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Reforming the House of Lords – a federal perspective

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Nearing the end of 'new' Labour's second term in office, the UK constitution can be visualised as being at a kind of crossroads. The programme of constitutional reform is itself incomplete; it is hard to envisage the current situation with regard to devolution, relationships between executive, legislature and judiciary or the role of the second chamber (to give but three examples) as having reached stable state. The contours of the traditional patterns remain in place alongside more modern, reformed structures. The process of change seems certain to continue. One major facet will be the future role and composition of the second chamber.

'New' Labour's constitutional reform programme included a commitment to reforming the second chamber. Phase one consisted of a bill removing the right of hereditary peers to sit in the chamber. By agreement with the Conservative majority in the House of Lords, this was amended during its passage to allow a small representative number of 'hereditaries' to remain in the House pending the report from a Royal Commission (chaired by Lord Wakeham) appointed to consider options and proposals for further reform. The Royal Commission reported in January 2000 and shortly thereafter the 'transitional' chamber was established. Since then there have been numerous reports and consultation papers, but no further changes. The process of reform is now 'on hold' until after the forthcoming general election.

The major official contributions to the debate have been the Wakeham Report; a Government White Paper issued in response in November 2001; a report by the House of Commons Select Committee on Public Administration (February 2002); two reports

by a Joint Committee of the House of Commons and the House of Lords (December 2002 and April 2003); a Department of Constitutional Affairs consultation paper (September 2003) and a summary of responses (April 2004). Given that Lord Richard was for a short time Leader of the House of Lords after Labour's election victory in 1997 it is worth also citing the book he co-authored with Damien Welfare – 'Unfinished Business: reforming the House of Lords' (1999).

It is possible to draw some broad conclusions from this mass of paper. Back in 1997 the incoming Labour government seems to have had no coherent view as to the ultimate goal of the reform process: phase one was self-evident, but nothing more. In the absence of any radical thinking as to the future role of the second chamber, there seems to be tacit acceptance (often expressed at considerable length) that there should broadly be 'no change'. Most of the argument has revolved around the issue of composition. Referring this question to various committees of the 'great and the good' has elicited no obvious answer. The same alternatives – appointed, indirectly elected, directly elected, a mixture of any two or all three – are invariably cited often without any clear-cut recommendation. The government, supported by the House of Lords and a good deal of what might be termed 'the establishment', now seem to have reached a new consensus.

This 'new consensus' envisages an all-appointed second chamber. Political parties will continue to make nominations; the Independent Appointments Commission – which would be made formally responsible to Parliament – will appoint independent members and supervise party nominations. No party will have an overall majority, but attention will be paid to the balance of votes and seats at the most recent general election. Existing life peers will continue indefinitely, but new appointments will be time limited – perhaps to fifteen years. There will be reserved places for spiritual leaders, not just the Church of England. Although serving Law Lords will no longer have places (consequent on the new arrangements for a 'supreme court') there is a strong suggestion that ex-law lords be included. There will be no fixed number in the House, but a total of around 600 is envisaged. Appointments will be made on the basis of expertise, experience etc, but the parties and the Independent Appointments Commission will be expected to take account of the need for gender balance, recognition of ethnic minorities and geographic balance. Members will not be required to be full time and they will not be paid (apart from expenses). It is difficult to resist the conclusion that this is little more than a sanitised variation of the current membership criteria with a marginally more transparent basis for appointment. In effect the old House of Lords would remain minus the hereditary element.

Nowhere else in Europe is there an all-appointed second chamber. The concept seems to be quintessentially British, limited to the UK and a few other Commonwealth countries. It needs perhaps to be recognised that many functioning democracies operate with only one legislative chamber: however, in almost all cases the power of the executive and/or a parliamentary majority is circumscribed by a written constitution and the existence of an independent institution to arbitrate on 'constitutional issues'. Half the member states of the EU have no second chamber, but they do tend to be the smaller countries. Apart

from the UK those with second chambers elect all or almost all the members – directly or indirectly.

The case for the UK continuing to have a second legislative chamber has normally been taken for granted. This is perhaps unfortunate since it prejudices debate on what the modern role of a second chamber ought to be. There is simply an assumption that we need a second chamber to assist in the work of the legislature and as another means of checking/scrutinising the executive. By way of contrast, the location of what is the UK equivalent of a supreme court within the existing House of Lords is a convenience rather than a necessity. Indeed another of the reforms currently on hold would end that formal link. Now there is certainly an extremely strong case for appointing rather than electing Law Lords, but it hardly seems appropriate where legislative and executive functions are concerned. Indeed this encapsulates the challenge to the legitimacy of both the pre-reform and the current transitional House.

Prima facie, direct election of a second chamber would seem to have the strongest democratic credentials. The problem is that unless the electoral system is different, the second chamber will bear an extremely close resemblance to the first. Given that the House of Commons is elected by the non-proportional and non-preferential first past the post system, employing a system of proportional representation for the second chamber would offer a contrast. However, the only major difference is that the majority party in the first house would hold a considerably smaller proportion of seats in the second with minor parties as the gainers.

Of those EU member states with a second chamber, only a small number have opted for the all directly elected variety. Others have chosen indirect election or some mixture of direct/indirect election or appointment. Systems of indirect election are normally based on the concept of regional/territorial representation. Most of the documents on House of Lords reform devote some space to this idea. Much of the discussion about possible direct representation for devolved institutions is confused. Reports on the House of Lords not infrequently contain ‘throw away’ phrases about regional issues along the lines that Britain is not and is unlikely to become a full-blown federation. Few, if any, federalists would have had any illusions on that score!

Experience elsewhere in Europe demonstrates that the impact of federal ideas and federal thinking is not limited to formal federations. Certainly, direct representation in central government through the medium of the second chamber seems to be an indispensable part of a fully federal system. However, many non-federations employ a territorial (albeit not necessarily regional) basis for direct or indirect election to the second chamber. France, Ireland, Netherlands and Spain are examples. Second chambers need legitimation if they are to be an effective part of the democratic process. Direct election is one route to legitimation. Indirect election offers an alternative, especially if there is a territorial/regional link. This latter is highly unlikely to be met simply through an affirmation that when nominating members of a revised UK second chamber, political parties and the Independent Appointment Commission should take regional factors into account.