THE UNITED KINGDOM IS CHANGING
A CONSTITUTIONAL LOOK AROUND*

The Right Honourable The Lord Slynn of Hadley**

It is not so long ago that at law conferences one often heard it said:

> But of course in England you have no Constitution, no entrenched human rights, no administrative law, a very primitive voting system which produces unfair results, no judicial control of legislation. You are too obsessed with the theory of the sovereignty of parliament. You are out of step with many principles and the court structures of the civil law countries on the Continent which are your closest neighbours. You pay too much attention to the Commonwealth whose Supreme Courts already are leaving you behind as they *modernise* the law.

Leaving aside my personal conviction that we cannot pay too much attention to the Commonwealth, the cross fertilisation of ideas between the Supreme Courts of the major Commonwealth countries has had an enormous impact on the development of the common law. The judgments of Gibbs CJ and Mason CJ are cited in the House of Lords as often as those of Berger CJ, Rehnquist CJ and other members of the Supreme Court of the United States, Canada, New Zealand and increasingly South Africa.

EXTENT OF CHANGE

The most far-reaching change was obviously our accession to the European Community – itself delayed in part by our hesitation as to its effect on our links with the Commonwealth. I remember on one occasion at the European Court one of my colleagues saying to me, "your Prime Minister can't see beyond the price of New Zealand butter". I thought that was very rude but it showed their attitude to us.

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* This is the edited text of the inaugural University of Western Sydney Law Lecture which was delivered on 31 August 2000 at Government House, Sydney.

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Joining the Community was bound to have profound effects on trade, on economic affairs – on the free movement of goods, people, services, capital and anti-trust law. It was, after all, in the first place to have been the creation of a common, or later an internal market. However, the Treaty, even in its original form[1] said that there was to be a "closer union" of the peoples of Europe. We should have seen clearly that there were social, political and constitutional aims. We have become more aware of the effect of these, as home affairs and justice, and cooperation through Europol of the police forces of our Member States, become part of the Community's activities.

Leaving aside the political arguments and the economic argument about a single currency, what in summary form are the constitutional effects giving "closer union" its broader meaning?

In the first place, we have obviously surrendered some national sovereignty – and we should not try to gloss over that – and those who accept that we should be part of the European Union think that such surrender is in exchange for the greater good. To take the simplest example, we agreed from the beginning that we could no longer impose customs duties on goods coming from other Member States – thus, our power to levy one of the oldest taxes had gone. Extensive prohibition on the United Kingdom's freedom to act followed. There were to be:

(1) no quantitative restrictions on imports unless justified on limited grounds such as health;
(2) no discrimination against the nationals of other Member States in areas covered by the Treaty; and
(3) no more curl of the lips, "Oh, but he's French or German or Italian or Greek, not one of us".

There were important treaty obligations to be met and we had to take all appropriate measures to ensure fulfilment of the obligations arising under the Treaty. There was also the obligation not to do anything to prevent the attainment of the objectives of the Treaty – an obligation that has been increasingly emphasised where precise obligations in economic or social areas had not been spelled out. We undertook an

[1] The Treaty of Rome of 25 March 1957 established the European Economic Community.

obligation to let the European Court of Justice decide all disputes between the Member States on the interpretation or effect of the Treaty, rather than the International Court at The Hague or by international arbitration.

In the second place, all courts must give effect to Community law in so far as this has direct effect in the Member States. This refers to the Treaty, Regulations and Judgments of the European Court of Justice, whether because of the 1972 (UK) European Communities Act[2] or as a matter of Treaty principle. Our final courts are required to refer questions of European law to the European Court of Justice unless the answer is very obvious on the basis of previous authority or principle. All other courts have the capacity to decide issues of European law and the opportunity to refer questions of interpretation to the European Court of Justice, the answers to which questions they must comply with. The result of this has been that new principles of law have been introduced in Community law as applied by national judges and these have, over time had an effect on parts of the common law – a concept of proportionality may well take over from our concept of *Wednesbury*[3] reasonableness.

The effect on the procedures and powers of the courts is no less striking. It was at first said that to give effect to Community law we must apply procedures and give remedies no less than the ones available in domestic law. Then it was said that those remedies must be effective to enforce Community law even if they are different from the ones available in domestic law. The certificate of a Minister as to what is in the public interest where discrimination is alleged may no longer be sufficient to bar judicial inquiry if judicial inquiry is really needed.

Perhaps most dramatic is the ruling of the European Court – now fully accepted by the British courts – that if primary legislation is incompatible with Community law, the courts must disapply the

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[2] Section 2(1) provides for applicability of Community Law in the United Kingdom and its legal effect. As a result, the courts in the United Kingdom have to give effect to rights arising under the 1957 Treaty of Rome when construing legislation: R v Transport Secretary; Ex parte Factortame Ltd (No 2) [1991] 1 Appeal Cases 603.

[3] Associated Provincial Picture House v Wednesbury Corporation [1948] 1 King's Bench 223 held that there was a ground for judicial review if a decision was so unreasonable that no reasonable person could have come to it.

English legislation. The Mother of Parliaments is no longer supreme in a Community law context, which was surrendered in the 1972 Act, if not by necessary implication in the Treaty itself.

The common law still flourishes, more outward looking though it must be, and indeed we should try to ensure that it has its appropriate influence in return on the development of European Community law. The influence of the European Community permeates not just our trade but our law and our constitutional arrangements.

RECENT IMPORTANT INTERNAL CHANGES

I turn to more recent changes internally which are of great moment.

The United Kingdom has not been a federation nor is it a truly unitary State in the sense that all areas of the State are treated alike, pursuing one policy with the same administrative standardisation. It is rather a union where integration is not complete and where some parts retain and control elements of regional policy. It is hardly surprising therefore that from time to time there should be calls for greater regional independence or autonomy, not least for popular or nationalist rather than economic reasons.

During this century, there have been calls for Scottish total independence by some people (I suspect still a minority) and for greater autonomy or recognition for Scotland by others (I suspect a great majority). The new measures of devolution in the 1998 (UK) Scotland Act seem to have satisfied some people so as to take them away from the "total independence" lobby, though no doubt there remain those who would like to see Scotland as a separate State. In addition, there have been calls for greater autonomy, though less for total independence, for Wales. The present government adopted measures of devolution for Scotland, Wales and Northern Ireland though there is a difference in that devolution for Northern Ireland has as its aim the securing or strengthening of ties with London whereas in the other two cases the aim is to weaken links with London.

Though on one view what has been done in a parliamentary context can be analysed as a simple loosening of the Union ties rather than a revolutionary change, the steps taken are of considerable constitutional

importance. I shall say little about Wales and nothing about Northern Ireland where as you well know there are still problems about getting the proposed procedures to work.

There are major changes in Scotland. Scotland now has its own parliament with members elected both by constituencies on a first past the post basis and by the regions on a system of proportional representation. Scotland will continue to have Members of Parliament in Westminster and Scottish Peers will continue to sit in the House of Lords but on the same basis as English Peers.

The proceedings and powers of the Scottish Parliament are dealt with by an Act of the Westminster Parliament, the 1998 (UK) Scotland Act, in considerable detail. A striking feature that immediately distinguishes the Scottish Parliament from the Westminster Parliament is section 29, which provides that "an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament". There is thus no absolute sovereignty. An Act is outside such competence:

(1) if it would form part of the law of any other territory, confer functions exercisable other than in or as regards Scotland, relates to reserve matters, or is in breach of certain specified restrictions; or
(2) if it would be incompatible with European Community Law or with the European Convention of Human Rights.

Reserve matters include constitutional issues such as the Crown and the Union of Scotland and England, the United Kingdom Parliament and the High Court of Justiciary as a criminal court, the funding of political parties, international relations, defence of the realm and the armed and the civil services. Fiscal policy is also reserved to Westminster.

Moreover, there are procedural checks on legislation being introduced – a Minister in charge of a Bill must give a written statement that the Bill is within the legislative competence of Parliament. If the Presiding Officer thinks that the Bill is not within such competence, it is not presented to Parliament. When this happens, both the Lord Advocate (the senior legal adviser in Scotland) and the Attorney General in London can refer the question as to whether the Bill would be within

the legislative competence of the Parliament to the Judicial Committee of the Privy Council. Moreover, if a Secretary of State thinks on reasonable grounds that a Bill would be incompatible with any international obligations the Secretary of State may prevent the Bill from being presented to the Queen for her assent. So there are remarkable differences between Westminster and Edinburgh.

There are also differences in regard to judicial control. Community law and human rights law raise questions of *vires* so that laws can be struck down if they are incompatible. However, in the Westminster Parliament, an Act can only be disapplied if it is in conflict with European Community law. If it is in violation of human rights law it can merely be declared incompatible by the courts.

But equally, and perhaps the greatest change, is the new role given to the Judicial Committee of the Privy Council. It will not only have power to give opinions on the competence of Parliament and the Minister but also have considerable responsibilities in relation to challenges to legislation on grounds that it is invalid. The Judicial Committee will decide finally what are called devolution issues – is Parliament competent and is this legislation compatible with European Union law or with the European Convention of Human Rights Law?

There may well be questions as to whether an issue raised is truly a devolution issue as it was in a recent criminal case which claimed that there could not be a fair trial of two persons charged with murder. The result is that if the question is a devolution issue, the Judicial Committee of the Privy Council may deal with it even though it is a criminal matter whereas the House of Lords has no competence to deal with appeals in criminal matters from Scotland.

The Judicial Committee normally sits five and in the past, in the usual way, one collegiate opinion was given. Dissenting opinions are now allowed and occasionally there have been concurring opinions. But the trend is to continue to give one collegiate opinion. On the other hand, when devolution issues arise it seems likely that the members of the Committee will give individual opinions since they are actually deciding rather than advising Her Majesty in the case of an appeal to the Judicial Committee in the ordinary way.

The position in Wales is somewhat different. There have been Bills promoting self-rule for Wales for a long time but they did not provide a clear pattern of devolved government. Under the new 1998 (UK) Government of Wales Act, the National Assembly exercised its functions on behalf of the Crown under delegated powers. It deals thus with agriculture, economic development, environment health and housing. Once the power is devolved, Westminster is not able to scrutinise secondary legislation by the Welsh Assembly. The Welsh Assembly can amend secondary legislation and may be given power to amend primary legislation.

However, Wales does not have a separate legal system as does Scotland. There are sixty members of the Assembly with considerable power to influence policy. It is anticipated that it will provide a powerful lobby in Westminster. The political debate in the Welsh Assembly will obviously be of considerable importance and no doubt will affect not only what the Assembly does but what the Government in Westminster does. The Assembly has important administrative and executive powers but it does not have the limited tax raising powers given to the Scottish Parliament.

Curiously, people in England have not risen up to say "we should have our Parliament with our English devolved powers". There has been some discussion as to whether it is right for Scottish members of the United Kingdom Parliament to vote on purely English affairs when English members will have no power to vote on devolved Scottish affairs. My understanding is that Scottish Opposition Peers in the Lords will not vote on the English measures on matters devolved to Scotland. There are, however, calls for regional devolution, for example, more powers to the North East and to Cornwall. London now has its own Assembly and it is possible that further regional development will follow. As with so much else in the way we do things in England we have to see how it works out.

HUMAN RIGHTS

The 1998 (UK) Human Rights Act is also of considerable constitutional importance.

Our approach to the protection of human rights has been somewhat curious. In the past, it was thought that the overriding principle that you could do what you wanted to do unless a rule of law prohibited it was the best guarantee of freedom. You could speak and write as long as you observed the law of defamation and sedition and were not in contempt of court. Your personal liberty was guaranteed by *habeas corpus* unless a clear rule of law justified your detention. This was thought to be greatly superior to the rule in civil law countries that you needed to find a rule of law that legalised what you wanted to do.

Yet we took a prominent part in the drafting of the 1950 European Convention of Human Rights (the Convention)[4] and we were one of the first to sign and then to ratify. Not everybody thought that it was a good idea. The Lord Chancellor of the day, a member of the Labour Government, has been quoted as saying that it was "so vague and woolly that it might mean almost anything" and it was "some half-baked scheme to be administered by some unknown court".

The United Kingdom granted the right of individual petition and governments have loyally observed the decisions of the Strasbourg Court and the Commission. Some of those decisions have had far-reaching consequences. Not incorporating the Convention as part of domestic law, however, meant that our own courts could not apply the Convention as part of domestic law. Accordingly, once claimants could show that they had exhausted all the remedies available at home, they had to go to the Commission and the Court in Strasbourg. For big questions challenging our traditions, indeed our culture, it was and will no doubt remain necessary to be able to resort to an international tribunal. But for the simpler issues this was absurd. Despite protests that the courts in the United Kingdom would become jammed with cases and that judges would get increasingly involved in political issues, the present government decided to incorporate the Convention as a part of domestic law.

The rights set out in the Convention (other than the right to an effective remedy that the government thinks is to be implicit in the Statute) are accordingly scheduled to the 1998 (UK) Human Rights Act. The list is

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[4] Signed in Rome on 4 November 1950.

familiar – the right to life, not to be tortured, to a fair trial, to freedom of speech, to family life.

Three important principles are incorporated in the Act. In the first place from 1st October 2000 when the Act comes into force, all courts must read primary and secondary legislation whenever enacted "so far as it is possible to do" in a way which is compatible with Convention rights. This is an important task for the courts. It will have an important influence on the interpretation of existing legislation. It is parallel to the judge-made obligation to interpret such domestic legislation so as to be compatible with European Community law. Much will depend on how the courts and particularly the House of Lords are willing to apply the procrustean phrase "so far as it is possible to do so". They are clearly intended to take a liberal view but there must be limits perhaps even short of producing absurdity. There is no great difficulty in giving effect to this in regard to legislation passed subsequent to the 1998 (UK) Human Rights Act or Community legislation. However, how far a court should go in stretching the meaning of language in an Act of 1920 or 1870 will need to be explored. One thing, however, is beyond argument. The courts cannot be accused of usurping Parliament's functions by giving a wide meaning since this is what Parliament has said in the 1998 (UK) Human Rights Act that the courts must do.

Secondly, in carrying out this task the courts are told that they must "take into account" decisions of the Strasbourg Court. The Government's intention was apparently that courts should not feel "bound" by decisions of the Strasbourg Court; so far so good but it seems to me that the tendency will be to follow, even if not strictly bound by those Strasbourg decisions. It may well be necessary to do so because if they do not, the claimant who fails can still go to Strasbourg on the basis of that Court's decision.

The real question, however, is what should happen if the court cannot find primary legislation to be compatible with Convention rights. The law is clear in regard to Community law that if a court finds that a statute is incompatible with Community law it must disapply the statute. The 1998 (UK) Scotland Act gives the Scottish courts power to do that in respect of Scottish legislation incompatible with Convention rights. Many people, including myself, thought that the same power should be given to the courts in England in respect to the Convention

rights. But there was much opposition to or doubt about the merits of incorporating the Convention and so as a compromise the court was not given such power.

Here comes the third principle enshrined in the new 1998 (UK) Human Rights Act. Instead of the power to disapply, the Court was given the power to make "a declaration of incompatibility" in respect of primary legislation. Such a declaration "does not affect the validity, continuing operation or enforcement of the provision and is not binding on the parties to the proceedings in which it is made". Subordinate legislation however usually can be quashed by judicial review if incompatible with Convention rights.

In future, it will be unlawful for a public authority to act in breach of Convention rights and a person who claims to be a *victim* of an unlawful act may bring proceedings. When this happens, the court will have power to grant an injunction or award damages. There is a fast track method of remedy for the future. If a court decides that a provision of the legislation is incompatible with Convention rights, and a government minister, having regard to findings of the Strasbourg Court, takes the same view, the Minister may "if he thinks that there are compelling reasons to do so make such amendments to the legislation as he considers necessary to remove the incompatibility".

As to legislation to be introduced after 1st October 2000, the Minister must, before the Bill is debated for the first time, make a statement to the effect that in the Minister's view the provisions of the Bill are compatible with Convention rights or if it cannot be said that the Bill is compatible, the government wish the Bill to be passed.

Inevitably, a number of questions arise on the legislation and some people have expressed misgivings about certain points, particularly by those who wish to give the courts wider powers. Why, for instance, limit the right to bring proceedings to a "victim", rather than to a person whom the Court finds had the necessary *locus standi?* Why not include Article 13 to require that there be an effective remedy rather than assume that the relief granted by the 1998 (UK) Human Rights Act is an effective remedy? Why limit, as appears to have been done, the right to a remedy, including damages against the act of a public authority, whatever that means, when it seems plain that other courts

will be required to give effect to the Convention when deciding all cases before them?

The absence of a Commission of Human Rights to enforce the law is in some ways to be regretted and I hope one day that it may be established. There must inevitably be doubt as to how far different Governments will go in introducing remedial action in respect of both primary and subordinate legislation. Further, how "compelling" is a "compelling reason" to amend by order rather than by new legislation passed by both Houses in the way prescribed and how far will courts review what the Minister does?

I have no doubt that the ordinary courts of the land are capable of dealing with all these matters. It seems to me that they will readily appreciate that a generous meaning must be given to the terms of the Convention in the many areas where it will be relevant, such as in relation to privacy, to the press, to immigration and to many other matters. They will no doubt be said by some to be creative, especially when they depart from the normal meaning of words to give effect to Parliament's intention by reading the 1998 (UK) Human Rights Act together with earlier legislation. Further, they will follow the presumption that Parliament did not intend new legislation to be contrary to the Convention.

It is to be noted that nothing in this Bill enables judicial review of *proposed* legislation. There is, of course, much room for debate during the various stages of a Bill through the House of Commons and the House of Lords, particularly in the Committee stages, when detail is examined. But, as has frequently been shown, defects in legislation can be missed and many of us, in particular members of the Statute Law Society, have advocated the establishment of a committee to review proposed legislation generally.

We have, in the House of Lords, a Committee called the Select Committee of the European Communities whose Sub-Committees examine in depth proposed legislation by the Council and the Commission of the European Communities. Its reports are widely respected and it is curious that we do not have such a Committee for our own legislation, particularly at times when Governments have heavy programs of legislation and when both Ministers and

Parliamentary draftsmen have to work to very short time limits. It was my view before the Bill was published that a Committee of the House of Lords should be set up to consider whether proposed legislation was compatible with the European Convention on Human Rights. The new Bill creates a primary area in which such a Committee could work.

However, it has been decided to set up a joint Committee of the House of Lords and House of Commons to review legislation with the 1998 (UK) Human Rights Act in mind although this Committee has not yet been established. It is expected that the 1998 (UK) Human Rights will lead to much litigation. There will be some serious questions to be tried and it may be that there will have to be a fast track to the House of Lords. Some of these decisions will have a serious effect on the conduct of public and private affairs. People are already asking whether what they do will survive. There will be challenges to: (1) the procedures of our courts under Article 6; (2) restrictions on free speech and meetings, demonstrations under Article 10; and (3) family life under Article 8. Restrictions based on sex and sexuality will come under challenge. Newspapers are now discussing all sorts of situations, which it is suggested, might be incompatible. There will also be, as there have been at Strasbourg, some hopeless try-ons. However enthusiastic about the new 1998 (UK) Human Rights Act, the courts will have to be strong to say that they are not runners.

HOUSE OF LORDS – REFORMS

The fourth change is historically, at any rate, no less interesting than the others and in the long term is of great constitutional importance.

It is obvious even to us that if you were creating a second Chamber – a Senate – today, you would not begin with the hereditary principle. The fact that you were the twenty-third Baron or the fourteenth Earl would not, *in itself*, be enough. But it isn't so. We are not starting from scratch, from a *tabula rasa* – and I for one am grateful that we are not starting from scratch. In medieval times, it was perfectly comprehensible that the king should consult those around him. If they were or if they became enobled it was perfectly comprehensible that they should become in a more formal sense the king's advisers, not only in military and political matters but in judicial matters too.

When a subject approached the king alleging a grievance, particularly against the great landowners, it became apparent that the king could not deal with these matters personally. And so the *curia regis* evolved. Peers sat in a separate chamber from the Commons and advised even on judicial matters. There were changes from time to time over the centuries and in the third quarter of the nineteenth century the king's advisers on judicial matters were replaced by professional judges, though they continued to sit in the House of Lords, known as Lords of Appeal in Ordinary.

From time to time, there have been calls at the Upper House of Parliament that the House of Lords should change. Sometimes there have been threats to create new peers in order to ensure a measure went through the House. It happened during the discussion about the Treaty of Union and it happened again at the beginning of the twentieth century when the king was prepared to create five hundred new peers to ensure that Liberal legislation went through. To recognise the democratic legitimacy of the House of Commons, the House of Lords became, following the Parliament Acts, a delaying and a revising chamber. Its role has nonetheless been of great importance. In initiating legislation, in revising or supervising legislation, at times in expressing a view that represented the contemporary view of many of the people, contrary to the views of the majority in the House of Commons, it has had a real function. That function was changed when the House of Lords was limited to delaying legislation passed by the Commons and by taking away its powers in relation to taxing legislation.

But limiting the function was not enough. There has been a lot of talk and a lot of theory about its composition. Even as far back as 1911 the government wanted to make changes. Why should membership of the House of Lords be largely hereditary, as one peer has put it "I am only here because my great grandfather used to get drunk with King George II".

Ideologically, such a body is difficult if not impossible to justify in the twenty-first century but it would be myopic and ungenerous not to recognise the great contribution made by many of the hereditary peers. There were of course some who did not come but the regulars were men and women of high ability and experience who, unpaid, inadequately recognised, devoted long hours to the service of

parliament and the nation. The 1959 (UK) Life Peerages Act enabled peers for life, again not on a salaried basis. They, too, have dedicated considerable time and energy to the work of Parliament. I chaired a Select Committee of the House into the working of the public service. I was very impressed by the dedication of the Members unsalaried, giving up many hours to take evidence, to discuss these issues to produce a report, often sitting at times inconvenient to them.

There have been many proposals going back to the days of Mr Lloyd George but the present government in its election manifesto undertook a commitment to remove the hereditary peers from the Upper Chamber. Many people thought that the logical step was to work out the structure of the new House of Lords first and then, knowing what would go in its place, to remove the hereditary peers. But the government took a different view. It had proven difficult to agree a blueprint before, yet enough was enough. If the hereditaries remained, things would drift on. If they were removed some solution would have to be found.

Thus, the Labour Party in its manifesto said that:

> [The House of Lords] must be reformed. As an initial self-contained reform not dependent on the further reform in the future, the rights of the hereditary peers to sit and vote in the House of Lords will be ended by Statute [and the] system of appointment of life peers to the House of Lords will be reviewed.

The legislative powers of the House of Lords will remain unaltered.

And so the 1999 (UK) House of Lords Act was passed. It provided that hereditary peers should not have the right to sit and vote in the Lords though they could stand for election to the Commons. That was to take place at the end of the session in which the Bill was passed even for those who had already received a writ to attend parliament. A hereditary peer will no longer be able to have a writ of summons. This measure, of course, was not popular either with many of the hereditary peers or many of the Conservative peers but following the Salisbury Rules the convention was that since it was part of the election manifesto the Lords would not oppose it root and branch.

Negotiations were protracted and difficult. Two matters were referred to the Privileges Committee that included three law lords and ten other peers, which I chaired. The first was a complaint that to remove the rights of Scottish peers to sit was contrary to the Act of Union of 1707. The second was that as a matter of drafting, the legislation did not achieve the government's intention to take away the right to sit immediately at the end of the session. Further, the most that could be done was to remove the right to sit at the end of the parliament, a writ once having been answered by the individual peers. Interesting questions, but as the law reports show, the Committee rejected both complaints.

In the end, following a crossbench proposal, ninety-two hereditary peers continued to sit, divided between the three parties and the crossbenchers until the new reforms take place. And so the place has changed. From 759 hereditary, 510 life peers and 26 bishops to something like 100 hereditary and an increasing number of life peers as new appointments have been made.

The Joint Committee of both Houses is to consider what happens next. The government has outlined its aims. The Conservative Party set up a Commission under Lord Mackay of Clashfern and a group of hereditary peers prepared a valuable paper. Of most significance for present purposes, a distinguished Royal Commission reported in a remarkably short time after examining many possible forms that the new House should take. It proceeded from the premise that we should have a bicameral legislature and so the two main questions were:

(1) what should be the role of the second Chamber? and
(2) who should be its members?

As to the first, it is significant that both the Government and the Royal Commission recognise the particular features of the House of Lords and the function it has carried out in the past, even though it was constituted with a majority of hereditary peers in:

(1) considering and amending legislation;
(2) challenging the Government through debates and questions to Ministers;
(3) debating matters of public interest; and

(4) carrying out investigations through Select Committees of the House.

As to the role of the new Chamber the keystone is that the House of Lords should not undermine or rival, but should complement and support the decisive political role of the House of Commons. Its role is seen to be first in bringing a range of different perspectives to bear on the development of public policy and second to be broadly representative of British society, representing regional, vocational, ethnic, professional and cultural groups. It should provide an important check and balance making the Government justify its proposals and the Commons to think again. It should provide a voice for the nation and for the regions.

The importance in scrutinising primary and secondary legislation, in looking at European Union proposals, in protecting the Constitution (a role so important when the Constitution is largely unwritten) and in considering whether proposed legislation is in compliance with human rights and Convention rights is underlined. The House should be free from party domination and the Members, who should be people of distinction, should have a breadth of experience outside the world of politics.

How its members should be chosen has led to many suggestions. Thus, it is possible that all should be elected, that all should be elected by devolved institutions such as local government authorities, the Assemblies of Wales and Scotland and by Members of the European Parliament and Members of the House of Commons. It is possible to have a random selection. It is possible to co-opt specialists to the House for particular areas.

The real issue however was whether the House of Lords should be elected directly. Direct election would have democratic legitimacy, should instil confidence and authority, particularly in vetoing a Bill passed in the House of Commons. Indeed the report stated that "there is a danger that without a directly elected element the reform of the Second Chamber might decline into an assemblage of respected but politically ineffective dignitaries".

The danger of direct election alone was the risk of conflict with the House of Commons, particularly if the two Houses had a majority of a different political colour. On the other hand, if they were of the same political colour there was a danger of the House of Lords simply rubber-stamping the Government, especially if the party had a large majority as in the present House of Commons. Nor would it necessarily solve the problem if the powers of the Second Chamber were limited or the form of voting was changed. For all to be elected would also mean that public life was even more dominated by professional politicians, whereas to make people feel they really had a voice in parliament, a wider range of representation than of people willing to fight elections seems to be called for. By direct election it would be impossible to constitute a Chamber independent of the influence of the political parties. The systems of indirect election proposed would again not necessarily provide the broad range of people required and the risk of office holders in professional and vocational groups being automatically elected would be undoubted.

Instead, an interesting proposal has been made. It is that in the first place a significant minority should be regional members to reflect the balance of political opinion in the nation and in the regions, elected by the regional electorate. Many proposals were considered but the Royal Commission thought that 87 should be elected at the same time as the European Parliamentary elections with one third elected at each election for three year periods, with a possibility of re-appointment by the Appointments Commission.

The proposal continued that the Appointments Commission should choose most of the rest of the members. The Commission must be a genuinely independent body, so that appointments were not based on the patronage of the Prime Minister in order to make the chamber representative of all walks of life and interest. And so as far as people with political affiliations were concerned, an attempt would be made to reflect the votes cast in the previous General Election. It was anticipated that crossbenchers should remain at around 20% of the total members. It was also proposed that existing life peers should become members of the second chamber.

The position of the Law Lords inevitably had to be considered. The proposal is that they should continue as members of the House since it

is valuable for the House for them to contribute and for them to be closely aware of what is happening in Parliament. However, as recently stated by the Law Lords, they should take care not to speak on politically controversial subjects or on subjects which might lead to litigation. This has long been our practice. But it seems to me that the Law Lords can fulfil a useful function in Select Committees as they have done on Europe, on Statutory Instruments and on special subjects.

There has been some talk about setting up a Supreme Court. We are a Supreme Court and it seems to me that the Law Lords can do anything that they could do if they were called a Supreme Court and constituted a separate body. The question is really whether we should be excluded from the legislature on the Montesquieu principle of the separation of powers.

It may look theoretically odd but it works, and I take great pleasure from the fact that the Royal Commission did not suggest a change. Whether it will come if the whole structure of the courts is reviewed is a different matter.

The role of the Lord Chancellor has been much more under review. There are many now who say that the Lord Chancellor should not be both a Member of the Cabinet and sit as a judge. Although again, by and large the system works, since the Lord Chancellor has to choose carefully the cases on which he will sit, there is an argument that has to be considered.

If the proposals of the Royal Commission are accepted things will change radically. The peerage will not mean a seat in the Upper House. A seat in the Upper House will not carry a peerage. Hereditary peers will be able to stand for the House of Commons. In addition to the Bishops of the Church of England, other Christian and other religious groups will be representative. Whether the new Chamber will be called a House of Lords or a Senate remains to be seen. The logic would seem to be to call it a Senate.

OTHER REFORMS

These are not the only changes in our society that have taken place which are of interest to lawyers. There are changes in the working

methods of the House of Commons, the procedures of the courts with case management and a fast track being the flavour of the day. There are changes in professional practice. There are solicitor advocates in the higher courts, the Inns are debating admitting solicitor advocates to membership. There have been significant changes in training and in professional rules not least with an eye on European Directives on the movement of lawyers across frontiers.

Our voting systems need to be reconsidered. Voting systems are more important in a democracy than we appear to have recognised in the United Kingdom. The first past the post method has been followed and many people are satisfied with it. It obviously has advantages and it may be the best. It is simple to operate, and it is intelligible to the electorate and it provides certainty. But it has its disadvantages – in a single Member constituency a candidate can be elected who does not have an overall majority of votes out of those cast, even if he has more than any other single candidate. A parliamentary majority may be elected and therefore a government formed that does not have an overall majority of votes and sizeable parties with a significant number of votes cast can finish up with little or even no representation. It can easily happen that in relation to the total number of votes the number of Members of Parliament or local councillors of a particular party is derisory. Swings in electoral opinion can magnify the number of seats won or lost.

There have been departures from the first past the post rule in the European parliamentary elections and in the elections for the Mayor and Assembly of London and it seems to me that we shall need to keep this subject under review. An independent Commission on the voting system has already reported but its recommendations have not so far proved attractive to the Government. The subject however will not go away. There are other topics as I said but on the last day of summer you can see that the winds of change have blown strongly, for better or for worse, for richer or poorer. Time will tell what other changes are needed.