Working in Harness: parliamentary government and the role of the Lords

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THE AUTHOR

Lord Strathclyde has been the Leader of the Opposition in the House of Lords since 1998. He was previously Opposition Chief Whip (1997-8), Government Chief Whip (1994-97) and served as a Minister in various government departments between 1988-1997 (most recently as Minister of State, Department of Trade and Industry).

Introduction: the background

The United Kingdom has a bicameral Parliamentary system in which the two Chambers – Lords and Commons – complement each other, but in which the work of each is improved by the existence of the other.

That has been the position for centuries – and since the retirement of Mr Michael Foot – no leading British politician has suggested that we should move to a one-chamber system. Indeed, after the crisis of March 2005, when the Blair government tried to take powers to suspend permanently the application of Habeas Corpus and other basic rights of British citizens and the House of Lords insisted successfully on Parliament's right to discuss such legislation in detail and to amend it, the number of people seeing the case for a check on the unbridled exercise of "elective dictatorship" through the Commons will surely have grown notably.

The relationship between the Chambers has altered greatly over the years. The Lords surrendered influence over finance more than 300 years ago and the House was finally stripped of all residual power in that area after it foolishly provoked the constitutional crisis of 1908-11. At that time the Lords also accepted that its power to reject legislation should – except in the case of a Bill to prolong the life of a Parliament – be transmuted into a power to delay - to ask the House of Commons to think again.

For nearly 100 years after the 1911 settlement the two Houses co-existed in peace. The composition of the Lords was radically reformed by the Conservative government of Harold Macmillan with the introduction of both life peers and female

members. But its primarily hereditary make-up meant that the Upper House felt inhibited in direct challenges to whatever government was in power. As a result – a paradoxical result but no less true for that – of the 1911 changes, the Lords progressively evolved a new role, as an expert revising chamber, retaining procedures which allowed it, indeed *required* it, to examine every proposed Act of Parliament line by line and to do so without time limit and with far more opportunities to make amendments than were allowed to the Commons.

Over the same period the Commons has progressively retreated from the detailed work of legislation and indulged itself increasingly in set-piece general political debate so that it is now generally acknowledged that almost all serious revision of draft legislation takes place in the Lords.

To illustrate this point, in the recent Terrorism Act the government was able to propose removal of ancient liberties, block a right for Parliament to amend the Act in future and carry the support of the Commons after only *four* hours' debate (before the start of "ping-pong" between the Houses). The Lords insisted on a minimum four days' debate and there was nothing the government could do about it. The Lords also refused to acquiesce in potentially permanent suspension of Habeas Corpus with no right for Parliament to amend the legislation. Not for the first time recently, basic liberties were upheld not by the Commons, but the Lords.

The 1911 settlement between the Houses was deliberately ended by the Blair government in 1998-9. In 1999 half the members of the House were purged, the largest purge of either House of

Parliament in history. The 1999 Act created a new House, in which no party or group comprises even 30% of the House. Mr Blair changed a mainly hereditary House – for no-one now sits in Parliament by virtue of a hereditary peerage alone and hereditary peers now make up only 13% of the House – into an overwhelmingly appointed House. Well over 40% of the House and over two-thirds of all Labour peers have now been appointed by Mr Blair.

In what became known as the Jay Doctrine, the then Leader of Labour's new model House, Baroness Jay, declared that it "will be more legitimate ... It will be able to speak with more authority…A decision by the House not to support a proposal from the government will carry more weight because it will have to include supporters from a range of political opinions. So the Executive will be better held to account."

The new House has indeed shown more independence, just as Lady Jay intended. Whereas in the heat of confrontation in 1997-9, before the expulsion of the derided hereditary peers, the government lost a quarter of divisions, in the current Parliament, where Labour and Conservative strengths are roughly equal, it has lost 40% of them.

At the time I also warned, in an address to *Politeia*, that with such a dramatic and single party driven change in composition New Labour were unilaterally uprooting the boundary stones that had kept the two Houses working well in harness since 1911. I warned that, once uprooted, one could never know where the stones would roll. The law of unintended consequences must inevitably apply.

It seemed certain that in such circumstances, encouraged by Margaret Jay or no, the Blair House of Lords would be less docile than its unreformed predecessor and far less open to government control than the Commons.

My prediction has proved correct. It took Labour over 100 years to fall so out of love with the old House of Lords that it legislated to change it; it has taken little more than 5 years for Mr Blair to lose patience with his own creation and now to begin to threaten to emasculate its remaining legislative powers.

The promise of Baroness Jay has not been followed with action. So far from being willingly held to account the government's response to being asked to think again is cry foul. The only inference can be that they do not want to be held to account. They do not *want* criticism. The only second opinion they welcome from the second Chamber is "Yes".

The Death of Parliament?

That is the reality underlying present debate about the future role of Parliament – and what is a stark choice in politics between a Labour Party, advocating further weakening of Parliamentary control on the executive and opposition parties who wish to see Parliament – both Houses of Parliament – strengthened.

There is nothing new in New Labour's impatience with Parliament. Powerful executives – and it should be remembered that Mr Blair has had successive majorities in the Commons unparalleled since the 1832 Reform Act, if the period of National government is excepted – have never cared for a troublesome Parliament.

Cromwell trained an army against his King in the name of Parliament; he used that same army against Parliament before the decade was out. Tony Blair created a legion of blackberry-toting peers to eclipse the old House of Lords; he is now calling on them to agree to the surrender of many of the powers, which Margaret Jay said they would have more authority to use.

Empowerment of a strong but accountable executive and, as complement to it, the effective control of the executive is the underlying question of politics – indeed, it is one of the basic purposes of politics. That question is as pressing today as ever before.

Take three recent instances of the assertion of executive power:

- The Civil Contingencies Act 2004 enables a government to declare an emergency and set aside or amend any Act of Parliament by Royal Order. That includes legislation on the composition of both Houses of Parliament, the length of a Parliament and Habeas Corpus – a reversal of the Glorious Revolution of 1688.

- The Prevention of Terrorism Act 2005 – albeit now only temporarily - enables detention of British subjects without charge or knowledge of evidence against them on an order issued by a Minister – a reversal of Magna Carta.

- The Constitutional Reform Act 2005, as it now is, following Liberal Democrat support for ending the present role of Lord Chancellor, will remove that historic "looming presence" at the Cabinet table. Instead, it enables David Blunkett to be the next Lord Chancellor. And even if not he, then no-one can imagine that an

> ambitious young MP, given the high-sounding title of Lord Chancellor, would be remotely effective in standing up for the rule of law in the face of a powerful Home Secretary or Prime Minister.

Bit by bit, in such measures, historic shackles on the executive, acting under Royal prerogative and above control of Parliament, are being stripped away.

Parliament itself has been increasingly belittled and slighted, while local initiative has been swamped in regulations, directives and targets. Sovereign powers – even to limit immigration - have been surrendered, in total secrecy and with brazen denial, to the unelected EU Commission. Our common law and Parliamentary decision-making, the twin bedrocks of personal liberty, have been subjected to foreign determination in a new framework of so-called Human Rights.

How then can the executive be contained? Surely it can only be in and through a reinvigorated Parliament.

There are those who say that recourse must be to the courts, buttressed where necessary by a written constitution (written by whom?) and by interpretation of international conventions such as the ECHR, that reck nothing of the centuries of successful experience of British freedom.

But is there not something faintly eccentric in replacing reliance on Parliament with faith in an unelected judiciary (appointed by whom?)? Am I alone in seeing problems in the increasingly frequent spectacle of judges, worshipping the Golden Calf of the ECHR, intervening to impose laws on our national Parliament? Yet on the very

biggest questions, the judiciary is chary of being sucked into the political arena or encroaching on the privileges of Parliament. The utter impotence of the Human Rights Act to defend important liberties of the subject has been demonstrated in the debacle over the Prevention of Terrorism Act. Where the ECHR was inconvenient Mr Blair simply derogated from it.

Sadly, the Human Rights Act has often been a better agent in elevating the absurd and enriching the few than it has been in protecting the basic rights of the many. The rule of law is an essential adjunct to the role of Parliament. But the problem of inadequate control of the executive has emerged in Parliament – and it is in Parliament that it must be solved.

Parliament must have the means to control the executive - and it must have the will. Yet Parliament is dying. The House of Commons is no longer functioning as an independent Chamber. In such circumstances, in a bicameral Parliament, only the House of Lords can help to make the House of Commons do its job properly. But it cannot do so unless reform gives it the authority and the independence to act.

Some of the worst mistakes of recent governments were made when large numbers of people in both Houses knew in their bones it was not right – but did not stir to stop it. Immediate imposition of a community charge was an example. The current farce of 24-hour drinking laws is another. No-one wanted it - apart from Mr Blair and, no doubt, the ghost of Jeffrey Bernard. The whole wretched fandangle could have been avoided if MPs had heeded warnings sounded by the Lords.

More darkly, the ending of the right to cast a secret ballot at a polling station and the introduction of all-postal ballots, now cast under the deepest shadow by a judge's conclusions as to the risks of corruption was blocked five times in the Lords. The difficulties were predicted in the Lords, but the ballot box ban still went through. It would have been stopped if the House of Pym and Hampden had been half of a half of what it was.

It is true that when Mr Blair legislated on tuition fees to do what his Manifesto promised he would legislate to prevent, some Labour MPs did try to hold to the pledge on which they were elected. But such instances are all too rare.

The Problems to be tackled

Against this background the first element of Parliamentary reform must come in the Chamber that is just as the government would like it – the Commons. It is absurd to pretend that Parliamentary reform can begin and end in the Lords.

There are weaknesses in the Select Committee system, which, with honourable exceptions, is too much dominated by the governing party.

The ruthless government control of the Commons timetable has reached unprecedented proportions, with huge chunks of legislation never properly discussed and Lords' amendments treated with something near contempt.

The Freedom of Information Act, theoretically intended to open up government to greater accountability has been distorted in operation into a political battering-ram against the government's predecessors, while, in the new era of "sofa

government" key decisions slide off paper and into shadows that neither Parliament, press nor public can hope to penetrate. We are not even allowed to know how often Mr Blair meets his reputedly omnipotent strategy adviser Lord Birt. No doubt Mr Blair is anxious that Mr Brown should not come to know the answer.

So we will need to make major changes in the Commons. We will for example –

- Strengthen Select Committees, by reducing their size and ensuring equal balance between government and opposition
- Halt Labour's unilateral squeezing of time for debate; guillotines have fallen in truly Robespierrian quantities in recent years – instead we will attempt to reach an agreed approach to setting time for debate.

These – and other initiatives - will give the opportunity to MPs to breathe life back into the Commons. But with the Commons still so weak, this is the last time, the very last time, to be weakening the powers of the Lords.

The new government mantra is about "codifying" conventions of Parliament. So what about starting with a convention that Lords reform should only be pursued by consensus? Or even one that, if faced with irreversible constitutional change, the House of Lords might be entitled to amend the Bill to require a referendum and expect a government not to use its Commons majority to block a referendum?

I do not expect action from this government on either front. New Labour insist on our keeping conventions that suit them but happily break the conventions that do not. The old world of convention did work. But it has gone – killed as

soon as one side was no longer ready to play by the rules. The 1999 reform broke the constitutional mould. We cannot recast it in a form in which it existed when the House of Lords was largely hereditary.

The world has changed in ways New Labour did not conceive. That is why their sudden desire to write conventions down is so striking. The centralisers sense the game is slipping out of central control.

Let me give another example. The recreation of the Scottish Parliament has created inescapable instability. Not only the West Lothian Question, but the Cook Corollary – Robin Cook's famous declaration that it would be impossible for him as a Scot representing a Scottish constituency to be a health minister in England – have risen from the books of theory to living reality.

Dr John Reid and his colleagues take the same view of that, as Canute's flatterers did of the advancing tide. They say the problems don't exist. But they will soon need to put on their waders. In this Parliament two critical votes affecting England – on tuition fees and foundation hospitals – were carried by the votes of Scottish MPs, where policy is devolved and different.

It was little noticed that on both occasions the House of Lords rejected those provisions, but that they were then sent back with larger majorities, carried this time without the need to rely on Scottish votes. In each case the Lords then deferred. Could it always be relied on to do so in future?

A Conservative government would solve this problem by addressing honestly the issue of

Scottish votes on exclusively English law. But until that happens it is at least arguable that it would be reasonable for the Lords to send back clauses in legislation affecting England and Wales, where Scotland had devolved powers, and which were carried only by the votes of Scottish MPs.

The House of Lords of the Future: Consensus, Commitment, or Control?

In what other ways is the role of the House of Lords likely to evolve in the coming years? Two years ago, by courtesy of Politeia, Shirley Williams and I set out some joint principles for the future shape of the House of Lords. Since then Lady Williams has retired as Leader of the Liberal Democrat peers, an office she filled with wisdom and grace. But her successor, Tom McNally, I know to be an equally strong defender of Parliamentary freedoms and I look forward to working with him.

The principles I laid out in 2003 are still valid today and have attracted wide agreement among commentators –

1. No reform is acceptable unless it carries consensus and redresses the balance between executive and Parliament. A reformed House must be at least as effective as the present one - ideally, more so. That need not mean new powers. What it does mean is no loss of existing ones.

2. Secondly, on composition, the policy of our party is on the record - and we shall try to build a consensus for it, though constitutional tinkering will not be an obsession with a Howard government as it is with a Blair one. But if composition is to change again and a Stage 2 is to be delivered, upheaval can only

be worthwhile if the House is able to exercise its full powers.

3. Using its powers requires the wide public consent that would only come if the people of this country were predominantly to elect it. To take one example - a largely elected Lords would surely never have yielded to the government on taking away the right to cast a secret vote in person, for which generations fought and died.

4. That is why my party proposed as a basis for discussion that 80% of the House should be directly elected for long terms with no re-election and no right to proceed to the Commons. This would ensure freedom from the insidious pressures of de-selection.

5. We do not propose full election because it would destroy continuity with the existing House, a reason why we would also phase change over more than one Parliament. We must also keep independent cross-benchers who are a distinctive element of the House. But if election were to be a defining source of authority for a reformed House the proportion could not be much less than 80%. Setting aside bishops and law lords, we would oppose legislation that fell short of that. And we would also oppose so-called indirect election. That is appointment by another name – and we will have none of it.

6. Some say a second elected House would weaken effective power to legislate. Would that be such a disaster in a country tormented by too much law? There is far too much legislation – and we need less of it. And are the critics unaware that the United States became

> the world's most powerful nation with two powerful elected chambers, the upper one with a mathematically bizarre franchise? Why only in Britain could the executive not brook such a check?

So much for composition. Some will agree; some not. But composition is only one means to the key end: a stronger Parliament. So where do we go now? First, a negative. The Conservative Party will not, in the next parliament, do what Labour did. There will be no go-it-alone change on the Lords. Labour was wrong to resist for so long involving Parliament as a whole in debate about its future.

So in a new Parliament we must consider again a Joint Committee or a Speaker's Conference, free to reflect without arm-twisting by government. That would avoid front-bench-back-bench confrontations and minimize cross-party ones. Given a remit to strengthen the Lords, it may help find a way through.

Secondly, as part of the maintaining of consensus, we will also respect the formal undertaking given to Parliament by Lord Irvine of Lairg, as Lord Chancellor, on conclusion of the negotiations that led the agreement that most hereditary peers would agree to leave, but that 92 would be elected to stay behind to guarantee long-term reform - the so-called Weatherill amendment. It was this agreement that enabled the government to secure broad acceptance of the 1999 Act.

Lord Irvine explained the government's undertakings to a packed House of Lords on 30th March 1999 (Hansard, col. 207). The quote is worth repeating, for I think so clear a formal statement on behalf of government has become a

mini-constitutional convention (though I somehow doubt if Labour will want to codify this one!).

In his prepared statement Lord Irvine said: "The amendment reflects a compromise negotiated between Privy Councillors on Privy Council terms and binding in honour on all those who have come to give it their assent…The 10 per cent would only go when stage two has taken place. So it is a guarantee it will take place."

Mr Blair was one of those Privy Councillors and, of course, this pledge remains binding in honour personally on him as it does on others. A commitment of that kind to Parliament cannot honourably be withdrawn by a Minister, however exalted.

The commitment is explicit. There can be no further interim change until full stage two reform is agreed – that would include any attempt to create an appointed House by stealth by not replacing hereditary peers who die, and so removing the guarantee that Stage 2 would take place that was intrinsic to the 1999 compromise.

We consider this undertaking to remain binding and not capable of being overridden by a sentence in a Manifesto, with no cross-party consent. We would not present legislation for such an incomplete Stage 2 - and we would not accept any such legislation.

It will be inevitably asked – but what about the Salisbury Doctrine – the convention that the House of Lords does not reject outright or seek to wreck legislation presented by a government in its Manifesto?

Of course, it will remain the case that however constituted, even an elected House which is not fully elected or one in which, because of the longer terms of its members, mandates are more decayed, a second Chamber in our modern Parliamentary tradition should normally defer to the first.

But we have good existing procedures to allow that to happen and the Parliaments Acts as the final guarantee that the Commons can prevail.

The flexibility and effectiveness of present arrangements is not fully appreciated. In the 2003-4 session we even agreed to resurrect a Bill that the incompetence of John Prescott and his officials had caused technically to be lost. That was the responsible thing to do: a word most of us still understand. The glory of the British constitution has surely always been the flexibility of its unwritten nature - and its evolving conventions.

So even if the Salisbury Convention evolves or withers, as the hereditary Tory-dominated House that it was created to deal with fades in memory, there will still be ways, with a will, to ensure that the Queen's business should be carried on.

And the Lords must have a right to stand firm on issues like the overthrowing of Habeas Corpus and a permanent power to detain British citizens without trial.

It must have the right to be toughly and tenaciously skeptical about ideas, like the abolition of the office of Lord Chancellor, that are introduced with no Manifesto promise, no consultation, no forethought and no initial concern for the independence of the judiciary.

It is obvious to me also that the Salisbury doctrine never did and never should apply to on-the-hoof, in-a-huff legislation of this kind.

And I should at least in passing make it clear that a Conservative administration will keep the Lord Chancellor as a lawyer in the Lords, keep the Law Lords in Parliament where their advice is so valued and not set up an expensive and unnecessary Supreme Court outside Parliament.

We could never then envisage the kind of weakening of the powers of the lords now being canvassed by the government. The executive may not want a second opinion, but every country needs a Parliamentary system that provides one.

Part of that must lie in a strong, independent House of Lords. And it is in our different views on that question that the line between the parties is so stark.

Soon Labour will outnumber Conservatives for the first time in the history of the Lords. 30% of Conservative peers are over 75. Only 18% of Labour peers are. Father Time – without a refreshing of the House – will continue to tip the balance the Labour way.

It is Margaret Jay's house of many different opinions that has been showing independence. There are no backwoodsmen any more, except, perhaps, those repining themselves in the dining rooms of Islington.

Mr Blair is acquiring control of the Lords by stealth. The fact that, in addition, he wants to cut its powers speaks volumes about his motives.

For to cut the power of the Lords is clearly now the government strategy. Recently, the House debated a report by Labour peers, written without consultation with other parties, on changes to the powers, procedures and conventions of the Lords.

Among its recommendations are:

- Cutting opportunities for the Lords to amend legislation
- A new, tougher Parliament Act applying to all legislation
- Automatic guillotining of discussion of government bills
- Ending of the Lords' ability to block regulations
- No voting during or after dinner.

Even to read the menu is to suffer acute indigestion. Instead of a stronger Commons, their recipe is an even weaker Lords. In my submission that would take dangerously further the process of striking away the shackles on the executive with which I began.

A Historic Opportunity

A Conservative government would halt that process and seek to reverse some of the damage. When we return to office Parliament will be strengthened. But if, by some collective delusion, we fall for the old schoolboy trick of "Give me one more chance, sir, and this time I really will be good" then the battle over Parliament will be joined on the powers of the Lords.

For, inevitably, the government has greeted enthusiastically the idea of reducing the powers of the Lords – in Newspeak it is called "codifying". That Napoleon of modern democracy, Peter Hain, has implied the Lords' power of delay could be

chopped to six months to allow any Bill that was introduced in any session to go through, whatever Parliament thought. Any such proposal would be resisted by every means in our power.

If that is the way we are to go one is inclined to ask: "What is the point of a second chamber at all?" Surely it does have a point. And surely these issues are worth engaging if we are not ever more to be the playthings of centralizing and authoritarian government.

I agree with the Leader of the Liberal Democrat peers, Lord McNally. He recently said that if Labour put lines in its Manifesto to curb the powers of the Lords and – here I quote - "if re-elected, start citing the Salisbury Convention to force these changes through the next Parliament…such a strategy will be fought every inch of the way by these Benches…"

He developed an argument I myself have put in the past – again I quote:
"Unless changes in the powers of the Lords are accompanied by real reform to strengthen the democratic legitimacy of both Houses, along with a strengthening of the powers of both Houses to call the executive to account, the Lords will be right to resist any piecemeal and arbitrary attempts to limit its powers."

As I sat listening on the Front Bench at 10 that evening and watched a dark cloud settling on the brow of a brooding Lord Falconer, I warmed even more to Lord McNally. He need have no fear that an incoming Conservative government will emasculate the powers of the Lords.

In the seemingly arcane small print of Lords procedures and conventions could lie some very

real battles for Parliamentary government. The next government will have a choice of historic moment. The choice of whether to breathe gently on the spark of independence that still glimmers in our Parliament and has lately glowed more brightly in the House of Lords – or whether to close the fist and snuff it out.

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