
A BRITISH BUNDESRAT? THE BROWN COMMISSION AND THE FUTURE OF THE HOUSE OF LORDS

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Abstract

Reform of the House of Lords has occupied the minds of politicians, civil servants and academics for over a century. In late 2022, the Labour Party published a proposal for the replacement of the Lords with a new, democratically elected, Assembly of the Nations and Regions. This proposed Assembly resembles, at least superficially, the German Bundesrat. The author reviews the history of Lords reform, examines Labour's proposals, compares the envisioned Assembly with the Bundesrat and concludes that the former will be found wanting.

Keywords: United Kingdom; Germany; constitutional law; Parliament; House of Lords; Bundesrat; constitutional reform.

[A] INTRODUCTION

Reform of the House of Lords—together with proportional representation (PR), a written constitution and, for some, the abolition of the monarchy—is a perennial favourite of those who yearn to refashion the constitution of the United Kingdom (UK). As Morgan once put it:

On summer evenings and winter afternoons, when they have nothing else to do, people discuss how to reform the House of Lords. Schemes are taken out of cupboards and drawers and dusted off; speeches are composed, pamphlets written, letters sent to the newspapers. From time to time, the whole country becomes excited (Morgan 1981).

Despite the hint of irony in that last sentence, Morgan's observation contains much truth. Since the Parliament Act 1911, which replaced the Lords' absolute veto over legislation with a two-year power of delay,¹ there has been a veritable cascade of articles, conferences, books, proposals, seminars, consultations, reports, White Papers and parliamentary bills on

¹ Under the 1911 Act, a money Bill (as certified by the Speaker of the Commons) became law one month after leaving the Commons, with or without the Lords' approval; non-money Bills could be delayed for two successive parliamentary sessions (ie two years) but would become law if passed by the Commons in identical form; and the maximum life of a Parliament was reduced from seven to five years. The only exceptions to the new regime on the passage of legislation were Bills commencing their readings in the Lords, Bills to extend the life of a Parliament and delegated legislation.

further reform. Few of these endeavours have, however, led to additions to the statute book.

Yet another reform proposal emerged late in 2022, within a report from the Labour Party’s “Commission on the UK’s Future” (Brown Commission 2022). This body, chaired by former Prime Minister Gordon Brown advocates “radical change” to the “relationship between our government, our communities, and the people”. This “radical change” includes the replacement of the Lords “with a new second chamber of Parliament”, to be named the Assembly of the Nations and Regions (the Assembly), which “must have electoral legitimacy, and should be markedly smaller than the present Lords, chosen on a different electoral cycle—with the precise composition and method of election matters for consultation”.

These recommendations on the Lords’ replacement by an “electorally legitimate” Assembly are accompanied by several other proposals on the latter’s composition, role and powers. The most significant of these being the proposition that “national and regional leaders” should be among the new chamber’s membership and that it should play decisive roles in “[b]ringing together the voices of the different nations and regions of the UK” and in “exercising new but precisely drawn powers to safeguard the constitution of the United Kingdom”.

When taken together, the Commission’s plans encompass the substitution of the Lords with an Assembly which, of all the other second or upper legislative chambers in the world, most resembles the German Bundesrat. Whether this similarity is intentional or accidental is unclear. Moreover, as is often the case with constitutional reforms, intentions and reality may diverge. This article begins with a brief review of the history of Lords reform before examining the Brown Commission’s proposals. It then compares the powers, role and composition of the proposed Assembly with those of the Bundesrat. It concludes that the Assembly will be a pale imitation of the Bundesrat and a poor substitute for the Lords.

[B] A BRIEF HISTORY OF HOUSE OF LORDS REFORM

As noted above, the 1911 Act reduced the Lords’ power of veto over legislation to one of delay. The original two years’ delay was subsequently diminished to a year by the Parliament Act 1949. This legislation was prompted by the Labour Government’s concern that the Conservative majority in the Lords would use the two-year delaying power to derail its nationalization programme. It is noteworthy that, despite the preamble

to the 1911 Act stating that “it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis”, the 1949 Act did not address the Lords’ composition but only—in a limited fashion—its powers. By contrast, subsequent legislation has not been concerned with the Lords’ powers (with one exception) but with its composition, albeit not in the manner anticipated in 1911.

The Life Peerages Act 1958 sought to redress the problem that out of 800 peers, there were only “some sixty ... who may be regarded as a nucleus of regular attenders” (Bromhead 1958). The 1958 Act provided for the appointment of members for life and of women to the Lords. The consequence was a more active and authoritative Lords, with many new capable life peers in place of a thinly populated chamber occasionally patronized by “backwoodsmen”.² By contrast, the Peerages Act 1963 enabled peers to leave the chamber. This legislation was the result of a campaign by Labour politician Tony Benn, who wished to remain an MP rather than follow his father into the Lords as Viscount Stansgate. In one of history’s ironies, it also enabled the Earl of Home to disclaim his peerage and, as Sir Alec Douglas-Home, become a Conservative MP and Prime Minister.

The House of Lords Act 1999, the “first stage” of New Labour’s plans for the Lords, removed 653 hereditary peers from the chamber, leaving only 92 in place alongside the life peers, law lords and lords spiritual. The law lords were removed from the chamber and packed off, along with their judicial power, to a new UK Supreme Court by the Constitutional Reform Act 2005, which was the only post-1949 legislation to alter the Lords’ powers (Hale 2018). Finally, the House of Lords Reform Act 2014 enabled members to voluntarily retire or resign from the chamber and the House of Lords (Expulsion and Suspension) Act 2015 authorized the Lords to expel or suspend members.

Among the unsuccessful attempts at Lords reform are the Parliament (No 2) Bill of 1968, which would have cut the number of hereditary and spiritual lords and reduced the chamber’s delaying power to six months. This bill was stymied by a coalition of Conservative and Labour MPs led by Michael Foot and Enoch Powell.³ Thereafter, the cause of Lords reform fell into abeyance until the late 1980s when, after a period of favouring

² There were 47 life peers (of whom seven were women) appointed during the 1957-1963 premiership of Harold Macmillan. By the end of John Major’s term of office in 1997, 742 life peers had been appointed, including 108 women (Taylor 2021).

³ [HC Deb 17 April 1969](#), vol 781, cols 1338-44.

abolition, the Labour Party advocated reform once again. As noted, the 1999 Act was intended to be the “first stage” of this reform, but the “second stage” staggered from a Royal Commission (Cabinet Office 1999) to two White Papers (HM Government 2001, 2007) and inconclusive votes in the Commons and the Lords before expiring. The last effort at comprehensive reform was the Conservative/Liberal Democrat Coalition Government’s House of Lords Reform Bill, which was withdrawn after a backbench rebellion by Conservative MPs and the Labour Party’s refusal to support a programme motion in its favour (Dorey & Garnett 2016; Atkins 2018).

Consequently, the Lords’ powers remain those determined in 1949 and its composition is that which was determined in 1999. Whilst this represents a substantial change from the chamber’s position in 1910, it is a far cry from the aspirations of reformers over the past century. Why is this? Ballinger has argued that the principal reason for the lack of substantive reform, as opposed to its “non-reform” variant, is that “no government has been united in a commitment, whether of its own volition, or of necessity—to secure reform”. He suggested, further, that “the series of non-reforms [ie the 1949 Act and the 1999 Act] have met the needs of changing constitution” (Ballinger 2011). Norton observed that “The absence of any intellectually coherent approach to constitutional change is apparent in respect of attempts to change the House of Lords”, a failing which he suggests has been fatal to the many attempts to actually produce such reform (Norton 2017). Indeed, he went so far as to state:

The history of the House of Lords is one of institutional continuity and occasional seminal and more frequent incremental change, with none of the changes resulting from a clear, considered view of the role of the House of Lords, let alone the role of Parliament, in the constitution of the United Kingdom. That appears unlikely to change.

It is into this territory of non-reforms and low expectations, which is marked by a proverbial mountain of paperwork (Raina 2011, 2013, 2014, 2015), that the Brown Commission has stepped.

[C] THE BROWN COMMISSION PROPOSALS

The Commission, laying claim to Norton’s “intellectually coherent approach to constitutional change” (2017), seeks to redistribute economic and political power in the UK from “the centre of government” to “the people whom it serves”. The justification for this redistribution is twofold. Firstly, it will end the “hyper centralised system of government which” it alleges “is at the root of so many of our political and economic problems”. Secondly, it will prevent future occurrences of the alleged abuses of Boris

Johnson's Government, which were not deterred by the current system. The Commission's plan comprises 40 recommendations, divided into six subject areas, including "an economic growth or prosperity plan for every town and city"; greater powers for the Scottish and Welsh Governments; and the creation of a new anti-corruption commissioner "to root out criminal behaviour in British political life where it occurs".

Insofar as the Lords is concerned, the Commission's intentions are unambiguous:

Our sixth set of recommendations will clear out the indefensible House of Lords and replace it with a smaller, more representative and democratic second chamber to safeguard the new constitutional basis of the New Britain (Brown Commission 2022, 17).

To this end, recommendations 37 to 39 are:

37. The House of Lords should be replaced with a new second chamber of Parliament: an Assembly of the Nations and Regions.

38. The new second chamber should complement the House of Commons with a new role of safeguarding the UK constitution, subject to an agreed procedure that sustains the primacy of the House of Commons.

39. The new second chamber must have electoral legitimacy, and should be markedly smaller than the present Lords, chosen on a different electoral cycle—with the precise composition and method of election matters for consultation (Brown Commission 2022, 17).

The Commission discusses the Lords' defects at some length. Its ire is directed particularly at the continuing presence of 92 hereditary peers; the fact that the chamber has "swollen in recent years to around 800 peers"; and at Johnson's alleged abuses of his power of patronage. The Commission, betraying its partisan nature, also criticizes similar alleged abuses by all Conservative Prime Ministers since 2010, whilst failing to mention those by Lloyd George and Harold Wilson. The Commission recognizes, nevertheless, that the Lords carries out important tasks in both the detailed scrutiny of legislation and in the contributions of its select committees before concluding "simply abolishing the House of Lords would therefore leave a significant gap in our constitution". Hence, as noted above, it recommends replacing the Lords with an Assembly rather than putting an end to any second or upper chamber.

Creating such an Assembly is a far from novel proposal. When the Labour Party abandoned unicameralism in the late 1980s, its policy document "Meet the Challenge, Make the Change: A New Agenda for Britain" (Labour Party 1989) suggested replacing the Lords with an elected

second chamber which would have the role of safeguarding fundamental rights and scrutinizing legislation and whose members would be elected on a different basis from the Commons to “particularly reflect the interests and aspirations of the regions and nations of Britain”. The Party’s 2015 and 2019 General Election manifestos also promised to replace the Lords with an “elected Senate of the Nations and Regions”. The Brown Commission, however, differs from these earlier proposals in the fact that its Assembly will not merely have a different composition from the Lords but modified—arguably weaker—powers.

With respect to its composition, the proposed Assembly would be “three quarters smaller than the present Lords, at around 200, and more in line with second chambers elsewhere” such as those in the United States (US), France and Switzerland. Further, the Commission asserts:

If the new second chamber is to function as an Assembly of the Nations and Regions, there is a case for elected national and regional leaders to be able to participate in the second chamber to raise issues of pressing concern on which the voices of the nations of the UK, or of its different localities, should be directly heard (Brown Commission 2022, 143).

The inclusion of such “national and regional leaders” in addition to elected members marks a significant departure from previously envisaged second chambers and, for that matter, the Commons. The ramifications are discussed further below.

Turning to its role, the Commission recognizes that an elected Assembly may not, unlike the unelected Lords, be restrained by the Salisbury Convention. Therefore, in order to avoid the consequential risk of “legislative gridlock”, it identifies those roles and powers which the Assembly should and should not possess. In the latter category:

- It should have no role in the forming or sustaining governments. That, as today, must fall to the House of Commons.
- Similarly, it should have no responsibility for decisions about public spending or taxation, including National Insurance.
- It should not in general be able to reject legislation but should be able to propose amendments.
- These limitations on its powers must be set out clearly in the statute which creates the new chamber, so that there is no ambiguity about the relationship between it and the House of Commons (Brown Commission 2022, 138).

Of these “non-roles” or “non-powers”, the third is the most consequential, and shall be returned to below. As to the roles and powers or, as the

Commission puts it, functions which the Assembly should possess:

It should discharge four broad functions:

1. Constructive scrutiny of legislation and government policy, as the House of Lords at its best does today.
2. Bringing together the voices of the different nations and regions of the UK at the centre of government.
3. Monitoring adherence to standards in public life.
4. Most significant of all, exercising new but precisely drawn powers to safeguard the constitution of the United Kingdom and the distribution of power within it (Brown Commission 2022, 139).

Of the second of these functions, the Commission states that the Assembly “should oversee the effective working of the new intergovernmental Councils” which the Commission promotes. These entities, which would replace the allegedly moribund Joint Ministerial Committees, would be,

- ◇ “The Council of the Nations and Regions [which] would bring together the devolved nations but also representatives of the different parts of England, Scotland, Wales and NI”;
- ◇ “A Council of the UK, to manage relations between the Scottish, Welsh, Northern Irish and UK Governments”; and
- ◇ “A Council of England to bring together English local government and metro mayors with central government”.

These entities would each have their own “independent secretariat” and “the power to call meetings and set agendas” (Brown Commission 2022, 118-119).

Of the fourth function, the Commission explains that the Assembly “would have an explicit power to reject legislation which related to a narrow list of defined constitutional statutes”. The Commission indicates that this list would include the Parliament Acts, the Constitutional Reform Act 2005 and the Representation of the People Acts. In addition, proposed legislation to enact the “Sewel convention”, which provides that the UK Parliament will not legislate on devolved matters or the powers of the devolved assemblies without their consent, would benefit from this protection. The Commission argues that:

there should be a new, statutory, formulation of the Sewel convention, which should be legally binding. It should apply both to legislation in relation to devolved matters and, explicitly, to legislation affecting the status or powers of the devolved legislatures and executives. It should ... be binding in all circumstances (Brown Commission 2022, 102).

The Commission’s justification for this “Sewel” legislation is the Johnson Government’s alleged breaches of the convention in relation to the passage of the Internal Market Act 2020 despite objections from the devolved assemblies. The Commission adds that giving the power to accept or reject “constitutional statutes” to the Assembly, rather than giving a comparable power to the courts, “sustains the principle, at the core of much of the UK constitution, of Parliamentary Supremacy” (Brown Commission 2022, 140).

The Assembly’s power would, however, be “hedged round”. Firstly, as noted, it would apply only to a limited number of statutes, and, secondly, the Assembly (through its presiding officer) would be required to ask the UK Supreme Court “for an authoritative judgement on whether the constitutional protection powers are engaged” prior to exercising its power to reject any proposed legislation. The Commission also mentions several ways in which to resolve a legislative conflict between the Commons and the Assembly, including “a Commons ‘supermajority’, of say 2/3, [which] could overrule the decision of the second chamber” but is silent on which of these it prefers (Brown Commission 2022, 140).

[D] ASSEMBLY VERSUS BUNDESRAT

As noted in the introduction, the composition and role of the proposed Assembly resemble—at least superficially—that of the Bundesrat. The Assembly will include “regional and national leaders”, and its powers are intended to maintain both the overall constitutional order of the UK and the relationship between the UK Parliament and UK Government and the devolved assemblies and executives. The Bundesrat’s membership is similarly comprised of Germany’s “regional leaders”, and it plays an important role in both the relationship between them and the Federal Government and in maintaining Germany’s constitutional order.⁴ That said, as will now be seen, the proposed Assembly lacks both its compositional clarity and constitutional authority.

Composition

The Bundesrat represents the 16 German Länder (ie states) at the federal level. As article 50 of the Basic Law 1949 states: “The Länder shall participate through the Bundesrat in the legislation and administration of the Federation and in matters concerning the European Union.” Unlike the second chambers of many other federal states, such as the US or

⁴ This article uses the terms “Germany” and “Federation” (which appears in the Basic Law 1949) as appropriate.

Australian senates, the Bundesrat's members are not elected (directly or indirectly) but are appointed by their state governments.⁵ As article 51(1) stipulates: "The Bundesrat shall consist of members of the Länd governments, which appoint and recall them. Other members of those governments may serve as alternates." Indeed, Gunlicks (2010), citing Wehling (1989), explains that:

Germany's second chamber is unique in the world's federal systems. It is unique in that it is a federal, not a Länd, organ, in which the member states are represented by their governments (i.e., cabinets). This means it is an executive as well as a legislative body, and it means also that it is not a part of parliament, which is the Bundestag alone.⁶

The Bundesrat is, as Gunlicks puts it, a "constitutional organ"—along with the federal government, federal president, Bundesrat and federal constitutional court—which "makes it possible for the Länder, via their governments, to participate in the legislative process". Consequently, each state's members typically comprise its Minister President (or, as in the case of Berlin, its Mayor) and other serving senior ministers. They sit in the Bundesrat only for as long as they form (and represent) their state's government, rather than for a fixed period of time. Moreover, given that Ländtag elections do not all take place at the same time across Germany, the Bundesrat's membership is subject to constant potential changes. For example, in 2023, Bremen's election was held on 14 May, whilst Bavaria and Hesse will hold theirs on 8 October.⁷

There are 69 members of (or votes available to the states represented in) the Bundesrat. A state's number of members (or votes) is determined by its population, subject to a weighted voting mechanism which favours the smaller states. Each has at least three members (or votes) with a maximum representation of six so that, for example, Bavaria's 13.3 million people are represented by six members, whilst Bremen's 700,000 have three members. As provided for by article 51(3), states cast their votes *en bloc* so, theoretically, a single member (generally termed the Stimmführer or "leader of the votes", who is normally the Minister President) may cast all its votes in the Bundesrat although, generally speaking, they tend to have as many members as they have votes. Given the multi-party composition

⁵ It is worth noting that, prior to the 17th amendment of 1913, US Senators were chosen by their state legislatures rather than elected by the populace.

⁶ He subsequently, and somewhat confusingly, goes on to elaborate that it is a second chamber but not an "upper house" of Parliament. Perhaps the clearest way of looking at the Bundesrat is to recognize that it is a separate entity from the Bundestag rather than them both being part of one larger whole.

⁷ See the [Bundesrat information on Ländtag elections](#).

of many state governments and the requirement for an *en bloc* vote, their members usually abstain if a measure is particularly divisive.⁸ Given the fact that senior ministers have many other calls on their time, states often send officials to attend many sessions of Bundesrat as “alternates”, as permitted by article 51(1).

In its composition and size, the Bundesrat resembles its predecessors of the North German Confederation, German Empire and Weimar Republic. It therefore represents a continuation of Germany’s historical constitutional framework (Gunlicks 2010; Heun 2011). By contrast, the Commission’s proposed Assembly does not represent such a continuation of the UK constitutional framework. Firstly, in terms of size, no reason is given for an Assembly of 200 members rather than, say, 300 or 400, other than the desirability of a chamber which is “markedly smaller” than the Lords. Nor, for that matter, does the Commission explain why the Assembly should be “markedly” larger than, say, the Bundesrat or US Senate. Both chambers deal with a range of complex legislative and administrative matters with far fewer than 200 members. It would seem, then, that this figure is a rather arbitrary one rather than a demonstration of an “intellectually coherent approach to constitutional change” (Norton 2017).

Secondly, the Assembly will be “elected on a different electoral cycle from the ... Commons”, but the timing of the elections, the members’ terms of office, their constituencies (if any) and mode of election are left to future “consultation”. The failure to address these questions is even more problematic than the seemingly random choice of the chamber’s size. At present, the Commons has a four to five year electoral cycle, the devolved assemblies are elected every four years and a plethora of local councils and mayors are elected each year. Where would the Assembly sit in this packed schedule? Would all its members be elected at the same time or in tranches, like the US Senate? These are not merely logistical issues but may have substantive political implications, as anyone who recalls that Theresa May’s decision to call a General Election in 2017 was triggered by her party’s performance in that year’s local elections will appreciate.

Further, whom would these members represent? Would there be 200 single-member constituencies across the UK or a smaller number of multi-member constituencies? Would each constituency, like Commons constituencies, have roughly the same number of voters or would they represent “geography” rather than population? For comparison, each

⁸ There was a breach of this principle in 2002 when the Brandenburg delegation was divided over the Federal Government’s immigration legislation. The vote in the Bundesrat was eventually held to be unconstitutional.

US state has two senators despite the fact that, for example, California has a population of 39 million and Wyoming has under 600,000 inhabitants. Taking the nine English regions as a model for multi-member constituencies, would London's 9 million people be represented by the same number of Assembly members as the North East's 2.67 million?⁹ What of Scotland, Wales and Northern Ireland? Would Assembly representation be a compromise between geography and population, as in the Bundesrat? Again, these are not merely logistical issues, as anyone who is familiar with the work of the Boundary Commissions will attest. Nor is the vexed issue of the mode of election—PR or first-past-the-post? If the former, which method of PR?

Then we come to the “national and regional leaders”. Would these elevated personages participate in the Assembly as ordinary members, non-voting observers or as some form of “super-representative” (with a block vote or veto powers)? Would a “national leader” rank higher than a mere “regional leader”? Further, whilst it is fairly easy to identify a “national leader”, who is a “regional leader”? There are 333 local authorities in England, 32 in Scotland, 22 in Wales and 11 in Northern Ireland.¹⁰ That amounts to 398 would-be “regional leaders” and over 20,000 councillors.¹¹ How would the leaders of Plymouth and Torbay feel if the leader of Devon County Council was admitted to the Assembly and they were not? What of the sometimes vexed relationship between borough councils and their local “metro mayors”? Finally, would these various “national and regional leaders” participate in all of the Assembly's business or merely in that which related to their own nations or regions? These are essential questions, and it is disappointing that the Commission—again—offers no solutions or even options. Again, an “intellectually coherent approach to constitutional change” is absent.

Functions and powers

As noted above, article 50 of the Basic Law entitles the German states to participate in the legislative process of the Federation. Like the relationship between the Lords and Commons, however, the Bundesrat's role is limited when compared to that of the Bundestag. As far as legislation is concerned, article 70 of the Basic Law provides:

⁹ For data on the English regions, see Office for National Statistics, “[International geographies](#)”.

¹⁰ See the Institute for Government briefing, “[Local government](#)”.

¹¹ To say nothing of the 10,000 parish councils in England. See the [National Association of Local Council's website](#).

- (1) The Länder shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation.
- (2) The division of authority between the Federation and the Länder shall be governed by the provisions of this Basic Law concerning exclusive and concurrent legislative powers.

Articles 71 to 74 set out the parameters of the Federation's exclusive legislative power and its and the states' concurrent legislative power. For example, the Federation has exclusive power over "foreign affairs and defence, including protection of the civilian population" whereas "admission to institutions of higher education and requirements for graduation in such institutions" may be legislated for by the Federation and individual states. Articles 77 and 78 go on to stipulate the process for the passage of legislation, and article 79 addresses amendments to the Basic Law 1949.

There is a clear delineation between those bills which require the Bundesrat's explicit consent, termed "consent bills", and those in respect of which it can only enter an objection, termed "objection bills".¹² Gunlicks estimates that consent bills make up about 55-60% of all bills (Gunlicks 2010). The Basic Law 1949 states that the following categories of legislation require the Bundesrat's explicit consent:

- ◇ legislation to amend the Basic Law—moreover, a two-thirds majority is required in the Bundesrat to pass any such legislation (article 79 (2));
- ◇ legislation which impinges on the states' finances—this includes legislation relating to taxes for which all or part of the revenue accrues to the states or local authorities (article 105(3)); and legislation which requires states to make monetary payments, provide equivalent benefits or provide comparable services to third parties (article 104a(4)); and
- ◇ legislation the enforcement of which "impinges on the organisational and administrative jurisdiction" of the states (article 84(1)).

Bills that do not fall into one of these three categories are, by default, objection bills. If the Bundesrat enters an objection to such a bill with an absolute majority, that objection may be overturned by an absolute majority in the Bundestag. By virtue of article 77(4), a two-thirds majority in the Bundestag (or at least the votes of half of all its members) is needed to overturn a Bundesrat objection by two-thirds majority of its members. Differences between the two chambers can be referred to a Mediation Committee but, ultimately, the fate of a bill—consent or objection—is

¹² For a more detailed guide to the legislative process, see the Bundesrat's own [website](#).

determined by votes (Koggel 2016). Hence, the Bundesrat's power over objection bills is suspensory in nature, similar to the Lords' power to delay the passage of legislation. That said, it should be appreciated that the Bundesrat approves over 90% of the bills sent to it after approval by the Bundestag (Gunslick 2010).

Turning to the Brown Commission's proposals, the incoherence evident in relation to the Assembly's composition continues in relation to its role and powers, but with a further flaw. This flaw is the negation of the very purpose of the Commission's endeavours. Firstly, the Commission stipulates that the Assembly will "have no responsibility for decisions about public spending or taxation", whereas the Bundesrat discusses and votes upon proposals relating to the raising and spending of public money in the individual states. Clearly, the Commission's proposal, rather than redistributing economic and political power, maintains the Commons' supremacy over the Assembly (formerly the Lords) and "national and regional leaders" on matters of public finance. Albeit limited revenue-raising powers have been (and more may be) passed to the devolved assemblies, the proverbial "key to the bank" will remain in the Chancellor of the Exchequer's grip.

The second manifestation of this flaw is the intended demise of the second chamber's power over the passage of legislation. Whereas the Bundesrat has a suspensory power over objection bills and the Lords may delay any legislation, the Assembly will have no power to reject or delay "non-constitutional" legislation. Whilst the Commission offers rhetorical window-dressing to the goal of redistributing power by stressing that the Assembly may continue "to propose amendments", this ignores the fact that the Lords' role in amending and scrutinizing Bills was reinforced by the risk (albeit rarely exercised) that it might vote to delay them.¹³ Without this risk, the government can simply ignore any of the Assembly's amendments. Again, rather than sharing political power, the Commission proposes to increase the power of the Commons and, consequentially, the power of the governments formed from and sustained by the Commons.

The proposed termination of the second chamber's power of delay has been recognized as a sop to those who fear that two elected chambers would struggle for legislative supremacy (Russell 2023). The Commission seeks, in its own words, to safeguard "the pre-eminent position of the House of Commons". Only in the Assembly's power to "safeguard the

¹³ The last Bill to be rejected by the Lords at its second reading was the Fraud (Trials without a Jury) Bill, which was rejected on 20 March 2007. Governments do, however, lose many votes in the Lords over specific clauses or amendments, see the University College London, Constitution Unit [website record](#).

constitution of the United Kingdom” is that pre-eminence challenged. And yet that challenge is a flaccid one. Unlike the provisions in the Basic Law, whereby bills are identified as consent or objection bills at their introduction to the Bundestag and Bundesrat, the Commission places the onus upon the Assembly’s presiding officer to determine whether or not a bill is “constitutional”. The potential for a government to obfuscate the nature of its proposed legislation and put pressure on a presiding officer to make the “right choice” is clear.

The situation is muddled—and the authority of the Assembly diluted—further by the need for a ruling by the Supreme Court on the constitutional nature of any such Bill. Whilst the pre-emptive “abstract constitutional review” of bills by the German federal constitutional court is possible (article 93(1)), this is an exception to routine practice. Moreover, it should be appreciated that this review is carried out by reference to the ultimate constitutional authority—the German Basic Law. In the UK, that ultimate constitutional authority is, or is supposed to be, Parliament. Part of that ultimate constitutional authority—the Assembly—would be required by the Commission’s proposal to defer to the authority of the Supreme Court, contradicting its own words, noted above, on parliamentary supremacy.

The Commission’s lack of genuine commitment to “safeguarding the UK constitution” is also evident in its failure to state how—and what would happen if—the Assembly rejected an “unconstitutional” Bill. The Commission mentions, in vague terms, that the Assembly’s rejection could be overturned by a two-thirds “supermajority” in the Commons; or that such a rejection itself would require a “supermajority” in the Assembly; or that the rejection could be ignored if the Bill was reintroduced following a General Election. Only the first of these suggestions would go any way towards “safeguarding the UK constitution”, whilst the others would neuter the Assembly. Moreover, the suggestion that a “unconstitutional” Bill subsequently included in a (winning) party’s General Election manifesto should be free from usual parliamentary processes is almost as asinine as the claim that a Scottish General Election should be treated as a referendum on independence. There is a clear way of ensuring that the Assembly can safeguard the UK constitution. It should, like the Bundesrat, have to pass any “constitutional” bill by a two-thirds majority. That, however, would require a reform which the Commission does not mention but which this article broaches at its conclusion.

Finally, the Assembly’s role in “Bringing together the voices of the different nations and regions of the UK” and overseeing the three intergovernmental Councils sees the disorder continue. A practical

example serves to illustrate the point. Perhaps a newly elected city council leader, acting on her voters' wishes, seeks to introduce a radical measure in her major city. The council leader has argued her case in the Council of England and in the Council of the Nations and Regions. Perhaps she received a favourable hearing in one of these Councils and a not so favourable one in the other. She speaks on the matter again, as a "regional leader" in the Assembly. Perhaps her city's "elected" Assembly members oppose her proposal. Perhaps a resolution on her plan is passed by one vote—her own. Whilst the Assembly is not a court, the principle *nemo iudex in causa sua* would seem to be relevant here, to say nothing of the administrative and political confusion created by the multiplicity of bodies and individuals with a say on the same issues. By comparison, although it is not free from authoritative critiques (Hegele 2017; Finke & Ors 2019; Souris & Müller 2022), the Bundesrat "works" because it is the principal body for addressing federal versus state issues in Germany, rather than one of three or four, and it is comprised of representatives of the state governments rather than a mélange of "leaders" and elected members.

[E] CONCLUSIONS

The Commission asserts that its "recommendations add up to a radical change in the distribution of power in the United Kingdom". When it comes to the replacement of the Lords by an Assembly, they do indeed but not in the manner it claims. Far from "bringing political power closer to the people", they concentrate that power in the hands of Members of Parliament. The Commons', and thereby governments', control of public finances will be maintained and its power over the passage of legislation will be enhanced. As a consequence, the Assembly will be little more than a proverbial talking shop, with or without the potential confusion and conflict that may result from its jumble of elected members and "national and regional leaders".

A truly "radical change" would be a second chamber which resembled the Bundesrat in substance rather than in superficial form. Such a chamber would have the power to prevent "unconstitutional" legislation, such as that which would affect the devolved assemblies without their consent, and power over public finance, at least insofar as local authorities were concerned. Moreover, its membership could properly reflect the views of the nations and regions of the UK if it was drawn from the representatives of those nations and regions. Clearly, although a Bundesrat of 69 members has operated for decades, an Assembly comprised of 398 local authority leaders would be untenable. A chamber with such powers that is selected

or elected by and on behalf the 20,000 local authority councillors, however, would have a measure of democratic legitimacy without challenging the supremacy of the Commons;¹⁴ reflect regional views whilst avoiding the confusion that would result from a chamber based on the multiplicity of districts, counties, boroughs and towns;¹⁵ and maintain the sovereignty of Parliament rather than of the Commons.

That last point, however, lies at the heart of the Commission's conundrum. It espouses the sharing of power and yet is wedded to the supremacy of Parliament. In fact, its problem is greater than that. It is wedded to the supremacy of the Commons. This supremacy renders any attempt at sharing power with "national and regional leaders" ephemeral as, once a dispute arises, that supremacy will be asserted, as it was over the Scottish gender recognition legislation. That supremacy also undermines any attempt to "entrench" so-called "constitutional" legislation, as has been pointed out by Sandro (2022) and others. The protection of "constitutional" legislation by, say, a two-thirds majority in the Assembly would require the end of parliamentary sovereignty as we know it. Ultimate constitutional authority would, like that relied upon and protected by the Bundesrat in Germany, instead need to be derived from another source. A written constitution.

About the author

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This is his first published article on the UK constitution since his prize-winning essay for the Politics Association (founded by Derek Heater and Bernard Crick in 1969) a very, very long time ago.

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¹⁴ There is nothing uniquely democratic about a directly elected legislature. According to the Inter-parliamentary Union, only 20 out of the 79 upper or second legislative chambers in existence are entirely directly elected. There are 14 second wholly indirectly elected and 15 wholly appointed second or upper legislative chambers. See IPU data, "[Compare data on Parliaments](#)".

¹⁵ It should be noted that some commentators believe that upper or second chambers generally are incapable of representing regions or "territorial interests" (Palermo 2018).

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Legislation, Regulations and Rules

Germany

Basic Law 1949

United Kingdom

Constitutional Reform Act 2005

House of Lords Act 1999

House of Lords (Expulsion and Suspension) Act 2015 (2015 Act)

House of Lords Reform Act 2014

Internal Market Act 2020

Life Peerages Act 1958

Parliament Act 1911

Parliament Act 1949

Peerages Act 1963

Representation of the People Acts