

# THE CASE for an ELECTORAL COMMISSION

Keeping election law  
up-to-date

Dr David Butler



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### **The Author**

David Butler, a Fellow of Nuffield College, Oxford since 1951, is chairman of the Hansard Society. He has written widely on constitutional and electoral matters at home and abroad. His books include volumes on each British General Election since 1951.

### **King-Hall Papers**

King-Hall Papers are named after the founder of the Hansard Society, Stephen King-Hall, who was its first Chairman from 1944 to 1964, and first Director from 1944 to 1957. Without his vision and energy the Society, with its object of promoting knowledge of and interest in Parliamentary Government, would never have existed. King-Hall Papers are a series of occasional papers which are published as a contribution to the continuous debate about the efficacy of Parliamentary Government, and how it can be maintained for the present and developed for the future. The views expressed are those of the author, and the Society, as an independent non-party foundation, is neither for nor against. The Society is, however, happy to publish these views and to invite analysis and discussion of them.

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by

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**The Hansard Society for Parliamentary Government**  
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## Foreword

by **Lord Holme of Cheltenham CBE**,  
Vice-Chairman, The Hansard Society

The effective functioning of the UK election process is a subject that has always, understandably, been at the forefront of the Hansard Society's interests. Seeking to ensure that elections are well run, and are as fair as is practicable, is a natural corollary to the promotion of parliamentary government and democracy.

In this context the question of whether there should be an Electoral Commission, to oversee the administration of elections, was given its first airing in 1991 in *Agenda for Change*, the Report of the Society's Commission on Election Campaigns which was chaired by Christopher Chataway. David Butler was the vice-chairman of that Commission, and central to its deliberations. Indeed he has been one of the leading British thinkers on the electoral process over the past forty years. When it came to selecting an author for this King-Hall Paper, therefore, the Council of the Society decided that it could do no better than invite its own chairman to lay aside, temporarily, his impartial role and to put pen to paper. This he has done with lucidity, and not for the first time he has demonstrated a knowledge of his subject which is both broad and deep.

This is the fifth in the series of King-Hall Papers, which were launched in 1994 as part of the celebrations of the Society's fiftieth anniversary. It is the third to be supported by the Joseph Rowntree Charitable Trust, and we remain grateful to them for being the major funder of what we believe to be an important series with the common theme and purpose of promoting the wellbeing and future development of parliamentary democracy.

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## Introduction

In 1982 Roy Harold Jenkins stood against Roy Harris Jenkins deliberately to confuse the electors of Hillhead in Glasgow. In 1994 a mischievous Liberal Democrat took enough votes from the Liberal Democrat candidate to deny him the Euro-seat in Devon. In the 1975 referendum the 'Yes' campaign was able to spend twenty times as much as the 'No' campaign. In the 1979 Scottish referendum it proved impossible to allocate broadcasting time between the two sides. In the 1997 General Election 4000 constituency candidates, under tight controls, spent less, collectively, than the national parties, totally unrestricted. In the 1997 Welsh Referendum there was no redress for those who challenged the conduct of what proved to be a close count. There was no breach of the law in any of these cases but each time the situation came up without notice, unanticipated by any Act of Parliament and each time it was a situation that raised the question of 'fair play'.

The British constitution has long run on the basis of tacit understandings. But people no longer have confidence in politicians interpreting the constitution. The rules of the game in British politics are in flux. We have moved from an unwritten constitution into a new and more legalistic world. Codes of conduct are increasingly in vogue, sometimes enforceable by a tribunal or a court, sometimes only subject to public censure by an Ombudsman or his like. But codes of conduct need continuous reappraisal either as circumstances change or as new ways of by-passing their injunctions are found. The Nolan/Neill Committee on Standards in Public Life (coupled with the new role of Sir Gordon Downey) offers a prime example of such developments.

This paper argues the case for the establishment of a permanent independent commission, not only to oversee all aspects of electoral administration, but also to suggest reforms whenever they are needed. The

following pages identify many current and potential problems; they do not prescribe specific solutions. At the time of writing the Neill Committee on Standards in Public Life, the Jenkins Commission on the choice of electoral systems and the Howarth Committee on electoral procedures are considering some of these problems. They will doubtless suggest improvements to the present arrangements – but their remedies will themselves need to be monitored and new problems will arise, since sometimes the cure can prove worse than the disease.

There has been a dangerous *ad hoc* approach to the manifold electoral problems inherent in the present government's reforming programme. The development of new voting systems for Scotland, Wales and Europe and the repeated use of referendums require the coordinating oversight from some independent and continuing body.

Experience in other countries, notably Australia and India, has shown the value of a permanent body in charge of electoral matters. In that most essential of democratic actions – voting by ordinary people – independent Electoral Commissions have proved effective in insulating procedures from partisan intervention and have helped to preserve confidence in the democratic process.

The idea certainly demands consideration in Britain. Indeed the Labour Party and the Liberal Democrats have explicitly committed themselves to the establishment of such a body<sup>1</sup>. But for the time being the problems are being considered piecemeal. Electoral arrangements in Britain, though much admired, have many rough edges that could and should be smoothed out.

## Law and Practice

British elections are regulated by a patchwork of nineteenth century legislation. In 1868 the *Election Petitions and Corrupt Practices Act* transferred

jurisdiction over controverted elections from the House of Commons to the High Court. In 1872 the Ballot Act laid down the basic procedures for the casting and counting of votes. In 1883 the *Corrupt and Illegal Practices Act* defined what candidates could – or could not – do or spend during a campaign. The *Registration Act* of 1884, the *Redistribution Act* of 1885, and the *Representation of the People Act* of 1885 completed the arrangements. Subsequent Acts have modified administrative details and greatly expanded the franchise. But the basic framework under which constituency battles are fought by candidates and administered by returning officers remains as it was laid down in the 1870s and 1880s.

However, although the law covering electioneering has hardly changed, the substance has been transformed. Contrast 1950 with 1997. In 1950 the national contest was fought through leaders' speeches delivered to mass rallies in provincial centres and carried by the next morning's papers. There was no broadcast reporting. There was almost no coordination of the campaign activities of major figures. There was no nationwide advertising. The situation changed radically in 1959. Large-scale poster and press advertising campaigns preceded the dissolution; private polling was undertaken; four competing public polls received full coverage; daily press conferences were instituted; and, above all, full-scale television coverage arrived, revolutionising public perceptions of the whole process. Over the following forty years innovations in communications and public relations have produced a situation that would have been unrecognisable in 1950. Direct mail, mobile phones, faxes, videos and E-Mail have made it possible to orchestrate the campaign. Party headquarters have expanded vastly and produce ever more elaborate war-books; each side monitors its rivals' utterances 24 hours a day and every significant statement produces a 'rapid rebuttal' (and even a 'prebuttal') within the same news cycle. The media are generously supplied with copy and systematically caressed and bullied. Press and poster advertising is on a new scale.

But, while all these developments have proceeded apace, old activities have withered away. Canvassing is at less than a third the level of 1950 and attendance at campaign meetings has declined from 30 per cent to 3 per cent of the electorate. Expenditure at the constituency level has stayed stationary, in real terms, while at the national level it has soared. Yet there has been no modification of the law to cope with this new world.

None the less the nineteenth century formulae still work. By world standards British elections are honestly and economically conducted. There are no great scandals

or inefficiencies waiting to be exposed. Nothing has happened to induce governments of any complexion to give up parliamentary time to a fundamental reexamination or reform of the arrangements.

However, as candidates and administrators will testify, there is great dissatisfaction with the detail. The whole system could work better. New challenges need a new structure to deal with them.

## Problem areas

**Registration.** The register of voters, compiled on the basis of residence on October 10 each year, has become increasingly flawed. In 1951 a study by the Government Social Survey found it to be about 2 per cent in error (with omissions and duplications roughly cancelling out). In 1991 a similar OPCS study found it to be almost 8 per cent in error (with omissions and duplications still cancelling out)<sup>2</sup>. Removals and deaths mean that the accuracy of the register degenerates by 1-2 per cent each month during the 17 months between its compilation and its replacement by a new listing. An apparent turnout of 75 per cent in a general election must represent 85 per cent or more participation by those who had any realistic chance of recording a vote. As Australians and Canadians have shown, there are many ways of improving procedures for compiling registers so that, on polling day, they come nearer to providing a comprehensive list of all those who should be entitled to cast a ballot. As the Association of Electoral Administrators has argued, computers have transformed the preparation of registers and modern technology could be used to allow a rolling register with opportunities for voters to be listed up to the last moment.

There are other problems in this area:

- the registration of British voters overseas and of European Union citizens living in Britain is not simple.
- there are difficulties for those who want to be registered but, for fear of domestic violence or other reasons, want to keep their names off the official list.
- homeless persons present an administrative challenge to registration officers.
- the sale of election registers for commercial purposes raises ethical questions.

There is also the possibility that registration officers need an independent authority to appeal to when their budgets or their administrative principles are interfered with by local councils.

**Absent voting.** Although the opportunities for absent voting have been enlarged, they leave space for improvement. People who are ill, or away on holiday, or away on business can vote by post or by proxy. But in recent elections only 2 per cent have done so<sup>3</sup>. Public

understanding of the facilities has been limited. There is often too little time between the announcement of the election and the closing date to publicise them (only four days in February 1974). It would not be impossible to arrange, as in Australia, for people to cast a ballot in advance, or in another polling station in the constituency, or even in some more distant spot. But the administrative details would need careful study.

**Voters with disabilities.** Access to polling stations can be difficult for the elderly or the handicapped. Arrangements for voting by the blind can cause embarrassment or suspicion. Humane attempts to solve these problems have been made but they leave many welfare lobbyists – and many returning officers – dissatisfied. As the Association of Electoral Administrators has argued, mobile ballot boxes could provide one answer.

**Ballot arrangements.** The routines imposed on polling clerks as they issue ballot papers go back to the Act of 1872. At that time there was no tradition of secret voting; in many places, there was a culture of bribery and of intimidation and some constituency electorates amounted to less than a thousand. Ballot papers were to be numbered and the number preserved on a counterfoil. They were also to be perforated by a special stamp issued only on the day of poll. Pink papers were to be available for voters who found that someone had voted in their name. These safeguards against forged papers and other kinds of fraud may well have been appropriate when imported from Australia in 1872. To many they now appear cumbersome and redundant. Other countries have shown that there are many simpler ways of ensuring the integrity of the vote. No one, asked in 1998 to draw up from scratch new voting-booth arrangements, would dream of following the 1872 formula. The layout of the ballot-paper has remained virtually unchanged, although New Zealand has shown how a small change in the layout can reduce the number of disputed votes.

In the computer age all sorts of possibilities have opened up. Simple electronic machines have been used in India and in the United States. It has even been suggested that here lottery terminals could be adapted to allow secure voting.

It is custom not law that dictates Thursday as polling-day. But other days might be more convenient for electors and for administrators. Weekend voting would avoid the closing of schools. It might also increase turnout. But experiments should precede any general change.

The hours of voting differ for parliamentary and local elections which causes confusion when they occur simultaneously. There is also the question whether the

extension of voting hours from 9pm to 10pm, effected in 1970, has proved justified.

It has also been argued that the calling of by-elections should be decided neutrally within a fixed time-table, rather than by the party of the former member.

**Illegalities.** Although there seems to be very little fraudulence in British contests and general elections produce at most a handful of prosecutions for personation or misuse of postal or proxy votes, there are dark rumours about the collection of such votes in old peoples' homes or through council records about removals. In Northern Ireland anxieties about personation have led to provisions for demanding proof of identification at the polling station. The problem may be trifling in scale but it has the potential to damage faith in the democratic process. Any assessment of its seriousness and any search for remedies would fall naturally within the remit of an Electoral Commission.

The limits on constituency election expenditure have in recent years been evaded with the use of centrally distributed direct mail and with centrally organised telephone banks. Effective regulation of such practices may be impossible; it may not even be desirable. But if there is concern, an Electoral Commission would be the ideal instrument to explore what ought to be done.

**The counting of votes.** At the count all ballots have to be assembled and shuffled together before the tallying begins. This was appropriate when electorates were numbered in hundreds and frightened tenants might be worried if the results from a single village were known to the landlord. But the procedure, which involves waiting for the last boxes to arrive before starting the count, causes gratuitous delay. It also denies the public and the parties knowledge of how individual wards have voted. In almost every other democracy voting statistics are available for quite small subdivisions without any threat to the secrecy of the ballot. There is a strong case for reexamining the arrangements for counting and publishing votes and for exploring whether voting machines or ballot-counting machines have a place in the British system.

**Redistribution of seats.** The statutory rules under which the Boundary Commissions have to work every time they redraw the electoral map are patently unsatisfactory, as the Commissioners have pointed out in the course of each of their reviews. There is no guidance on how they are to hold the balance between the conflicting goals of equality of numbers and respect for existing communities. They are not told how much inequality they should tolerate. They are constrained by having to use as building blocks wards drawn up by local authorities and authorised by a different boundary commission. The allocation of seats to the four parts of

the United Kingdom is unequal and has come about by accident. The rules for determining electoral quotas lead, necessarily, to a continuous enlargement of the House of Commons. But, since 1958, nothing has been done to prevent the situation<sup>4</sup>.

The neutrality of the Boundary Commissioners is beyond question. But partisan intervention is possible: during the 1992 Parliament the Secretary of State for Scotland got the Scottish Office first to draw up new local government areas and later to intervene in re-warding decisions, allegedly with a partisan intention.

**Election expenses.** Election expense law is broadly respected. Although there may be a modicum of 'constructive accounting', most candidates and agents faithfully observe the limits on expenditure and, at the constituency level, the costs of elections are remarkably low. But, by 1997, more was being spent at the national level than by all the 4000 candidates put together and nothing had been done to ensure a level playing field in financial terms.

**Candidate's description.** In 1969 candidates were, for the first time, allowed to put six words of self-description on the ballot paper as an approach to a party label. But this opened the way to confusion as was shown by the gentleman who, having changed his name to Edward Heath, stood as 'Conservative and Consult the People' against Edward Heath 'Leader of the Conservative Party' in 1970. It was demonstrated more spectacularly by Mr Huggett, the Literal Democrat, in the 1994 Euro-election in Devon and again in the 1997 Winchester contest. In 1997 there were half a dozen court actions when the major parties tried to enjoin independent candidates from calling themselves 'Conservative' or 'New Labour'. The need to give time for checking and legal challenge to such descriptions at the nominating stage is obvious to all concerned. The case for revising the rules on nominators and assessors also merits re-examination. There are those who object to the alphabetical listing of candidates. There is also the problem of the superfluity of candidates. In 1951 there were 1409. In 1997 there were 3724; outside the main parties only five candidates in mainland Britain got over 10 percent of the vote. All candidatures cost money with the right to a free post; they can be used for commercial advertising or for access to free television; frivolous candidates can deny serious ones access to the airwaves because of the rules of balance. The £150 deposit established in 1918 would be worth £4000 now. The change to £500, introduced in 1983, hardly touches the problem. The case for an increased deposit or for a vastly increased number of nominators needs consideration.

**The redress for abuse.** Since 1929 there has been no challenge to a parliamentary election on the ground of

overspending or false accounting- and only one suggestion of a scrutiny of ballots (the last petition on expenses was in Plymouth, Drake in 1929; the only scrutiny since 1922 was started in Winchester in 1997). Over the years there have undoubtedly been instances of substantial misdemeanour but the costs and difficulties of carrying through a petition have been sufficient to deter any aggrieved candidates from seeking redress. It is said that the legal costs of the 1997 Winchester petition – which was aborted before it went to full trial – exceeded £100,000. Should not responsibility for establishing that the result of an election has been arrived at honestly and fairly rest on the state and not on the contestants?

**Other electoral systems.** In some quarters objections are increasingly voiced against the basic principle of a first-past-the-post electoral system and the disproportionate way in which it translates votes into seats. This is not the place to canvass the merits of that argument, although proportional representation is definitely coming for Scottish, Welsh and European elections. But it is clear that almost any change in the system will require modifications in the basic rules covering nominations, ballot-paper format and vote-counting. Plainly this should be done on the basis of mature research and consultation rather than by arbitrary regulation.

Moreover, even if the basic first-past-the-post system survives, there may be a need to explore its operation to see whether it can be adjusted to maintain a fair balance between the major parties. In the 1950s the system had, though the distribution of population, a slight bias towards the Conservatives. Today it has developed a much heavier bias towards Labour; if in 1997, on an even swing, the Conservative and Labour parties had tied in percentage of the vote, Labour would have secured 82 more seats than the Conservatives. Even those who favour the system's bias in favour of large parties and strong governments may feel uneasy at such imbalance. If the problem were to be tackled, it would need an impartial body to come up with a well-researched remedy.

**Incremental changes.** Some far-reaching changes in the customs of electioneering have come unexpectedly and incrementally- not from changes in legislation but from judge-made decisions and modified interpretations of the law. Until the Tronoh-Malayan verdict in 1951 it was thought that party advertising during a campaign was illegal unless it was returned as part of an individual candidate's expenses. In due course this judgement opened the door to the hugely expensive nationwide press advertising during the 1980s<sup>5</sup>.

It was also thought until the 1980s that all advertising on hoardings had to be charged to candidates. But a



legal consensus developed that a nationwide poster campaign, if conducted in safe seats as well as marginals, could be ignored in constituency accounts as long as candidates' names were not mentioned. This allowed the enormous proliferation of posters seen in 1992 and 1997. There was no place in the administrative system for the automatic review of such developments.

**Political education.** Public understanding of electoral systems and procedures is limited, particularly among the younger generation. Constructive thinking about the best ways of educating and informing present and future voters is needed. It will be particularly important if new electoral systems are adopted. An independent commission would be much better suited than a government department to thinking about such matters.

## Roads to Reform

It would be wrong to suggest that there have been no attempts to consider reforms. In 1917 and again in 1944, during the bipartisanship of wartime, there were Speaker's Conferences where a large number of MPs gathered under the Speaker's chairmanship to seek a consensus on the form of electoral system, on the franchise and on other electoral arrangements. There was also the Ullswater Commission of 1930, under an ex-Speaker, which, operating on strict party lines, failed abjectly to find any agreement. In 1966 and again in 1972 there were further Speaker's Conferences which achieved little (except encouragement for the 1969 lowering of the voting age to 18). Lord Selwyn-Lloyd, the last Speaker to chair such a conference, roundly condemned the process<sup>6</sup>.

The most useful work on electoral arrangements has come from departmental committees. In 1942 the Vivian Committee provided the framework for wartime voter registration and for the reform of redistribution procedures. In 1946 the Oliver Committee agreed on a permanent routine for voter registration. In 1944-7 the Carr Committee suggested some of the very minor administrative reforms incorporated in the *Representation of the People Act (1948)*<sup>7</sup>.

In the 1980s various questions were referred to the Home Affairs Committee of the House of Commons. In 1985 their recommendations led to a modified Representation of the People Act in which, notably, the candidate's deposit was raised from £150 to £500 while the condition of forfeiture was lowered from an eighth to a twentieth of the total vote. However, in 1986, when the Committee did offer a solution to the paradox inherent in the current redistribution rules (which necessarily involve a continuous increase in the number of MPs), the Home Office rejected it<sup>8</sup>.

After recent general elections the Home Office has

engaged in limited post-mortems with the parties and the electoral administrators, discussing matters of detail.

But it does not seem that, with one notable exception, any of the conferences, committees or discussions involved serious research, let alone exploration of practice overseas. The exception was the Houghton Committee on Financial Aid to Political Parties which in 1975 conducted extensive investigation into the current situation<sup>9</sup>.

Outside individuals and unofficial commissions have made substantial contributions to the debate. In 1976 the Hansard Society Commission under Lord Blake explored fully the possibilities of a change in the electoral system<sup>10</sup>. In 1981 another Hansard Society Commission under Lord Barnett produced *Paying for Politics*<sup>11</sup>. In 1991 yet another Hansard Society Commission under Christopher Chataway looked into most other areas on electoral administration<sup>12</sup>. In 1985 there was a joint Hansard Society/Constitutional Reform Centre working party, chaired by Rt Hon Edmund Dell, which produced a suggested code of practice for company donations<sup>13</sup>. The Institute for Public Policy Research sponsored a full report on party finance from Martin Linton in 1994<sup>14</sup>.

There has also been a large amount of academic work on the conduct of elections, published in books and articles, but there is no indication that this has been much drawn upon by the authorities.

## Overseas examples

Since 1984 the Australian Electoral Commission has existed as an independent body, responsible for all aspects of federal elections, including registration, redistribution of seats, party labels, voting arrangements, electoral research and electoral education; it is also charged with assisting in elections overseas. The fact that Australia has compulsory voting puts a major premium on the efficient listing of electors and on facilities for absent voting, as well as on educating present and future voters on their rights and responsibilities. The Australian Commission has set very high standards – most notably in 1984 when in seven months it completed, with all due process, the transformation of 125 constituencies into 148. (It took the United Kingdom Commissions four years to complete the 1996 redistribution and seven years to complete the 1983 redistribution). The quality of the register and the speed of the count in Australia offer an impressive model. The three-member Commission has a federal judge as a part-time chair and one other part-time member as well as the Chief Executive Officer<sup>15</sup>.

In Canada there are statutory federal and provincial Election Officers with wide-ranging powers to supervise and modify electoral arrangements, significantly increased after the Lorty Commission of 1991. The

federal Chief Electoral Officer, whose post dates from 1920, is appointed until retirement. He is responsible for administration but he is now also charged with:

- the assurance of access to the system for all eligible citizens, through both physical facilities and public education and information programmes
- the process of periodic adjustment of boundaries
- the registration of political parties
- the control of election spending by candidates and political parties
- overseeing the work of a Commissioner of Canada Elections and a Broadcasting Arbitrator (who allocates free broadcasting time in elections and referendums)
- deciding personally whether prosecutions for violations of the Elections Act should be undertaken.

One of the reasons why India, by far the largest democracy in the world, has stayed a democracy lies in its independent Electoral Commission, which has had the strength to resist enormous partisan pressures. It has been innovative in its efforts to prevent fraud at the count. Its attempt to introduce voting machines, although frustrated by constitutional nit-picking, may offer a technology worth studying in the British context.

### **The Case for a British Commission**

The case for an Electoral Commission in Britain was firmly set out in Christopher Chataway's Hansard Society Report of 1991 (paragraph 23):

*'Under existing arrangement, responsibility for elections is diffused, with deleterious consequences. A single body, an Electoral Commission, should be directly and solely responsible for all aspects of electoral administration. Its brief should be to supervise, streamline and unify arrangements, and to increase public and parliamentary access to information about electoral administration. It should also have responsibility for allocating broadcasting time, monitoring party accounts, and should take over responsibility from the Boundary Commissions for drawing constituency and European Parliament boundaries. It should have a full-time Chairman. The Home Secretary should remain the minister responsible to Parliament for all electoral matters.'*

The proposal was developed in more detail by the Constitution Unit, an independent research body, in a March 1997 'Briefing', *Establishing an Electoral Commission*, which offered detailed suggestions on the scope and operation of such a body<sup>16</sup>.

David Gardner, Labour's Director of Development and Organisation, told a joint Hansard Society/Association of Electoral Administrators seminar on June 18 1997:

*'We envisage an Electoral Commission as an independent expert body responsible for promoting*

*electoral participation and high standards in elections. They would be charged with a duty to:*

- *Promote Britain's democracy through public education, marketing and training.*
- *Ensure the establishment of an accurate rolling register through the United Kingdom with national standards and a code of practice.*
- *Promote measures to improve democratic participation including national standards on absent voting and access to polling stations.*
- *Coordinate support and advice to Returning Officers at parliamentary and local elections.*
- *Be the registrar of political parties; receiving and reporting on accounts and protecting their names and symbols for ballot paper purposes.*
- *Conduct and coordinate national and sub-national referenda.*
- *[Supervise] parliamentary boundary and [re-warding] arrangements, reviews being undertaken by four panels of the Commission for each country.*
- *Be the first arbiter in interpreting electoral law and practice, providing authoritative and expert advice.*
- *Promote best practice in electoral administration and explore and recommend legislative changes to ministers and to parliament.'*

Mr Gardner went on to argue:

*'Britain badly needs an independent elections watchdog. We have a mishmash of responsibilities and bodies with too much left to the vagaries of custom and practice and the courts. The Home Office (or Scottish Office) do not have the independence, the teeth or the authority. In the end they act to the Government's tune... The Boundary Commissions are widely respected for their independence but it is a nonsense that they are not involved in the review of wards, the building blocks for constituencies, and have no role in ensuring common standards for electoral registration which is their baseline. ... An electoral commission could bring considerable expertise to many of these issues and drive our good, but very tired, election system into the 21st century. ... We would always expect the conduct and coordination of elections to be totally independent of Government.'*

### **New Developments**

Although there have long been strong arguments for establishing a statutory commission to oversee all aspects of electoral activity and administration, recent developments have enormously enhanced the case.

*New electoral systems.* In four separate areas divergence from the traditional first-past-the-post approach are under consideration.

**a.** If Londoners approve, they will before long have an elected Mayor and an elected Council. The Mayor will be chosen by the Alternative Vote. The Council will be chosen by some new but as yet unspecified system. The Mayor will face a larger electorate than any candidate has yet confronted in Britain (it is not surprising that at least two of the most discussed candidates are multi-millionaires); the fair regulation of campaign finance may take on a new aspect in such a fight.

**b.** Scotland and Wales have each voted for devolved assemblies. The Bills now before Parliament each envisage an Additional Member System of election with party lists. The Scotland Bill allows the Scottish Parliament to legislate on local elections and to amend the rules for the redistribution of seats in a piecemeal way.

**c.** The 1999 elections to the European Parliament are to be conducted on the basis of a regional list system of proportional representation.

**d.** Lord Jenkins is currently chairing a Commission which is to report by the end of 1998 on how the Government should fulfil its promise to give the electorate a choice between first-past-the-post voting for Parliament and some form of proportional representation.

These proposals all involve the registration of parties. It seems that an Act may give this function to a Registrar, as with companies; but it might be better carried out by an Electoral Commission, as in India and Australia.

**Referendums.** A notable expansion of the use of referendums is currently envisaged.

In September 1997 referendums were held in Scotland and Wales on the issue of devolution. A referendum is promised for London on whether to have an elected Mayor and Council. There is the possibility of further referendums on Regional Government within England. Another referendum is promised on the UK electoral system when Lord Jenkins' Commission has decided on the choice to be offered. And if the Government concludes that the country should join the European Monetary Union, there will be a referendum on that. A referendum is also envisaged as part of any Northern Ireland constitutional settlement.

Referendums may involve simple 'Yes'/'No' choices on a clear-cut question. There was little trouble over the Scottish vote. But referendums may provoke disputes over timing, question-wording, franchise, money, access to media and required turnout or majority. In the 1975 Referendum on staying in the Common Market the 'Yes' campaigners managed to spend twenty times as much as the 'Noes'. In the 1979 Scottish Referendum the courts were involved to prevent any formal 'Yes' or 'No' broadcasts. In the 1997 Referendum in Wales there were

worries about the disparity in expenditure and about the use of government resources, as well as about the validity of certain ballot-markings. The need for an umpire was plain. The authority of a referendum verdict must depend upon the acceptance that it was fairly conducted.

Awareness of this fact led the Constitution Unit and the Electoral Reform Society to join forces in 1996 in an unofficial Commission on the Conduct of Referendums. This body was chaired by Sir Patrick Nairne, who had been responsible in the Cabinet Office for arranging the 1975 Referendum. Its report, published in November 1996, explored the many problems and looked at overseas experience. It came to the firm conclusion that the best way of running Referendums was under the aegis of a statutory Commission, either an ad hoc Referendum Commission or as part of a comprehensive Electoral Commission<sup>17</sup>.

**Party funding.** Lord Neill's Committee on Standards in Public Life has been asked to look into the problems of political contributions – a study which must necessarily bear on the finance of elections. If there is to be any public funding of parties, it will plainly have to be administered by an independent body, not by a partisan government. The recognition of parties and the auditing of accounts is potentially too controversial to be left to ministers. Moreover the rules for the control of contributions will need continuous monitoring. It may not be easy to decide what is a 'foreign contribution' or what is a front organisation. The opportunities for bypassing any restrictions will have to be watched. So will the danger, well exemplified in the United States, of mounting bureaucracy in the attempt to secure comprehensive and fraud-proof accounts and then to audit them.

**Election expenditure.** There is a growing demand for national party expenditure to be limited, just as constituency expenditure is; after all, the sums involved are now greater at the centre than in the constituencies. Furthermore the intervention in 1997 of Sir James Goldsmith, with his £20m. war chest, raised new questions about the use of money in campaigns. All these matters involve complexities which are most unlikely to be solved with a once-for-all package of legislation.

Even the existing restraints on constituency expenditure can cause confusion. Is legal advice a chargeable expense as suggested in the case of Martin Bell in Tatton? There is also the ambiguity over when an election begins.

But the law is under a much more serious challenge. Since 1883 it has been deemed illegal for anyone other than the duly authorised agent to spend money to promote a candidacy. For 115 years this restraint on individual freedom has been the essential element in

keeping the costs of constituency electioneering within bounds. Such a restriction would be impossible in the United States because of the First Amendment provisions for freedom of speech. It is now under threat in Britain because of similar provisions in the European Convention on Human Rights. A judgment in the Bowman case was announced on February 19. This was an appeal to Strasbourg on the basis of a case in Southwark Crown Court, following the 1992 General Election; the Society for the Protection of the Unborn Child claimed the right to advertise in a contest where it had no candidate, especially as it was not explicitly advocating voting in any particular way. The verdict went against the accepted restriction on any electoral advertising that is not authorised on behalf of a candidate. Large bodies of law and practice will now need reconsideration. There is an inevitable conflict between two types of rule – those designed to safeguard freedom of expression and those designed to provide a level playing field. An Electoral Commission could offer a forum within which to work out the least undesirable compromise.

**Broadcasting.** Fair play in the allocation of broadcasting time always involves difficult decisions and the old formulae are certainly due for reconsideration. In referendums a just balance in granting access to the airwaves may be particularly difficult. In 1997 the ground-rules for televised debates between party leaders became the subject of controversy (the Hansard Society itself published an earlier King-Hall Paper in which Dr Stephen Coleman argued the case for debates)<sup>18</sup>. It can be argued that such matters are best left to the BBC and the Independent Television Commission – but even they might welcome the umbrella authority of an Election Commission.

There is also the problem of allowing candidates to appear in broadcasts about a constituency contest if any of their opponents refuses to take part. Section 93 of the *Representation of the People Act* of 1983 lays this down – to the extreme frustration of responsible producers trying to report the campaign.

**Litigation.** Recent events in Winchester and elsewhere have provoked the Association of Electoral Administrators to renew their advocacy of a Commission, saying: 'The time has come for a **radical and thorough overhaul of the British electoral system**'. In 1997 controversies over the rules of fair play led some observers to speculate on the need for an impartial arbiter ready to make quick decisions in the heat of the campaign.

**Codes of Conduct.** In some jurisdictions overseas there are codes of conduct for those participating in elections. These are usually virtuous aspirations about

fair play, unenforceable in law. In a bitter contest they may be neglected. But they can be cited by opponents or by the media when the boundaries of decent behaviour are transgressed. An election commission would be in a position to express an opinion in such situations even if its words had no more legal sanction than those of the Press Complaints Commission. This is an age when, in all sorts of fields, there is increasing recourse to codes of conduct or of best practice. If such were wanted for British elections, plainly an electoral commission would be well-placed to devise and supervise a code.

**Redrawing of boundaries.** In June 1995 the Conservative Home Secretary promised a review of the rules under which the Boundary Commissions work. No progress was made before the Government fell in May 1997. But in November 1997 a quinquennial review of the working of the Local Government Commission was announced, including consideration of the possibility of a merger with the Parliamentary Boundary Commissions.

Furthermore, the coming of proportional representation in almost any form, nationally or regionally, must involve delineation of boundaries. New rules for the Boundary Commissioners will be needed. But this would best be done if those who draw the boundaries were working within the general ambit of an Electoral Commission.

**New technology.** Developments in centralised direct mail and centralised telephone banks can now make nonsense of the legal focus on the local limitation of expenses. Cable and satellite television offer possibilities for by-passing the current restrictions which preserve a level playing ground in broadcasting. The Internet will develop as a significant instrument for electoral communication. The computer listing of electors on constituency and national files for the purposes of direct mail and telephone approaches may violate the Data Protection Act. The need for continued vigilance and for an ingenious search for remedies against abuse is obvious.

### **Current administration**

Since the war elections have been administered by a small unit in the Home Office- half-a-dozen or so officials supervised, part-time, by an Assistant Secretary and under the political control of a Junior Minister<sup>19</sup>. It has almost always been a very low-profile part of Home Office activity. In what is inevitably a politically sensitive area, doing nothing is often seen as the most prudent policy. Those involved have usually shown themselves temperamentally averse to pro-active research and reform.

In Northern Ireland the roles both of Electoral Registration Officer and Returning Officer are now

carried out by a Chief Electoral Officer who is an independent Crown official.

However, in December 1997, it was announced that George Howarth MP, the Home Office Under-Secretary in charge of elections, would head a Working Party on Electoral Procedures which would commission papers and reports on a wide range of electoral issues. It was also announced that the Department of the Environment in a promised White Paper on Renewal of Local Democracy would re-assess measures to increase interest and involvement in local government, including ways of increasing turnout and improving the register as well as voting arrangements and access to polling stations.

The Howarth committee may well recommend desirable reforms over the whole range of electoral procedures. It may indeed suggest solutions to a number of the problems that might naturally fall to an Electoral Commission. But it is a one-off affair, not a continuing body. The world does not stand still; as technology advances, it opens up new opportunities to contestants and administrators alike. Developments in electronic communication and in public relations will make elections in the coming decades very different from the ones we have known. New abuses will have to be checked, new anomalies will have to be tidied up and new arts of administration will have to be employed. Electoral processes will need continuous monitoring in a fashion that they have not previously had.

It is not for this paper to specify the exact composition of an Electoral Commission or to lay down its precise terms of reference. At one extreme it could be given a comprehensive mandate to review and administer every aspect of electoral administration, as in Australia, but such centralisation would not be popular with our current electoral administrators. At the other extreme an electoral commission could merely serve as an independent advisory body, available to report on all kinds of electoral problems and to act as a 'watch-dog'. In the latter case it could perhaps involve as little as three part-time commissioners supervising a small permanent staff and with the right to sponsor research from outside. A reduced version of the Nolan/Neill Commission might offer a model.

Any Commission would, however, have to contain a

territorial element to allow for the varied components of the United Kingdom and to cope with the tensions between diversity at a sub-national level and uniformity of citizen rights. It should certainly be charged with overseeing boundary redistributions and with ensuring the fair conduct of referendums; it should also be responsible for the registration of party labels and for producing reports on any anomalies in the law that become apparent as electoral practices evolve; one of the most important functions of any commission would be to act like (or on behalf of) the Law Commission in continuously suggesting simplifications of electoral law.

One objection to an Electoral Commission must lie in its cost. This need not be great but, almost inevitably, it will be greater than the status quo – and Chancellors are most reluctant to accept any innovation that involves additional money. In fact the cost of a Commission would be partially offset by taking over jobs done elsewhere, as well as by the savings flowing from its encouragement for best practice in the expensive activities of compiling the register and organising polling-places and ballot-counting (the Australian Commission can point to some notable successes in this area). But the main justification would lie in increased turnout and increased confidence in the democratic process; that would be worth a far larger outlay than is envisaged in the current proposal.

In the last resort Parliament must, of course, be sovereign over the electoral framework. As in other matters, a minister must be responsible for promoting legislation and authorising expenditure. But Parliament has often found it expedient to delegate issues which are likely to be the subject of party controversy to independent bodies or executive agencies. Statutory autonomy can promote efficiency and fairness – as well as the impression of fairness.

Any attempt to modernise the constitution which fails to modernise the voting process will be sadly incomplete. British democracy could work better than it now does. This paper does not offer a comprehensive blueprint with answers to all questions about electoral procedure. What it does is to suggest an approach through which solutions can be found, not only to current difficulties, but also to problems as yet unforeseen.

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