a committee of both Houses of Parliament to consider further reform. We intend to appoint, first, a Royal Commission to undertake a wide-ranging review and to bring forward recommendations for further legislation. When the Royal Commission is formally established, we will set a time limit for it - a time limit for it to do its work and a time limit for it to report back to the Government. The Royal Commission is not a delaying tactic but it is right that there should be wider debate and further analysis before the long term is settled. Our detailed proposals on the role and working operations of the Royal Commission will be announced in the forthcoming White Paper.

¹⁶ "Liam Fox launches battle for Britain campaign", *Conservative Party PN 186/99*, 26.1.99. See also the accompanying booklet, *Battle for Britain*, p 5

¹⁷ HL Deb vol 593 c 926, 14.10.98. The junior Home Office minister, Lord Williams of Mostyn, made similar remarks when winding up the debate the following day, cc 1163-4, 15.10.98. See generally the Lord Chancellor's lecture to the Constitution Unit on 8 December 1998, "The Government's Programme of Constitutional Reform", examined later in this Paper

In a recent newspaper interview, she said that "we do think House of Lords reform is very much part of the jigsaw ... it could be the way in which these other elements relate to each other."¹⁸

An emerging criticism of the Government's constitutional policy is that it is not a 'joined-up' programme, simply being a collection of ad hoc changes, with little or no thought as to their inter-relationship or as to the overall constitutional picture. The Opposition spokesperson on constitutional affairs, Liam Fox, has described the Government's approach as "piecemeal, vacuous and superficial. It is all about Labour. It may be good for Labour, but it is bad for the United Kingdom. It should be opposed. We will relish that opposition."¹⁹

More recently, William Hague has attacked the Government's "constitutional vandalism":²⁰

Because New Labour do not understand the British way, they pursue policies which not only threaten our political institutions but also, because those institutions shape our national character, threaten Britain itself. This is not some academic threat.

For in Scotland, we have a situation where ill-conceived constitutional change has unleashed a wave of Scottish nationalism that now threatens the physical dismemberment of the United Kingdom. In England, we can detect a backlash with the first stirrings of the sleeping dragon of English nationalism. In Europe, we face a concerted drive by politicians towards an ever-deeper political union in which national identity and sovereignty is consciously being submerged in a federal European state.

And here in Westminster, we find a Government which, you could be forgiven for believing, thinks that British history started on 1st May 1997, that understands nothing about our traditions except that it wants to destroy them, and that is so lacking in any clear purpose other than its own re-election that it will vandalise our constitution and happily let Britain be broken apart and submerged in a United States of Europe, and all in the name of latest buzz-word: "modernisation".

The latest expression of the Opposition's approach has come with their 'Battle for Britain' campaign, launched on 26 January. Liam Fox set out their criticisms of the Government's constitutional policies:²¹

¹⁸ "The ermine has to go ..", *Financial Times*, 23.1.99

¹⁹ HC Deb vol 321 c 636, 30.11.98. He had set out this argument in an earlier statement which described the Government's approach as a 'legoland policy': "Fox highlights Labour's legoland assault on constitution", Conservative Party PN 21.11.98

²⁰ "Identity and the British way", speech to the Centre for Policy Studies, 19.1.99

²¹ "Liam Fox launches battle for Britain campaign", Conservative Party press notice 186/99, 26.1.99. See also the accompanying booklet, *Battle for Britain*

"Our country is in grave danger. The Government has embarked upon a series of radical changes to the way we run our affairs - but, as always, has got no idea how to finish what it's begun. The British people care about their country; so does the Conservative Party. We recognise the genuine danger that, a few cars from: now, the United Kingdom as we know it will no longer exist.

Devolution doesn't make the break up of the Union inevitable. But it's our duty to point out that this Government has unleashed a tide of separatism, which it doesn't know how to control. Either that or they've got a wider agenda. We know that, for some members of the Government, devolution and the break up of England is part of a long standing ambition to submerge Britain into a single European state.

This isn't what the British people want. And it's not what the Conservative Party wants. We are totally committed to defending our nation and making sure it can run its own affairs.

We also totally oppose the way in which this Government's sidelining Parliament. Despite the huge majority it won at the last election, it wants even more power. That's why it's trying to kick reform of the Lords into touch and keep a House of 'Yes Men' for as long as possible.

It also explains why Labour are taking away our democratic rights: for the first time ever this year, political parties - rather than individual voters - will choose who represents us in the European Parliament. And this is the same Government that is toying with PR: an electoral system that would mean politicians, rather than voters, get to choose which party is in power.

Labour just don't care about the same things as the British people. We do, which is why I am launching the Conservative party's Battle for Britain campaign this morning. We are embarking upon a nationwide tour to highlight what the Government is doing to our country. We'll set out four clear principles that should determine the way we are governed.

First, we believe in strengthening the United Kingdom. We oppose its break up into separate countries or regions.

Second, we want a strong democratic Parliament that keeps all governments in check. We oppose any moves to increase the ruling party's control over Parliament.

Third, we believe that power should rest with the people. We oppose any changes to the voting system that give more power to parties or reduce voter choice.

Fourth, we believe that Britain should govern itself. We oppose the further transfer of power to Europe without the consent of the majority of British people.

These four principles make up our Charter for Britain. We feel that our beliefs are the beliefs of the British people - and will show how out of touch this Government is, in contrast, by asking people to sign the Charter. Our goal is to collect 200,000 signatures and so intensify the pressure on Tony Blair to abandon his mindless constitutional vandalism.

It is vital that everyone who cares about our country joins me in the Battle for Britain, whether or not we are political allies on other issues. After all, if we lose our democratic institutions and can no longer run our own affairs, none of the other arguments really matter any more."

The Liberal Democrats have continued to promote their policy of more fundamental and comprehensive constitutional reform. For example, in the Queen's Speech debate on constitutional affairs last November, Robert Maclennan said:²²

The likelihood of our delivering constitutional reform which modernises Britain's system of government is enhanced by the extent of the agreement that was reached prior to the election between the Liberal Democrats and the Labour party, which has been sustained since the Government took office. That has resulted, as I have said, in an unprecedented programme, which is being implemented with deliberation and, indeed, rapidly by comparison with any previous episode in our history.

Although we share the Government's views on the appropriateness of their proposed programme, there is not an identity of view about the end point. That stems from a somewhat different approach to constitutional reform generally, and to what is desirable. Although the hon. Member for Ealing, Acton and Shepherd's Bush, in his thoughtful speech, rightly recognised the step-by-step approach, it is time we acknowledged that we should be seeking to establish new fundamental principles in our constitutional settlement -- principally the notion that constitutionalism is a safeguard for the rights of citizens.

The constitution should rest on the sovereignty not of this House but of the British people. That is not a purely theoretical matter, for this House is capable of acting with authority in a majoritarian fashion in disregard of the rights of minorities. The rights of minorities can best be protected by a fundamental constitutional law to which the courts can pay proper attention when Parliament, for whatever reason, is unwilling or unable to do so.....

It may be said that, in enacting the Human Rights Act in the previous Session, we have moved a long way towards blunting the sharp edge of the old doctrine of parliamentary sovereignty. However, hon. Members will remember that the Government were at pains to state in introducing the Bill and, indeed, in designing it, that it was not intended to limit parliamentary sovereignty; and that, where a clash occurred between the interests of minorities and the will of Parliament, the latter would prevail. That is why I unashamedly advocate a fundamental written law of the constitution. We shall not arrive at that point in one big step. The process, however, has been given a great fillip by the scope of reforms embraced by the Government and well begun.

²² HC Deb vol 321 cc 588-90, 30.11.98. See also the 'constitutional affairs' section of the party's policy review, *Moving ahead: towards a citizens' Britain*, approved at the 1998 party conference, www.brighton98.libdems.org.uk/agenda/papers/review/fincont1.htm

One of the disadvantages of the piecemeal approach to reform is that it is capable of producing some incoherences. I fear that that has indeed been the consequence of proceeding with the decentralisation of government by route of devolution rather than by the introduction of a federal solution, to which my party is firmly attached. I predict that problems will become substantially greater unless the Government proceed, as they have said they may in due course, towards establishing a regional dimension in England, with powers for regional assemblies not merely to supervise the regional development agencies, which they are in the process of establishing, but over all the functions of government that were grouped together by the late Conservative Government in regional government offices; these should be brought under the supervision and control of regional assemblies.

Such balanced home rule all round has long been an objective of my party, and clearly distinguishes it from the Labour party -- in government and before -- which has tended to yield decentralisation only under pressure from a particular part of the country.

The coherence of the settlement must be objective, notwithstanding the fact that different parts of the reform are proceeding at different speeds. I particularly draw attention, not only in the light of the significant judicial events in the House of Lords last week, to which several hon. Members, including the right hon. Member for Sutton Coldfield, have referred, to the fact that the political importance of the judiciary has never been more evident. It is important that, in the ultimate constitutional settlement towards which we strive, the independence of that judiciary should not depend, as it does today, on the independent-mindedness of the judiciary in which we have certainly been able to trust, but on the independence of its appointment and on constitutional safeguards.

That is not a matter of theory either, as is demonstrated by the provision of the Scotland Act, which, until tackled, would have allowed the Scottish Parliament to remove judges on a motion without cause given. That is not only against the traditions of the Bill of Rights but a dangerous step. I believe that it was an attempt to subordinate the judiciary to the Executive -- an attempt which it is right to resist.

If we are to have in our constitution the checks and balances to which the right hon. and learned Member for Rushcliffe paid lip service, they demand more than the conventions on which these things have rested hitherto, because it is clear how frail those conventions are when they come into conflict with the interests of parties seeking power.

A considered analysis of the Government's constitutional programme as a whole, albeit from the perspective of Scottish devolution, was produced recently by the Scottish Affairs Committee in its report on *The operation of multi-layer democracy*. In the context of the present Paper, the Committee's concerns about the coherence, cohesiveness and viability

of the Government's programme are of particular interest, as in the following passage about what it described as 'stress points':²³

Big bang reform versus incremental change

31. Devolution to Scotland, Wales and Northern Ireland is only one part of the re-writing of the Constitution which is currently taking place. As far as we can see, this reform is being conceived piecemeal; if there is an overall blue-print showing how all the pieces will fit together, none of our witnesses were aware of it. As Mr Barnes put it 'what the Government has done is to set free two devolved assemblies without thinking through how the relationship between them is structured'.

32. Two aspects of the way in which the constitutional reform is being implemented give us particular cause for concern. One is the belated addressing of the English dimension. The other is that, although the Secretary of State will continue to exist there is to be no central legislative representation of all the sub-state units as such.

33. In defence of the Government's timetable and approach, it might be argued that a pragmatic approach, and responding to demand rather than forcing the pace of change was in accord with the traditional practices of the UK. Indeed, Mr McLeish did so argue in defending the Government's approach to the English dimension, saying that 'this step by step process is very much in tune with the British Constitution'. We hope this view will prove justified, that the Government will not be overtaken by events and that when the pace of reform slackens it will be found that all the separately-constructed pieces of the jig-saw puzzle will fit together. While we understand the reasons for haste in view of overwhelming pressure for change in Scotland, we hope in future to see evidence of a more coherent approach to the whole issue of UK constitutional change.

A direct defence of the Government constitutional strategy was launched by the Lord Chancellor in his Constitution Unit lecture at Church House, Westminster in December, where he described the Government's approach as "pragmatism based on principle. Our aim is to develop a maturer democracy with different centres of power, where individuals enjoy greater rights and where government is carried out closer to the people." He continued:²⁴

The various measures we set out in our Manifesto offer specific solutions to specific problems; and because we believe that "what matters is what works", we are not imposing uniformity for uniformity's sake. I shall return to that theme a little later. But what unites our reforms is that, in each case, they are sensible

²³ HC 460-I, 1997-98, December 1998

²⁴ These extracts relate to the theme of this section of the Paper. The Lord Chancellor dealt in some detail with the various individual items of the constitutional reform programme, especially devolution and the *Human Rights Act 1998*

incremental responses, based on liberal constitutional principles, reconciling mature demands for reform with the status quo in the most appropriate way. Thus, our approach is consistent with a long tradition of constitutional reform, which gave Britain what was until recent decades widely regarded as Europe's most progressive and stable constitutional settlement. What runs counter to the grain of our history is the notion that the constitution cannot be changed to meet changing demands. What we are about is improving our traditions whilst we transmit them.

We are steering a steady, pragmatic course. Let me assert this as strongly as I may. Pragmatism is not unprincipled.

The withholding of uniformity where uniformity would be inept is rational, not irrational. Many countries have experienced a growing desire for greater local autonomy. Sometimes this has led to civil war and anarchy, not greater democracy. We think at once, with sorrow, of the recent conflicts in Bosnia, Albania and some of the African countries. But this is not the inevitable consequence of pressure for greater local self determination. What strong established democracies such as ours must do is try to manage and respond to this pressure by modernising and reforming existing political processes. It would be extraordinary if a Union of such diverse parts as the United Kingdom could yield to a uniform pattern of powers devolved from the centre. The continued harmony of a Union of parts so diverse requires structures sensitive to place and people, not uniform structures imposed for uniformity's sake. Intellectually satisfying neatness and tidiness is not the cement which makes new constitutional arrangements stick. What sticks are arrangements to which people can give their continuing consent because they satisfy their democratic desires for themselves.....

I dispute any proposition that our programme lacks coherence. We made conscious choices about precisely which aspects of our constitution needed earliest attention, and on what basis. We are conscious of the way different elements of any constitutional settlement can impact on each other. Nonetheless many elements of the package are not interdependent. Nor is there any reason why they should be. Many of the measures are responses to particular problems which are the product of lengthy and complex pre- histories of their own.

Each strand of our constitutional reform programme is well justified on its merits. The strands do not spring from a single master plan, however much that concept might appeal to purists. Non sequitur that they are incoherent. There are uniting themes and objectives - modernisation; decentralisation; openness; accountability; the protection of fundamental human rights; the sharing of authority within a framework of law - all of which will fundamentally change the fabric of our political and administrative culture. In a sentence: our objective is to put in place an integrated programme of measures to decentralise power in the United Kingdom; and to enhance the rights of individuals within a more open society.....

After many decades of sterility we have embarked on a major programme of constitutional change realigning the most fundamental relationships between the

state and the individual in ways that command the consent of the people affected. We are not, however, hunting the chimera of constitutional master plans, nor ultimate outcomes. Too easily these can map out well intentioned routes to disaster. We prefer the empirical political genius of our nation: to go, pragmatically, step by step, for change through continuing consent. Principled steps, not absolutist master plans, are the winning route to constitutional renewal in unity and in peace.

Part of the argument about the nature and coherence of the overall package being pursued by the present government, indeed, is over the reasons for, and origins of, the policy itself. Many of the detailed items were developed in academic and political circles over the last quarter century or more, but many were not accepted policy of the Labour Party during that period.²⁵ How these various proposals became adopted by the Labour Party (and others) is beyond the scope of this Paper, but it may be that part of the reason is that, in recent years, there has been a coming together of a number of distinct (sometimes conflicting) trends of political thought.

There was a desire among some reformers for the insertion of clear and enforceable checks and balances on what they regarded (based on experiences of governments in the 1970s and 1980s, especially those with a very small or no majority, and those with massive majorities) as the virtually unfettered political power of governments.²⁶ The experience of the 1980s (and developing experience of continental political and constitutional practice through EC/EU membership) also encouraged greater sympathy for the notion of positive, individual 'rights' rather than immunities, and for the enactment of other formal legal and political checks on government power (including the diffusion of power throughout the UK) among those who had hitherto had been more sceptical of such approaches. This can be seen in policies such as ECHR incorporation, proportional representation and devolution.

In his Constitution Unit lecture already cited, the Lord Chancellor set out the Government's motivation for its reform programme:

We came to power with specific problems identified:

- a government that was over-centralised, inefficient and bureaucratic local government in need of reform;
- something approaching a national crisis of confidence in the political system;
- excessive secrecy that both encouraged and reflected the arrogance of power and a lack of accountability;
- a lack of clarity about individual rights, and a deficiency in ready and effective means of enforcing them;
- Parliament itself at risk of falling into disrepute, with the House of Commons in need of modernisation, and the House of Lords with an inbuilt Conservative majority from the hereditary peerage which was unsustainable at the end of the twentieth century; and

²⁵ Devolution was, of course, the policy of the Labour government in the 1970s, but divisions within the governing party over this policy contributed greatly to its defeat

²⁶ A famous formulation of this was Lord Hailsham's attack on 'elective dictatorship'.

- a country that was sidelined in Europe, for lack of decisive leadership and commitment.

Our constitutional measures each have their own pedigree and some have greater public salience than others. But they all have two things in common.

First, they are the product of long-standing dissatisfaction with constitutional practice in particular areas - in some cases going back a decade or so, for example the government of London since the abolition of the GLC, but in others dating back far longer: reform of the hereditary component of the House of Lords is unfinished business from the last century.

And, second, the reforms we are introducing to tackle the problems are essentially incremental. Scottish legislative devolution is a sensible step forward after a century of administrative devolution; a Freedom of Information Act will follow on from a non-statutory Code; incorporation of the European Convention on Human Rights follows from nearly half a century of experience with the Convention.

B. Announcement of the Lords reform proposals

In his foreword to the white paper, the Prime Minister reiterated the Government's programme of 'constitutional modernisation'.²⁷

New Labour was elected with a mandate to modernise. Our commitment to modernisation is clear and comprehensive. We are modernising and bringing closer to people representative arrangements in Scotland, in Wales and in Northern Ireland; introducing new structures for the regions of England; bringing in a new capital-wide authority and Mayor for our great city of London; bringing forward measures to reform and renew the vital democratic strand of local government; and implementing a significant programme of modernisation of the House of Commons.

In line with this programme of renewal, the modernisation of the House of Lords is vital. The Government will be judged on the improvements we bring about on health, education, crime, jobs and the economy. But reforming the House of Lords is a key element of the Government's legislative plans, and proposals for further reform beyond that.

The statements made by the Leaders of the two Houses emphasised the place of Lords reform in the broader programme of constitutional reform.²⁸

²⁷ Cm 4183, pp ii-iii

²⁸ HL Deb vol 596 cc 582-3, 20.1.99

This White Paper marks another significant step in the Government's overall objective to improve the institutions of this country, so that they fulfil their functions in the new century with energy and effectiveness. We want to create a modern Parliament for a modern Britain. The reforms that the White Paper introduces will form a vital part of our constitutional reform programme. It makes clear how a revised second chamber could play an important role in the new constitutional settlement.

The former Opposition leader in the Lords, Viscount Cranborne, asked Baroness Jay how the proposed timetable for further reform squared with ministers' statements that constitutional changes already made, such as devolution, needed time to 'bed down'. The Leader of the House replied by referring to "the terms of reference which ask the Royal Commission to look at the roles and functions of the second Chamber in the context of the constitutional settlement."²⁹ In exchanges following the equivalent statement in the Commons, the shadow constitutional spokesperson, Liam Fox, said:³⁰

Any wise reform would have allowed the royal commission genuinely to examine all the relationships within and outwith Parliament--the relationship with the Executive and with the judiciary; the relationship between the two Houses of Parliament and the balancing of their powers; and our relationship with the new bodies--and how we scrutinise legislation.....

We want a Parliament that keeps the Government in check, and we want Parliament to make our laws, not the Executive, judges or Europe. We want to strengthen the United Kingdom and ensure that power rests with the public, not with politicians. We shall work to make that come about.

The white paper clearly placed Lords reform in the broader constitutional context, emphasising that consultation was required on issues "which are of great constitutional importance and complexity. Successful proposals will have an impact on every part of our political structure."³¹ Later it stated:³²

3. Stable government, within a flexible and evolving constitutional framework, has been the hallmark of the British system since the end of the 17th century. Alone of all major European countries - and of most other countries in other continents -the United Kingdom has been able, at least on the mainland of Great Britain, to avoid violent constitutional convulsions for three centuries. It is essential that any reform of the House of Lords should be consistent with this important tradition of stability.

The white paper's more detailed consideration of wider constitutional issues is examined in the following sections of this Paper.

²⁹ c 594

³⁰ HC Deb vol 323 cc 912-3

³¹ Cm 4183, para 7.2, p 35

³² para 8.3, p 43

III The Royal Commission on Lords reform

The main initial mechanism of longer-term reform of the Upper House is the royal commission, to be chaired by Lord Wakeham. Its terms of reference and possible operation are considered generally in section III of the companion Research Paper 98/6. In the context of this Paper, what is relevant is that it is required, in its terms of reference, to take "particular account of the present nature of the constitutional settlement, including the newly devolved institutions, the impact of the Human Rights Act and developing relations with the European Union."

The adoption of the Royal Commission device, and the explicit reference to the wider constitutional programme, may well have significant implications for the progress of that programme. The question remains as to how far the Commission, given its relatively short timescale, will examine these other constitutional changes in substantive and critical terms, to enable it to take them into account.

For example, examination of any form of 'regional' representation will, almost inevitably, involve consideration of policies such as devolution and regionalism, as well as local government in the traditional sense. Again, examination of the oft-stated role of the Upper House as 'constitutional guardian' could well involve consideration of new areas of jurisprudence arising from devolution and human rights legislation, but also the involvement of the House, in its non-judicial mode, in constitutional matters.

Any form of elected element in the Upper House would raise questions as to the voting system (or systems) which could be involved. Legislation has already been enacted or is before Parliament at present to provide novel forms of voting systems for the European and Scottish Parliaments, the Welsh and Northern Ireland Assemblies and the Mayor and Assembly for London. In addition the Government is currently considering the proposals for elections to the House of Commons contained in the Jenkins Report.³³ There has been some press speculation that Ministers may be considering a 'package deal' for Parliamentary elections, involving a measure of proportional representation in a reformed House of Commons but the entire or substantial retention of the present simple majority system for the House of Commons.

More generally, any examination of the Upper House must involve, to some degree, an examination of the function and operation of the House of Commons. The relationship between the two Houses of Parliament is central to any reform of the Lords, especially, but not exclusively, in the legislative field. This could lead to more focussed consideration of the composition, procedures and powers of the Commons itself, some of which is already under examination through the 'modernisation' programme, through the

³³ See generally Research Papers 98/112 and 98/113

Modernisation Committee and otherwise.³⁴ Virtually all schemes propose to retain the existing primacy of the House of Commons, but the relationship between the two Houses is a result of a number of factors, such as their composition and form of election/appointment, and their powers and functions. In some respects these matters are dealt with expressly by statute, such as the Lords' legislative powers under the Parliament Acts,³⁵ but more generally these relationships are determined at any particular time by political and constitutional practice, not all of which can be predicted in advance. The relationship between the Commons and the Lords, including issues of democratic legitimacy, is considered more fully in section III of the companion Research Paper 99/5.

If the Royal Commission examines some or all of these actual and proposed changes in the context of its remit, it has the potential (subject to the given timescale) to develop into not just an inquiry into reform of the House of Lords, but something more akin to an investigation into the 'British Constitution' itself.³⁶ As such, if desired, it could form the prelude to (or the basis of) such mechanisms as may be deemed necessary or expedient to a fundamental 'constitutional revolution', such as some form of constitutional convention. Professor Robert Hazell of the Constitution Unit has commented recently:³⁷

Other roles have also been posited for the House of Lords, in addition to its existing revising and scrutiny functions; that it should integrate upwards as well as downwards, and strengthen links with the EU; or that it should be a human rights watchdog and guardian of the constitution. Not all these roles are necessarily compatible; different expertise would be required, and there is a risk of the House of Lords becoming overloaded by reformers with different sets of wish lists. But there is also a risk of undershooting on Lords reform: it creates a unique opportunity to underpin other parts of the constitutional settlement, and would be a major opportunity missed if reform simply stopped at removal of the hereditary peers. That is the necessary first step; but I sincerely hope it does not turn out to be the last.....

The Unit has advocated a step by step approach to Lords reform, and an inquiry of a more high powered kind for stage two than can be achieved by a parliamentary committee, which was the proposal in the government's manifesto. So I was delighted when Baroness Jay announced last month that there was to be a Royal Commission for stage two; and particularly pleased with the terms in which it was announced, which could have come word for word from our own Briefing." Those who were inclined to dismiss the Royal Commission as a delaying tactic have missed something rather important. The breakthrough is that

³⁴ See generally Research Paper 97/107. Other examples include the changes to Prime Minister's Questions at the very start of this Parliament, and the work of the Procedure Committee on important areas such as financial procedure and the procedural consequences of devolution.

³⁵ on which see Research Paper 98/103

³⁶ Sir Douglas Wass, in his final Reith Lecture in 1983, outlined a proposal for a standing, permanent royal commission, in place of ad hoc royal commissions, which could inquire into, *inter alia*, constitutional issues: *The Listener*, 15.12.83, pp 15-7

³⁷ *Reinventing the constitution: can the State survive?* CIPFA/ *Times* lecture, Nov 1998, p 14

for the first time the government has started to make connections between different parts of the constitutional reform programme. What Margaret Jay said was that she wanted the Royal Commission to think about the role of the House of Lords against the background of the other changes - devolution, the growing influence of the EU, the incorporation of the ECHR, and possible changes to the electoral system for the House of Commons. This has to be the right approach: it moves the debate on from the circular and often self-serving arguments about composition, and it recognises that the whole of our constitutional architecture is changing, and the role of the Lords is likely to change with it.

Such a 'Kilbrandon Mark II'³⁸ may well have attractions for the Government. Ministers have long emphasised (before and since the general election), that their constitutional package is a programme of modernisation and reform rather than a fundamental constitutional revolution. However, they may see some merit in an independent and detailed review of the major changes that will have been instituted by the time the promised Royal Commission is at work. Many of the changes enacted in this Parliament will potentially or inevitably interact with each other, and some of the most crucial interrelationships will occur in the Parliamentary arena.³⁹ Many, such as devolution, ECHR incorporation and freedom of information, will have potentially profound implications for the relationship between Parliament and government on the one hand and the courts on the other. Most will affect the current British political system, at the centre in Westminster and Whitehall,⁴⁰ and beyond the centre.

Few of these potential interactions and interrelationships have as yet been the subject of detailed public examination by official bodies, in Parliament or elsewhere, although many think tanks, research bodies and academics have long considered the implications of constitutional reform. Co-ordination in this area of policy is being undertaken in central government, in the Cabinet Office and elsewhere, as well as in the Cabinet itself and its various committees. But most official statements - such as White Papers, Green Papers, government evidence to Parliamentary and other committees and so on - on constitutional changes have tended to concentrate in detail on particular policy issues and their implementation, rather than on broader issues encompassing the whole area of 'constitutional modernisation'.

³⁸ Interestingly, while the remit of the Kilbrandon Commission was the constitution in a relatively wide sense, it concentrated on devolution. The 1973 report sets out the commission's difficulties in interpreting the given terms of reference, Cmnd 5460, paras 11-19. This is considered further in the Appendix to this Paper

³⁹ Some of these issues, often described as the 'West Lothian Question' or the 'English Dimension', have been examined in previous Research Papers. See for example, Research Paper 98/3, *The Scotland Bill: some constitutional and representational aspects*, January 1998. Such issues are currently being considered, for example, in the Commons context by the Procedure Committee

⁴⁰ It is interesting to note that the Prime Minister's announcement last July on Sir Richard Wilson's review of the Cabinet Office did not refer expressly to the potential impact of constitutional reform on the civil service: HC Deb vol 317 cc132-4, 28.7.98.

Some of these results of constitutional change may well be unwelcome to, or unforeseen by, the Government and others, but could be difficult to alter or halt in isolation, through amending legislation or otherwise, because of the effect of other constitutional changes. Ministers have emphasised, for example, that devolution is a continuing process, not a one-off event, but have denied that its end-point is either a revolutionary step such as a federal UK or even the dissolution of the Union. The Government's critics, on the other hand, have expressed concern that embarking on a major programme of constitutional change, especially in the way being undertaken at present, is akin to opening Pandora's box, or starting out on a train or car journey without knowing the ultimate destination.

An independent evaluation of the significant changes made and proposed since May 1997 could examine this broader picture, and make any appropriate recommendations for dealing with any complications or difficulties, including those which had been hitherto unforeseen. Lords reform would be a relatively convenient catalyst for such an examination, especially in relation to the Government's territorial and representational reforms – devolution, regionalism, electoral voting systems, Commons modernisation – and, possibly to a lesser extent, to those with a quasi-legal aspect, such as ECHR incorporation and freedom of information. A Royal Commission established towards the mid-term of the current Parliament could also provide a reason for any change in the pace of constitutional legislation, say in areas where legislation has not yet been enacted or implemented, such as freedom of information, voting reform, political funding or the administration of elections and referendums.⁴¹

To sum up, the proposed Royal Commission on stage two of House of Lords reform could potentially develop, either intentionally or almost by default, into a wider review of constitutional reform being undertaken by the Government, providing both a relative parliamentary break from such a legislative concentration on constitutional matters, and a practical brake on the form and extent of these changes, planned or otherwise, consequent on the programme already undertaken.

IV The second chamber in a new constitutional settlement

As already noted, this Paper does not examine in great detail the European dimension of Lords reform or constitutional reform generally, although it is referred to in appropriate places. The Royal Commission's terms of reference require it to take particular account of "developing relations with the European Union", and the white paper considers relevant matters such as the Upper House's traditional concentration on EU scrutiny, and on the possible representation in some way of UK MEPs in the reformed second chamber.⁴²

⁴¹ Draft bills have been promised on party funding and FoI later this session, and there is a current private Member's bill on referendum rules, *Referendums Bill*, Bill 15, 1998-99

⁴² See, for example, Cm 4183, para 7.17, p 38

A. Territorial considerations⁴³

The white paper considers the territorial aspects of the evolving constitution (devolution, regionalism, local government and so on) mainly in representational terms regarding the composition of a reformed second chamber. It noted, for example, the use of second chambers in federal systems "to provide a forum for the individual states or provinces."⁴⁴ In its examination of the role of a reformed House it described a possible new role of being "the hub of a representative institutional network."⁴⁵ This was considered further:⁴⁶

8. By the time a fully reformed second chamber can be put in place, there will be devolved institutions in Scotland, Wales and Northern Ireland. London will have its directly elected Authority. English regionalism will be increasingly recognised through Regional Development Agencies and regional chambers. Some regions may be working towards regional assemblies of their own. The relationship of the second chamber to those bodies will need to be a significant part of the Royal Commission's deliberations; it could have a marked impact on both the second chamber's functions and how its members are selected.

9. One question which therefore arises is whether the second chamber should have some overt role as the representative of the regions, or of the regional bodies. This is a very common role for second chambers overseas. The French Senate, for example, has a special function in representing the 'communities' of France, reflected in the make-up of the electoral college which selects members of the Senate. Using the second chamber in this way would give it a role distinct from that of the House of Commons, where the local links will continue to be the much more immediate one of the MP and his or her constituents. The second chamber could provide a forum where diversity could find expression and dialogue, and where such an expression could work towards strengthening the Union.

However it warned that a territorial role may not sit well with the traditional function of legislative scrutiny:⁴⁷

12. Of the possible roles for the second chamber, the traditional one of legislative scrutiny and a new one as the hub of a representative institutional network are, in the United Kingdom setting, in some tension with each other. Although they are both roles which occur frequently, in combination, in overseas second chambers,

⁴³ The method of election or appointment of 'regional/devolved' representatives is discussed more fully in section IV E of Research Paper 99/6

⁴⁴ Cm 4183, para 4.3, p 23

⁴⁵ para 7.12, p 37

⁴⁶ paras 7.8-9, p 36

⁴⁷ para 7.12, p 37

the constitutional settlements in those countries usually mean that each of the regional bodies has the same relationship with the centre. Few countries face the situation which will be the United Kingdom's immediately after the devolved institutions take up their duties, of having a central Parliament whose powers are different in relation to different parts of their country. Spain, perhaps, comes the closest to recognising regional identities through devolution rather than federalism, but even in Spain the process of devolution is further advanced and the different stages reached are now less diverse.

Chapter 8 of the white paper considered various models of composition,⁴⁸ including how these approaches could incorporate territorial aspects, in the sense already discussed. One model which can be tailored to such representation is that of indirect election, and the white paper examines this in some detail.⁴⁹

AN INDIRECTLY ELECTED CHAMBER

22. About 30 per cent of overseas second chambers are elected by indirect methods, including France, the Netherlands and South Africa. Indirect elections can be found in both unitary and federal states. The electoral college often consists of members of local authorities or regional assemblies, and may include members of the primary chamber.

23. With regard to party political members, indirect elections to the future second chamber by bodies with specific local interests could work well alongside a system of UK-wide political appointments. The United Kingdom Parliament has now passed legislation establishing the devolved institutions of the Scottish Parliament, Welsh Assembly and Northern Ireland Assembly. All are intended to begin to operate in 1999.

24. There is in addition the beginning of a process in England for a stronger voice for the regions, each of which is similar in population, or larger, than the other nations of the Union. Regional Development Agencies and voluntary regional chambers based on existing networks of local authorities are already being established. A Bill to establish a Mayor and Assembly for Greater London is passing through Parliament with the intention of holding elections in May 2000.

25. Indirect election by these bodies would have two advantages. First, it would demonstrate a direct connection between these other bodies and the central institutions at Westminster. This is a common role for second chambers to play in other countries. Second, it would mean that in many cases those selecting the members had themselves been elected. It could therefore reinforce the democratic nature of an otherwise nominated House.

⁴⁸ This is considered more fully in section IV of the companion Research Paper 99/6

⁴⁹ para 8.22-24, pp 47-8

26. The Royal Commission may also wish to examine whether there is a possible role which could be played by MEPs in the second chamber, through a contribution to an indirect election system. The House of Lords already plays an important role in the examination of European legislation and it may be that there are reforms which can enable it to become even more effective in this task.

27. It would be for consideration whether those representatives had to be chosen from the institutions and the MEPs which formed the electoral college. If the Commission were attracted to this basic principle it would no doubt wish to take evidence, including from the devolved institutions themselves, as to how this part of the system might operate.

As the white paper suggests, the present existence of a second Parliamentary chamber at the UK level provides scope for the construction of a new representative structure, linking the two Westminster chambers with the new/proposed devolved and regional bodies (and even European-level bodies⁵⁰). Such proposals could attempt, for example, to 'answer' potentially tricky post-devolution issues subsumed in phrases such as 'The West Lothian Question' and 'The English Dimension', and address the fact of all devolved bodies so far established are unicameral in structure. There are many variations on this theme, some of which have already been floated in Parliament and elsewhere.⁵¹

For example, a second Westminster chamber could reflect the various territories (countries and regions) within the UK, making it, in some sense, a 'Union Chamber'. This could be achieved in a variety of ways, from direct elections using these territories as the representative units,⁵² to forms of indirect election, where the devolved bodies would send some of their own number to sit in Westminster's second chamber.⁵³ Alternatively the devolved bodies could nominate such members from outside their own membership, or some central body could undertake this form of nomination system. Something of this kind was considered by the Wilson Government's 1968 white paper, which examined ways in which a second chamber could be constituted on a regional basis. However that government was not enthusiastic, and suggested that territorial second chambers tended to operate in federal systems, and were therefore not appropriate to the UK situation:⁵⁴

The government certainly thinks it essential to include in the reformed House members from Scotland, Wales and Northern Ireland, and from the regions of

⁵⁰ The new devolved bodies will have their own relationships (formal or otherwise) with the institutions of the European Union, and the House of Lords has long had a significant role in EU scrutiny

⁵¹ This discussion of options is solely for illustrative purposes in the context of this debate, and does not consider any practical or procedural consequences which may result.

⁵² which could, for example, be of equal size in terms of numbers of representatives, notwithstanding differences in their population, as in the US Senate. This might be a difficult format to justify on 'fairness' grounds if one of these units was the whole of England rather than its various regions

⁵³ There may be practical difficulties in such 'dual mandates' as it is likely that the devolved schemes have been designed, in statute and otherwise, without taking fully into account any additional workload generated by Lords membership of some members of the devolved bodies

⁵⁴ *House of Lords reform*, Cmnd 3799, Nov 1968, para 23

England, but does not believe it would be desirable or practicable at this stage to establish a reformed second chamber on a regional basis. There do not at present exist national or regional institutions which could provide the machinery for selection to such a chamber and the selection could hardly be made through the existing system of local government.”

and the white paper went on to say:⁵⁵

Scotland, Wales and Northern Ireland

50. The Government attaches the greatest importance to the presence in the reformed House of peers who can speak with authority on the problems and wishes of Scotland, Wales and Northern Ireland and of the regions of England, and it has considered very carefully how their presence might most effectively be secured. There are strong constitutional arguments, based on the presence of Scottish peers in the House of Lords ever since 1707, and practical arguments arising from the existence of separate Scottish law, which make it particularly important that the reformed House should include a suitable number of Scottish peers. There is at present in the House of Lords a considerable number of peers who can speak with authority on the needs of the different parts of the United Kingdom, and the objective must be to ensure that this situation continues in the future. The Government has felt obliged to reject a House composed on a regional basis for the reasons given in paragraph 23 above, and it considers that in present circumstances the most satisfactory method of achieving this objective would be for the Prime Minister of the day, in advising the Queen on the creation of new peers, to pay special and continuing regard to the need for the membership of the House of Lords to include a suitable number of persons with knowledge of and experience in matters which are of special concern to the various parts and regions of the United Kingdom. If the proposed Commission on the Constitution leads to changes which would make practicable or desirable new methods of securing the presence of members with knowledge of the various parts and regions of the United Kingdom these methods could be introduced at a later date.

51. The committee which has been proposed to review the composition of the reformed House should consider how far it includes members with knowledge of the various parts and regions of the United Kingdom, and this is one aspect to which it should pay particularly close attention.

The 1973 report of the Kilbrandon Royal Commission on the constitution was not enthusiastic at that time about introducing a territorial element into the Upper House:⁵⁶

1073. In our view it would be neither practicable nor desirable for a change in the structure of Parliament to give effect to a regional policy to take the form of a

⁵⁵ paras 50-1

⁵⁶ Cmnd 5460, October 1973, para 1073

change in the House of Lords. Reform of the House of Lords raises considerations extraneous to the question of regional government, and recent history shows that these considerations would prevent any change in the near future; if a regional structure for Parliament were thought advantageous, therefore, it would be inadvisable to link it with the House of Lords. Moreover, Members of the House of Commons are, in the nature of the case, representative of the interests of geographical units in the form of constituencies and these interests could readily be amalgamated into regional committees. If any element of regional structure were to be introduced into Parliament it would seem rational to build on a long-standing tradition and adapt the existing arrangements of the House of Commons, and irrational to introduce a novel geographical factor into the House of Lords.

A variant on the territorial theme has recently been proposed in a Fabian pamphlet, building on the potential of the Good Friday Agreement's proposed British-Irish Council. *Reforming the Lords and changing Britain*, written by John Osmond, Director of the Institute of Welsh Affairs, and published in the Fabian Society's *Redesigning the state* series, made the following proposal:⁵⁷

The sensible approach therefore, is to start thinking of a reformed Second Chamber at the centre which can hold together and mediate between the constituent parts. Within such a framework the British-Irish Council could sit quite comfortably, as the Second Chamber operating, so to speak in its international mode, embracing Wales and Scotland as well as the North and South of Ireland.

And after all, the kind of issues that the Irish Agreement suggests as suitable for early discussion in the British-Irish Council fit very well with traditional House of Lords preoccupations, namely 'transport links, agricultural issues, environmental issues, cultural issues, health issues, education issues, and approaches to EU issues.'

Though a reformed Upper Chamber should be representative of the nations and regions of the United Kingdom, this should not be its sole function. It cannot just be a question of transplanting a European model, such as the German Bundesrat, to Britain. Given British traditions this would be too big a political and cultural shift. Representing the regions and nations should be **one** function of the reformed Second House. Maybe it will evolve into its most important function.

At the same time other, more traditional functions would persist for the reformed House of Lords. It would need to continue as a revising chamber. Equally important it would need to expand and elaborate the role it has already begun, of developing as a constitutional and human rights watchdog. If Britain is to develop a written constitution the Second Chamber should be the place to locate the legitimacy for the legal structures that would be required to oversee it. That

⁵⁷ Fabian pamphlet 587, August 1998, pp 29-30

legitimacy would be enhanced if the Chamber itself was rooted in a mandate derived from the nations and regions rather than in a more centralised all-British election.

Professor Robert Hazell of the Constitution Unit has also considered the potential territorial representational role of a reformed House of Lords:⁵⁸

The Unit hopes to contribute to that debate, through a major study we are conducting of the role, functions, powers and composition of second chambers in seven other countries - Australia, Canada, France, Germany, Ireland, Italy and Spain. For me the most interesting question is how the second chamber integrates with the other parts of the political system. In a quasi-federal Britain one role for the Lords would be to represent the nations and regions, as second chambers in federal systems represent the states and provinces. This could help counteract the centrifugal political forces released by devolution, and give the devolved governments and assemblies a stake in the institutions of the centre. How strong a stake would depend upon how they were represented. It does not follow that to be 'democratic and representative' (to quote the Labour manifesto) a second chamber has to be directly elected: something the government understands, but many knee jerk reformers do not. Of the second chambers in our comparative study only two out of the seven are directly elected. Direct election would do little to help bind together the devolved governments and assemblies into the Union, because it would be the people of Scotland, Wales etc who would be represented rather than their institutions. (It has been said of the Australian Senate - which is directly elected - that it does nothing for the federation).

Indirect election could give the devolved governments or assemblies a direct stake. It is then a nice question whether it should be the devolved governments which are represented, as in the German Bundesrat, or the assemblies, as in the second chamber in India. The Bundesrat plays a highly functional and integrating role in the conduct of intergovernmental relations in Germany, but leaves the state parliaments rather marginalised. Finally there is the possibility of appointment, as in the Canadian Senate. It produces a body of doubtful legitimacy - the Senate suffers from the same patronage difficulties as our own House of Lords: but in terms of linking Lords reform with devolution, it could prove a useful option so long as there are no regional assemblies in England. Representatives of the English regions could be appointed, while representatives of Scotland, Wales and Northern Ireland were indirectly elected.

The recent report of the Scottish Conservative Policy Commission, chaired by Sir Malcolm Rifkind, has taken on board the potential for linkage between devolution and Lords reform. It contained a policy proposal that "the proposed Royal Commission on the House of Lords must consider whether a reformed Upper House should include some

⁵⁸ Hazell, op cit, pp13-4

direct representation for the countries of the United Kingdom in the manner of the US Senate or German Bundesrat."⁵⁹

Ministers have indicated interest (some of which can be seen in the white paper) in the possibility of some form of territorial representation which would involve the existing and proposed devolved/regional bodies directly in the second chamber at Westminster. A very recent instance of this was a report in the *Financial Times* quoting the Leader of the Lords, Baroness Jay of Paddington: "Clearly a new role and function of Westminster, which has not existed before ... is to try to strengthen links between the devolved institutions and Westminster."⁶⁰

Suggestions, especially by some Conservatives, that there should be some form of 'English Parliament', as a free-standing body, as part of the present Westminster structure, or even, most dramatically perhaps, as a replacement for the House of Commons itself, could slot in with a 'territorial' second chamber, although an English-only Commons would leave the second chamber as the sole all-UK body. Equally it would be possible *in theory* for the present second chamber to be transformed into some sort of 'English Parliament', leaving the House of Commons in substantially its present form.

B. Constitutional and human rights considerations⁶¹

Those proposing reform of the present House of Lords often suggest that the chamber's perceived role as a 'guardian' of the constitution, in a broad sense and in relation to the protection of individual human rights and civil liberties,⁶² could be entrenched and expanded in a reformed House. This could have relevance in the context of certain components of the Government's constitutional package, especially in relation to the *Human Rights Act 1998*, proposed freedom of information legislation, and the legal aspects of devolution.

This role would presumably be wider than the present House's revising role in legislation,⁶³ highlighting, for example, provisions with potential 'rights' implications.⁶⁴

⁵⁹ *Scotland's future*, November 1998, p 11

⁶⁰ "Jay signals opposition to Lords referendum", *Financial Times*, 22.1.99, and see further "The ermine has to go ...", *Financial Times*, 23.1.99

⁶¹ On which see, for example, R Blackburn & R Plant (eds.) *Constitutional reform*, 1999, especially chapters 1 and 16-20

⁶² This role could be said to arise out of the House's parliamentary and judicial guises. An example of this is the statutory provision that bills seeking to extend the maximum duration of a Parliament beyond five years is not subject to the *Parliament Acts* procedure (s2(1), *1911 Act*) which prevents governments using their Commons majority to preserve their own life, by postponing or abolishing elections. Similar considerations may apply to the non-application of the *Parliament Acts* to delegated legislation. See generally, Research Paper 98/103

⁶³ The Conservatives' 1978 Home Report asserted strongly that "the ability of the Second Chamber to use its revising powers effectively is itself a part of what is meant by constitutional protection.": para 13

To some degree, any such role at present is a result of practice rather than deliberate policy, due in part to the nature of the present House's composition, both in terms of its unelected nature and lifetime tenure, and the significant reservoir of legal and other relevant expertise residing there.⁶⁵ A more formalised role could have implications for any future composition of a second chamber, suggesting perhaps the inclusion of members with some legal expertise, although not necessarily in the form of Law Lords as in the present arrangements. It might also suggest some form of protected tenure of office (whether lifetime or otherwise) for some or all of its members, not dependent on regular election or nomination.

As already noted, the proposed parliamentary committee on human rights, announced by Margaret Beckett, in December,⁶⁶ is to be a *joint* committee, as explained in the relevant Cabinet Office press notice:⁶⁷

1. The terms of reference have not been finalised but they would enable the joint committee to look at:

- general issues of human rights in the UK;
- remedial orders following a court ruling that a statute was incompatible with the ECHR;
- draft legislation in cases of doubt about compatibility with the European Convention of Human Rights (ECHR);
- whether there is a need for a Human Rights Commission;
- the operating of the Human Rights Act.

Other select committees will continue to have an interest in related areas such as human rights overseas (Foreign Affairs Committee).

2. The joint committee will probably be set up before next summer's recess, to give time for it to develop its working methods before the Act comes fully into force.

3. The exact composition of the joint committee is yet to be decided but will probably be between 12 and 16 members, divided equally between the two Houses, with the Government having no more than half the members. The chairmanship remains to be decided.

A recent study of the possible structure and operation of a parliamentary human rights committee briefly considered the place of a reformed second chamber in this new arrangement:⁶⁸

⁶⁴ The unique function in the Upper House of scrutinising formally through a select committee provisions Bill which grant delegated powers is a good example

⁶⁵ See the white paper's consideration of the role of the law lords: Cm 4183, paras 19-20, p 39

⁶⁶ HC Deb vol 322 c 604, 14.12.98

⁶⁷ "Margaret Beckett announces plans to increase individual rights and make government more open" CAB 265/98, 14.12.98. It also quoted Jack Straw: "The committee's work will provide Parliament with a central role in the scrutiny of the Act and the issues surrounding it. This scrutiny will be extremely valuable in the development of the human rights culture"

The future role of a reformed House of Lords is another closely associated factor. The forthcoming changes to the Lords promised by the Labour government can only properly proceed upon the basis of some new statement or re-definition of the future work and functions of the reformed Second Chamber which are most likely to involve some elevated role with respect to constitutional and human rights affairs. This, therefore, makes it all the more important that the House of Lords plays an essential role in whatever scrutiny arrangements are now put in place. In this context, it is worth observing how the Memorandum cited above, co-authored by Lord Irvine, stressed that the Second Chamber should perform an essential role in any new human rights scrutiny procedures, as follows:

"We agree that it would be desirable for the House of Commons to devise procedures of its own or to join with our House in undertaking the work [of pre-legislative human rights scrutiny]. However, it seems to us to be work which is, in any event, well suited to the interests and concerns of the House of Lords and to its constitutional role."

The terms of reference of the Royal Commission require it to take particular account of a number of recent constitutional developments, including "the impact of the Human Rights Act". However, the white paper itself did not make much direct reference to any perceived role of the House of Lords as a constitutional watchdog or guardian of human rights, other than in contexts already considered.

⁶⁸ R Blackburn, "A human rights committee for the UK Parliament: the options" [1998] *European Human Rights Law Review* 534, 554-5. The Memorandum referred to was one prepared by a number of peers in July 1994, *Scrutiny of legislation for consistency with obligations under the European Convention on Human Rights*

Appendix: The terms of reference of the Kilbrandon royal commission on the constitution

The terms of reference were as follows:

to examine the present functions of the central legislature and government in relation to the several countries, nations and regions of the United Kingdom; to consider, having regard to developments in local government organisation and in the administrative and other relationships between the various parts of the United Kingdom, and to the interests of the prosperity and good government of Your people under the Crown, whether any changes are desirable in those functions or otherwise in present constitutional and economic relationships; to consider, also, whether any changes are desirable in the constitutional and economic relationships between the United Kingdom and the Channel Islands and the Isle of Man

The royal commission's report began with a frank admission as to the reasons for its establishment:⁶⁹

In 1969, when we were appointed, there was obviously some discontent with the workings of government, and the outward signs of that discontent seemed to reflect especially the frustrations of those living furthest from London.

These apparent discontents were greatest in Scotland and Wales, which manifested itself in support for nationalist parties.⁷⁰

The report described the difficulties the commissioners had in the interpretation of their terms of reference:

Interpretation of the terms of reference

12. The width and diversity of our terms of reference, and the requirement to have regard to a continually changing situation, have made the mere identification of our task a major preoccupation. The inadequacy of the narrowest interpretation which might be put upon the terms of reference, and the sheer impracticability of the widest interpretation, have led inevitably to a compromise. It is important for an appreciation of this Report to understand how this compromise was arrived at.

⁶⁹ Cmnd 5460, October 1973, para 1

⁷⁰ While the commission also addressed the position in Northern Ireland, especially as the present troubles flared up during the period of their inquiry, it recognised that it was a distinct case from that of Scotland and Wales. Its analysis of the position of the Channel Islands and Isle of Man is not directly relevant to this Paper

13. We have no doubt that the main intention behind our appointment was that we should investigate the case for transferring or devolving responsibility for the exercise of government functions from Parliament and the central government to new institutions of government in the various countries and regions of the United Kingdom. This involves looking at the arguments for and against Scottish and Welsh independence, and considering many less advanced solutions for those two countries, ranging from a form of federalism to a strengthening of the Scottish and Welsh Offices and a greater decentralisation of civil servants from Whitehall. It also involves the study of parallel arrangements for devolution to the regions of England. That, together with the examination of the special problems of Northern Ireland and of the Channel Islands and the Isle of Man, is a very big task, and many would think that we had sufficiently fulfilled our duty if we accomplished it without doing more.

14. On the other hand, our terms of reference do not mention specific reforms such as devolution. They speak of prosperity and good government, and of changes in the functions of the central legislature and government in relation to the several parts of the United Kingdom *or otherwise* in present constitutional and economic relationships. On the most sweeping interpretation, it might be argued that these terms of reference open the way to a root and branch examination of the whole of the British constitution. Some people who commented in Parliament and elsewhere on our appointment evidently thought that it was this wider kind of investigation, or something approaching it, that the Government had in mind for us. Our own conclusion was that such a wide review was not intended, and would not be practicable. If it had been intended, our membership would hardly have reflected as clearly as it did the different national and regional interests and would no doubt have incorporated a somewhat different range of expertise. Even if we had felt qualified to tackle the whole constitutional field, the proper performance of that task would have engaged us for a quite unreasonable length of time.

15. We also concluded that the narrowest interpretation of our terms of reference - the consideration of devolutionary models only - would be unduly restrictive. Three factors led to this conclusion. In the first place, if devolution were found to be desirable it would be necessary to consider consequential or complementary reforms to the central institutions of government.

16. Secondly, in the earlier stages of our enquiry we were not at all sure what was the true nature of the complaint against government. There was certainly some kind of discontent, and the outward expressions of that discontent seemed to reflect unfavourably on our centralised system of government. But the existence of widespread pressure for devolution was far from proved. Who, apart from fairly small minorities in Scotland and Wales, had actually said that they wanted self-government, or anything like it? Was there really a general desire for more participation in government in the regions, and what did people mean by "participation"? Might we not find, on looking into it, that the prevailing discontent was due not to an unsatisfied demand for devolution, but to something quite different? It was possible, for example, that the discontent arose mainly from dissatisfaction with the current performance of the government in office-part of the ebb and flow of politics - or from resentment at the remoteness

and inaccessibility of government in general, reflecting a need for government at all levels to be more sensitive and responsive to personal needs and feelings. People might want better opportunities to register their grievances against government and to have them remedied. It might even be that the discontent, although augmented in Scotland and Wales by stirrings of nationalism, was fundamentally yet another manifestation of the anti-authoritarianism which was a feature of the times.

17. None of these possible explanations would necessarily call for more devolution. But if they were found to be valid we could not simply reject devolution and say nothing more. We would at least have to suggest the possible need for other reforms. Those reforms might amount to a tuning-up of the present system, or might involve more radical changes in the central government institutions themselves.

18. The third factor which led us to the conclusion that we could not confine ourselves strictly to the consideration of devolutionary models was the realisation that devolution cannot sensibly be looked at in isolation. A number of witnesses suggested that the institutions of central government, in addition to any defects they might have in relation to the several countries, nations and regions of the United Kingdom, were unsatisfactory on other grounds. It was represented to us that in various ways these institutions were not as effective as they should be in meeting the needs of the times, and that the people working in them—Members of Parliament, Ministers and civil servants—were prevented by the system from contributing as they would wish to the good government of the country. Although we recognised that it would not be practicable for us to follow up this line of enquiry to the point of making definite recommendations, we felt that in making our analysis we should at least identify the issues for public debate.

19. The course we finally took, therefore, was broadly to identify the problems of government as a whole, in so far as they were reflected in the evidence and other information available to us, but to concentrate our work of detailed examination and our positive recommendations on those issues which were primarily geographical in character.

Notwithstanding this protracted analysis, two commissioners disagreed with the majority approach to such a degree as to issue their own minority report, in the form of a memorandum of dissent. Lord Crowther-Hunt and Professor Peacock wrote:⁷¹

We have interpreted our terms of reference as meaning that we should consider what changes might be necessary in our system of government as a whole if it is to meet the needs and aspirations of the people. Our colleagues have concentrated almost exclusively on the single question of devolution—though the word was not in fact used in our terms of reference; and they make no specific recommendation on any other issue.....

⁷¹ Cmnd 5460-I, p vii

No single group of our colleagues is presenting a comprehensive scheme for the United Kingdom as a whole which will achieve what we consider must be the three essential objectives of any changes in our system of government:-

- (i) to provide equality of political rights for people in all parts of the United Kingdom;
- (ii) to reduce the present excessive burdens on Whitehall and Westminster;
- (iii) to provide full opportunities for democratic decision-making by people in all parts of the United Kingdom at all levels of government;
- (iv) to provide adequate machinery for the redress of individual grievances.

The majority report rejected these strictures:

32. We feel bound to refer to the criticisms in the Memorandum, some of them severe, of our attitude to the Commission's terms of reference and of the way we set about our task. In the first place, it is certain that each individual member, if called upon to prepare an essay on the Constitution, would concentrate on those problems which he found most interesting, and would lay the emphasis in the way he himself found most telling. But the report of a Royal Commission is necessarily a team product; the general shape and scope has to be agreed between the members, each of whom must sacrifice some of his or her own private opinion as to the best way to go about the work. Secondly, it will be found that none of the main topics mentioned in the Memorandum is overlooked in our Report; where we refrain from a full treatment it is for the reasons already given. Thirdly, while the problems of the government of Scotland and Wales figure, as might have been expected, more largely in the Report than do other topics, it should not be inferred, as might be inferred from the Memorandum, that the regions of England have been inadequately considered. Much of our time has been spent on detailed examination of the application to the English regions of the various devolutionary models we have examined. Had that not been so, our Report would have been ready for presentation a long time ago. Lastly, we wish to make it clear that we reject the strictures contained in Chapter 2 of the Memorandum on the report of the attitude survey conducted for the Commission.