

A Directly-Elected House of Lords: A Proposal for Reform

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ABSTRACT

This article proposes a possible reform of the House of Lords, namely to its composition and functions. By examining previous reform attempts as well as the current criticisms and issues facing the United Kingdom's upper chamber, the article contends that the House of Lords is necessary due to the benefits of a bicameral legislature that it offers to the United Kingdom. The article provides arguments in favour of the implementation of direct elections and addresses criticisms of this scheme. Subsequently, this article argues in favour of a system of party-list proportional representation; it reviews other electoral systems, examines the merits of party-list proportional representation and offers successful examples of its current implementation by other states. Finally, the article offers a prediction of the overall effects on the relationship between the House of Commons and the House of Lords if direct elections are implemented.

INTRODUCTION

Reforming the House of Lords (henceforth “the Lords”) – an unelected body of Parliament composed of hereditary peers, life peers as well as archbishops and bishops – has been considered a legal quagmire. Prior to the 20th century, the Liberals and the Conservatives, the two main political parties of the 19th century,¹ had debated a possible curb on the Lords’ political and legislative powers.² Subsequent to the debate, the Parliament Act 1911 was adopted, concluding the

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¹ Peter Dorey and Alexandra Kelso, *House of Lords Reform Since 1911: Must the Lords Go?* (Palgrave Macmillan UK, 2011) 16.

² *ibid* 10.

most significant period of change from 1906 to 1911 in the Lords.³ The Act imposed several restrictions on and removed certain rights from the Lords, such as its absolute power of veto on legislation.

As an important preliminary step in the process of reforming the Lords,⁴ the 1911 Act was later supplemented by the Parliament Act 1949, which imposed further limitations on the upper house's power.⁵ This period also saw the manifestation of the so-called 'Salisbury Convention' in 1945, originating from when Lord Salisbury led an initiative in which the Lords would refrain from voting down or opposing the second reading of legislation promised in the government's election manifesto.⁶ Subsequent to the Peerage Act 1963, however, there had been little real progress until 1997 due to a failure to agree on what further reforms ought to be made.⁷ Even with further reforms enacted after 1997, touched upon later in this article, the Lords, faced with criticisms of its functions and overall purpose, has not been completely reformed. This article considers the issues that the Lords currently faces and proposes a plan for its reform. It will argue for a directly-elected Lords, with single fifteen-year terms through a proportionally-representative system in staggered elections, so that only a third of the members are elected every five years, in contrast to the first-past-the-post system used for the House of Commons (henceforth "the Commons").

Section I of this article focuses on the current status of the Lords, namely its functions, previous reforms, and the problems and criticisms that it faces today. Section II argues for maintaining a bicameral legislature rather than abolishing the Lords. It also contends that a second chamber could legitimise the practices of Parliament as a whole. Section III argues that direct elections would allow the Lords to better serve the public interest and analyses how the Lords could maintain its relative independence from party politics. It also contends that direct elections would not necessarily mean a loss of wisdom or stability. Finally, section IV looks into possible means through which direct elections could be implemented and argues that the Lords could represent the people's interest more

³ Lord Longford, *A History of the House of Lords* (New ed, Sutton Publishing 1999).

⁴ Meg Russell, *Reforming the House of Lords: Lessons from Overseas* (OUP 2000) 12.

⁵ *ibid* 12. An example is the limitation of the House of Lords' delaying power.

⁶ *ibid* 13.

⁷ *ibid* 14.

effectively through party-list proportional representation (henceforth “party-list PR”). It also looks into the current use of party-list PR, which has been successfully implemented in the second chambers of other nations, and asserts that the future relationship between the two Houses would not be necessarily different from that between the two Houses today. It is with this proposal that the Lords may become an improved representative institution that serves the modern interests of the people and works in an enhanced manner with the Commons.

CURRENT STATUS OF THE HOUSE OF LORDS

The Current Functions of the House of Lords

The exact nature of the Lords’ powers should be defined prior to the discussion of whether the Lords ought to be reformed and, if so, in what manner. As such, this section examines the current role the Lords plays in the UK’s constitutional makeup. Archer lists three constitutional justifications for the Lord’s existence: its role as a scrutiniser and drafter of legislation;⁸ its role as a mechanism of preventing the Commons from becoming despotic; and its ability to reflect on legislation for an extended period of time.⁹ More generally, Bagehot argues that there are two functions of the Lords: the power to delay legislation and propose revision.¹⁰

With the Parliament Act 1911, the Lords’ power to veto was replaced by a power to delay a bill by up to two years.¹¹ The Parliament 1949 Act reduced this time period to just one year. As an example, the Lords delayed the Hunting Bill 2004,¹² which banned the hunting of wild mammals with dogs in England.¹³

⁸ An exception is legislation relating to financial matters.

⁹ Peter Archer, ‘The House of Lords, Past, Present and Future’ (2000) 70 PQ 396, 396-397.

¹⁰ Adam Tomkins, ‘What is Parliament For?’ in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003) 55, 56.

¹¹ The removal of a veto does not apply to all legislation. For instance, the Lords may veto a bill extending the term of the current Parliament.

¹² Later passed into law as the Hunting Act 2004.

¹³ Ben Russell and Colin Brown, ‘Day of chaos ends with fox-hunting ban forced into law’ *The Independent* (London, 19 November 2004).

Though the Commons invoked the Parliament Acts to overrule the delay – making the Hunting Act 2004 the seventh statute since 1911 to be enacted through such a procedure –¹⁴ it nonetheless demonstrates the power of review that the Lords holds with this power to delay; it is able to ensure that the Commons thoroughly reviews a bill’s political implications, even though the ultimate decision lies with the it. Such a power could be a de facto veto in certain circumstances: for instance, where there is an upcoming general election¹⁵ and the current government does not have the confidence of the majority of the populace, the subsequent government, perhaps of a different political party, may not wish to pass the delayed bill. However, in most cases, the Lords invokes the right to delay in order to allow the Commons to reconsider a bill. While such a right may not be a direct form of control over the Commons, it is effective in that it forces re-examination of a bill’s issues. The Commons cannot regularly circumvent the Lords’ authority in such a way, lest it undermine the political legitimacy of its legislation. Although *Jackson* concluded the question of whether Acts made under the Parliament Acts’ procedure were validly enacted,¹⁶ the Commons has an interest in adhering to the standard legislative procedure.

The power of revision, according to Bagehot, refers to the Lords’ ability to scrutinise legislation, though it is limited by the previously-explained Salisbury Convention.¹⁷ Oliver suggests that the Lords can be construed as a constitutional watchdog through its work in select committees.¹⁸ Through calling experts and demanding information from the government, the committees report on certain topics and bills to which the government is obligated to respond.¹⁹ Having recently been reformed following the ‘Wright Report’ of 2009,²⁰ the five committees of the Lords have the responsibility of overseeing general areas of

¹⁴ HL Deb 8 April 2010, vol 718, col WA463.

¹⁵ The election would have to be in less than a year but in more than a month from the point where the bill was delayed.

¹⁶ R (*Jackson*) v *Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

¹⁷ Jowell and Oliver, *The Changing Constitution* (7th ed, OUP 2011) 169.

¹⁸ *ibid* 181.

¹⁹ *ibid* 174.

²⁰ *ibid* 175. One recommendation was for the election of committee members by secret ballot within the parties.

government,²¹ contrasted with the Commons' thematic and departmental select committees. Bagehot also contends that the Lords has an important symbolic value: its imposition of the value of nobility on the common masses and preventing them from experiencing worse forms of rule that would replace the nobility if it did not exist, such as the rule of wealth, of rank, and so on.²² While this may not be seen as a benefit, as nobility normally arises from the confluence of wealth and rank, the symbolism of the Lords as an independent entity, apart from ordinary political turbulence, can legitimise Parliament's legislation, an idea explored later in this article.

Several Criticisms of the House of Lords Today

Numerous proposals for reforms have either failed to be enacted or have been enacted without significantly changing the Lords. Jeremy Bentham argued that if the second chamber offers nothing different from the first, then it is redundant and a 'net loss'.²³ Emmanuel Siéyès concurred, asserting that 'if second chamber dissents from first, it is mischievous; if it agrees, it is superfluous'.²⁴ However, such an argument can be dismissed in considering the Lords' practical and symbolic advantages, such as its ability to review legislation and legitimise Parliament; without the Lords, the authority and functionality of Parliament could suffer.

While some concede that a second chamber is necessary, they criticise the Lords' unrepresentative nature. The Lords' current composition²⁵ is significantly different from that of the Commons²⁶ and from the percentage of

²¹ The five Select Committees of the Lords are European Union Committee, the Constitution Committee, the Economic Affairs Committee, the Science and Technology Committee, and the Communications Committee.

²² Tomkins (n 9) 56.

²³ Waldron, 'Bicameralism and the Separation of Powers' in (2012) 65 CLP 31, 35-36.

²⁴ *ibid* 37.

²⁵ See 'Lords by party, type of peerage, and gender' (UK Parliament)

<<https://www.parliament.uk/mps-lords-and-offices/lords/composition-of-the-lords/>> accessed 2 January 2019. As of 2019, the Lords currently consists of 676 life peers and 90 hereditary peers, with 26 bishops, 249 Conservative peers, 186 Labour peers, 185 crossbench peers, 98 Liberal Democrats peers, and 31 non-affiliated peers.

²⁶ See 'Current State of the Parties' (UK Parliament) <<https://www.parliament.uk/mps-lords-and-offices/mps/current-state-of-the-parties/>> accessed 2 January 2019.

votes gained by each party in the 2017 general election.²⁷ These serve as a point of comparison between the general ideology of the populace and that of the Lords, which can be inferred to be significantly different. In addition, despite the Peerage Act 1963 permitting female peers to sit in the Lords,²⁸ there are currently only 208 female peers compared to their 584 male counterparts.²⁹ Therefore, the Lords may not effectively represent the interests of the populace, with its agenda out of line with the people's wishes.

The membership of hereditary peers, who gain their position by virtue of birth rather than merit or work, is also criticised. Reform was attempted with the House of Lords Act 1999, which removed all but ninety-two hereditary peers.³⁰ The significance of this Act was to allow, for the first time, life peers to form the majority of the Lords.³¹ Yet, criticism persisted due to the continued membership of hereditary peers and bishops. The Royal Commission on the Reform of the House of Lords recommended that hereditary members be removed altogether and that the number of bishops be reduced to sixteen.³² It also recommended that the Prime Minister ought not to have the right to appoint the members of the second chamber and that the Lords move towards gender and ethnic balance.³³ However, such reforms have not been implemented, as, according to Russell and Cornes, the report failed to adequately address the impacts and potential efficacy of a redeveloped Lords and its new composition on the constitution more broadly.³⁴

Another criticism of the Lords is that, although unelected, it has immense authority, which seems to conflict with the UK's democratic principles, which generally stipulate that the rulers, the government, ought to be accountable to the ruled, the people. Although the House of Lords Reform Bill 2012, which

²⁷ See Vyara Apostolova and others, *General Election: Results and Analysis* (House of Commons Library Briefing Paper, 2nd ed, CBP 7979, 2018).

²⁸ See s 6 Peerage Act 1963.

²⁹ See 'Lords by party, type of peerage, and gender' (n 25).

³⁰ S 1 and s 2(2) House of Lords Act 1999.

³¹ Richard Cracknell, *Lords Reform: The interim House – background statistics; Research Paper 00/61*. (House of Commons Library Research Paper, No 00/61, 2000).

³² Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000).

³³ *ibid*.

³⁴ Meg Russell and Richard Cornes, "The Royal Commission on Reform for the House of Lords: A House for the Future?" (2001) 64(1) MLR 82.

would have made the Lords mostly elected, attempted to change the manner with which the Lords was comprised,³⁵ it was abandoned due to opposition from Conservative backbench members of Parliament.³⁶ Subsequent to the Bill's failure, there have been no serious proposals to alter the Lords' composition. This represents a clear structural issue since, due to the Lords' composition of unelected members who may not accurately represent the people, it is difficult to contend that the Lords can speak on behalf of the people.

THE NEED FOR A BICAMERAL LEGISLATURE

A Check on the House of Commons

Despite its issues, the absence of the Lords as an upper chamber would cause more problems than it would solve. The upper house's role as a check on the Commons is essential for the proper and legal functioning of Parliament. This subsection argues why reform would be a better option than abolition.

As mentioned in the previous section, critics such as Bentham and Siéyes have questioned the need for the Lords, arguing that it adds no substantial value. Yet, without a second chamber to review the activities of the first, the Commons would be a virtually unchecked power, such as with the Draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 (DTCR).³⁷ If the Lords were not required to affirm the instrument, the Commons could have passed the DTCR without waiting for an independent, second review,³⁸ thereby avoiding proper scrutiny.

Parliament currently enjoys the doctrine of parliamentary sovereignty, which holds that Parliament has absolute authority and is supreme over all other government institutions. Although the courts had initially argued that the common law did not unquestioningly accept the binding authority of

³⁵ See House of Lords Reform Bill 2012.

³⁶ 'Nick Clegg confirms House of Lords reform plan is officially scrapped' *Evening Standard* (London, 3 September 2012).

³⁷ 'Tax credits: Lords vote to delay controversial cuts' *BBC* (London, 26 October 2015).

³⁸ *ibid.*

Parliament,³⁹ they now formally recognise the doctrine of parliamentary sovereignty by bestowing upon Acts of Parliament a legal status higher than that of judge-made law.⁴⁰ Even the Supreme Court, formed in 2009 to replace the Lord's previous judiciary role as the final port-of-call for cases, cannot override Parliament, but may only interpret and develop the law when necessary.⁴¹ Despite recent legislation which have qualified the broad doctrine – such as, but not limited to, the European Communities Act 1972, Human Rights Act 1998, and the Scotland Act 1998 – it has nonetheless persisted and remained relatively unchanged in recent history;⁴² today, Parliament can make laws concerning anything, and an Act's validity cannot be questioned by the courts.

The Lords is vital in this consideration and contributes by examining and revising bills brought by the Commons, acting as a forum for a free discussion of important general questions of policy, and delaying a bill's passage to allow all opinions of it to be expressed and be responded to.⁴³ Without a second chamber, it would be difficult to ensure that more concerns regarding the Commons' legislation are addressed and that Acts passed are well-justified and do not contain any significant issues. Indeed, Mill opined that, as a majority in a single assembly is always assured of attaining victory, it could become despotic without a second chamber to review its legislation.⁴⁴ Hence, an independent point of view through the Lords is vital to ensure that the majority does not oppress the minority.

Yet, it would seem illogical that those who scrutinise the legislation of the Commons would themselves be unaccountable to the people that they claim to represent and benefit. As the scrutiny is meant to prevent the Commons from becoming despotic, the Lords ought not to become unaccountable themselves by not being representative of the people. As such, reforming the Lords to ensure

³⁹ See *Thomas Bonham v College of Physicians* (1610) 8 Co Rep 107. Lord Coke CJ: 'When an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void'.

⁴⁰ Adam Tomkins, *Public Law* (OUP 2003) 104.

⁴¹ *ibid* 18.

⁴² Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003) 54.

⁴³ Paul Carmichael and Brice Dickson (eds), *The House of Lords: Its Parliamentary and Judicial Roles* (Hart 1999) 38. Examples include examining bills brought from the Commons, acting as a forum for free discussion, and delaying a bill's passage.

⁴⁴ Waldron, 'Bicameralism and the Separation of Powers' (n 23) 42-43.

that it can more accurately reflect the desires of the populace without compromising its regulatory functions is essential, which can be done through a proportionally-representative electoral system, as is argued in section IV.

Maintaining the Legitimacy of Parliament

Despite the current restrictions upon the Lords, its abolition would considerably diminish the legitimacy of Parliament's actions. As such, this subsection contends that the Lords legitimises the actions of Parliament as a whole.

If Parliament is unicameral, a party or a coalition with a majority in the Commons would have little difficulty in ensuring that its legislation is passed. This exacerbated by the use of party whips in the Commons; a member of Parliament who opposes the whip's directives would face severe political consequences.⁴⁵ Those who are not represented by the majority would find their concerns unheard and, consequently, have their faith in the current government reduced. This issue is compounded by the fact that the often political-partisan scrutiny of legislation in the Commons is not completed with any set criteria but at-large,⁴⁶ which could further undermine Parliament's legitimacy. While it may seem as though an elected Lords would result in greater tyranny of the majority, it would not be so in an electoral system different from that used by the Commons as the Lords' composition could be significantly different from that of the Commons, allowing the Lords majority to set their own agenda, an idea later explored in section IV.

As a result, the Lords' role as the scrutiniser of the Commons is a means to counteract the potential lack of faith in a government. Democratic elections do not mean that checks and balances are unnecessary; for example, control is exerted by the judiciary, which, for example, regulate executive action,⁴⁷ or interpret Acts of Parliament as compatible with fundamental common law rights.⁴⁸ The Lords' significant contribution to checks and balances within the Westminster system is through its review of legislation passed by the Commons from a viewpoint, and against a standard, independent from those who proposed

⁴⁵ *ibid* 46-47. An example would be expulsion from the party or potential deselection in elections.

⁴⁶ Jowell and Oliver (n 17) 173.

⁴⁷ See *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.

⁴⁸ See *R (Simms) v Secretary of State for the Home Department* [1999] UKHL 33.

the measures.⁴⁹ By calling experts on relevant matters and pressing for information from Parliament, the Lords can allow relevant opinions about the justification and consequences of a certain Bill to be addressed. Even by delaying the enactment of a bill, the Lords can compel the Commons to re-examine any problem that may arise from its passing which it deems significant but overlooked. Yet, to ensure that the Lords itself does not lose the confidence of the people, it must not be completely detached from the latter's desires. A democratic House of Lords, elected through a proportionally-representative system, would be best able to reinforce Parliament's popular legitimacy. With this scrutiny, people from the entire political spectrum, even if they disagree with an Act, can be assured that Parliament has carefully considered whether it has the justification necessary to be passed, whether it would infringe upon anybody's fundamental rights, and what consequences could arise.

With the Lords, Parliament can generally function with the support of the people. Yet, reform is necessary to ensure that Parliament's legitimacy is strengthened. Overall, the Lords' complete abolition would not be advisable, and reform would allow the criticisms of the Lords to be addressed while retaining the benefits that it currently confers on Parliament.

THE CASE FOR A DIRECTLY- ELECTED HOUSE OF LORDS

The Representative Nature of Direct Elections

Ultimately, direct elections would best represent the interests of the people and increase Parliament's legitimacy. This subsection will look at other proposals for reform and assert as to why they cannot be as representative as direct elections.

Proposals for a more representative Lords have been made throughout the past century, as can be seen in the previous sections. The Wakeham Report argued for a combination of an elected and appointed Lords, which is constituted through selections by an independent Honours and Appointments Commission

⁴⁹ David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] PL 323.

and proportionally-representative elections.⁵⁰ A 2007 white paper also called for a House composed of elected members and members appointed by a new Statutory Appointments Commission, which would direct select non-party-political appointees, whereas party-political appointees would be nominated by party leaders in the Commons and vetted by the Commission.⁵¹ Yet, this recommendation was never implemented, as the Wakeham Report was criticised for remaining ambiguous on several critical issues.⁵² For example, its proposals may have created two separate classes of members who may not be able to work with one another in an effective manner⁵³; the elected members may have greater legitimacy, by being directly chosen by the people, than those appointed. For instance, if legislation, supported by elected members, is blocked due to opposition from the appointed members, it could undermine the people's faith in the Lords. Thus, with the lack of synergy that could occur as a result of such a combination, the Lords ought to be formed through a single process, which ought to be direct elections rather than another means, such as appointment or indirect elections.⁵⁴

The main, and perhaps most obvious advantage of direct elections are its adherence to democratic principles, thereby making the Lords more able to translate the people's support into a democratic mandate.⁵⁵ Although appointment by an independent commission would improve the Lords' overall legitimacy as compared to the current arrangement, it would not do so as much as direct elections would. Whilst the people, in the case of direct elections, would have a direct say in the process of deciding who would represent them in the second chamber – thereby allowing them to believe that they are making their opinions heard – the people, an appointments process, may lead people to question whether any selection was truly representative of the people's wishes. This was the case in the Canadian Senate, which, although wholly appointed, suffers from legitimacy issues that prevent it from effectively challenging the

⁵⁰ See Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000).

⁵¹ See Jack Straw, *The House of Lords: Reform* (Cm 7027, 2007).

⁵² Jeremy Mitchell, 'Review of "Reforming the House of Lords: Lessons from Overseas" by Meg Russell' (2000) 71(3) PQ 375–377.

⁵³ 'Wakeham is not the answer' *BBC* (London, 20 January 2000).

⁵⁴ Meg Russell, *Reforming the House of Lords* (n 4) 316.

⁵⁵ *ibid* 317.

lower house.⁵⁶ There may even be questions regarding the independence of the commission itself, such as whether it was acting in the public interests. With the Lords, these questions are likely to keep persisting as the current arrangement in the Lords is facing issues related to its institutional legitimacy. Indirect elections, such as those through selections by elected party leaders, could also face legitimacy issues as the people would not have a direct say as to whether they are being represented. While it partly adheres to democratic principles (as the people can elect those who would vote for the members of the Lords), this method would be seen as less reflective of the people's opinion. However, such questions would be less likely to arise with direct elections.⁵⁷

Such an advantage may seem to undermine existing checks and balances as the Lords could be seen to gain much power. However, democratic control can also, and perhaps better, function as regulatory oversight over Parliament.⁵⁸ As Parliament would be directly accountable to the people, it would be able to ensure that it does not act in a manner that harms the public wellbeing. This would be beneficial to the Lords' efficacy, allowing better and more stringent oversight over what the Commons proposes whilst simultaneously being seen as acting in the people's interest, rather than contrary to it.

Hence, direct elections are a viable alternative to the current system of appointment of members. Many other nations have directly-elected second chambers, distinct from the first in their electoral system, which the government noted in 1998 while considering different methods through which the upper house could be created.⁵⁹ For example, Australia and Ireland use the single transferable vote (proportional representation) and the United States uses a first-past-the-post (single-member constituency) model. The Lords could adopt direct elections for its own use to ensure that it seen as both stable and legitimate, which is explored further in section IV.

⁵⁶ *ibid* 327.

⁵⁷ *ibid* 328.

⁵⁸ Eric Barendt, 'Separation of powers and constitutional government' [1995] PL 559, 603.

⁵⁹ See HMSO, *Modernising Parliament, Reforming the House of Lords* (Cm 4183, 1998) 34.

Maintaining Independence from Party Politics

Despite the important advantages of direct elections, there has been fear of introducing political chaos into a supposedly stable second chamber. This subsection discusses how the independence of the Lords from the politics of the Commons could still be maintained.

One of the main fears of a directly-elected Lords is the possible loss of an independent non-party element. It could succumb to political strife, with members vying for power, unlike the current Lords, whose members are unlikely to seek either support or favour from political parties.⁶⁰ Through a carefully designed electoral system, however, the influence of politics on the Lords can be considerably diminished.

The need to seek re-election is one of the main reasons as to why members of the Commons are loyal to their parties, who provide both directly, with campaign support, and indirectly, by not supporting a candidate opposed to their nomination. Furthermore, there are many rewards available to those with a long history of support,⁶¹ such as being appointed by the Prime Minister to select posts and building popularity so that, one day, they may become the Prime Minister themselves. To avoid this, prospective members of the Lords ought to serve single fifteen-year terms, as proposed in 2012.⁶² The Political and Constitutional Reform Committee reported that fixed-terms, albeit through appointments, may be desirable for long-term reform⁶³. This could be extended to direct elections as the Committee reported that long terms would afford stability and allow for new members to flow in.⁶⁴ Members ought also to be prohibited from seeking political office after their terms in order to ensure that, once elected, they have a degree of independence from their political parties. Without the need to seek re-election or the desire to reach higher office, these members can objectively judge the bills proposed by the Commons and avoid the

⁶⁰ Thomas Bingham, 'The House of Lords: Its Future?' [2010] PL 261, 267.

⁶¹ Fergal F Davis 'Political Rights Review and Political Party Cohesion' (2016) 69(2) *Parl Aff* 213–229.

⁶² House of Lords Reform Bill 2012.

⁶³ Political and Constitutional Reform Committee, *House of Lords reform: what next?* (HC 251, 2013) 3, 19.

⁶⁴ *ibid* 18.

influence of a politically-motivated agenda as they are no longer bound to the party's whims. In this regard, direct elections could preserve the independence of the Lords, while allowing its composition to better respond to the people's needs.

This is not to say that members of the Lords would be running as complete independents; such a system is infeasible as forcing people to run solely as independents would create an imbalance due to a host of factors, such as the expenses involved in running a campaign (which would create a Lords dominated by more affluent members). Support by political parties may be necessary, though its influence can be severely limited by making sure that those elected to the Lords are independent from party politics through the use of single lengthy terms. Through this, political parties, while motivated to run such a campaign to allow members who have a similar political ideology to theirs to represent the people in the Lords, would not be able to influence the members' decisions by allowing for rewards, such as a promise of a political office after their term is completed, or sanctions, such as deselection in later elections. As such, the members of the Lords would be more able to stay above the chaos of ordinary party politics.

Furthermore, while there may be concern that those elected to the Lords would be partial to agreeing, and even negotiating, with those in the Commons who are of the same party, this would not necessarily be the case. Currently, the two Houses maintain relative independence from each other; each has an exclusive right to manage its own affairs without interference from the other House or outside Parliament.⁶⁵ For instance, convention dictates that the Prime Minister and members of Cabinet are to be selected from members of the Commons, rather than the Lords.⁶⁶ By preserving such a principle in a directly-elected Lords, the two Houses can remain distant in terms of their influence over the other House's functions. In addition, contacts relating to political matters could be limited between the members of each House to further discourage the introduction of political discord and favouritism to the Lords. Consequently, the Lords can ensure that it remains impartial and focuses on reviewing the legislation from the Commons without the lower house actively pressuring members of the Lords to vote in a particular manner.

⁶⁵ See *R v Chaytor* [2010] UKSC 52, [2012] WLR 311 [63] (Lord Phillips).

⁶⁶ Waldron, 'Bicameralism and the Separation of Powers' (n 22) 45-46. See also Lucinda Maer, *Ministers in the House of Lords* (House of Commons Library Briefing Paper, No 5226, 2017).

Preserving Wisdom and Stability in the House of Lords

With direct elections, however, there is concern regarding the motivations of those who are elected to the Lords and whether the current expertise currently found in the Lords could be preserved. It may be also questioned whether an upper house subject to the whims of its electorate can truly remain stable. This subsection argues that a directly-elected Lords would still be able to retain its wisdom and remain stable.

Critics of direct elections maintain that loss of expertise could occur, as members with expert knowledge and experience, such as retired servicepersons, diplomats, doctors, and lawyers, are replaced with younger politicians.⁶⁷ As a result, a directly-elected Lords, critics claim, could lose a significant advantage since, unlike the Commons, the Lords currently has members with years of highly-specialised experience.

Such a fear, however, is unfounded because the Lords has the power to call experts for select committees and debates concerning important national issues.⁶⁸ Contrasted with the Common's thematic and departmental Select Committees, the five committees of the Lords, following the "Wright Report of 2009", have the responsibility of overseeing general areas of government, as mentioned in Section I. The advantage is that the Lords can call in a broader range of opinions, perhaps not considered by the lower House, in order to develop a better sense of the impact of legislation. As the select committees have the power to appoint outside specialist advisers, often academics, those advisers can provide the knowledge and reasoning required when examining a certain issue.⁶⁹ While some more experienced members may no longer be part of the Lords, this power to call experts ensures that such knowledge would not be lost entirely. It is also arguable that with the lengthier terms for the Lords, members would possess comparable amounts of experience to present, and thus would be able to review legislation as effectively. With the staggering of elections, this expertise will not be excessively cyclical. Furthermore, though there are expert peers in the Lords

⁶⁷ Bingham, 'The House of Lords' (n 60) 268.

⁶⁸ Mark Elliott and Robert Thomas, *Public Law* (3rd ed, OUP 2017) 436.

⁶⁹ See 'Select Committees' (UK Parliament)

<<https://www.parliament.uk/about/how/committees/select/>> accessed 4 January 2019.

presently, the vast majority are still political appointees.⁷⁰ As such, reforming the Lords to introduce direct elections would not be as detrimental to its expertise as it may initially seem.

It may be arguable that such procedures do not necessarily ensure the retention of accumulated knowledge and experience. For instance, the members of the Senate of the United States serve six years compared to those of the House of Representatives, who serve two years. However, it does not necessarily appear as though the upper chamber possesses an advantage in expertise over the latter. As such, it may be difficult to see how the use of direct elections for the Lords would yield any benefits. However, unlike the US Senate, which is far less independent of whims of each political party, the Lords' strong symbolic value works to stabilise it and it put it above the politics of the commons.⁷¹ While also retaining the expertise it needs to review legislation, the Lords can add legitimacy to the legislation passed through its unique institutional competencies.

It is also important that the Lords remain stable. In other words, the implementation of direct elections has to avoid allowing the chaos of ordinary politics from entering the upper chamber. Its composition ought not to change too frequently to preserve its stability, but not too infrequently to allow for the consideration of new ideas over time. A method through which the Lords could remain stable, in addition to using single lengthy terms, is to stagger elections so that not all members' terms are concurrent. For example, the US Senate holds elections every two years in which a third of members are up for re-election, with each member serving at least six years. A similar principle can be applied to the Lords, where a third of members can be elected every five years, for example, with each member serving fifteen-year terms. Indeed, it could reduce the effect of swings in public opinion and allow the Lords to be more stable,⁷² while becoming more representative of the people's wishes compared to the present arrangement. By not constantly changing its members, the Lords can deliberate measures over time and reduce the chances that its composition changes too

⁷⁰ See Darren Hughes, 'House of Lords: Fact vs Fiction' (Electoral Reform Society) <https://www.electoral-reform.org.uk/latest-news-and-research/publications/house-of-lords-fact-vs-fiction/> accessed 8 March 2019.

⁷¹ Tomkins (n 10) 56.

⁷² See HMSO, *Modernising Parliament, Reforming the House of Lords* (Cm 4183, 1998) 34.

radically. At the same time, elections would allow ideas to flow into the Lords and prevent it from falling too far behind the times. Thus, by enabling new members to represent their constituency while retaining the Lords' current stability, staggering elections could be an effective feature of a directly-elected Lords.

THE PRACTICALITY OF DIRECT ELECTIONS

Possible Systems of Voting

This subsection observes certain possible forms of voting and argues in favour of a proportionally-representative system, with party-list PR being the optimal manifestation of this electoral system. It also argues as to why a different electoral system from that of the Commons is necessary to differentiate the two Houses.

Considering the advantages brought by direct elections, there are several systems through which the Lords could be elected. Examples include plurality voting, where the candidate with the highest amount of votes wins (such as first-past-the-post), majoritarian voting, where candidates have to receive a majority of the votes (such as the two-round system), proportional representation, where the electorate vote for a list of candidates proposed by a party (such as party-list PR, which will be the focus of this subsection), and a mixed system, which combines two or all three of the voting systems previously mentioned (such as parallel voting).

Yet, a plurality voting system ought to be eliminated from consideration because it is already used by the Commons. If the Lords uses a similar system, it could undermine the very need for a second house. One of Lords' main advantages, as previously mentioned in section II, is its ability to view certain issues from a different perspective so that it can act as a constitutional check and balance, preventing tyranny of the majority.⁷³ Without its unique perspective from a different electoral system, it would not adequately perform this duty as its members would likely have identical biases and

⁷³ Mark Ryan, 'The Royal Commission on the reform of the second chamber: a case of constitutional evolution rather than revolution' (2000) 5(1) *Cov LJ* 27, 29.

backgrounds compared with those of the Commons. Hence, there is a virtue in having two separate bases for legislative representation,⁷⁴ since any issue or bill could be debated in two different ways, by two different forms of representation.

This is strengthened by the fact that there can be no perfect method with which to represent 'the people'. Waldron contends that there is no such thing as a single entity which can be called 'the people' because society is composed of a diverse group of thoughts, backgrounds, expertise, etc.⁷⁵ Simply using plurality voting, which tends to overrepresent a few political parties at the expense of others, thereby creating a two-party Parliament, may not be the best option for it does not represent the entirety of the population. As a candidate in an election in the form of plurality voting only needs to win the most votes amongst the candidates, rather than the majority, he or she may only represent a minority of opinions and backgrounds within a constituency. This method, as previously mentioned, is already used for the Commons through its first-past-the-post system. Simply reforming the electoral system of the Commons, however, would not be enough for any electoral system would have its issues due to the inherent difficulty in representing a diverse group of people such as that of the UK's population.

Applying a separate electoral system for the Lords which complements the Commons' system would enhance Parliament's democratic legitimacy as a whole. Proportional representation can allow for better representation of the people's wishes by proportionally allocating seats to each party. For instance, if a party wins 30% of votes, it receives 30% of the seats. In doing so, it enables a multitude of differing ideologies to be represented in the Lords and provides the opportunity for those who may not be represented in the Commons to have a say in the Lords. As an example, while UKIP received 1.84% of the vote share in 2017 general election, the fifth largest out of all parties, it does not hold seats in the Commons whereas the Green party, despite having received 1.63%, does hold a seat.⁷⁶ Such a scenario would be less likely to occur in the case of

⁷⁴ Waldron, 'Bicameralism and the Separation of Powers' (n 22) 38.

⁷⁵ *ibid* 40.

⁷⁶ See Vyara Apostolova and others (n 27).

proportional representation, as each party would gain seats as dictated by their vote-share.

Notwithstanding these precautions, an elected Lords may be less able to check on the tyranny of the majority compared to the status quo as, despite the longer terms and staggered elections, popularity will ultimately determine composition. Indeed, there is some concern that the introduction of politics to the Lords would introduce bias as the appointment of members simply becomes a political election.⁷⁷ However, by using a different voting system from that of the Commons, the Lords, made up of a different ‘majority’ owing to the different electoral system, would still be able to offer an important second perspective. As it is extremely difficult to ensure that the entire population’s concerns are adequately met with just one electoral system, another may encourage a broader variety of opinions to be represented within the legislature.⁷⁸ Furthermore, it has already been argued that many of the political elements of elections to the Lords can be removed by introducing single lengthy terms and staggered elections. As such, the Lords can perform their functions without much loss in efficacy due to the implementation of direct elections, whilst reaping the benefits offered, such as increased legitimacy through being more representative of its electorate.

Examining Party-List Proportional Representation

Out of the numerous forms of proportional representation, party-list PR, could be the most effective means of doing so. It entails parties drawing up a list of candidates, each of which is then voted on, with parties receiving seats in proportion to their overall share of the vote and candidates taking seats in the order they were in on the list.⁷⁹ It is relatively simple compared to other proportionally-representative systems like the single transferable vote. In this sense, party-list PR is the most conducive to public understanding, which is necessary to the Lords’ popular legitimacy. Though electoral methods other than

⁷⁷ Oliver Rieche ‘Reassessing the House of Lords: Why the Lords Should Remain Unelected’ [2011] 3(11) *Inquiries J* < <http://www.inquiriesjournal.com/articles/594/reassessing-the-house-of-lords-why-the-lords-should-remain-unelected>> accessed 8 March 2019.

⁷⁸ Waldron, ‘Bicameralism and the Separation of Powers’ (n 23) 38.

⁷⁹ International Foundation for Electoral Systems, ‘Proportional Representation Open List Electoral Systems in Europe’ (Election Issues, Paper 1, 2009).

party-list PR may be used elsewhere, using party-list PR for an institution as vital as the Lords would allow for a method that is easy to understand, which is necessary when making a drastic change to such a significant institution, and results in a more varied representation of the people, which is crucial to the legitimacy of the Lords as a whole. Furthermore, this system is likely to represent a wide variety of parties, especially those with representatives of minority groups; accordingly, each party would have to work together, compromise, scrutinise over legislation and debate regarding certain issues.

However, party-list PR is not devoid of its issues, such as how party leaders can reward loyalty by adding candidates to the top of their list. Naturally, this would undermine a voter's ability to vote for those who would represent them best. Yet, such an issue occurs mainly with a closed list system, in which only active members of a party and public officials determine the order of candidates, which would offer, according to Ritchie, only an imperfect form of democracy.⁸⁰ In contrast, an open list system allows voters to have at least some influence on the order through a preference vote. In the Netherlands, voters can either express support for the party in general or for a specific candidate in the party. Even if the party presents a list of candidates, the people in an open-list party PR system can ensure that the candidate they feel can best protect their interests is elected.⁸¹

Another potential disadvantage is the possible need for members to be part of a party in order to be elected. As party-list PR relies on voters voting on particular parties, it may result in a disadvantage for independent candidates.⁸² However, voters are still able to decide whether they wish to elect those candidates. Additionally, the overall purpose of implementing party-list PR is not to eliminate every single issue of the Lords. Rather, it is to ensure that the

⁸⁰ Ken Ritchie, 'Which electoral procedures seem appropriate for a multi-level policy?' (Committee on Constitutional Affairs, European Parliament 2008)

<[http://www.europarl.europa.eu/RegData/etudes/note/join/2008/408297/IPOL-AFCO_NT\(2008\)408297_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2008/408297/IPOL-AFCO_NT(2008)408297_EN.pdf)> accessed 8 March 2019.

⁸¹ *ibid.*

⁸² See Piret Ehin and others, *Independent candidates in national and European elections* (European Commission Directorate-General for Internal Policies 2013). Retrieved

<[www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493008/IPOL-AFCO_ET\(2013\)493008_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493008/IPOL-AFCO_ET(2013)493008_EN.pdf)>.

Lords is more representative of the people and is able to view certain issues from a different perspective than that of the Commons. Party-list PR can accomplish this by formulating a new method with which the people are represented; the people can, compared to under the current system, directly have a say in how the Lords is organised. The advantages offered by party-list PR could allow the system to be effectively implemented in a directly elected Lords.

The Current Use of Party-List Proportional Representation in Second Chambers

Several upper chambers around the world today have already partially or fully implemented versions of party-list PR, such as Bolivia, Paraguay, Japan, the Netherlands, and Costa Rica. This subsection focuses on two states, namely Chile and Colombia, and how the Lords could be reformed based on these successful examples.

An example of how party-list PR was used in order to add democratic legitimacy to a system of government, the Chilean Senate attempted to become more democratic, transitioning away from Augusto Pinochet's regime.⁸³ Until 2005, the Senate comprised of both non-directly elected and directly elected senators. However, with an amendment approved by both houses of Congress in 2005, the entire upper house became directly elected;⁸⁴ in 2017, the previous electoral system was replaced by open-list party-list PR.⁸⁵ Party-list PR was expected to increase the government's legitimacy, especially as the previous system normally resulted in two dominating coalitions (the New Majority and the Alliance) winning nearly all the seats, with minority parties having little independent representation.⁸⁶ By ending this imbalance, which had supposedly

⁸³ Cristóbal Bellolio, 'Will the People of Chile Succeed in Rewriting their 'Dictatorship Constitution'' (The Foundation for Law, Justice and Society, 2016). <<http://www.fljs.org/content/will-people-chile-succeed-rewriting-their-%E2%80%98dictatorship-constitution%E2%80%99>> accessed 6 December 2018.

⁸⁴ See Article 49 of 'Chile's Constitution of 1980 with Amendments through 2012'. Retrieved <https://www.constituteproject.org/constitution/Chile_2012.pdf>.

⁸⁵ Fabián Riquelme, Pablo Gonzalez-Cantergiani, Gabriel Godoy 'Voting power of political parties in the Senate of Chile during the whole binomial system period: 1990-2017' (2018) arXiv:1808.07854 [econ.GN].

⁸⁶ *ibid.*

bred mistrust among voter and corruption, the use of party-list PR brought ideological diversity.⁸⁷ While some have criticised this democratic method for potentially causing political chaos by breaking up the relatively stable relationship between the two coalitions,⁸⁸ it would ultimately result in the best reflection of the people's ideology by allowing candidates to run independently, gain votes, and compromise to create the most representative Senate possible. Furthermore, to retain some stability in the chamber, not all members would be elected at the same time; half of the body is elected every four years with each senator serving eight-year terms. As a result, the Chilean legislature was able to move past its unrepresentative history towards a more democratic system.

Colombia, replacing the single non-transferable vote with party-list PR in 2003, had also desired to improve collective accountability, as the previous representatives were viewed as “purveyors of local favours and nothing else”, as stated in 1998 by Andrés Pastrana, then-President of Colombia.⁸⁹ One of the main issues that Colombia faced was that parties with small vote shares could gain seats at the expense of those with larger vote shares; as party-list PR required candidates to gain more votes than in the single non-transferable vote,⁹⁰ it increased the government's legitimacy, as voters felt that their opinions were being better considered by each party. With an optional preference vote, where a voter can indicate a party vote even if the list the party has presented is open,⁹¹ party-list PR also had the effect of increasing the representation of parties, especially in smaller districts.⁹² By changing from a system in which parties could tactically put forth candidates in a manner that subverted voters' expectations to one in which the people could have a direct say in whom they wanted, the government was able to better represent its constituents and to become accountable.

An important commonality among all three upper chambers is that they have similar general functions. Although one chamber may possess a few

⁸⁷ ‘Tie Breaker’ *The Economist* (Santiago, 12 February 2015).

⁸⁸ *ibid.*

⁸⁹ Steven L Taylor and Matthew S Shugart ‘Electoral Systems in Context: Colombia’ in Erik S Herron and others (eds), *The Oxford Handbook of Electoral Systems* (OUP 2017) 872, 886.

⁹⁰ *ibid.*

⁹¹ *ibid.*

⁹² *ibid.*

powers that another does not, all three have the purpose of reviewing legislation. Furthermore, both the Chilean and Colombian legislatures implemented this reform to tackle issues that are currently facing the Lords, namely lack of legitimacy and public mistrust. As it is evident that the use of party-list PR in both Chile and Colombia did not negatively affect that legislative capabilities of each nations' legislature but rather enhanced them, it may be concluded that the Lords could adopt this electoral system to solve its own issues, such as being viewed as illegitimate and unrepresentative of the people's wishes, which the abovementioned states had successfully addressed.

The Future Relationship Between the Two Houses

If direct elections are implemented, it is necessary to analyse the potential future relationship between the Lords and the Commons. Though not intended to be a comprehensive review, this subsection outlines some concerns with said relationship but contends that there would not necessarily be much change in the relationship between the two Houses.

As discussed, the Lords is currently limited in its powers and oversight over the Commons, partly due to the unelected nature of the Lords;⁹³ there was concern that an unelected Lords could decide differently to the elected Commons, which could contravene democratic principles that the legislature be held electorally accountable to the people.⁹⁴ In contrast, if the Lords becomes directly-elected, such a concern may become unwarranted.

However, if the upper house becomes more powerful than the lower one,⁹⁵ by wielding the democratic mandate and the associated privilege that comes with the Lords, the upper house could conceivably demand more powers, including the right to veto, by asserting it is representing those who were overlooked in the Commons. However, such a power may frustrate the passage of legislation, since a party who holds a majority or a coalition in the Lords may deny passage of an opposing party's legislation in the Commons

⁹³ See HL Deb 19th January 2001, col 1307

⁹⁴ Vernon Bogdanor in *Political Insight*: 'Because it (the House of Lords) lacks democratic legitimacy, it cannot act as a rival to the House of Commons or an alternative legislative chamber'.

⁹⁵ Ian Cruse, 'Possible Implications of House of Lords Reform' (House of Commons Library Note, LLN 2010/014, 2010).

simply due to political beliefs, unrelated to constitutionalism. Yet, mechanisms that deal with legislative gridlock already exist in other nations; the Australian government uses the procedure of double dissolution⁹⁶ and, if the procedure is unsuccessful, calls for a joint-sitting of the Houses. Furthermore, there are already various safeguards built into second chambers of other nations so that they neither challenge the legitimacy of the lower houses nor threaten the relationship between the two Houses, such as having longer terms for elected members of the upper house, only electing a portion of the members at the time, and prohibiting ministers from sitting in the upper house to emphasise the government's stronger link with the lower house.⁹⁷

In addition, although there may be some gridlock, it is not necessarily a disadvantage. Ethridge contends that gridlock can dampen the negative effects of self-interested political action and reduce social inequality by limiting the influence of lobbyists or specific political groups.⁹⁸ Nevertheless, it is also equally important to ensure that gridlock does not become so large an issue that it is impossible to pass legislation. As a result, there ought to be a balanced relationship between the Lords and the Commons not dissimilar to the relationship that is currently in place to prevent legislative gridlock from becoming out of control.

At this point, we could also examine the Salisbury Convention, one of the most important conventions that regulates the relationship between the two Houses.⁹⁹ A democratic Lords with its own governing party or parties could believe this convention to be less justified as the upper house would have the democratic mandate to oppose any bills. Yet, this concern is irrelevant when contrasting the roles of the Commons and the Lords; while the former, politically charged and having its own agenda, would legislate in accordance with its political beliefs, the latter, independent and functioning as a check and

⁹⁶ For more on double dissolution, see Barwick of the High Court of Australia in *Cormack v Cope* [1974] HCA 28, (1974) 131 CLR 432.

⁹⁷ Robert Hazell, 'Commentary on the white paper: The House of Lords -- Completing the Reform' (The Constitution Unit 2002) 9.

⁹⁸ Marcus E. Ethridge, 'The Case for Gridlock' (Lexington Books 2011).

⁹⁹ To learn more regarding the conventions on this matter, see See Lucinda Maer, 'Conventions on the relationship between the Commons and the Lords' (House of Commons Briefing Paper, Number 5996, 2016).

balance, must not succumb to opposing such legislation simply due to its political beliefs. As stated previously, various checks, such as the implementation of single fifteen-year terms and the staggering of elections, would enable members of the Lords to become relatively independent from party politics; with this reduction in bias, it would be better able to review legislation from more politically-charged Commons from a different perspective. The Salisbury Convention, while possibly becoming more flexible, perhaps by allowing the Lords to reject legislation on broader bases than it currently does,¹⁰⁰ could be allowed to remain in place to minimise the extent to which politics plays into the Lords' scrutinising powers. In order to provide it greater political force, it could be codified, such as how the Sewel Convention was included as s28(8) of the Scotland Act 1998. While the Sewel Convention is somewhat qualified by the language used to describe the convention by using the phrase "will not normally legislate",¹⁰¹ a possible statute, reforming the Lords, could phrase the Salisbury Convention with firmer language. In doing so, the relationship between the Commons and the Lords could remain relatively unchanged while gaining the benefits of direct elections in the Lords.

This is evidently desirable, as indicated by the Ministry of Justice in 2010, which stated that the government believed that the relationship between the two Houses, as stated in the Parliament Acts 1911 and 1949, should continue if the Lords is reformed.¹⁰² The maintenance of the basic relationship between the two Houses is crucial for two reasons. First, it would allow for the least amount of disruption during the period of constitutional acclimation if the Lords is reformed. Second, and more importantly, the current arrangement is criticised mainly due to its undemocratic nature; maintaining the basic relationship after implanting direct elections would allow for minimal gridlock while retaining the regulatory function the Lords currently performs.

What ought to be noted is that a codification of the Salisbury Convention would likely be politically-binding rather than legally-binding.

¹⁰⁰ See Parliament Act 1911 s2. Currently, the House of Lords may reject a bill extending the life of Parliament or a bill for confirming a provisional order. Furthermore, the Act does not affect private bills, delegated legislation, or bills introduced in the House.

¹⁰¹ See Scotland Act 1998 s28(8).

¹⁰² HL Hansard, 24 June 2010, col 205WA.

Conventions themselves are not generally legally enforced by the courts, as confirmed in cases such as *Madzimbamuto v Lardner-Burke*¹⁰³ and *Reference Re Resolution to amend the Constitution*.¹⁰⁴ Even when included in statutes such as the Scotland Act, courts may decline to police the “scope and the manner of its [a convention’s] operation”.¹⁰⁵ Yet, it is possible to say that the Lords would follow a codified Salisbury convention by being politically bound to do so. The absolute authority of Parliament, contained in the notion of parliamentary sovereignty, in itself, can be considered as a political fact as according to Dicey.¹⁰⁶ Its authority is unable to come from a legal source; it cannot be a common law rule, for then it means that Parliament could enact a statute to overturn or amend parliamentary sovereignty itself. Parliament also cannot legislate on parliamentary sovereignty itself through primary legislation for it would inevitably cause circularity: Parliament’s authority would derive from a statute that derives its authority from itself. As such, parliamentary sovereignty can be seen as above the law as a political fact, which the judges recognise to authoritatively apply the law. Similarly, according to Loughlin and Tierney, Parliament has recognised that, in certain areas, it may be politically bound to respect the popular will of the people.¹⁰⁷ For instance, in devolution, Parliament has recognised it cannot unilaterally halt or reverse the process by parliamentary fiat.¹⁰⁸ This recognition can be extended to a codified Salisbury convention, which would, in effect, politically bind the Lords to follow the convention once legislation passes through the Commons. Rather than the courts themselves enforcing the convention, political pressure and popular will would bind the Lords to respect the convention.

Focusing on the exact power balance between the Houses, it is possible that there would be no significant change in any case. Donald Shell contends that the question of conflict between the two Houses is, in fact, a misleading one and that the real conflict is between Parliament as a whole and

¹⁰³ [1968] UKPC 18.

¹⁰⁴ [1981] 1 SCR 753.

¹⁰⁵ *R (Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [151]

¹⁰⁶ Martin Loughlin and Stephen Tierney, ‘The Shibboleth of Sovereignty’ (2018) 81(6) MLR 989, 991.

¹⁰⁷ *ibid.*, 1013-1014.

¹⁰⁸ *ibid.*

the government.¹⁰⁹ While this may be true in some sense, it is still important to consider what the relationship between the two Houses will become. The fact that the Lords is unelected is not the only reason for its limited powers. Rather than being a body focused on the tabling of legislation, the Lords' role is more to be a scrutiniser, as evidenced by the convention preventing it from introducing money bills. Its function as a body providing meaningful oversight could enable some powers to be limited to ensure that, while it is to scrutinise legislation passed by Commons, it cannot excessively frustrate the passage of legislation through Parliament. Simply reforming the Lords to be directly-elected would give the upper house more legitimacy but would not necessitate a change in its functions or powers, such as that to delay a bill. A change to implement more radical procedures, such as reintroducing the veto, could cause inefficiency in passing legislation without gaining many benefits. Rather, powers such as that to delay would allow for a smoother and less frustrating passage of legislation while also having the regulatory oversight that the Lords currently possesses. By being more representative of the people, the Lords can better review legislation and government action in the public interest, though having more power could overstep its legitimate functions as a check and balance within government. As such, the future relationship between an elected Lords and Commons must remain as similar as possible to the one they have today.

CONCLUSION

This article has sought to argue that, in the interest of conforming to democratic principles and allowing the Lords to better represent the people and further legitimise Parliament's practices, direct elections would preserve much of the advantages already possessed by the Lords whilst adding new benefits. The Lords ought not to be abolished due to, first, the Lords' constitutional function as a check and balance on the legislation of the Commons and, second, the practical advantages offered by preserving a second chamber.

In terms of direct elections, this article has analysed several criticisms of applying such a system to the Lords and offered both counter-arguments and

¹⁰⁹ Donald Shell, *The House of Lords* (Manchester University Press 2007) 169-170.

potential solutions to said criticisms. Furthermore, by examining several possible electoral systems, this article contended that proportional representation, specifically party-list PR, would be best suited for the purposes of electing members of the Lords. While no electoral system is perfect, a different electoral system from that of the Commons should to be used. Party-list PR would allow voters to better appoint representatives of their interests, backgrounds, and needs to the Lords and thus offer a much-needed second perspective to the legislation passed by the Commons. This claim has been supplemented using successful examples of second chambers currently using party-list PR to elect its members, which demonstrate how the use of this electoral system can feasibly be implemented in the UK. The examples of Chile and Colombia demonstrate how these nations moved from a relatively-undemocratic upper house to one more representative of the people, suggesting that the UK, which faces a similar issue, can do the same.

Finally, this article has analysed the possible future relationship between the Commons and the Lords and has argued that, although there may be several minor changes, the relationship should remain similar to that which is already in place. Noting several concerns regarding the possible changes that direct elections could bring, the article has proposed multiple solutions that could alleviate some of the issues brought up, such as staggering elections and using single, lengthy terms to maintain the independence of the members of the Lords and the upper chamber's stability. While direct elections may have some issues, it would be the optimal method through which the Lords could be reformed, so as to allow Parliament to better fulfil its constitutional functions.