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The House of Lords: The Working of the Electoral Process in the 1999 Act of Parliament

TOMILA LANKINA AND MICHAEL PHILLIPS

The purpose of what follows is to investigate the working of the 1999 Act of Parliament in relation to the electoral process put in place for the purpose of maintaining the representation of the hereditary element in the House of Lords. After nearly ten years it is good time to assess the consequences of this process, as this was one of the controversial measures in the 1999 Act. In the 2006-2007 and 2007-2008 Sessions of Parliament Lord Avebury introduced House of Lords (Amendment) Bills to repeal this electoral process. Both Bills received second readings after the issues were debated. Also in the 2007-2008 Session Lord (David) Steel of Aikwood introduced the House of Lords Bill, which included a second Part which covered the same measure as Lord Avebury's Bill. This House of Lords Bill has also received a second reading and had one session in the Committee stage. So the working of this electoral process is likely to be a topic of debate in the current 2008-2009 Session of the House of Lords. We suggest that there are three possible options to deal with the present and likely future issues for this electoral process. These we present as a contribution to a wider debate on the way forward for this constitutional issue.

An acceptable second chamber

The New Labour Government led by Tony Blair came to power in 1997 with a mandate to reform the House of Lords. As there was no firm idea of how the reformed House of Lords would be constituted the first stage was to create a 'transitional' chamber. There was a desire by some in the Government to exclude all hereditary peers from the Chamber but political considerations prevailed. As a result of a deal negotiated by the then Leader of the Conservative peers, Lord Cranborne, 92 peers were allowed to remain in the transitional chamber, and elections took place for the 90 elected places¹. This resulted in a group of peers who reflected well the composition of the hereditary peerage, in terms of the origin and date of the titles held in 1999². But the question was how to maintain this representation. Many Labour supporters would have been happy to see this representation eroded over the years by the natural process of death. However the hereditary peers managed to insert an electoral process into the 1999 Act, to ensure the number of hereditary peers remained at 92.

Thus a mixed second chamber has persisted as proposed by the 1999 Act with the 90 elected hereditary peers representing the historic hereditary peerage and the remaining directly appointed Life Peers. Though such a solution to the composition of the second chamber has found favour, it was also pointed out at the time that there were problems with this arrangement³. Firstly there was no advance towards making the second chamber more democratic. Secondly it did not fulfil the Labour Party's manifesto commitment to remove the hereditary element entirely from the House of

Lords. Thirdly there was the problem of how each of the selected 92 peers would be replaced after death. This third problem is the one we wish to consider in this article. Consideration of the second stage of reform was given to a Royal Commission, chaired by Lord Wakeham. This commission was much preoccupied with the legitimacy of any reformed second chamber. The Royal Commission concluded that whilst elections to this chamber could result in too much legitimacy, public support for the chamber could be substantially increased by other means⁴. However no further reform has taken place and the House of Lords remains in 2008 in the transitional state as set up in 1999. Perhaps this is because soon after the transitional status had been achieved it was realised that this transitional status had achieved the desired aims of the reform⁵. So *de facto*, the current status (and consequent replacement electoral process for hereditary peers) of the second chamber has become acceptable to many over these nine years.

The working of the electoral process

Before the question of the appropriateness of the electoral process is considered, a few remarks on how this works are in order. There were 75 Political Party choices which were made in proportion to the numbers in the hereditary peerage in 1999. Hence 42 Conservative, 28 Cross-bench, 3 Liberal Democrat and 2 Labour members of the hereditary peerage were elected by the hereditary Peers and Peeresses of these Parties in 1999. Also 15 Elected Office Holders were chosen. The original elections were conducted in October and November 1999 using the Alternative Vote electoral system. The results were announced on Friday 5th November for the 75 Political Party choices, before the end of the session on Thursday 11th November. This session terminated the membership of the unelected hereditary peers and peeresses. The 15 Elected Office Holders had been chosen the week before. This election process worked well in reflecting the composition of the hereditary peerage.

How were these peers (and peeresses) to be replaced in the event of death? Obviously not by the natural inheritance process that had been traditionally used. In what reflected a belief that this transitional chamber would not last long, it was agreed that the 1999 election results would be used, if required before the next general election, which occurred in 2001. So the best two runners-up (Lord Cobbold and Lord Chorley) joined the Cross-benchers in 2000 and 2001. This method of replacement had the advantages of being both the simplest and also least controversial as these runners-up, who had missed election originally by a few votes, had the most right to represent the hereditary peerage. However it could not persist as the rights of new holders of peerages, as they succeeded to hereditary peerages, would be ignored. Also those who had stood in the original 1999 election would grow old and die.

We now consider developments after the 2001 general election. The first replacement occurred without an election when the Duke of Norfolk succeeded his deceased father in 2002 as a Hereditary Office Holder. The first by-election that was required was as the result of the death of the Conservative Viscount of Oxfuird in 2003. As he was one of the 15 Elected Office Holders the electorate for this by-election was the whole of the House of Lords (of more than 600 members). This event highlighted the consequences of the 1999 Act, and resulted in much adverse comment from Labour Peers. The result of this by-election was the election of Viscount Ullswater, a Conservative, who thus replaced another Conservative peer. A similar by-election for the Elected Office Holders occurred in 2005 when Viscount Eccles, a Conservative,

replaced the Conservative Lord Aberdare. This explains what has happened for the 15 Elected Office Holders since 2001. These two and all other by-elections used the Alternative Vote electoral system.

With regard to the other 75 Political Party choices it was decided to freeze the political composition of the hereditary peerage as it stood in 1999. So members of the four political groups would replace themselves with members of the same political persuasion. These groups were of vastly different sizes with the Conservatives taking the majority (42) of the 75 places compared to Labour, the smallest group, with only 2 places. Not surprisingly the most Party by-elections have been for the Conservatives with three by-elections to 2008. Next has been the other large group (28) of Cross-Benchers with two by-elections. Despite the small numbers there have been by-elections for both the small groups (3 and 2 respectively) of Liberal and Labour peers. The electorates for each of these by-elections were the hereditary peers elected to the House of Lords belonging to the four groups to be replaced. If the electorate had simply been drawn from the 75 Political Party choices this would have resulted in the situation at the death in 2003 of Lord Milner of Leeds of the only remaining Labour peer (Lord Rea) having the right to decide who should join him! Hence it was decided that the electorate should be drawn from the whole body of the 90 elected hereditary peers, including the 15 Elected Office Holders. This increased the Labour by-election electorate to three by the addition of Viscount Simon and Lord Strabolgi, who elected Lord Grantchester from the 11 candidates, who put themselves forward for election. It was a similar situation when Bertrand Russell's son Conrad died in 2004 and the Liberal Democrat electorate of four elected the Earl of Glasgow, though there were only three candidates. As these by-elections were such small affairs they attracted less attention than those for the Elected Office Holders which included an electorate of all (over 600) of the members of the House of Lords.

The electorates for the three by-elections for the Conservative Political Party hereditary peers elected to the House were much larger. These by-elections had electorates of 47 peers and attracted about 40 candidates each time. Hence it was not the case as with the Labour Party that the candidates exceeded the electorate. These by-elections demonstrated the effect of the Alternative Vote electoral system (as opposed to the First Past the Post system) as the candidate with the most first preference votes did not necessarily win the by-election.

For the other large group of Cross-Benchers there have been two by-elections including the most recent one in May 2008. These by-elections had electorates of 29 peers and attracted about 30 candidates each time, having numbers of candidates and members of the electorate comparable as in the case of the Conservatives. This latest by-election demonstrates that the desire to have a seat in the House of Lords has not diminished as the numbers of candidates had increased from 26 in 2005 to 33 in 2008. There have been a total of nine by-elections in the period from 2002 to 2008 of which only two have involved the whole (over 600) members of the House of Lords. Apart from these two Elected Office Holder by-elections the remaining seven by-elections have been low-key affairs and have attracted little public notice. In fact the most recent election in May 2008 of the Earl of Stair (a cousin of the Queen) to the Cross-Benches seemed to go unreported in the Press. It occurred at the time of the much more newsworthy event of the Conservative victory in the Crewe and Nantwich House of Commons by-election.

Is the electoral process acceptable to the interested parties?

In order to consider whether this process is acceptable, and therefore there is no great urgency to change the present arrangements, it is necessary to decide who has an interest in answering this question. The first group with an interest is the hereditary peerage. They may conclude that the House of Lords reform has reflected and enhanced the negotiating skill of their leaders in that they ensured the inclusion of this electoral process in the 1999 Act and the continued presence of the hereditary peerage in the House of Lords to maintain the integrity of the second chamber.

The Labour Government in 1997 had a mandate to reform the House of Lords. So far the progress made in this reform has included the creation of the first stage of a 'transitional' chamber. This first stage did not exclude all hereditary peers from the Chamber although it did succeed in excluding the majority. This had the effect of ending the inbuilt Conservative advantage. The result has been a House of Lords with no party or group with an overall majority. In fact the Labour, Conservative and Cross-Bench groups have rough parity (of about 200 peers)⁶. The breaking of the Conservative majority in the House of Lords was probably one of the main stimulants to changing the composition of the House of Lords. As this has been achieved, the present Labour Government of Gordon Brown is likely to be satisfied to accept the present arrangement. This was confirmed at the second reading of Lord Avebury's Bill in February 2008 by the Government spokesman Lord Hunt of Kings Heath. The Government wishes to wait for a White Paper on the second stage of reform and is not prepared to support any change in the 1999 Act till then.

Another effect of the 1999 Act was to exclude many Conservative supporters, who were hereditary peers, from politics at Westminster. However the Conservative leadership in the House of Lords managed to resist their complete exclusion. The Conservatives managed to obtain the majority of the 90 places. Though this arrangement was not universally welcomed by the then Conservative leadership the Conservatives were generally content with the deal as the most realistic one that was on offer⁷. With the change of the Conservative Party leadership from William Hague to David Cameron it is unlikely that this present leadership would see the reform of the House of Lords as a major priority of any new Conservative government. This is because with the Conservative peers still in 2008 one of the largest groups in the House of Lords the Conservative leadership will feel that the House of Lords should be no major obstacle to the policies of a Conservative government as was the case with the Blair Labour government.

It has been suggested that the biggest winners in the 'transitional' chamber have been the Liberal Democrats⁸. Though only a third of the size of the three main groups it is more organised than the large Cross-Bench group. It boasts a common purpose rather than being a group of peers who belong together only because they do not want to belong to any other group. The sponsors, Lord Avebury and Lord Steel of Aikwood, of both the Bills before the House of Lords in the 2007-2008 Session to abolish hereditary peerage by-elections were Liberal Democrat peers. It is not clear that their views represent that of their party. Though the present arrangement is unlikely to conform to Liberal Democrat policy, others are probably likely to admit in private that they can live with the present arrangement of the composition of the House of Lords and the use of by-elections.

From the point of view of the general electorate, the implications of the reform are not very substantial. The electorate's interest in issues tends to depend on the current economic or international climates. It is doubtful that the composition of the second

chamber comes high up in the priorities of the average member of the electorate. Given the ignorance of the general population about those who sit in the House of Lords or who held hereditary peerages, this is not surprising.

Consequences of the electoral process

In outlining the working of the electoral process we have highlighted some of the consequences. Now we go into a little more detail about the effects of the working of the 1999 Act which might not have been foreseen.

The first is connected with gender. The hereditary peerage was basically a male caste. Until 1958 there were no female members of the House of Lords, hence the reason for its name. Even prior to that however there were some female members of the hereditary peerage, but they were barred from entering the House of Lords. Though still few, at the time of the 1999 Act there were 17 female peeresses, holders of hereditary peerages. Since 1963, they had the right to a seat in the House of Lords.

At the election of hereditary peers in 1999 the peeresses had been very successful managing to get five (29%) elected to the 90 places available. Four of them sat as Cross-Benchers and the Countess of Mar was elected as an Elected Office Holder. Three of the female Cross-Benchers have died over the last ten years and have been replaced by peers. Thus their numbers in the elected hereditary peerage have fallen by 60%. Of course, their present representation (of just over 2%) does reflect their proportion in the overall hereditary peerage. But what has happened as a result of these by-elections probably highlights why a peeress like Lady Strange would have little chance of winning a by-election⁹. In fact no peeresses have stood for election to the House of Lords since 1999.

The second unforeseen consequence was what appears to be the enthusiasm of the Scottish peerage to participate in the politics of Westminster. The Scottish peerage is one of the historic components of the hereditary peerage. It accounted for 11% of the hereditary peerage in 1999 and managed to be elected to 13 (14%) of the 90 places available. So it was slightly more favourably represented than would have been expected. In the last ten years one Scottish peer has died and three of the nine peers elected have been Scottish peers, a net gain of two. The Scottish peerage now has 15 (17%) of the 90 places available. Though this is hardly a major constitutional issue, it is interesting. So amongst some Scots there seems to be a stronger desire to participate in the political institutions of the United Kingdom than one would be led to believe if you listened to the views on the Union propagated by their First Minister Alex Salmond.

A third consequence of the electoral process is that new peers, who have succeeded to their hereditary peerages since 1999 could be elected. At first when it was thought that this transitional chamber would not last long, it was agreed that the runners-up in the 1999 election results would be used. The measure was employed to compensate those who had just failed to be elected in 1999. This continued to be the situation with near failures in the 1999 election being elected in the subsequent by-elections. The one exception to this was the election in 2005 of Lord De Mauley, who had succeeded his uncle in 2002, to replace one of the Conservative Political Party choices. This demonstrated that it was possible for an outsider, with no previous experience of the House of Lords, to be elected in a by-election.

What is the future of the electoral process?

Where does the House of Lords go from here? At the time of writing this article in 2008 there have been twelve deaths (13%) of the original 92 peers and peeresses who were allowed to remain in the House of Lords after November 1999. This has resulted in 9 by-elections, 2 involving the whole House of Lords and the other 7 Party Political by-elections involving different groups of elected hereditary peers acting as the electorate. There was adverse comment from Labour peers in 2003 at the first by-election of an Elected Office Holder, when Viscount Ullswater, a Conservative, was elected and the electorate for this by-election was the whole of the House of Lords. One disadvantage of the process is that it is forced to work with the allocation of Party Political choices that were determined by the 1999 political composition of the hereditary peerage. There are consequences of the electoral process which may not have been foreseen, which we have outlined - gender balance, Scottish representation and the recruitment of new, younger members. Another consequence that needs to be taken into consideration is the likely increase in the annual number of by-elections, because of the age structure of the present hereditary peers in the House of Lords. Lord Avebury admitted at the second reading of his Bill that he had taken no actuarial advice on this matter. At the present time of writing (in 2008) by-elections are occurring at a rate of about one a year but we have made a simple actuarial calculation using life tables and this would suggest that the annual number of by-elections will rise rapidly to three over the next decade.

What could be the options? We suggest that there are three. A first option is to stay with the present electoral process which involves using by-elections. The advantages of this option are firstly that no legislative action has to be taken and secondly that the present composition of the hereditary peerage is maintained. The disadvantages are firstly the consequences which we have outlined – lack of gender balance, Scottish representation and the recruitment of new, younger members and secondly the increase in the number of by-elections. Though the Political Party choices involve small electorates (and hence are easily managed) the Elected Office Holders by-elections involve all the members of the House of Lords and these would be likely to occur once every two years.

A second option is to widen the electorate of the present electoral process for by-elections to the whole House of Lords, which was suggested by Lord Desai during the debate on the second reading of Lord Avebury's Bill. The advantages of this option are firstly that candidates for by-elections for the Political Party choices would have to appeal to a wider constituency and secondly that this could be done by a simple amendment of the 1999 Act which would make the process more transparent and perhaps more acceptable to all parties in the House of Lords. The disadvantages are firstly that by-elections involving all the members of the House of Lords would be likely to occur three times a year and secondly that the Conservatives might feel that they would be the losers in such an arrangement. However when Elected Office Holders candidates were chosen by the whole House, in the two by-elections held so far (in 2003 and 2005), in both cases Conservatives were elected. As stated above, as the Conservatives do not have a majority in the House of Lords, this would suggest that the replacements were chosen not simply for Party reasons but on merit.

A third option is to go back to the original 1999 electoral process and have elections every Parliament and fill the vacancies that occur with runners-up as was done before the 2001 general election. The advantages of this option are firstly ease of administration, as elections would only occur normally every four or five years, so

there would be no need for by-elections and secondly that the political party composition of the hereditary peerage does not have to be frozen in the 1999 state. The disadvantages are firstly that this is a radical process involving some detailed revising of the 1999 Act and secondly this would raise the question of what the political party representation of the Political Party choices should be. Should it represent the current political composition of the hereditary peerage or should it represent the current political composition of the House of Lords?

What could be done? The easiest option is to do nothing. However this has consequences which may be considered undesirable by perpetuating an outdated system. The simplest option, if anything could be done, is to keep by-elections and widen the electorate. But the whole House of Lords may think this is too much of a burden to be involved in this three times a year. The best option could be to have one election every general election. This offers simplicity but at the price of renegotiating the rules.

Is any of this practical? All the signs are that easiest option to do nothing will prevail. Both the Bills of Lord Steel of Aikwood and Lord Avebury attracted large numbers of amendments. When Lord Steel of Aikwood's Bill was debated in Committee for the first time only three amendments were considered. Two of these were concerned with the name of the Second Chamber. Rather than spending time debating this question Lord Strathclyde suggested that this could have been left to such constitutional experts as Vernon Bogdanor and Meg Russell to decide. There seemed no interest, despite the pleadings of the sponsors, for members of the House of Lords to address the issue of the present working of the hereditary peerage by-election process. The main aim of the article has been to highlight the present position and outline the possible options in the hope that this will lead to a more realistic debate on a practical way forward for this constitutional issue.

Notes

1 It had also been decided that the two Hereditary Office Holders the Earl Marshal (the Duke of Norfolk) and the Lord Great Chamberlain (the Marquess of Cholmondeley) should also retain their seats in the House of Lords.

2 Michael Phillips, Letter to the Times, 6th November 1999.

3 Vernon Bogdanor, Reform of the House of Lords: A sceptical view. *The Political Quarterly*, 1999, pp 375-381.

4 Royal Commission (2000). *A House for the Future*. Royal Commission on the Reform of the House of Lords, Cm 4534. London: The Stationary Office.

5 Meg Russell, Is the House of Lords Already Reformed? *The Political Quarterly*, 2003, pp 311-318.

6 John Parkinson, The House of Lords: A Deliberative Democratic Defence. *The Political Quarterly*, vol. 78, no. 3, 2007, pp 374-381.

7 Emma Crewe, *Lords of Parliament*, Manchester, Manchester University Press, 2005, pp 49-50.

8 Meg Russell and Maria Sciara, Why does the Government get defeated in the House of Lords? *British Politics*, 2007, 2(3), pp 299-322.

9 It is suggested that Lady Strange was elected in 1999 because she declared in her Electoral statement that she "loves and brings flowers to decorate the House of Lords". Emma Crewe, *Lords of Parliament*, Manchester, Manchester University Press, 2005, p 59.