

SHIFTING SOVEREIGNTIES

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I.

Democracy is a political system in which those who hold political power are elected by, and accountable to, the people. But, in Britain, neither the head of state nor the upper house is elected. Tony Benn once quipped that, of the three elements of the legislature, the Queen-in-Parliament, only one – the House of Commons – was chosen by the people. Nevertheless, both a hereditary monarchy and an appointed House of Lords can be justified without doing violence to the democratic principle.

In a modern constitutional monarchy, the head of state is neither a political actor nor even an arbiter between the parties. The queen's constitutional functions are residual – to appoint a prime minister and agree to a dissolution when sought by her prime minister. These functions are normally uncontentious, though they may become contentious when there is a hung parliament. The queen also sees the prime minister for around an hour every week when both are in London.

The queen's role as head of government is, however, far less important than her role as head of the nation. The central argument for constitutional monarchy is that, under it, the head of state is free from party ties, and also without specific territorial allegiance, so that she can represent everyone in a multinational state. In Belgium, it is often said that the king is the only Belgian. Everyone else is either a Fleming or a Walloon. In this case, the queen is the only person in the United Kingdom who is not specifically English, Welsh, Scottish or Northern Irish, but both all and none of these. She is in a better position than anyone else could be to represent the nation to itself.

An elected head of state would most probably be a retired politician. Certainly no one could hope to be elected who did not have the support of a large political party. Someone from 'the great and the good' without party allegiance – the late Lord Franks was often mentioned as a strong candidate for any would-be British presidency – would have little chance. A partisan figure would be less trusted than a politically neutral head of state to resolve the problems that might arise with a hung

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parliament. But, even more importantly, he or she would find it difficult to act as the representative of the whole nation. Seeing Margaret Thatcher or Roy Hattersley on the balcony of Buckingham Palace on ceremonial occasions would not have quite the same resonance as is evoked by Elizabeth

II.

It would seem more difficult to defend the continued existence of an unelected upper house. Yet, curiously enough, almost every democracy with an elected upper house is dissatisfied with it. Why is this? The reason so many countries are unhappy with their upper houses is that there is a problem of a very fundamental kind in creating an upper house in a modern democracy, especially in a non-federal state. An upper house needs to be based upon an alternative principle of representation to that embodied in the lower house. But what is that principle to be? How can the same electorate be represented in two different ways in two different houses? The first house, to which of course a government in a parliamentary regime is responsible, represents the principle of individual representation. So what alternative principle should the upper house represent? In the 19th century, in a predemocratic age, this was easy. Many upper houses, including the House of Lords, exemplified the principle of giving special representation to hereditary right or to the landed interest. But such a rationale is quite unacceptable today.

The problem seems easier to resolve in a federal state than in a unitary one since an alternative principle of representation in a federal state immediately suggests itself – the representation of territory. Britain, however, is very far from being a federal state and, even if it were, the problem would not be resolved. For second chambers in federal states – the United States being the prime exception – represent less the interests of territory than the interests of the political parties that are strong in that territory. In Australia, for example, the Senate represents less the interests of the Australian states than of the state parties. As Meg Russell notes in her book *Reforming the House of Lords*, one of Australia's founding fathers predicted as much in the debates on federation at the end of the 19th century. 'The people will divide themselves into two parties. The instant Federation is accomplished the two Houses will be elected on that basis. State rights and state interests ... will never be mentioned'. Indeed, the Australian Senate is no more diligent in protecting state interests than the lower house. The same applies in most federations: the upper house in most federations generally provides a home for a second set of professional politicians differing in hardly any respect from those sitting in the lower house.

The House of Lords evades the fundamental problem of finding an alternative basis of representation to that exemplified by the practice of electing a lower house. Because it lacks democratic legitimacy, it cannot act as a rival to the House of Commons or an alternative legislative chamber. Its main role is that of a chamber of experts. It provides an essential component needed for effective government, the bringing to bear of informed and expert opinion upon the workings of the polity. From this point of view, the most important work of the House of Lords occurs not in its legislative committees but in its select committees. With the apparent demise of the Royal Commission, the need for a forum for informed public debate in relation to major policy issues, over a longer time horizon than that with which governments usually concern themselves, has become more vital than ever. The House of Lords, because of the specialist knowledge of many peers and its comparative absence of partisanship, is well equipped to provide that forum, and performs a function of vital importance to a modern democracy. An elected upper house, by contrast, would replicate the Commons with its confrontational politics and whipped majorities. It would be more powerful than the current House of Lords, because it would conceive of itself as being more democratically legitimate. For that very reason, it would make Britain more difficult to govern.

If the conjunction of democracy with a hereditary head of state and an appointed upper house seems paradoxical, it would serve us well to bear in mind Freud's aphorism that it is only in logic that contradictions cannot exist.

Is there anybody as conservative as an English constitutional lawyer? The US Constitution, ratified in 1790, opens: 'We, the people of the United States'. The Australian Constitution was also popularly ratified, in 1900. But English lawyers still cling to a structure labelled 'parliamentary sovereignty', which is as secure as a Workington river bridge.

I started work on *What's Wrong with the British Constitution?* in 2000. What got me going was the Report of the (Wakeham) Royal Commission on the House of Lords. Wakeham, a former Conservative chief whip, was commissioned by Tony Blair to shut down the dangerous notion of an elected upper house. Labour, said Blair in a 1996 lecture that has mysteriously disappeared from the web, has always favoured an elected upper house. Or has it? An elected upper house might endanger the supremacy of the Commons. And the prospect of elective dictatorship has always seemed attractive when you expect to be one of the elected dictators. Many of Labour's most

radical leaders, including Clement Attlee, Nye Bevan and Tony Blair, have been conservative when it comes to Lords reform.

The Royal Commission thought that a few peers might be elected. It said that the bishops in the Lords had always been a force for tolerance and diversity. If you believe that, please check the pre-1914 debates on Welsh disestablishment and Irish Home Rule.

Some remoter history is also relevant. That great ideologue of parliamentary sovereignty, professor AV Dicey (1835-1922), insisted that 'Parliament means, in the mouth of a lawyer ... the King; the House of Lords, and the House of Commons'. This, for Dicey, is the locus of parliamentary sovereignty. But in 1660 and 1688-9, Convention Parliaments, sitting without a king because there was none, chose a king and set the line of royal succession. In 1689, the Scots chose the same king as the English, but did not commit to the same line of successors. So King Arthur's reply to the old woman should have been: 'You become king by being the oldest son of the previous king, whose ancestor was selected by the two Convention Parliaments of 1688-9'.

A head of state should be universally respected. The last constitutional crisis in the UK started with the Lords' rejection of the 1909 Budget on 30 November 1909. In 1914 it culminated in two revolutionary acts: a contingent mutiny of cavalry officers at the Curragh, near Dublin, and the import of 30,000 German rifles to Larne to arm the Protestant paramilitary Ulster Volunteers. This coup d'État was actively assisted by professor Dicey and by opposition leader Bonar Law, who may have financed the gunrunning. King George V was also an ardent unionist who seriously contemplated dismissing his Liberal government. The coup plotters said they had the will of the people on their side, but there is no evidence for this. The by-election trends show that in August 1914 the Liberals and their allies were on course for a fourth consecutive general election victory.

If the main ideologue of parliamentary sovereignty abandoned it as soon as the elected house tried to enact something he disliked, why should anyone else sustain it? Secondly, although there are good grounds for supporting checks and balances on the elective dictatorship of the Commons, the checkers and balancers need to have democratic authority. The two unelected houses had none between 1909 and 1914. Nor do they now.

The composition of the Lords changed fundamentally in 1999. A house that had been unbrokenly Conservative since 1832 turned into one where no party had a majority. But, nevertheless, it

remains unelected. Some Conservatives are talking of creating Conservative peers to repeal the Human Rights Act through the Lords if they form the next UK government. This would be 1832 and 1911 all over again, when the same threat was issued. And, as then, to be effective it would require a radical overhaul – one that would return the House to the single-party Conservative predominance that it held from 1832 to 1999.

As a legal doctrine, parliamentary sovereignty still has its defenders. They say that decisions should be taken by elected politicians, not by unelected judges. Fine: but elected politicians means elected politicians. All three houses of Parliament must be elected for it to have the legitimacy that supporters of parliamentary sovereignty take for granted. Electing a non-executive head of state is easy. The Irish and German constitutions contain rules that could easily be copied.

Some, such as Lord Howe of Aberavon, complain that an elected Senate would be ‘clones of the clowns in the Commons’. But a Conservative committee under the former lord chancellor, Lord Mackay of Clashfern, pointed the way some years ago. To adapt the Mackay model, the elected senators should sit for a single, non-renewable term of perhaps three parliaments. A third of the house would be elected at each election, from the UK’s 12 standard regions, by proportional representation. Nobody would be eligible to move directly from either house to the other. Senators thus elected would not be clones of anybody. Elected by proportional representation, they would not disproportionately come from one side – but on average the Commons would always be the more recently elected house, and could claim supremacy on that basis. Senators would be immune to deselection threats from their party whips because they would not be reelected anyhow. The quarantine rules would deter career politicians and would bar retired or dismissed MPs.

A little-noticed parliamentary statement by Jack Straw in July 2009 endorses the Mackay (or McLean) model. The Conservative and Liberal Democrat parties called for an elected upper house in their 2005 manifestos. Labour did not, but Gordon Brown has now signalled his support for it. And the Commons have voted for an all-elected or 80 per cent elected upper house. As the 2010 general election approaches, the people could create a ‘We the People’ moment as in the USA in 1787 or Australia in 1900.

If they did, they would catch up, not only with the Americans and the Australians, but with the ‘Levellers’ of the English civil war. Their An Agreement of the People (1647) says:

That the power of this and all future representatives of this nation is inferior only to theirs who choose them, and doth extend, without the consent or concurrence of any other person or persons, to the enacting, altering, and repealing of laws; to the erecting and abolishing of offices and courts; to the appointing, removing, and calling to account magistrates and officers of all degrees; to the making war and peace; to the treating with foreign states; and generally, to whatsoever is not expressly or impliedly reserved by the represented to themselves.

At the ensuing Putney debates, Thomas Rainsborough said that ‘the poorest hee that is in England hath a life to live as the greatest hee’. Rainsborough certainly had a much clearer idea of what democratic constitutionalism means than AV Dicey.