Chapter 7

CONSTITUTIONAL CONVENTIONS[1]

I. The Nature and Purpose of Constitutional Conventions

Nature of constitutional conventions

7–001 Some study of constitutional conventions is necessary in order to understand the working of the British Constitution. In drawing the distinction between the laws and conventions of the Constitution, Dicey was anticipated by a number of nineteenth-century writers, notably by E. A. Freeman in his *Growth of the English Constitution* (1872)[2]: but the significance of conventions in the working of the British Constitution, and therefore the importance of their study for an understanding of our constitution, were brought out by the emphasis Dicey placed upon them. Dicey's discussion of the distinction between the laws and conventions of the Constitution was not designed to exclude the latter from the purview of law students. On the contrary, his purpose was to insist that the student of constitutional law ought not to neglect to study the conventions as well.

Conventions are sometimes called "unwritten laws," but this is very confusing because according to the generally accepted doctrine they are not laws at all. "Unwritten law" in our system is a term properly applied to the common law. Again conventions are sometimes called "customs." This is liable to cause confusion with customary law, which not only is law in the strict sense but requires for its validity (as conventions do not) immemorial antiquity.

The working definition of constitutional conventions suggested here is: *rules of political practice which are regarded as binding by those to whom they apply, but which are not laws as they are not enforced by the courts or by the Houses of Parliament.*

This definition *distinguishes* constitutional conventions from:

7–002 (i) *mere practice, usage, habit or fact*, which is not regarded as obligatory, such as the existence of political parties (fact) or the habit of Chancellors of the Exchequer in carrying from Downing Street to the House of Commons a dispatch case supposed to contain his "Budget" speech. If the persons concerned are not aware that they are under an obligation to act in a certain way, there is no convention. On the other hand, the opinion that they are bound is not conclusive

[1] See Dicey, *Law of the Constitution* (10th ed.), Chaps 14 and 15; *cf.* Professor E. C. S. Wade's *Introduction*, pp. cli–cxci; R. A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (1981), pp. 87–90. Sir Ivor Jennings, *The Law and the Constitution* (5th ed.), Chap. 3; *Cabinet Government* (3rd ed.), Chap. 1; *Parliament* (2nd ed.), Chap. 3; G. Marshall and G. C. Moodie, *Some Problems of the Constitution* (5th ed.), Chap. 2; K. C. Wheare, *Modern Constitutions* (1951), Chap. 8; *The Constitutional Structure of the Commonwealth* (1960); S. A. de Smith, *The New Commonwealth and its Constitutions* (1964), Chaps 1–3; O. Hood Phillips, "Constitutional Conventions: A Conventional Reply" (1964) 8 J.S.P.T.L. 60; C. R. Munro, "Laws and Conventions Distinguished" (1975) 91 L.Q.R. 218; "Dicey on Constitutional Conventions," [1985] P.L. 637; G. H. L. Le May, *The Victorian Constitution* (1979); G. Marshall, *Constitutional Conventions* (1984); T. R. S. Allen, *Law, Liberty, and Justice* (1993, Oxford).

[2] O. Hood Phillips, "Constitutional Conventions: Dicey's Predecessors" (1966) 29 M.L.R. 137.

as they may be mistaken. The precise content of some conventions is uncertain, since they must be flexible enough to meet changing circumstances; and as that which is not certain cannot be obligatory, it is sometimes difficult to distinguish between obligatory rules and non-obligatory practice, such as the consultation of outside interests when social welfare legislation is being drafted.[3]

(ii) *non-political rules, i.e.* rules of conduct which are not referable to the needs of constitutional government, *e.g.* ethical or moral rules, or the almost invariable custom of crowning the Queen Consort, which has no constitutional significance.[4]

(iii) *judicial rules of practice such as the rules of precedent.* In *R. v. Knuller (Publishing, Printing and Promotions) Ltd*,[5] Lord Simon of Glaisdale referred to the current practice under which the House of Lords does not consider itself as bound by its own previous decisions as "one of those conventions which are so significant a feature of the British constitution, as Professor Dicey showed in his famous work." Whatever the status of the rules of judicial precedent, particularly in the House of Lords,[6] to describe them as conventions is probably more misleading than helpful.

(iv) *rules enforced by the courts, i.e. laws.* Judicial enforcement does not necessarily, or indeed usually, imply specific enforcement. In public law it usually involves an action for damages, declaration or injuction, habeas corpus or judicial review of administrative action; or it may involve a criminal prosecution or a defence to a criminal charge.[7] Sir Ivor Jennings,[8] while admitting that there was this formal distinction between laws and conventions, contended that there was no distinction of substance. The distinction may perhaps be comparatively unimportant for the political scientist or the politician, but it is surely of vital importance for lawyers.[9] Mitchell criticised the distinction on the ground that there may be laws with no judicial sanction.[10] It is true, as Jennings pointed out, that laws cannot be enforced against the government as a body or against either House of Parliament; but they can be enforced against individual Ministers personally,[11] or (subject to parliamentary privilege, which is itself part of the law) against individual members of either House; and judgment may be delivered (though not executed) against a government department.[12] It is also true, as Mitchell pointed out, that Parliament sometimes imposes "duties" on public authorities while going on to say that such duties are not to be enforced by

7–003

[3] See E. C. S. Wade in Dicey, *op. cit.* at pp. cliv–clv.
[4] In *Queen Caroline's Claim* (1821) 1 St.Tr.(N.S.) 949, the Privy Council held that the Queen Consort has no legal right to be crowned.
[5] [1973] A.C. 435, 484.
[6] See Sir Rupert Cross, *Precedent in English Law* (4th ed., 1991), pp. 109 *et. seq.*
[7] In *Madzimbamuto v. Lardner-Burke* [1969] 1 A.C. 645 the Privy Council held that the convention under which the United Kingdom Parliament did not legislate for Southern Rhodesia without the consent of the government of that colony, although important as a convention, had no effect in limiting the powers of the United Kingdom Parliament.
[8] Jennings, *Law and the Constitution* (5th ed.), p. 117.
[9] The distinction between legal and non-legal rules is recognised outside the field of constitutional law, *e.g.* (formerly) the Judges' Rules, the *Highway Code* and Codes of Practice made under various statutes.
[10] J. D. B. Mitchell, *Constitutional Law* (2nd ed. 1968), pp. 34–39.
[11] *Raleigh v. Goschen* [1893] 1 Ch. 73.
[12] Crown Proceedings Act 1947.

judicial proceedings. For example section 59 of the British Telecommunications Act 1981, provides "(1) It shall be the duty of the Post Office . . . to provide . . . such services for the conveyance of letters as satisfy all reasonable demands for them. . . . (4) Nothing in this section shall be construed as imposing upon the Post Office, either directly or indirectly, any form of duty or liability enforceable by proceedings before any court."[13] On analysis it appears that from a legal point of view such "duties" are properly classed as powers.[14] The statutory requirement that a Governor-General shall direct the issue of writs has been construed to be directory, not mandatory[15]; and the requirement that a Minister shall lay certain instruments before Parliament would probably be interpreted in the same way.[16]

7–004 (v) *rules enforced by the Houses of Parliament* through their officers, *e.g.* the Speaker and the Serjeant-at-Arms, notably parliamentary procedure and privilege (part of "the law and custom of Parliament," which is itself part of the common law in the wide sense). These may, however, overlap constitutional conventions. Thus some parts of parliamentary practice constitute conventions, such as the protection of minorities in debate and the party composition of committees. Standing Orders are often said to be examples of constitutional conventions; but on analysis they will be found to consist partly of law, partly of mere practice, and only to a small extent of convention.[17]

It is also useful to distinguish "conventions" from such distinct, if allied, concepts as "'traditions,' 'principles' and 'doctrines.'"[18] The purpose of conventions may be seen as to give effect to these traditions, principles or values.[19] In *R. v. H.M. Treasury, ex p. Smedley*,[20] for example, Sir John Donaldson M.R. referred to the relationship between Parliament and the judiciary in terms of conventions:

> "Although the United Kingdom has no written constitution, it is a constitutional convention of the highest importance that the legislature and the judicature are separate and independent of one another, subject to certain ultimate rights of Parliament over the judicature."

The independence of the judiciary might be described as a *principle* of the Constitution since 1668, enshrined in successive statutory provisions guaranteeing judicial security of tenure.[21]

Judicial recognition of conventions

7–005 The fact that the courts do not *enforce* constitutional conventions does not mean that the courts do not incidentally recognise their existence. They may be

[13] subs. (4) means what it says: *Harold Stephen & Co Ltd v. Post Office* [1977] 1 W.L.R. 1172, CA: *per* Lord Denning M.R. at p. 1177.
[14] Although s.58 enumerates "powers" of the Post Office. The non-performance of "duties" would concern the ultimate authority of the Minister under the Act. For the current position under the Postal Services Act 2000, see *post*, para. 28–012.
[15] *Simpson v. Att.-Gen.* [1955] N.Z.L.R. 271, CA of New Zealand.
[16] *post*, para. 29–023.
[17] *post*, Chap. 11.
[18] Geoffrey Marshall, *Constitutional Conventions* (1984), p. 3.
[19] *Reference re Amendment of the Constitution of Canada* (1982) 125 D.L.R. (3d) 1, 84, *per* Martland, Ritchie, Dickson, Beck, Chouinard, Lamer J.J.
[20] [1985] Q.B. 657, 666.
[21] *post*, para. 20–025.

relied on as an aid to statutory interpretation or to justify non-intervention by the courts in ministerial decisions in areas in which the courts feel that they cannot or should not become involved. Thus the responsibility of the Home Secretary to Parliament was one of the reasons for the decision of the House of Lords in *Liversidge v. Anderson*.[22] The Judicial Committee of the Privy Council in *British Coal Corporation v. The King*[23] mentioned the conventions regulating what was then called Dominion status, and also the convention that the Crown invariably accepts the Judicial Committee's advice. In *Carltona Ltd v. Commissioners of Works*[24] Lord Greene M.R. referred to the convention of a Minister's responsibility to Parliament for the acts of his officials; in *Att.-Gen. v. Jonathan Cape Ltd*,[25] Lord Widgery C.J. referred to the doctrine of joint responsibility within the Cabinet, Cabinet meetings, the Secretary to the Cabinet and the Prime Minister; and in *ex p. Hosenball*,[26] Lord Denning M.R. referred to the responsibility of the Home Secretary to Parliament for the exercise of his power to deport persons on grounds or national security. In *Air Canada v. Secretary of State for Trade*[27] there were a number of references to the convention which prohibits ministers of one party from having access to the papers of their predecessors of other parties without the agreement of the previous administration.

The case *Re Amendment of the Constitution of Canada*[28] that came before the Supreme Court of Canada in 1981 is of great interest as being a unique discussion of constitutional conventions by a Commonwealth court of the highest standing, especially since a case of this kind could never come before British courts who have no jurisdiction to determine such matters.[29] The Canadian Supreme Court was hearing an appeal from various provincial courts exercising their statutory jurisdiction to consider references from the Executive on matters which included questions that otherwise might not be justiciable. In addition to the legal question whether the consent of the Provinces was required before the Canadian Parliament could request the United Kingdom to amend the Canadian Constitution **7–006**

[22] [1942] A.C. 206; but the Home Secretary was also required by statutory regulation to report monthly to Parliament. Ministerial responsibility was also referred to in *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997, by Lord Reid, and in *Raymond v. Attorney-General* [1982] Q.B. 839, by Sir Sebag Shaw.

[23] [1935] A.C. 500; W. Ivor Jennings, "The Statute of Westminster and Appeals" (1936) 52 L.Q.R. 173.

[24] [1943] 2 All E.R. 560.

[25] [1976] Q.B. 752; refusing an injunction to restrain publication of Vol. 1 of Richard Crossman, *Diaries of a Cabinet Minister*.

[26] *R. v. Secretary of State for Home Department, ex p. Hosenball* [1977] 1 W.L.R. 766, DC, 776, CA.

[27] [1983] A.C. 394, HL. See further, Lord Hunt of Tanworth, "Access to a Previous Government's Papers" [1982] P.L. 514. Mr Callaghan was reported in *The Times*, July 14, 1986 to have agreed to allow Conservative Ministers to examine the papers on which the Labour Government in 1977 had decided to buy the Nimrod airborne early warning system; *post* para. 17–022.

[28] (1981) 125 D.L.R. (3d) 1. And see O. Hood Phillips, "Constitutional Conventions in the Supreme Court of Canada" (1982) 98 L.Q.R. 194. *cf.* Rodney Brazier and St. John Robilliard, "Constitutional Conventions: The Canadian Supreme Court's Views Reviewed" [1982] P.L. 28; they go too far in saying "the question of the existence, but not of the precise limits of a convention is now unquestionably a justiciable issue." The jurisdiction of the Canadian Supreme Court in this context was based on certain special provincial statutes, and in any event that Court's opinions, though persuasive, are not binding in this country.

[29] The Judicial Committee of the Privy Council might possibly be called upon to give an opinion on such a matter in relation to the constitution of some other Commonwealth country from which appeals to it have not been abolished.

(British North America Act 1867, as amended), the Supreme Court accepted appellate jurisdiction to determine whether such consent was required by constitutional convention and, if so, whether the convention had been observed in that case. Both the existence and content of the alleged convention being disputed, the Supreme Court's decision involved an analysis of the general nature of constitutional conventions. A majority held in the first place that a constitutional convention cannot crystallise into law. They said[30]:

> "No instance of an explicit recognition of a convention as having matured into a rule of law was produced. The very nature of a convention, as political in inception and as depending on a persistent course of political recognition by those for whose benefit and to whose detriment (if any) the convention developed over a considerable period of time, is inconsistent with its legal enforcement. . . . The attempted assimilation of the growth of a convention to the growth of the common law is misconceived. The latter is the product of judicial effort, based on justiciable issues which attained legal formulation and are subject to modification and even reversal by the courts which gave them their birth. . . . No such parental role is played by the courts with respect to conventions."

Conventions, said their Lordships, are not enforced by the courts: if there is a conflict between conventions and law the courts must enforce the law. The sanctions for conventions are political, though the violation of conventions is "unconstitutional." The Supreme Court approved Jennings's criteria for establishing the existence of a convention (*supra*). However, Jennings says "it is sometimes enough to show that a rule has received general acceptance," and goes on to speak of the assertions of "persons of authority," whereas their Lordships apparently took the view that it is the actors who must have treated the rule as binding.[31] The majority admitted a lack of precision in the convention asserted, but came to the conclusion that "at least a substantial measure" of provincial agreement was necessary, a requirement which was not satisfied in this case. A minority (including Laskin C.J.) had no doubt that the consent of all the Provinces was required, taking the view, which it is submitted is preferable, that a convention must be sufficiently definite to be understandable and understood. They said further that conventions have the unquestioned acceptance not only of the politicians but of the public at large. The precedents on this view were far from conclusive.

7–007 Legislation may recognise or presuppose conventions. Thus the Ministers of the Crown Act 1937 implied a knowledge of the existence of the Prime Minister, the Leader of the Opposition and the Cabinet; and later statutes dealing with salaries and pensions acknowledge the existence of leaders of the Opposition and Chief Whips in both Houses.[32] The preamble to the Statute of Westminster 1931 recites several conventions of inter-Commonwealth relations.

[30] At p. 22.

[31] Marshall, *op. cit.* note 18 pp. 11–12, on the obligatory nature of conventions distinguishes between "positive morality" (subjective test) and "critical morality" (objective test), preferring the latter but not stating definitely whose opinion is to be taken.

[32] See now, Ministerial and other Salaries Act 1975, *post*, para. 10–024.

Conventions are capable of being formulated in statute, *e.g.* the Statue of Westminster 1931, s.4, and they have been incorporated (with or without justiciable effect) in various Commonwealth constitutions.[33]

Devolution has resulted in the role of the Prime Minister in the appointment of the Lord President and Lord Justice Clerk being given statutory recognition, presumably to prevent any possible dispute over the respective rights of himself and the First Minister.[34]

The laws of the constitution could stand alone, although the constitution would then be antiquated and static; but the conventions would be meaningless without their legal context. Every constitutional convention is closely related to some law or laws, which it implies. The conventions forming the Cabinet system, for example, presuppose the laws relating to such matters as the Queen's royal prerogative, the office and powers of Ministers (except the Prime Minister), the constitution of government departments, and the composition of Parliament. There are thus layers, as it were, of laws, conventions and facts (political practice); and any one situation may be governed by a number of layers of this kind, perhaps including a statute which implies the existence of a convention.

On the other hand, constitutional conventions are subject to the processes of growth and transformation. As Baldwin said in the House of Commons at the time of the "agreement to differ" in 1932: "The historian can probably tell you perfectly clearly what the constitutional practice of the country was at any given period in the past, but it would be very difficult for a living writer to tell you at any given period in his lifetime what the constitution of the country is in all respects, and for this reason, that at almost any given moment of our lifetime, there may be one practice called 'Constitutional' which is falling into desuetude and there may be another practice which is creeping into use but which is not yet called 'Constitutional.' "[35]

Purpose of constitutional conventions

Conventions are a means of bringing about constitutional development without formal changes in the law.[36] This they often do by regulating the exercise of a discretionary power conferred on the Crown by the law. It must not be supposed that conventions are peculiar to unwritten constitutions. They are found to a greater or less extent in written constitutions as well. Canada and Australia,[37] for example, observe the main British constitutional conventions, and many conventions have been developed in the United States relating to such matters as the method of electing the President, his choice and use of a Cabinet, and "senatorial courtesy" in making appointments to office.[38] This informal method of change is more adaptable than a series of statutes or constitutional amendments. The

7–008

[33] *Adegbenro v. Akintola* [1963] A.C. 614, PC *per* Viscount Radcliffe; *cf. Ningkan v. Government of Malaysia* [1970] A.C. 379; see de Smith *The New Commonwealth and its Constitution* (1964), pp. 51–52, 88–90. K.J. Keith, "The Courts and the Conventions of the Constitution" (1967) 16 I.C.L.Q. 542. (British constitutional conventions were not expressly incorporated but were used by the courts to help to interpret the Nigerian constitution); C. Sampford and D. Wood, "Codification of Constitutional Conventions in Australia," [1987] P.L. 231.

[34] Scotland Act 1998, s.95(1).

[35] H.C. Deb., Vol. 261, ser. 5, col. 515 (1932).

[36] Conventions therefore change in accordance with the underlying ideas of government: see Holdsworth, "The Conventions of the Eighteenth-Century Constitution" (1932) 17 *Iowa Law Review* 161.

[37] George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne, 1983).

[38] H. W. Horwill, *The Usages of the American Constitution* (1925).

general tendency is towards democracy, due regard being had to the protection of minorities and their right to be heard.")

("The ultimate object of most conventions is that public affairs should be conducted in accordance with the wishes of the majority of the electors. The reason why the Ministry must be chosen from the party or parties enjoying a majority in the Commons is that, on the assumption that the majority of the Commons reflect the views of the majority of the electors,[39] a Ministry so selected will be most likely to give effect to the will of the nation as a whole. And this is also the reason why the Queen should act on the advice of Ministers, why Ministers should resign if they lose the confidence of Commons, and why the House of Commons should have a political ascendancy over the House of Lords, especially in matters of finance.")

("To ensure that the power of government shall be exercised in accordance with the popular will, that will must be ascertained from those best qualified to know it, namely, the elected representatives of the people; hence the convention requiring Parliament to be summoned annually. If the Government no longer retains the confidence of the House of Commons the Prime Minister should ask for a dissolution of Parliament,[40] in order to enable the electorate, through a new Parliament, to obtain a new Ministry more in accordance with its views.

7–009 In this way the legal framework of 1688—a strong monarchy limited in certain specific ways—has become a "constitutional" monarchy, that is to say, a democratic political system with a hereditary Head of State practically bereft of governmental powers and distinguished from the head of the Government (Prime Minister). To meet current political ideas and social needs, conventions have facilitated the growth of the Cabinet system; changed the emphasis on the functions of Parliament, which is now largely occupied in representing the views of the electors by criticising the government's activities and debating their measures; and developed the autonomy of other Commonwealth countries.

("Conventions also make the legal constitution work by providing means for co-operation in the practice of government. In particular, the Cabinet system co-ordinates the work of the various government departments among themselves, and promotes co-operation between the departments and Parliament and between the Ministry and the Queen. Similarly, the conventions governing inter-Commonwealth relations enable the members of the Commonwealth, although independent, to co-operate to a great extent in their defence and foreign policy.")

How and when do conventions become established?

7–010 It is wrong to suppose that constitutional conventions are analogous to customary law in that they must necessarily have existed a long time, or even from time immemorial. A moment's thought will show that this cannot be so, for the conventions of our constitution mostly date from a time later than the Revolution of 1688, and in most cases a good deal later. Many conventions are indeed based on usage, although this is not necessarily of long standing. Some conventions, however—especially among those concerned with Commonwealth relations—are based on agreement,[41] and we know exactly when and how they were formulated.

[39] Owing to our "first past the post" electoral system, a majority in the Commons may, however, represent a minority of the voters and a smaller minority of the electorate.
[40] In some circumstances it may be appropriate for the Ministry to resign: *post*, para. 8–019.
[41] This is the sense in which international lawyers speak of "conventions."

It is not easy to say precisely how or when conventions based on usage come into existence. Every act by the Queen or a responsible statesman is a "precedent"[42] in the sense of an example which may or may not be followed in subsequent similar cases, but it does not necessarily create a binding rule. For that it must be generally accepted as creating a rule by those in authority. A long series of precedents all pointing in the same direction is very good evidence of a convention, but this is not possible in the case of recent precedents. Thus the fact that no monarch has refused the Royal Assent to a Bill since Queen Anne clearly points to the existence of a convention that the Royal Assent should not be refused; but can we say that the Queen may in no circumstances refuse the Prime Minister's request to dissolve Parliament?

Sir Ivor Jennings suggested two requirements for the creation of a convention: (i) general acceptance as obligatory, and (ii) a reason or purpose referable to the existing requirements of constitutional government. Thus one precedent might create a convention whereas a long series of precedents might not. Owing to Cabinet secrecy, posthumous biographies and prejudiced autobiographies, it is often difficult to find out whether the actors thought they were obeying a binding rule.[43]

Why are conventions observed?

What is it that induces obedience to these extra-legal or conventional rules? **7–011**
The answer seems to be that obedience is yielded to the conventions because of the consequences that would plainly ensue if they were disregarded. Thus if Parliament were not summoned annually the army and air force could not lawfully be maintained, an important part of the public revenue, namely income tax, could not be lawfully raised, and even less could be lawfully spent.[44] If the Queen appointed as Prime Minister someone who did not enjoy the confidence of the majority of the Commons, he and his colleagues could be defeated in the lower House. If a government after such defeat in the House declined to resign or ask for a dissolution, the Commons could paralyse the business of government by withholding supplies or refusing to agree to the continuance in force of the Army and Air Force Acts. Even if a government succeeded in carrying on for a time in disregard of Parliament, it would cease to be in touch with the will of the electors and would forfeit their favour, assuming this had not been already lost by the recourse to extra-parliamentary government.

Some conventions are not always observed if special circumstances warrant a departure from established practice, but if they were not regularly observed they would not be, or would cease to be, conventions.[45] It is the reason or purpose for which they stand that both leads to their development and secures their observance. The "agreement to differ" in 1932, whereby certain Liberal members of the Cabinet were permitted by their colleagues to disagree openly on the majority's fiscal policy, was alleged to be justified by the necessity of preserving the National (Coalition) Government in view of the "economic crisis"; but it did not

[42] The word "precedent" is not, of course, used here in the technical sense of a legal (judicial) precedent.
[43] *Cabinet Government* (3rd ed.), pp. 5–13.
[44] That is, so long as the practice, itself also a convention, continues of authorising these matters by annual Acts or statutory provisions having force for one year only.
[45] F. D. Roosevelt broke the American convention against standing for the office of President for a third term. He was elected and later re-elected for a fourth term; but an amendment to the Constitution has since been passed limiting the tenure of office to two terms.

work, and the recalcitrant members soon resigned office.) The convention of the collective responsibility of Ministers has shown signs of weakening in the last few years, notably during the EEC referendum campaign in 1975 when the Prime Minister (Mr Wilson) allowed Ministers to speak against this country's staying in the Community, though this concession did not extend to speaking in Parliament.[47] One Minister who did speak in the Commons against the Government White Paper advocating continued membership of the EEC, was dismissed from office.[48]

7–012 Dicey rejected the answer that observance of constitutional conventions is secured by "public opinion," on the ground that it begs the question, which is, why does public opinion appear to be sufficiently strong to ensure the observance of the conventions?[49] In the past, respect for conventions was established by the threat of impeachment, greatly influenced by public opinion; but a stronger sanction was needed, and impeachment has in practice become obsolete as being unnecessary in view of the development of ministerial responsibility to Parliament. Dicey concluded that the sanction of constitutional conventions is to be found in the fact that a person who persisted in the breach of convention would inevitably be led into a breach of the law "sooner or later"—in one place he says "immediately." Thus if Parliament were not summoned in any one year, so that the annual Finance and Appropriation and Army Acts[50] expired, the collection of much of the national revenue (especially income tax), the expenditure of most of the public funds and the maintenance of a standing army and enforcement of military discipline would be illegal under the Bill of Rights.

Dicey dealt, however, only with one group of conventions, though admittedly the most important, namely, those that regulate the relations between the executive and Parliament, especially those between the government and the House of Commons. No breach of law would follow if Standing Orders relating to the rights of minorities were not followed in conducting the business of either House, nor (by English law) if the United Kingdom Parliament legislated for an independent member of the Commonwealth without its consent, nor (assuming it to be a constitutional convention, as distinct from the practice of the court, that they should not) if lay peers took part in an appeal before the House of Lords.

7–013 Further, certain qualifications must be made even in the case of those conventions to which Dicey's argument applies. If a government that was committing breaches of convention retained the confidence of the Commons it could procure the alteration of the law, as it did with the Provisional Collection of Taxes Act 1913, following the decision of *Bowles v. The Bank of England*[51] or the passage of an Act of Indemnity, thus indicating that the convention in question was considered undesirable or to have lost its purpose. Even if the government lost the confidence of the Commons, it might remain in office for some months without breaking the law owing to the time-lag between the lapsing of the Finance Act (fixing the standard rate of income tax and authorising most of the

[46] Keith Middlemas and John Barnes, *Baldwin* (1969) Chap. 24.
[47] See David L. Ellis, "Collective Ministerial Responsibility and Collective Solidarity", [1980] P.L. 367; *post* para. 17–019.
[48] *post*, para. 17–019.
[49] Dicey, *op. cit.* note 1; Chap. 15.
[50] His argument is not affected by the modern procedure whereby the Army and Air Force and Naval Discipline Acts are continued in force for 12 months at a time by Orders in Council subject to affirmative resolution of both Houses: Armed Forces Act 1976.
[51] [1913] 1 Ch. 57.

expenditure) and the Army Act and the beginning of the next financial year when the Commons must be asked for fresh supplies.

For the reasons stated above, however, it is submitted that it is not necessary to go as far as Dicey. The question why conventions are observed is a political or psychological question. One might equally ask what motives induce people to obey the law, since fear of the legal sanction only operates on some of the people some of the time.[52] As a matter of fact, statesmen probably observe the conventions because they wish the machinery of government to go on[53] and because they hope to retain the favour of the electorate.[54]

II. Classification and Illustration of Constitutional Conventions

7–014 This section should be prefaced by a reminder that it is not practicable either to enumerate all the conventions applicable to the working of the British Constitution or to define most of them with any great precision. Subject to this caution, it is proper to ask what non-legal rules we would feel constrained to put into a written constitution if it was decided to have one?[55]

Constitutional conventions may be classified into three main groups:

(1) relating to the exercise of the royal prerogative and the working of the Cabinet system;

(2) regulating the relations between the Lords and Commons, and proceedings in Parliament; and

(3) regulating the relations between the United Kingdom and the independent members of the Commonwealth.

The first group is the most important, and forms the main theme of Dicey's discussion (*ante*). The second group has lost much of its importance as convention since the passing of the Parliament Acts. The third group has developed almost entirely since Dicey's day.

It is difficult to say to what extent conventions, in the sense in which we have defined them, exist in English local government, *e.g.* as to the election of chairmen of council and its committees, having regard to the state of the parties on the council. The practice varies greatly from one local authority to another, and is often not consistent over a period within the same authority. Further, political scientists who have examined this question tend to ignore the distinction between rules regarded as obligatory and mere practice.[56]

[52] See Bryce, *Studies in History and Jurisprudence*, Vol. II, Essay IX.

[53] Marshall and Moodie, *op. cit.* suggest that the sanction for the observance of conventions is that a breach of convention is likely to lead to a *change* of law.

[54] Reciprocity is the chief sanction of Parliamentary conventions; each Government is likely in time to be in opposition.

[55] Mr Trudeau, Prime Minister of Canada, made a partial attempt to do this in 1969; *The Constitution and the People of Canada* (Ottawa), pp. 64 *et seq.*

[56] See R. S. B. Knowles, "Local Government Practices—or Conventions?" (1958) 122 J.P. 856; E. S. Walker, "Conventions in Local Government" (1959) 123 J.P. 234; H. Maddick and E. P. Pritchard. "The Conventions of Local Authorities in the West Midlands" (1958) *Public Administration* 145; (1959), *Public Administration* 135.

1. Conventions relating to the exercise of the royal prerogative and the working of the Cabinet system

7–015 The Sovereign could legally declare war or make peace; dissolve Parliament at any time, and need not summon another for three years; she could refuse her assent to measures passed by both Houses of Parliament; she could at any time dismiss her Ministers and appoint others, and so on. The exercise of these powers, however, is either restricted altogether or regulated by conventions, of which the following are some of the most important.

(i) The Queen must invite the leader of the party or group commanding a majority of the House of Commons to form a Ministry. The person so called on is the "Prime Minister." In law the Prime Minister until recently did not exist, and even now is only referred to incidentally in statutes relating to salaries and pensions.[57]

(ii) The Queen must appoint as her other Ministers such persons as the Prime Minister advises her to appoint. Ministers should have seats in either the House of Commons or the House of Lords. The latter convention is illustrated by the appointment by Mr Harold Wilson of Mr Cousins and Mr Gordon Walker to ministerial posts after the Labour victory in the general election in October 1964. Neither was a Member of Parliament: Mr Cousins was a trade union official, and Mr Walker (who was appointed Foreign Secretary) had actually been defeated at Smethwick in the recent election. In January 1965 they stood as candidates in by-elections facilitated by the grant of life peerages to two Labour M.P.s. Mr Cousins was elected, but Mr Walker was again defeated and resigned office next day. (By law the Queen can appoint and dismiss Ministers at her pleasure).[58]

7–016 (iii) The body of Ministers so appointed become the "Government," and an inner ring of them is called the "Cabinet."[59] Cabinet Ministers are always made Privy Councillors, if not such already. The Cabinet is entirely the product of convention, and is unknown to the law except for a few incidental references in statutes relating to Ministerial salaries, the Parliamentary Commissioner Act 1967 and the Data Protection Act 1998.

(iv) The Queen is bound to exercise her legal powers in accordance with the advice tendered to her by the Cabinet through the Prime Minister. She has the right to be kept informed and to express her views on the questions at issue, but not to override ministerial advice. This advice is expected to be unanimous.

(v) The Queen must assent to every Bill passed by the Houses of Parliament, or passed by the House of Commons only in accordance with the provisions of the Parliament Acts. A sovereign has not refused assent to a Bill since Queen Anne refused her assent to the Scottish Militia Bill in 1707, and the exercise of this prerogative today would be unconstitutional.[60] (No Bill has the force of law until the Queen gives her assent, but there is no law requiring her to give it.)

[57] *post*, para. 17–025; Even so, to get the salary or pension the Prime Minister must hold, or have held, the legal office of First Lord of the Treasury.

[58] See also *post* para. 17–008 for the case of Lord Young of Graffham, elevated to the House of Lords in 1984 and appointed Minister without Portfolio before becoming, in 1985, Secretary of State for Employment. Gus Macdonald was appointed Scottish Office Minister for Business and Industry in August 1998, four months before he could take a seat in the House of Lords as Lord Macdonald.

[59] It has been suggested that it has also become a convention that the Opposition leaders should form a Shadow Cabinet; D. R. Turner, *The Shadow Cabinet in British Politics*, (1969).

[60] The Prime Minister might perhaps advise the Queen to refuse assent to a Private Bill passed by both Houses but to which the government objected; and possibly to a Public Bill if there has been a change of circumstances or a mistake has been found in the text; though in the latter case an amending Act would more likely be the appropriate procedure.

(vi) Parliament must be summoned to meet at least once each year. The observance of this convention is secured by the practice (probably itself also a convention) of limiting to one year at a time the statutory authority covering the raising and spending of part of the revenue and the maintenance of the Army and Air Force. (By the Meeting of Parliament Act 1694 Parliament must be summoned at least once in three years.)

(vii) The Government is entitled to continue in office only so long as it enjoys the confidence of a majority in the House of Commons. The Prime Minister is bound to advise the Sovereign to dissolve Parliament, or to tender the resignation of himself and his ministerial colleagues, if the government is defeated on the floor of the House of Commons on a motion of confidence or of no confidence. Owing to party discipline, the defeat of a Government with a party majority in the Commons on a motion of this kind is rare in modern times. Mr Wilson's government was defeated in the Commons in March 1976 on its policy of cutting public expenditure, but it won a motion of confidence next day. When Mr Callaghan's government was defeated on a guillotine motion relating to the Scotland and Wales Bill in February 1977, this was not regarded by either side as a question of confidence. Similarly in May 1978 the Government was defeated twice in three days in Committee on amendments to the Finance Bill but did not—and was not expected—to resign.[61] A Government may, conversely, expressly make an issue one of confidence in order to bring its recalcitrant backbenchers into line, as for example Mr Major did, in order to secure the passage of legislation necessary to give effect to the Treaty of Maastricht.[62] **7–017**

(viii) The Ministers are collectively responsible to Parliament for the general conduct of the affairs of the country. This collective responsibility requires that on a major question Ministers should be of one mind and voice. If any Minister does not agree with the policy of the majority in the Cabinet, he should resign or, if the matter is a minor one or he is not a member of the Cabinet, at least keep quiet about it.[63] On two occasions the convention has been formally waived, the "agreement to differ" in 1932 when members of the National government Cabinet were free to express conflicting views publicly on the economic crises then facing the country and the EEC Referendum campaign in 1976.[64] Where a decision is taken to postpone a decision—as currently, for example, whether (or when) to adopt the euro as the currency in place of the pound—collective responsibility is put under particular pressure as attempts are made to read into ministerial speeches indications of agreement—with or dissent from the officially agreed decision.[65]

(ix) Ministers are also individually responsible to Parliament for the administration of their departments.[66] A Minister must be prepared to answer questions in the House concerning matters for which he is administratively responsible, and

[61] *cf.* a defeat in the House on Budget resolutions which would lead to resignation. *Post*, para. 12–014. Motions other than motions of confidence or no confidence may be treated as matters of confidence, and rather more latitude is allowed to a minority government *i.e.* one that does not hold a party majority in the House. See further, pp. 150–152. See Philip Norton, "Government Defeats in the House of Commons: Myth and Reality," [1978] P.L. 360.

[62] European Communities (Amendment) Act 1993; *post* para. 15–030.

[63] *post*, para. 17–020.

[64] *ante*., para. 4–019.

[65] The present position is that when the Cabinet is satisfied that a sufficient degree of "convergence," as measured by five economic tests, exists between the economies of the United Kingdom and the euro economies, a referendum will be held to decide the issue.

[66] *post*, para. 12–024.

if a vote of censure is passed against him he must resign his office. Standing Orders of the House of Commons assume the existence of the former convention by prescribing days and times for questions. (By law, Ministers are individually responsible to the Sovereign.)

(x) Ministers are expected to disembarrass themselves of any company directorships or shareholdings that would be likely, or might appear, to conflict with their official duties.[67]

(xi) A government should not advise the Crown to declare war, make peace or conclude a treaty unless there is ample ground for supposing that the majority of the Commons approve of the policy. (By law the power to make war and peace and to enter into international treaties is vested in the Queen, who is not bound to consult advisers[68] or Parliament, though the Bill of Rights prevents her from imposing taxation to meet financial commitments.)

2. Conventions regulating the relations between the Lords and Commons, and proceedings in Parliament

7–018 The House of Commons being the representative assembly, its will ought ultimately to prevail in cases of conflict with the House of Lords, which is mainly hereditary and partly nominated. Since medieval times the Commons have claimed the right to control national finance, that is, the levying of taxation and the supervision of the expenditure of public money.

Each House must have power to control the conduct of its own proceedings free from outside interference, and in course of time the Houses have evolved rules and customs, privileges and practice regulating legislative procedure and the conduct of debate.

The following are some of the most important conventions in this group:

(i) In cases of conflict the Lords should ultimately yield to the Commons.[69] (Perhaps the Parliament Acts 1911 and 1949—by defining the period during which the Lords may delay public Bills, other than a Bill to extend the maximum duration of Parliament—have rendered this convention unnecessary.) Until the Parliament Act 1911 was passed it was legitimate for a Ministry, when an important measure was rejected by the Lords, to advise the Sovereign as a last resort to create a sufficient number of peers to ensure its passage in the Upper House. The Treaty of Utrecht was ratified by this method in 1712; and the Reform Act 1832 and the Parliament Act 1911 were passed by the threat of recourse to it. (The Parliament Act 1911 made recourse to this expedient for the future unnecessary and perhaps improper.)

(ii) Proposals involving the expenditure of public money may only be introduced on behalf of the Crown by a Minister in the House of Commons. Standing Orders provide that a financial resolution shall only be proposed by a Minister on behalf of the Crown. There may be elements here of parliamentary custom and privilege, as well as constitutional convention. (The Parliament Act 1911 assumes, without expressly stating, that Money Bills will be introduced in the Commons.)

(iii) The business of the House of Commons is arranged informally "behind the Speaker's Chair" between the Prime Minister or Leader of the House and the

[67] See the *Ministerial Code*, the formal guide to conduct for ministers.

[68] Foreign countries, however, might well be unwilling to enter into a treaty that was not authenticated by the signature or seal of some senior Minister.

[69] See *post* paras 7–022 to 7–023 for a discussion of recent instances of serious embarrassment caused to the Government by the rejection and amendment of legislation by the House of Lords.

(vi) Parliament must be summoned to meet at least once each year. The observance of this convention is secured by the practice (probably itself also a convention) of limiting to one year at a time the statutory authority covering the raising and spending of part of the revenue and the maintenance of the Army and Air Force. (By the Meeting of Parliament Act 1694 Parliament must be summoned at least once in three years.)

(vii) The Government is entitled to continue in office only so long as it enjoys the confidence of a majority in the House of Commons. The Prime Minister is bound to advise the Sovereign to dissolve Parliament, or to tender the resignation of himself and his ministerial colleagues, if the government is defeated on the floor of the House of Commons on a motion of confidence or of no confidence. Owing to party discipline, the defeat of a Government with a party majority in the Commons on a motion of this kind is rare in modern times. Mr Wilson's government was defeated in the Commons in March 1976 on its policy of cutting public expenditure, but it won a motion of confidence next day. When Mr Callaghan's government was defeated on a guillotine motion relating to the Scotland and Wales Bill in February 1977, this was not regarded by either side as a question of confidence. Similarly in May 1978 the Government was defeated twice in three days in Committee on amendments to the Finance Bill but did not—and was not expected—to resign.[61] A Government may, conversely, expressly make an issue one of confidence in order to bring its recalcitrant backbenchers into line, as for example Mr Major did, in order to secure the passage of legislation necessary to give effect to the Treaty of Maastricht.[62] 7–017

(viii) The Ministers are collectively responsible to Parliament for the general conduct of the affairs of the country. This collective responsibility requires that on a major question Ministers should be of one mind and voice. If any Minister does not agree with the policy of the majority in the Cabinet, he should resign or, if the matter is a minor one or he is not a member of the Cabinet, at least keep quiet about it.[63] On two occasions the convention has been formally waived, the "agreement to differ" in 1932 when members of the National government Cabinet were free to express conflicting views publicly on the economic crises then facing the country and the EEC Referendum campaign in 1976.[64] Where a decision is taken to postpone a decision—as currently, for example, whether (or when) to adopt the euro as the currency in place of the pound—collective responsibility is put under particular pressure as attempts are made to read into ministerial speeches indications of agreement—with or dissent from the officially agreed decision.[65]

(ix) Ministers are also individually responsible to Parliament for the administration of their departments.[66] A Minister must be prepared to answer questions in the House concerning matters for which he is administratively responsible, and

[61] *cf.* a defeat in the House on Budget resolutions which would lead to resignation. *Post*, para. 12–014. Motions other than motions of confidence or no confidence may be treated as matters of confidence, and rather more latitude is allowed to a minority government *i.e.* one that does not hold a party majority in the House. See further, pp. 150–152. See Philip Norton, "Government Defeats in the House of Commons: Myth and Reality," [1978] P.L. 360.

[62] European Communities (Amendment) Act 1993; *post* para. 15–030.

[63] *post*, para. 17–020.

[64] *ante*., para. 4–019.

[65] The present position is that when the Cabinet is satisfied that a sufficient degree of "convergence," as measured by five economic tests, exists between the economies of the United Kingdom and the euro economies, a referendum will be held to decide the issue.

[66] *post*, para. 12–024.

if a vote of censure is passed against him he must resign his office. Standing Orders of the House of Commons assume the existence of the former convention by prescribing days and times for questions. (By law, Ministers are individually responsible to the Sovereign.)

(x) Ministers are expected to disembarrass themselves of any company directorships or shareholdings that would be likely, or might appear, to conflict with their official duties.[67]

(xi) A government should not advise the Crown to declare war, make peace or conclude a treaty unless there is ample ground for supposing that the majority of the Commons approve of the policy. (By law the power to make war and peace and to enter into international treaties is vested in the Queen, who is not bound to consult advisers[68] or Parliament, though the Bill of Rights prevents her from imposing taxation to meet financial commitments.)

2. Conventions regulating the relations between the Lords and Commons, and proceedings in Parliament

7–018 The House of Commons being the representative assembly, its will ought ultimately to prevail in cases of conflict with the House of Lords, which is mainly hereditary and partly nominated. Since medieval times the Commons have claimed the right to control national finance, that is, the levying of taxation and the supervision of the expenditure of public money.

Each House must have power to control the conduct of its own proceedings free from outside interference, and in course of time the Houses have evolved rules and customs, privileges and practice regulating legislative procedure and the conduct of debate.

The following are some of the most important conventions in this group:

(i) In cases of conflict the Lords should ultimately yield to the Commons.[69] (Perhaps the Parliament Acts 1911 and 1949—by defining the period during which the Lords may delay public Bills, other than a Bill to extend the maximum duration of Parliament—have rendered this convention unnecessary.) Until the Parliament Act 1911 was passed it was legitimate for a Ministry, when an important measure was rejected by the Lords, to advise the Sovereign as a last resort to create a sufficient number of peers to ensure its passage in the Upper House. The Treaty of Utrecht was ratified by this method in 1712; and the Reform Act 1832 and the Parliament Act 1911 were passed by the threat of recourse to it. (The Parliament Act 1911 made recourse to this expedient for the future unnecessary and perhaps improper.)

(ii) Proposals involving the expenditure of public money may only be introduced on behalf of the Crown by a Minister in the House of Commons. Standing Orders provide that a financial resolution shall only be proposed by a Minister on behalf of the Crown. There may be elements here of parliamentary custom and privilege, as well as constitutional convention. (The Parliament Act 1911 assumes, without expressly stating, that Money Bills will be introduced in the Commons.)

(iii) The business of the House of Commons is arranged informally "behind the Speaker's Chair" between the Prime Minister or Leader of the House and the

[67] See the *Ministerial Code*, the formal guide to conduct for ministers.

[68] Foreign countries, however, might well be unwilling to enter into a treaty that was not authenticated by the signature or seal of some senior Minister.

[69] See *post* paras 7–022 to 7–023 for a discussion of recent instances of serious embarrassment caused to the Government by the rejection and amendment of legislation by the House of Lords.

Leader of the Opposition. The last is a product of convention more recent than the Prime Minister, and fulfils the function of a sparring partner. Charles James Fox is generally regarded as the first Leader of the Opposition, when the younger Pitt became Prime Minister in 1783. (The Ministers of the Crown Act 1937 first gave the Leader of the Opposition a salary payable out of the Consolidated Fund; and the Ministerial Salaries and Members' Pensions Act 1965 gave salaries to the Leader of the Opposition in the House of Lords and the Chief Opposition Whips in both Houses.[70] These salaries are charged on the Consolidated Fund.) A member may, so far as his Chief Whip is concerned, safely absent himself from a debate if he obtains a "pair" from among members of the other party.

(iv) The majority in Parliament must not stifle minorities. It is a duty of the Speaker to protect minorities in debate, and so far as possible he calls on speakers from alternate parties.

(v) The political parties are represented in parliamentary committees in proportion to the number of their adherents in the House. (The Ministers of the Crown Act 1937 indirectly recognised the existence of political parties in its definition of the Leader of the Opposition.)

(vi) Peers who do not hold or have not held high judicial office do not take part when the House of Lords is sitting in its judicial capacity. (The Appellate Jurisdiction Acts provide for the appointment of a certain number of Lords of Appeal in Ordinary, but there is no law that lay peers may not sit as well.) This rule is perhaps rather one of parliamentary practice or the practice of the court than a "convention," as it is not of a political nature referable to the needs of constitutional government.[71]

(vii) We may say that there is a convention that the Houses of Parliament will not entertain, or pass, a private Bill without providing for adequate notice to be given to persons affected and allowing them an opportunity to state objections. The Standing Orders relating to private business, which are alterable in detail, presuppose this convention.[72]

3. Conventions regulating the relations between the United Kingdom and other members of the Commonwealth

7–019 A number of conventions have grown up, or have been formulated, regulating the relations between the United Kingdom and the independent members of the Commonwealth, providing methods of co-operation and communication among the members of the Commonwealth and concerning negotiations between them and foreign countries. Many of these conventions were formulated as resolutions of Imperial Conferences between the wars, though that did not give them legal effect. The following are some of the most important of this group of conventions:

(i) The Parliament of the United Kingdom may not legislate for a former dependent territory that is now an independent member of the Commonwealth except at its request and with its consent. (This convention is recited in the preamble to the Statute of Westminster 1931, and enacted as section 4 of that Act. It has also been enacted in various Independence Acts.)

(ii) Any alteration in the law touching the succession to the throne or the Royal Style and Titles requires the assent of the Parliaments of Canada, Australia

[70] These provisions are now contained in more recent legislation.

[71] See further, *post*, para. 7–045.

[72] *cf. Edinburgh and Dalkeith Ry. v. Wauchope* (1842) 8 Cl. & F. 710, HL; *Pickin v. British Railways Board* [1974] A.C. 765, HL.

and New Zealand as well as of the Parliament of the United Kingdom. (This convention is recited in the preamble to the Statute of Westminster 1931.) The same convention may apply to other members of the Commonwealth of which Her Majesty is Queen.

(iii) The Queen in appointing the Governor-General of an independent Commonwealth country acts on the advice of the Prime Minister of that country.

(iv) The Governor-General is the representative of the Queen, not of the British Government, and acts on the advice of the government of the Commonwealth country concerned.

(v) The governments of the United Kingdom and the independent members of the Commonwealth keep each other informed with regard to the negotiation of treaties and the conduct of foreign affairs, and one of them can commit the others to active participation without their consent.

The Crown or the Governor-General would not be bound by English law to observe these last three conventions, but such conventions may be enacted in the constitutions of Commonwealth countries. Convention (iii) and (iv) are not applicable to Commonwealth countries that have become republics, and is doubtful whether convention (ii) is applicable to them.[73]

[73] See further, *post*, Chap. 36.

Part II

Parliament

CHAPTER 8

"THE HIGH COURT OF PARLIAMENT"[1]

I. HISTORICAL INTRODUCTION

8–001 In origin Parliament was not primarily a lawmaking body, nor are its functions exclusively legislative at the present day. A "parliament" was a council summoned to discuss some important matter, and the name is still appropriate to its present activity of debating policy and questioning and criticising the government. The title given it in the Book of Common Prayer, "the High Court of Parliament," reminds us that Parliament was, and still is, a court—the highest court in the land. The word "court" (*curia*) has a number of meanings. It may mean the place where the Sovereign is, a body of judges appointed to administer the law, or a place where justice is administered. Coke, in his treatment of the jurisdiction of the courts, deals first with "The High and most Honourable Court of Parliament,"[2] and says that "the Lords in their House have power of Judicature, and both Houses together have power of Judicature."[3]

The distant precursor of Parliament was the *Curia Regis*, in which the judicial, executive and legislative powers were fused. Its remotest ancestor, the Witenagemot, also exercised all three functions of government. In the early Middle Ages the common law courts split off from the council, and the latter may be said to have separated from Parliament in the reign of Richard II. Appeal by writ of error passed to what came to be called the House of Lords. Adjudication was one of the essential elements in the early Parliaments, notably those of Edward I.[4] The statutes of the Lords Ordainers (*temp.* Edward II in 1311) ordained that the King should hold a parliament at least once a year in which pleas that had been delayed or about which the judges differed should be recorded and determined.

8–002 The medieval King decided whether or not the assembly he had in mind should be a Parliament and whether legislation should be passed, or taxation discussed, or popular representatives summoned. The medieval Parliament was not "democratic." Professor Sayles has suggested that three factors combined to produce the early Parliaments:

(i) the King's desire to expedite the processes of administration and law by the provision of means for resolving difficulties;

[1] The leading reference book on the topics discussed in Chaps 8–13 is Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, hereafter cited as Erskine May, *Parliamentary Practice*. The first edition appeared in 1844; the 22nd (current) edition in 1997. Although a valuable work of reference it is not itself authoritative nor is it necessarily always correct: Mr Robin Maxwell Hyslop M.P., letter to *Daily Telegraph* January 10, 1984. See also Griffith and Ryle, *Parliament* (R. Blackburn and A. Kenyon eds., 2nd ed., 2001).

[2] 4 Inst. 3,4.

[3] 4 Inst. 15.

[4] Maitland, *Memoranda de Parliamento* (1893); McIlwain, *The High Court of Parliament* (1910), Chap. 3; Baldwin, *The King's Council during the Middle Ages*, Chaps 1 and 12; Pollard, *Evolution of Parliament* (2nd ed., 1926), Chap. 2; Pike, *Constitutional History of the House of Lords* (1894), Chap. 4.

(ii) the desire of the barons to control the government by establishing a method of proper consultation; and

(iii) the popular desire to get abuses removed and grievances remedied through ready access to an institution which could grant the highest justice.[5]

Judicial functions

8–003 Before treating of the legislative functions of Parliament, which today are at least of equal importance to its general supervision of the government of the country, we may preserve a historical sense by glancing at its remaining judicial functions. These include:

(1) The appellate jurisdiction of the House of Lords, both civil and criminal.

(2) The judicial functions of the Lords and Commons within the sphere of their privileges.[6]

(3) The jurisdiction of the Lords and the Commons in committees dealing with private Bills.[7]

(4) The judicial functions of the Lords with regard to claims to ancient peerages.[8]

These are discussed later in their appropriate chapters. Here we will mention impeachment and attainder (now in practice obsolete) and trial of peers (abolished)[9] to which we add a note on Committees and Tribunals of Inquiry.

Impeachment

8–004 Impeachment was a judicial proceeding against any person, whether lord or commoner, accused of state offences beyond the reach of the law, or which no other authority in the state would prosecute. The Commons were the accusers, and the Lords were judges both of fact and law.

The first recorded case of impeachment occurred in 1376, when two lords and four commoners were charged with removing the staple from Calais, lending the King money at usurious interest, and buying Crown debts for small sums and then paying themselves in full out of the Treasury. There were no impeachments between that of the Duke of Suffolk for treason in 1449 and that of Sir Giles Mompesson in 1621 for fraud, violence and oppression. In the same year, Bacon was impeached for bribery in the office of Lord Chancellor: the large fine was remitted and the King set him at liberty, but he was banned from public office for the rest of his life.[10] Most impeachments took place in the early 1640s.

8–005 The Act of Settlement 1700 provides that no pardon under the Great Seal shall be pleadable to an impeachment by the Commons. This provision arose out of

[5] G. O. Sayles, *The King's Parliament of England* (1975) covers the period 1258–1377.

[6] *post*, para. 13–020.

[7] *post*, para. 11–038.

[8] *post*, para. 9–004. This function remains, as the House of Lords Act 1999 does not affect the existence or continuation of hereditary titles.

[9] For the history of impeachment, attainder and trial of peers, see Stephen, *History of the Criminal Law* (1883), Vol. 1, Chap. 5.

[10] See Clifford Hall, "Francis Bacon: The 'Wisest, Brightest, Meanest of Mankind'?" (1976) 7 *Cambrian Law Review*, 38.

CHAPTER 8

"THE HIGH COURT OF PARLIAMENT"[1]

I. HISTORICAL INTRODUCTION

8–001 In origin Parliament was not primarily a lawmaking body, nor are its functions exclusively legislative at the present day. A "parliament" was a council summoned to discuss some important matter, and the name is still appropriate to its present activity of debating policy and questioning and criticising the government. The title given it in the Book of Common Prayer, "the High Court of Parliament," reminds us that Parliament was, and still is, a court—the highest court in the land. The word "court" (*curia*) has a number of meanings. It may mean the place where the Sovereign is, a body of judges appointed to administer the law, or a place where justice is administered. Coke, in his treatment of the jurisdiction of the courts, deals first with "The High and most Honourable Court of Parliament,"[2] and says that "the Lords in their House have power of Judicature, and both Houses together have power of Judicature."[3]

The distant precursor of Parliament was the *Curia Regis*, in which the judicial, executive and legislative powers were fused. Its remotest ancestor, the Witenagemot, also exercised all three functions of government. In the early Middle Ages the common law courts split off from the council, and the latter may be said to have separated from Parliament in the reign of Richard II. Appeal by writ of error passed to what came to be called the House of Lords. Adjudication was one of the essential elements in the early Parliaments, notably those of Edward I.[4] The statutes of the Lords Ordainers (*temp.* Edward II in 1311) ordained that the King should hold a parliament at least once a year in which pleas that had been delayed or about which the judges differed should be recorded and determined.

8–002 The medieval King decided whether or not the assembly he had in mind should be a Parliament and whether legislation should be passed, or taxation discussed, or popular representatives summoned. The medieval Parliament was not "democratic." Professor Sayles has suggested that three factors combined to produce the early Parliaments:

(i) the King's desire to expedite the processes of administration and law by the provision of means for resolving difficulties;

[1] The leading reference book on the topics discussed in Chaps 8–13 is Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, hereafter cited as Erskine May, *Parliamentary Practice*. The first edition appeared in 1844; the 22nd (current) edition in 1997. Although a valuable work of reference it is not itself authoritative nor is it necessarily always correct: Mr Robin Maxwell Hyslop M.P., letter to *Daily Telegraph* January 10, 1984. See also Griffith and Ryle, *Parliament* (R. Blackburn and A. Kenyon eds., 2nd ed., 2001).

[2] 4 Inst. 3,4.

[3] 4 Inst. 15.

[4] Maitland, *Memoranda de Parliamento* (1893); McIlwain, *The High Court of Parliament* (1910), Chap. 3; Baldwin, *The King's Council during the Middle Ages*, Chaps 1 and 12; Pollard, *Evolution of Parliament* (2nd ed., 1926), Chap. 2; Pike, *Constitutional History of the House of Lords* (1894), Chap. 4.

(ii) the desire of the barons to control the government by establishing a method of proper consultation; and

(iii) the popular desire to get abuses removed and grievances remedied through ready access to an institution which could grant the highest justice.[5]

Judicial functions

8–003 Before treating of the legislative functions of Parliament, which today are at least of equal importance to its general supervision of the government of the country, we may preserve a historical sense by glancing at its remaining judicial functions. These include:

(1) The appellate jurisdiction of the House of Lords, both civil and criminal.

(2) The judicial functions of the Lords and Commons within the sphere of their privileges.[6]

(3) The jurisdiction of the Lords and the Commons in committees dealing with private Bills.[7]

(4) The judicial functions of the Lords with regard to claims to ancient peerages.[8]

These are discussed later in their appropriate chapters. Here we will mention impeachment and attainder (now in practice obsolete) and trial of peers (abolished)[9] to which we add a note on Committees and Tribunals of Inquiry.

Impeachment

8–004 Impeachment was a judicial proceeding against any person, whether lord or commoner, accused of state offences beyond the reach of the law, or which no other authority in the state would prosecute. The Commons were the accusers, and the Lords were judges both of fact and law.

The first recorded case of impeachment occurred in 1376, when two lords and four commoners were charged with removing the staple from Calais, lending the King money at usurious interest, and buying Crown debts for small sums and then paying themselves in full out of the Treasury. There were no impeachments between that of the Duke of Suffolk for treason in 1449 and that of Sir Giles Mompesson in 1621 for fraud, violence and oppression. In the same year Bacon was impeached for bribery in the office of Lord Chancellor: the large fine was remitted and the King set him at liberty, but he was banned from public office for the rest of his life.[10] Most impeachments took place in the early 1640s.

8–005 The Act of Settlement 1700 provides that no pardon under the Great Seal shall be pleadable to an impeachment by the Commons. This provision arose out of

[5] G. O. Sayles, *The King's Parliament of England* (1975) covers the period 1258–1377.

[6] *post*, para. 13–020.

[7] *post*, para. 11–038.

[8] *post*, para. 9–004. This function remains, as the House of Lords Act 1999 does not affect the existence or continuation of hereditary titles.

[9] For the history of impeachment, attainder and trial of peers, see Stephen, *History of the Criminal Law* (1883), Vol. 1, Chap. 5.

[10] See Clifford Hall, "Francis Bacon: The 'Wisest, Brightest, Meanest of Mankind'?" (1976) 7 *Cambrian Law Review*, 38.

Danby's Case.[11] Danby was impeached in connection with a letter written by him to the English ambassador at Versailles with the approval of Charles II, who wrote on the letter: "This letter is writ by my Order—C.R." The last two cases of impeachment were those of Warren Hastings, Governor-General of India,[12] and Lord Melville, formerly treasurer to the Admiralty.[13] Both were acquitted.

The Joint Committee on Parliamentary Privilege said of impeachment "that the circumstances in which impeachment has taken place are now so remote from the present that the procedure may be considered obsolete."[14]

Acts of Attainder[15]

8–006 An Act of Attainder, though it served the same purpose as impeachment, was strictly a legislative and not a judicial act. It was an Act of Parliament finding a person guilty of an offence, usually a political one of a rather insubstantial kind, and inflicting a punishment on him. The subject of the proceedings was allowed to defend himself by counsel and witnesses before both Houses. One of the first Acts of Attainder of which we know was that of the Duke of Clarence in 1477, and from about that time until James I's reign this procedure was commonly used instead of impeachment. Attainder was later used occasionally down to 1715. It has not been used since the early eighteenth century when Cabinet government was beginning to develop. We may therefore describe it also as obsolete.[16]

Committees and Tribunals of Inquiry

8–007 A Select Committee of Inquiry may be set up by either House to investigate any matter of public interest, and such a committee may include persons who are not Members of Parliament. This method was first used in 1689 to investigate the conduct of the war in Ireland, but Parliament is a political body and voting tends to be on party lines. Dissatisfaction with the way in which a parliamentary committee had investigated the Marconi scandal[17] and a realisation that political scandals cannot be investigated by politicians led to the enactment of the Tribunals of Inquiry (Evidence) Act 1921.

This provides that on a resolution of both Houses on a matter of urgent public importance, a Tribunal of Inquiry may be appointed by the Queen or a Secretary of State with all the powers of the High Court as regards examination of witnesses and production of documents. The procedure provided by the statute is

[11] (1679) 11 St.Tr. 599.

[12] Impeachment of Warren Hastings (1787) Lords' Journals Vol. XXXVII, p. 678; (1795) Lords' Journals, Vol. XL, p. 388; P. J. Marshall, *The Impeachment of Warren Hastings* (1965).

[13] Impeachment of Lord Melville (1805) 29 St.Tr. 549.

[14] H.L. Paper 43-I, H.C. 214 (1998–99), para. 18, where details of the procedure for impeachment can be found. Two previous House of Commons Committees had recommended the abolition of impeachment: H.C. 34 (1967–68), H.C. 417 (1976–77). As was seen in 1999, impeachment remains important in the U.S.A.

[15] Lord Justice Somervell, "Acts of Attainder" (1951) 67 L.Q.R. 306. And see *Kariapper v. Wijesinha* [1968] A.C. 717.

[16] Also obsolete, but this time by virtue of statutory abolition (Criminal Justice Act 1948), is the so-called privilege of peers to be tried by the House of Lords for treason or felony, or misprision of either. This could be traced back to the *judicium parium* of Magna Carta, c.39, though the law did not become settled until well after 1215. If Parliament was sitting the House was presided over by the Lord Chancellor as the Lord High Steward. If Parliament was not sitting, the Lord High Steward acted as judge, sitting with a jury of peers. The last trial of a peer before the House of Lords was that of Baron de Clifford for manslaughter in 1935 (*R. v. Baron de Clifford, The Times*, December 13, 1935, pp. 15–16; *Proceedings on the Trial of Lord de Clifford*, H.M.S.O, 1936).

[17] Which involved allegations of corrupt financial speculation by members of the government, the select committee split along party lines, see H.C. 152 and 217 (1913).

essentially inquisitorial. If a person refuses to answer relevant and essential questions or to produce documents, the matter may be referred to the High Court to be dealt with as contempt of court.[18] From 1921 to 1982 twenty one such tribunals were set up[19]; no further Tribunals were established until 1996. In the intervening period a variety of statutory and non-statutory judicial inquiries were established. A characteristic of most of these inquiries, including those under the 1921 Act is that they are chaired by a judge.[20] Since 1996 several tribunals have been established including include the Cullen Tribunal into the Dunblane massacre[21]; the Waterhouse Tribunal to investigate allegations of child abuse in North Wales[22]; and the Saville Tribunal into the events of "Bloody Sunday" in Londonderry, the second tribunal to be established to investigate these events.[23]

8–008 Concern about the working methods of Tribunal of Inquiry and alternative non-statutory inquiries such as the 1963 Denning inquiry into the Profumo affair[24] led to the Salmon Royal Commission investigation. The Salmon Report considered whether the 1921 procedure which could expose people to unfair public scrutiny and where there were no strict rules of evidence, no right of appeal, no right to legal representation, and no opportunity to meet allegations made by witnesses "was so objectionable in principle that the Act should be repealed." It decided that the inquisitorial powers of tribunal should be retained, but only for matters of vital public importance where there was something in the nature of a nation-wide crisis of confidence. In addition it recommended certain safeguards, the six "cardinal principles" which would introduce adversarial procedures into the essentially inquisitorial procedure provide for in the 1921 Act. These included allowing witnesses before such tribunals to be legally represented and to be examined by his own counsel and to test evidence by cross-examination.[25] The difficulty of achieving a balance between ascertaining the "truth" and providing a procedure that is fair to individuals implicated in the

[18] This power was invoked at the Vassall spy inquiry in 1963, when two journalists refused to reveal the source of their information, one being sentenced to six months' imprisonment and the other to three months. *Att.-Gen. v. Clough* [1963] Q.B. 773 (Lord Parker C.J.): Clough never in fact served his sentence as the source revealed itself and he confirmed it: *Att.-Gen. v. Mulholland* and *Att.-Gen. v. Foster* [1963] 2 Q.B. 477, CA.

[19] These included: the Lynskey Tribunal to inquire into allegations of bribery and corruption arising out of the use of "contact men" to approach Ministers, Cmd. 7616 (1949); the Tribunal set up to inquire into the Aberfan disaster, H.C. 553 (1966–67); allegations of irregularities by the Crown Agents were investigated by a Tribunal of Inquiry under Croom Johnson J. which was set up in 1978 and reported in 1982, H.C. 364 (1981–82).

[20] See Drewry [1996] P.L. 368.

[21] Cm. 3386.

[22] H.C. (1999–2000)

[23] The first was the Widgery Tribunal 1972. See Brigid Hadfield "*R v. Lord Saville of Newgate, ex p. anonymous soldiers*: What is the Purpose of a Tribunal of Inquiry?", [1999] P.L. 663.

[24] Cmnd. 2152 (1963), where Lord Denning had been unhappy with his role as "detective, inquisitor, advocate and judge".

[25] *Royal Commission Tribunals of Inquiry* (1966) Cmnd. 3121.; *Report of Interdepartmental Committee on Tribunals of Inquiry and Contempt* (Salmon L.J.) (1969) Cmnd. 4078. The response of the government, *Tribunals of Inquiry set up under the Tribunals of Inquiry (Evidence) Act 1921*, (1973) Cmnd. 5313, was to accept the recommendations, but also to suggest that there could be circumstances when they would be observed in spirit but not in letter (para. 17). See also G. W. Keeton, *Trial by Tribunal* (1960); Z. Segal, "Tribunals of Inquiry: A British Invention Ignored in Britain." [1984] P.L. 206; Helen Grant, "Commissions of Inquiry—Is there a Right to be Legally Represented?", [2001] P.L. 377.

matter being investigated remains.[26] Most non-statutory tribunals after the Salmon Report adhered to its "cardinal principles"; an exception was the Scott inquiry into the "arms for Iraq"[27] affair where these principles were disregarded on the basis that they would be "inoperable and ineffective and inefficient".[28] In the light of the Scott inquiry the Council on Tribunals conducted a review of inquiry procedures based on recommendations in the Scott Report, and concluded that it would be impracticable to attempt to devise a single set of rules for every inquiry.[29]

The choice of the type of inquiry to investigate events which will inevitably have "political" elements is difficult.[30] The Scott inquiry was set up partly because a select committee investigation has been unable to conduct a proper investigation into what had happened. This has led to the suggestion that Parliament or one of its select committees should be able to establish a Parliamentary Commission, on the National Audit Office model, to "establish factual information on complex subjects".[31] Such a move would be a return to the pre-1921 type of Parliamentary investigation.

II. The Meeting of Parliament

8–009 A "parliament" lasts from the summons of the legislature until its sittings are terminated by dissolution or lapse of time. During a single parliament there may be a number of sessions—before 1914 generally not more than one a year, since 1918 usually two a year. A session is usually terminated by prorogation; it may also be terminated by the dissolution of Parliament and the calling of a general election. Within a session there are a number of sittings separated from each other by *adjournments*, which can be brought about by motion of each House. Either House may adjourn its sittings for any given number of hours, days, weeks, or months; but the Crown has a statutory power to issue a proclamation ordering resumption of business when both Houses stand adjourned for more than 14 days.[32]

[26] Some of the problems are illustrated in the litigation that arose out of the Saville Inquiry into "Bloody Sunday", *R v. Lord Saville of Newgate and others, ex p. B.O.U.V.* [1999] 4 All E.R. 860. It was held that a tribunal set up under the 1921 Act could not reach a decision that interfered with fundamental rights of individuals in the absences of compelling justification. In consequence the decision of the tribunal not to allow soldiers involved in "Bloody Sunday" in 1972 to anonymity had failed to take sufficient notice of the risk to the lives of the soldiers, and was unreasonable. See Hadfield, *op. cit.* note 23.

[27] *Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, H.C. 115 (1995–96). Sir Richard was given the option to request the inquiry to be converted into a 1921 Act inquiry.

[28] Evidence by Scott L.J. to the Public Service Committee, *Ministerial Accountability and Responsibility*, H.C. 313-III (1995–96) Q. 322; for criticisms of the procedure used see Lord Howe, "Procedure at the Scott Inquiry", [1996] P.L. 445.

[29] Published in H.L. Deb.Vol. 575, W.A. 149–150.

[30] See Wintrobe, "Inquiries after Scott: the return of the tribunal of inquiry", [1997] P.L. 18; "Parliamentary arithmetic and other political factors, as well as the nature of the controversy itself, can all influence the decisions about the modes of investigation and resolution." (At p. 29).

[31] *Export Licensing and B.M.A.R.C.*, H.C. 87 (1995–96), para. 172–3; *Ministerial Accountability and Responsibility*, H.C. 313 (1995–6).

[32] Meeting of Parliament Acts 1797 and 1870, Parliament (Elections and Meetings) Act 1942; in addition each House confers on its Speaker powers to recall Parliament during an adjournment if it is in the public interest to do so.

The exercise of the royal prerogative is necessary to summon, to prorogue or (before the expiration of the statutory period) to dissolve Parliament. The royal proclamation that dissolves one
Parliament also summons the next.

Royal prerogative in relation to Parliament

Sovereign's presence in Parliament

8–010 The Sovereign, although in constitutional theory present in the High Court of Parliament as in other courts, does not now in practice visit Parliament in person, except to read the speech from the Throne in the Lords' Chamber at the opening of a new Parliament or session. Other royal functions performed in whole Parliament, such as prorogation, dissolution or giving the Royal Assent to Bills, are now done by royal proclamation or commission under the Great Seal.[33]

A convention to ensure freedom of debate forbids the Sovereign to be present in either House sitting separately. As regards the Commons, the Sovereign was not present in the Middle Ages, but occasional intrusions were made in the seventeenth century. The Lords, on the other hand, were the Great Council and the Sovereign's presence was necessary in early times; but the practice of attending was dying out in the Stuart period and ceased on the death of Queen Anne.

Royal Assent to legislation

8–011 The Queen may still give the Royal Assent in person in Parliament, but this has not been done since 1854. The Royal Assent Act 1967 provides that the Royal Assent, signified by letters patent under the Great Seal signed with Her Majesty's own hand, may also be: (a) pronounced by commissioners in the presence of both Houses in the House of Lords in the manner customary since George III's reign[34]; or (b) notified to each House separately by the Speaker of that House. The latter method was new and avoids interrupting the proceedings of the Commons by a summons from Black Rod. The customary method (a) is still used at the time of prorogation.

When the Royal Assent is given to a public or private Bill the words "La Reine le veult" are pronounced by the Clerk of the Parliaments, and for a Money Bill the following: "La Reine remercie ses bons sujets, accepte leur benevolence, et ainsi le veult." If the Queen were to refuse her assent, which would now be unconstitutional, the tactful formula. "La Reine s'avisera" (The Queen will think about it) would be used.

Prorogation

8–012 The exercise of the prerogative of prorogation terminates a *session* of Parliament.[35] It is effected by command of the Queen—acting by convention on the advice, formerly, of the Cabinet but, it seems, in practice in modern times on the

[33] Since the reign of Charles II Parliament has only once, in 1818, been dissolved by the sovereign in person.

[34] Under the Royal Assent by Commission Act 1541, which was repealed by the 1967 Act.

[35] Normally a week earlier a press notice will have been issued by the Prime Minister's staff to the media giving the dates of the dissolution, the election and the first day of the new Parliament. Since 1966 it has not been the practice to make an announcement first to the House of Commons; see Blackburn, *The Electoral System In Britain* (1995) pp. 33–37.

advice of the Prime Minister[36]—such command being signified to both Houses either by the Lord Chancellor (in the Queen's presence or by commission) or by proclamation. In either case the date for the new session is stated, but statutes enable the Crown by proclamation to accelerate or defer the next meeting of a Parliament that stands prorogued.[37] The interval between two sessions is called a recess.

The former rule that the progress of Bills is stopped by prorogation has been modified. Both House commonly pass resolutions allowing private and hybrid bills to be proceeded with in the next session. In 1997 the House of Commons agreed that in certain circumstances an ad hoc motion could be passed to allow a public bill to be carried over to the next session,[38] this was not envisaged to happen very frequently. It is sometimes the case that a Minister is content to drop a Bill and to bring in an approved version later.

Prorogation may be preceded by the signification of the Royal Assent to Bills that have passed both Houses.

Frequency and duration and parliaments

8–013 It is a prerogative of the Crown to convene Parliament. In early times Sovereigns generally pleased themselves when they would do so. Statutes have limited this prerogative.[39] Section 1 of the Meeting of Parliament Act 1694 which provides that a Parliament should be held once at least in three years, is still in force. Section 2 provides that within three years after the determination of every Parliament, legal writs shall be issued by directions of the Sovereign for calling another new Parliament. In effect this means that by law a general election need only be held within three years of the dissolution of Parliament, that is every eight years. Meanwhile the Bill of Rights 1688 had declared (section 13) that for the redress of all grievances and for the amending, strengthening and preserving of all laws, Parliament ought to be held "frequently." The real security, however, for the frequent—indeed annual—meeting of Parliament consists (as we saw in Chapter 7) in the practice of passing annual Finance Acts and annual orders continuing the Army and Air Force and Naval Discipline Acts. In modern times it is necessary to keep Parliament in almost constant session, not only to legislate but to supervise the government of the country, to say nothing of dealing with emergencies.

The power to dissolve Parliament is another prerogative of the Crown. By statute a parliament may also be terminated by lapse of time.[40] This is now regulated by the Parliament Act 1911, which provides (section 7) that the maximum life of a Parliament shall be five years. This period can, of course, be extended by Act of Parliament,[41] but it has only been done in wartime and the

[36] *post* para. 8–025.

[37] Meeting of Parliament Act 1797; Prorogation Act 1867; Meeting of Parliament Act 1870; Parliament (Elections and Meeting) Act 1943.

[38] The first Bill to be carried over was the Financial Services and Markets Bill in 1999. See *post* para. 11–032.

[39] Starting with the first Triennial Act which enacted that a Parliament should be held in every third year, itself repealed by the Triennial Act 1664.

[40] The Meeting of Parliament Act 1694, s.3 provided that no Parliament should last for more than three years. This provision was repealed at the time of the Scottish rising by the Septennial Act 1715, which provided that the existing and future Parliaments could continue for a period not exceeding seven years.

[41] Such a bill may not be passed without the consent of the Lords under the provisions of the Parliament Act 1911; see *post* paras 8–022 to 8–028.

practice has been to extend the period for one year at a time. Thus the Parliament that passed the Parliament Act 1911 survived until after the Armistice in 1918, and the Parliament elected in 1935 lasted until 1945.

Parliament and the demise of the Crown

8–014 Formerly Parliament expired when the Sovereign died, but this inconvenient rule was abolished by various statutes. On the demise of the Crown, Parliament (if sitting) is to proceed to act, and if prorogued or adjourned is to meet immediately without the usual form of summons.[42] The duration of an existing Parliament is not affected by a demise of the Crown.[43] All members of both Houses must take the oath of allegiance to the new Sovereign. When a demise of the Crown occurs after a proclamation summoning a new Parliament has been given it shall have no effect except that if the demise occurs before the date of the poll, the meeting of Parliament shall be delayed by 14 days.[44]

Summons of a new Parliament

8–015 When the Queen accepts the advice of the Prime Minister to dissolve,[45] a proclamation is published dissolving the existing Parliament and fixing the date for the meeting of the new Parliament. The proclamation also announces the making of an Order in Council directing the Lord Chancellor to issue the necessary writs. The Clerk of the Crown in Chancery then prepares Writs of Summons, which are sent to the temporal peers and the Lords Spiritual. The judges are also summoned to attend and advise, but (unless they are peers) they do not attend, though they may be asked to advise the House of Lords sitting as the final court of appeal. Writs of Elections are issued to the returning officers instructing them to cause election to be made of a member to serve in Parliament for the constituency mentioned, and to return the name to the Crown Office.[46]

Meeting of a new Parliament

8–016 On the appointed day each House assembles in its own chamber until the Gentleman Usher of the Black Rod (Black Rod) requires attendance of the Commons at the bar of the Lords. As many members as space permits and as have the inclination, then proceed with the Assistant Clerk of the Parliaments (Clerk to the House of Commons) to the "bar," a line which is deemed to mark the boundary of the Lords' Chamber. Unless the Sovereign is present, the commission for opening Parliament is then read by the Lord Chancellor. The Commons are then bidden by him to retire and proceed to the election of a Speaker. The election of Speaker ends the day.

Next day the new Speaker proceeds with the Commons to the bar of the House of Lords. He announces his election, which is confirmed by the Lord Chancellor in the name of the Sovereign. It is not certain whether the Sovereign's approval is required by law; but it is always sought and has only once been refused, by Charles II in the case of Sir Edward Seymour in 1678. After this the Speaker claims certain ancient privileges of the House. The Sovereign, if present, reads the Queen's speech. If she is absent her speech is read by the Lord Chancellor. It is drafted by the Cabinet, and outlines the government's policy with regard to

[42] Succession to the Crown Act 1707.
[43] Representation of the People Act 1867.
[44] Representation of the People Act 1985, s.20.
[45] *post*, paras 8–022 to 8–028.
[46] Representation of the People Act 1983, s.23 and Sched. 1.

foreign affairs and legislation. After this the Commons retire, and each member of either House proves his right to membership. Then members of both Houses take the statutory oath or affirmation of allegiance.

Beginning of a new session

8–017 At the beginning of each session when the Speaker returns from the Lords to the House of Commons, a Bill for the Suppression of Clandestine Outlawries[47] is formally read the first time. This practice preserves the right of the House to initiate Bills not foreshadowed in the Queen's Speech, and in particular the ancient right of the Commons to air grievances before granting the Sovereign supplies. The Speaker then reads a copy of the Queen's Speech to the House, and a loyal address of thanks to Her Majesty for the speech is moved and seconded. On that question amendments may be moved, and the general debate on the address which takes place, is an opportunity for a debate on government policy. Out of courtesy to the Sovereign, the motion is agreed to without a division, though any amendments proposed may be voted on.

A similar debate on the Queen's Speech, in the form of a loyal address, takes place in the House of Lords after the formal first reading of the Select Vestries Bill.

III. The Prerogative of Dissolution[48]

The Queen, the Prime Minister and the Commons

8–018 One of the most important of the prerogative powers in connection with Parliament is that to dissolve Parliament. However the significance of this power rests on the conventions which surround its exercise. Although in law the Queen may dissolve Parliament when she likes, her conduct would be unconstitutional (*i.e.* contrary to convention) if she did so without or against the advice of her Ministers. In what circumstances it is constitutionally proper for the Prime Minister (or the Cabinet) to refuse to advise a dissolution, and whether the Queen is necessarily bound by convention to dissolve when advised to do so, are questions discussed in the following paragraphs.

8–019 The conventions governing the exercise of the prerogative power to dissolve Parliament are in normal circumstances the following:

(a) The Sovereign should dissolve Parliament when requested by the Prime Minister to do so.

(b) The Sovereign should not dissolve Parliament unless requested by the Prime Minister to do so.

[47] See G. Chowdharay-Best, "The Clandestine Outlawries and Select Vestries Bills" (1974) 124 New L.J. 230.

[48] Sir Ivor Jennings, *Cabinet Government* (3rd ed., 1959), pp. 412–428, and App. III; J.P. Mackintosh, *The British Cabinet* (3rd ed., 1977); B.S. Markesinis, *The Theory and Practice of Dissolution of Parliament* (1972); Anson, *Law and Custom of the Constitution* (1922 5th ed. Gwyer), Vol. I, pp. 325–330; Dicey *Law of the Constitution* (1959 10th ed.), pp. 432–437. See also B.E. Carter, *The Office of Prime Minister* (1956), pp. 273–294; E.A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943); H.V. Evatt, *The King and His Dominion Governors* (1935).

(c) The Prime Minister has the power to choose the time of dissolution, within the five-year period prescribed by the Parliament Act 1911.[49] A convention appears to have developed in the years from the 1920s to the 1950s that the Prime Minister does not have to have the approval of the Cabinet before doing so.[50] This power of timing is a weapon of great political importance in the hands of the government, and especially of the Prime Minister.[51]

(d) If the Government party is defeated at a general election, the Prime Minister should tender the resignation of the Government at once, at least where another party has an overall majority, and the Opposition will take over. At one time, before the party unity was as definite as it is now, it was the practice to await defeat in the Commons. If there is in the future a return to a system where no one party has a clear majority this former practice may revive.[52]

(e) If the government is defeated in the House of Commons on a motion of confidence or a motion of no confidence, the Prime Minister must either ask for a dissolution or tender the resignation of himself and his ministerial colleagues. Such occasions are rare; only three times in the last century was a government dismissed in this way, the most recent being in 1979.[53] Where there is a dissolution, which is the usual course, Ministers retain office during the ensuing general election. The Address on the Queen's Speech and the general Budget resolution would be regarded as matters of confidence.[54] In practice also, before a debate on a major item of government policy the Prime Minister may indicate—largely for the information of his followers—that he intends to regard the pending vote as one of confidence. This may be resorted to by a Prime Minister who wishes to overcome dissidents in the party by the implied threat of a general election if government policy is not supported. On several occasions Mr Major, when faced with opposition from his own party on European Union policy, indicated that the passage of a piece of European legislation was a matter of confidence.[55]

8–020 A government with a clear majority in the House of Commons can usually be assured of the confidence of the House, governments with a very small majority or a minority government may be in a different position. It is no longer the case

[49] The alternative would be to have five fixed-term parliaments, see O. Hood Phillips, *Reform of the Constitution* (1970), p. 52; Blackburn, *The Electoral System in Britain* (1995), p. 49–65.

[50] See Lord Blake, *The Office of Prime Minister* (1975) p. 59, who explains how this developed due to a misunderstanding of the precedents. See also Geoffrey Marshall *Constitutional Conventions* (1984) pp. 48–53, who doubts the view that Cabinet approval is not required.

[51] Accounts of how this decision is taken can be found in the autobiographies of Prime Ministers and other leading members of political parties.

[52] After the February 1974 general election neither the Conservative nor Labour party had a majority in the Commons, although Labour had the most seats. Only after Mr Heath, the Conservative Prime Minister at the time of the election, had failed to persuade the Liberals to join a coalition did he resign and Mr Wilson, the leader of the Labour party, succeed him as Prime Minister.

[53] When the motion of no confidence in the then Labour government was carried by 311 votes to 310. H.C. Deb. vol. 965 cols. 461–590 (March 28, 1979).

[54] As happened with Mr Baldwin in 1929.

[55] *e.g.*, November 1992 on the European Communities (Amendment) Bill and in November 1994 on the European Communities (Finance) Bill.

(if it ever was)[56] that defeat in the division lobbies on a major matter calls in question a government's right to continue to govern.[57] In March 1974 Mr Wilson, who presided over a minority government, stated in the House that if the Government were defeated in the Commons it would consider its position and make a definitive statement after due consideration; but the Government would not be forced to go to the country except in a situation where members voted knowing the full consequences of their vote. He added that a snap division, or even a defeat on quite major matters, would not immediately lead to the Government's asking for a dissolution or resigning.[58] After the October 1974 election Labour were returned with a very small majority, and became a minority government in 1976. In the course of the next five years the Government were defeated forty-two times losing several Bills and, contrary to its wishes, having to accept amendments to other Bills.[59] However, it was not defeated in a confidence motion until March 1979.

Opposition parties do not necessarily want to force a general election at any given time. They may be short of electioneering funds or may think their electoral chances will improve later on. Defeats in by-elections do not require a government to resign unless they wipe out its majority in the Commons, though Balfour resigned in 1905 when Parliament was not in session as the loss of a series of by-elections indicated that his party no longer enjoyed the support of the electorate.

Defeats of a government in a committee of the Commons, which are not rare when the government has a small majority, can usually be reversed later on the floor of the House. A minority government may lose its majority membership of committees, where its Bills are subject to amendment. When the Labour Government lost its overall majority in the Commons in the early part of 1976 there was controversy as to the meaning of the Standing Order that directs the Selection Committee to have regard to the composition of the House. Labour members argued that the principle of a Bill is approved by the Commons on second reading, and therefore the government should be assured that it can get its Bills through Committee; but they gave way and agreed to equal numbers of Labour and Conservative members together with third-party representative. **8–021**

Exceptional situations

The question arises whether there are any exceptional circumstances in which the Sovereign may: (i) dissolve Parliament without, or against, the advice of the Prime Minister; (ii) dismiss a Ministry that refuses to advise a dissolution; or (iii) refuse a dissolution when advised by the Prime Minister to dissolve. **8–022**

1. Dissolution without or against advice

There is no instance in this country, since the Restoration, of a Sovereign attempting to dissolve Parliament without or against the advice of the Ministry. It seems that, apart from convention, the Queen cannot now in practice dissolve **8–023**

[56] See Philip Norton, "The House of Commons and the Constitution: The Challenges of the 1970s" (1981) *Parliamentary Affairs*, 253.

[57] See further Philip Norton "Government Defeats in the House of Commons: Myth and Reality" [1978] P.L. 360. *Dissention in the House of Commons 1974–1979* (1980); S. E. Finer, *Five Constitutions* (1979), pp. 68–69.

[58] H.C. Deb.Vol. 870, cols. 70–71 (March 12, 1974). The Government was defeated 17 times before the second election of 1974 was held.

[59] Even Mrs Thatcher's governments with safe majorities had to abandon legislation because of lack of support in the Commons, *e.g.* the Shops Bill 1986.

Parliament without or against the advice of her Ministers. Dissolution involves an Order in Council made at a meeting of the Privy Council convened by the Lord President of the Council; and the issue of a proclamation and writs of summons under the Great Seal, which is kept by the Lord Chancellor.[60] She might dissolve Parliament orally in the House of Lords, but proclamations and writs would still be required for the holding of elections and the summoning of the new Parliament. The Queen may take the initiative in proposing a dissolution, and then if the Ministers agree with her they adopt her policy as their own; but if Ministers refuse to advise a dissolution, they could only be dismissed.

2. Dismissal of a government that refuses to advise a dissolution

8–024 The last occasion in this country when a Ministry was dismissed was that of the North-Fox Coalition in 1783. During the Irish Home Rule controversy of 1913, Dicey expressed the opinion that the King might dismiss a Ministry that refused to advise a dissolution if he had reason to think that their policy, although supported by the House of Commons, was not approved by the electorate. On the other hand, although there might be an argument for dissolution if the Sovereign thought the Government had lost its majority in the country,[61] it is very doubtful whether she is sufficiently in touch with public opinion to judge the attitude of the electorate or to anticipate its decision on all items of the government's policy. Only most exceptional circumstances would justify the dismissal of a Ministry, such as unconstitutional conduct like introducing Bills for unnecessary or definite prolongations of the life of Parliament, gerry-mandering of constituencies or fundamental modifications of the electoral system in the interests of one party,[62] or if the government were unable to obtain supply from the Commons.[63]

Dismissal of a Ministry would be a last resort, for the evil to be expected from inaction by the Sovereign would have to be weighed against the evil of bringing the Crown into the political arena. And the Sovereign would have to be satisfied, presumably from the advice of the Leader of the Opposition (which normally cannot be sought unless the Government resigns) that an alternative Government was willing to take office.

3. Refusal of dissolution

8–025 Down to the early nineteenth century the defeat of the government at a general election was regarded as a rebuff to the Sovereign. Since the Reform Act 1832 the prestige of the Sovereign has been dissociated from the fate of governments and there has been no instance of refusal to dissolve the British Parliament.

[60] Great Seal Act 1884: a warrant under the Royal Sign Manual countersigned by the Lord Chancellor, or by a Secretary of State or two Treasury Commissioners, is necessary and sufficient authority for passing any instrument under the Great Seal; but the authority of the Lord Chancellor alone is sufficient in cases where that was so before the Act.

[61] *Cf. Adegbenro v. Akintola* [1963] A.C. 614, PC. For the background of this case, see B.O. Nwabueze, *Constitutionalism in the Emergent States* (1973), pp. 74–75.

[62] Jennings, *op. cit.* p. 412.

[63] The dismissal by the Governor-General of Australia of the Prime Minister (Mr Gough Whitlam) in November 1975 is an instructive precedent, but it must be studied in the light of the Senate's legal power to refuse to grant supply. See D.P. O'Connell, "The Dissolution of the Australian Parliament: 11, November 1975," (1976) 57 *The Parliamentarian*, 1–14. The Leader of the Opposition was invited to form a caretaker government (no appointments and no legislation) on the understanding that, when the Senate had approved the grant of supply, he would forthwith advise a dissolution.

George V is said to have refused (at least temporarily) to dissolve Parliament in 1910 and the Cabinet decided to resign; but he later agreed to a dissolution.[64] In 1918 the King only agreed to Lloyd George's request for a dissolution with justifiable reluctance: it is not certain whether Lloyd George would have resigned if the request had been refused.[65]

The question whether the Sovereign could still constitutionally refuse to dissolve Parliament when advised by Ministers to do so was raised in 1923–24 and 1950, and again early in 1974. In 1923 Ramsay MacDonald was appointed Prime Minister of a minority Labour Government which could only count on a majority in the House of Commons so long as it retained the support of a sufficient number of Liberals. Lord Cave, the Lord Chancellor in the previous administration, advised George V's private secretary, Lord Stamfordham, that if no constitutional reason exists for the request of a dissolution the Sovereign may properly refuse the request, provided he is assured that other Ministers are prepared to carry on the government. He went on to say that if a statesman is asked to form a government and makes it a condition of accepting office that the Sovereign will grant a dissolution in the event of a new government being defeated in the House of Commons, the Sovereign is under no obligation to give such a promise, and he should not give such an assurance unless it is the only way of securing that the government of the country will be carried on.[66]

8–026 Asquith (a former Liberal Prime Minister) said that "the Crown is not bound to take the advice of a particular Minister to put its subjects to the tumult and turmoil of a series of general elections so long as it can find other Ministers who are prepared to give contrary advice. The notion that a Minister who cannot command a majority in the House of Commons ... is invested with the right to demand a dissolution is as subversive of constitutional usage as it would, in my opinion, be pernicious to the paramount interests of the nation at large." When the minority Labour Government was defeated in the Commons in 1924, George V did not want to grant a dissolution but did so after consulting Conservative and Liberal leaders, who were unwilling to combine in the existing House. Lord Attlee thought that the King might legitimately have refused a dissolution to Ramsay MacDonald, but he added: "I fancy it was thought impolitic to refuse the request of the first Labour Prime Minister."[67] The view that a Sovereign is not bound to grant a dissolution when asked for, provided that he can obtain other Ministers to take responsibility for the royal refusal, was supported by Keith, who added: "The right to a dissolution is not a right to a series of dissolutions. The King could not, because a Ministry had appealed and lost an election, give them forthwith another without seeming to be endeavouring to wear out the resistance of the electors to the royal will."[68]

Refusal of a dissolution would be proper if, but only if, there was general agreement inside and outside the House of Commons that a general election should be delayed pending further developments of the situation, for where the view of the people can be gathered without a dissolution it would be absurd to insist upon it. As Anson said, the uniform practice for more than a century that

[64] Jennings, *op. cit.* p. 425.
[65] *ibid.* p. 425.
[66] R.F.V. Heuston, *Lives of the Lord Chancellors 1885–1940* (1964), pp. 432–435.
[67] "The Role of the Monarchy," *The Observer*, August 23, 1959.
[68] Keith, *op. cit.* p. 301.

the Sovereign should not refuse a dissolution when advised by her Ministers to dissolve has been largely due to the observance of another convention, namely, that dissolutions should not be improperly advised.

8–027 The other view is that the Sovereign's right to withhold a dissolution has become obsolete, and that the convention that she must in all circumstances accept the advice of the Prime Minister provides her with a clear and simple rule about which there can be no mistake.[69] Sir Ivor Jennings denied that it is a convention that a dissolution may not be refused, since Victoria, Edward VII, George V and their Prime Ministers all thought there was a right to refuse a dissolution[70]; but he thought that while the Queen's personal prerogative is maintained in theory, there are hardly any circumstances in which it could be exercised in practice. He pointed out, however, that this assumed a continuance of the two-party system. "If the major parties break up," he wrote,[71] "the whole balance of the Constitution alters; and then, possibly, the Queen's prerogative becomes important." Some writers who adopt the "new" doctrine which deprives the Queen of any discretion, would make an exception where a Prime Minister requests a second dissolution immediately after being defeated at a general election, provided that an alternative government could be formed.[72]

The former opinion, which allows a limited personal prerogative to the Sovereign, appears to be the better one. It is more in consonance with the traditions of British parliamentary government, and it has tended to be adopted in other Commonwealth countries. It was supported by Viscount Simon (a former Lord Chancellor) in April 1950[73] when the Labour Government had been returned with a majority of only six in the Commons. Attlee, who was Prime Minister in 1950, later expressed the opinion that if the Government had been defeated in the House at that time, George VI would have been within his rights in sending for the Leader of the Opposition if he thought a working majority in the House could have been obtained by him.[74]

8–028 The reason for the general convention that the Sovereign is bound by the advice of her Ministers is not applicable if they do not represent the wishes of the electorate (or the Commons). Among the factors that would have to be taken into account before the Sovereign could properly refuse a dissolution would be the time that had elapsed since the last dissolution, whether the last dissolution took place at the instance of the present Opposition, whether the question in issue is of great political importance, the supply position,[75] whether Parliament is nearing the end of its maximum term, whether the Prime Minister is in a minority in the Cabinet,[76] and whether there is a minority government.[77]

[69] Lord Chorley, letter to *The Times*, April 26, 1950.
[70] *Law and the Constitution* (1959 5th ed.), p. 135.
[71] *Cabinet Government* (1959 3rd ed.), pp. 427–428.
[72] G. Marshall and G.C. Moodie, *op. cit.*
[73] Letters to *The Times*, April 24 and 27, 1950, and see Wheeler-Bennett, *King George VI*, (1958) pp. 771–775.
[74] "The Role of the Monarchy," *loc. cit.*
[75] The grant of a dissolution must be dependent on supply having been voted to the Crown for the period that would elapse before the meeting of the new Parliament.
[76] Lord Blake in a letter to *The Times*, October 25, 1974.
[77] Markesinis, *op. cit.* thinks the practice shows that the Crown cannot refuse a dissolution to a majority government, but it may refuse a dissolution to a minority government (whether defeated or not) provided an alternative government can be formed.

IV. The Lords and Commons in Conflict[78]

Earlier conflicts

Until 1911 the United Kingdom was fully bicameral, except in respect of the Commons' financial privileges. In the reign of Charles II the Commons passed resolutions denying the right of the Lords to introduce or amend Money Bills. They did not specifically deny the right of the Lords to reject a Money Bill, a right which the Lords continued formally to claim, although before 1860 they exercised it extremely rarely. In 1832 there was a serious controversy over the Reform Bill. William IV, much against his inclination, supported Lord Grey by threatening to use the prerogative power of creating sufficient peers to carry the measure in the House of Lords.[79] **8–029**

In 1860 the Lords exercised their legal right of rejecting Money Bills by throwing out a measure for the repeal of the paper duty. Three resolutions to the following effect were carried in the Commons:

(1) that the right of granting aid and supplies to the Crown is in the Commons alone;

(2) that, although the Lords could legally reject Money Bills, yet the exercise of that power was regarded by the lower House with peculiar jealousy;

(3) that the Commons had the power so to impose and remit taxation and to frame Bills of Supply that the right of the Commons as to the matter, manner, measure and time might be maintained inviolate.[80]

In the following year, Gladstone being then Chancellor of the Exchequer, the opposition of the peers was overridden by tacking the provision regarding paper duties on to a general financial measure for the services of the year. The House of Lords, therefore, had to face the alternative of passing the provision they disliked, or of rejecting the whole financial provision for the year. They shrank from the latter alternative.

In 1869 the Irish Church Disestablishment Bill was strongly opposed by the Lords, in spite of the clearly expressed wishes of the electorate, but the difficulty was surmounted by Lord Cairns's influence. Another memorable dispute concerned the rejection in 1872 of a Bill to abolish the purchase of Army commissions. The warrant authorising the purchase of commissions was cancelled by exercise of the prerogative, and so the Government attained their object without a direct conflict between the two Houses. There was considerable friction between the two Houses when the Lords at first rejected the Representation of the People Bill in 1884, but mutual concessions were made by Salisbury and Gladstone. The next dispute was over Gladstone's second Home Rule Bill in 1893, but as the Lords were in this instance supported by the electorate their position was for the time being maintained.

[78] This section is confined to conflicts over legislation and finance.

[79] A power exercised by Queen Anne in 1712 by the creation of 12 Tory peers to ensure a majority in the House of Lords for approval of the terms of the Peace Treaty of Utrecht; however the commercial treaty between England and France was rejected by Parliament.

[80] C.S. Emden, *Selected Speeches on the Constitution*, Vol. I, pp. 141–142.

Events leading to the Parliament Act 1911[81]

8–030 In 1909–06 the Liberals were returned to power with a gigantic majority, only to find that their principle measures continued to be rejected or drastically amended by the upper House. In 1907 the Commons passed a resolution to the effect that the power of the Lords to alter or reject Bills passed by the Commons should be so restricted that the will of the Commons should prevail within the lifetime of a single Parliament. This resolution as explained by Campbell-Bannerman, the Prime Minister, afterwards with some expansion formed the basis of the Parliament Act 1911. In 1908–1909 Liberal measures—notably the Licensing Bill—were again thrown out by the Lords.

The climax was reached in 1909 when the Finance Bill, containing Lloyd George's Budget, was thrown out in its entirety. The Commons resolved that this action was "a breach of the Constitution, and a usurpation of the rights of the Commons." Edward VII refused to promise Asquith, the Prime Minister, to create enough peers to swamp the Lords until the government's financial policy had been endorsed by the electorate. Parliament was dissolved. In the general election of January 1910 the government lost many seats, but retained its majority with the help of Irish Nationalist and Labour members. The Lords then passed the Finance Bill, which had been reintroduced by the Commons. The Parliament Bill was introduced in the Commons in April; but Edward VII died, and a conference of party leaders was formed to try to reach a settlement and to preserve King George V from a constitutional crisis at the beginning of his reign. Lord Landsdowne, leader of the Conservative peers, proposed that when an important constitutional Bill dealing with such matters as the Crown or the Protestant succession thereto, or establishing a national legislature in Ireland, Scotland, Wales or England, has been rejected three times by the House of Lords, the matter should be decided by referendum. Balfour, the Conservative leader, moved a clause requiring a referendum also for Bills affecting the Parliamentary franchise, the distribution of Parliamentary seats, or the constitution and power of either House of Parliament or relations between the two Houses.[82] Another suggestion was that deadlock over non-financial Bills should be resolved at a joint sitting of both Houses, with the Speaker of the Commons as chairman. Other Lords' amendments would exclude from the operation of the Parliament Bill certain fundamental or constitutional matters, including Irish Home Rule.

8–031 The conference broke down, mainly on the application of the Bill to Home Rule, and in November the Cabinet advised another dissolution. It is now clear that the second general election was embarked on in deference to the wishes of Edward VII expressed shortly before his death. The Cabinet also asked the new King to promise to create a sufficient number of peers to pass the Parliament Bill, and advised that his intention should not be published unless and until the actual occasion should arise. About 400 additional peers[83] would have been needed. The King felt that he had no alternative but to assent to the advice of the Cabinet.

The following general election made little difference to the position of the parties. The Lords proposed a number of amendments to the Parliament Bill

[81] See Anson, *Law and Custom of the Constitution* (5th ed. Gwyer), Vol. I pp. 304–308; Jennings, *Parliament* (2nd ed.), pp. 408 *et seq.*; Harold Nicolson, *King George V*, pp. 102–104, 125–139, 148–158; Kenneth Rose and Roy Jenkins, *Mr Balfour's Poodle* (1954).

[82] See Philip Goodhart, M.P., *Referendum* (1971), Chap. 2.

[83] The provisional list of nominees later published shows that most of them had no male issue, so that the number of new hereditary peerages would in fact not have been large.

which the Commons rejected, and in the summer of 1911 the Prime Minister divulged the King's promise to create a sufficient number of peers to force the Bill through the Lords. The Parliament Bill was eventually passed by the Lords in August 1911 with the help of a large number of abstentions, a majority of 17 (131–114) voting against the Lords insisting on their amendments.

The Parliament Act 1911 in effect abolished the Lords' power to reject Money Bills (as therein defined); and substituted for their power to reject other public Bills a power to delay them (with one important exception) for two years spread over three sessions. The important exception was a Bill to extend the life of Parliament.

Events leading to the Parliament Act 1949[84]

8–032 In the general election of 1945 the Labour Party said that they would not allow the House of Lords to thwart the will of the people, but they did not ask for a mandate for its abolition or reform. There was a mandate for the nationalisation of certain industries, not including iron and steel. The House of Lords did not reject the Labour Government's nationalisation measures in 1945–47: they suggested a number of useful technical amendments, but did not insist on any amendments to which the Commons did not agree. It seemed likely, however, that the Lords would reject the Iron and Steel Bill.

In 1947 the Commons passed a Parliament Bill (in the form which eventually became the Parliament Act 1949) designed to reduce the period of the Lords' delaying power in the case of public Bills other than Money Bills from two years to one year, spread over two sessions instead of three. The object of introducing this Bill at that stage was to ensure the passing of the Iron and Steel Bill, and perhaps further nationalisation measures, in spite of the opposition of the Lords in the fourth year of the existing Parliament. The Conservative majority in the Lords opposed the Parliament Bill on the grounds that (*inter alia*) it did not reform the membership of the upper House, the nation had expressed no desire for it, and it would go far to expose the country to the dangers of single chamber government.

8–033 A Conference of Party Leaders, representative of the three main parties in each House was convened in 1948.[85] It was agreed that the discussion should treat the composition and powers of the House of Lords as interdependent, but as far as concerned powers the terms of reference were limited to the delaying power. The Conservative leaders regarded 12 months from the third reading in the Commons as the shortest period acceptable. The Labour leaders regarded the maximum period acceptable as nine months from the third reading in the Commons or one year from the second reading, whichever might be the longer in a particular case. The difference between the parties was more than a matter of three months, for it revealed a cleavage of opinion as to the purpose of the delaying power. The Labour view was that each House should have a proper time for the consideration of amendments to Bills proposed by the other. In effect this meant that the Commons should have time to think again. The Conservative view was that in the event of serious controversy between the two Houses on a measure on which the view of the electorate is doubtful, a sufficient time should elapse to enable the electorate to be properly informed of the issues involved and for public opinion to crystallise and express itself. This does not necessarily involve a general

[84] See Jennings, *op. cit.* pp. 428–434. For arguments as to the validity of the 1949 Act see *ante*, paras 4–035 to 4–036.
[85] (1948) Cmnd. 7380.

election. The Conference therefore broke down, and the Lords then rejected the Parliament Bill at its second reading. The Bill was eventually passed in 1949 without the consent of the Lords under the provisions of the Parliament Act 1911, it being necessary to introduce an extra short session for the purpose.

The Parliament Act 1949 was remarkable as being an important constitutional measure that included a retroactive provision (the proviso to section 1) extending to Bills introduced before the Parliament Bill itself.[86] The 1949 Act made no change with regard to Money Bills as the Lords could scarcely be allowed a shorter period to consider them than the month allowed by the 1911 Act.

The Parliament Acts 1911 and 1949[87]

8–034 The provisions of the 1911 Act, as amended in 1949, are to the following effect: After reciting (*inter alia*) that it was eventually intended to substitute for the existing House of Lords a second chamber constituted on a popular instead of a hereditary basis, it is provided that:

Section 1

(1) If a Money Bill, having been passed by the Commons and sent to the House of Lords[88] at least one month before the end of the session, is not passed by the Lords without amendment within one month after it has been sent up, the Bill, unless the Commons direct to the contrary, shall be presented to the Sovereign and become an Act of Parliament on the Royal Assent being signified, notwithstanding that the House of Lords have not consented to the Bill.[89]

(2) A Money Bill means a public Bill which, in the opinion of the Speaker of the House of Commons, contains only provisions dealing with the following topics:

imposition, repeal, remission, alteration or regulation of taxation (not including local rates);
imposition for any financial purposes of charges on the Consolidated Fund or the National Loans Fund, or on money provided by Parliament, or the variation of such charges;
supply;
appropriation, receipt, custody, issue or audit of accounts of public money;
raising or guarantee of any loan (not including loans by local authorities) or the repayment thereof; or
subordinate matters incidental to the above topics or any of them.

(3) There shall be endorsed on a Money Bill when sent up to the Lords, and when presented to the Sovereign for assent, a certificate signed by the

[86] The Iron and Steel Bill was not in fact forced through under these provisions, a compromise was reached whereby the proposed corporation would not be appointed until after the next general election, which the government lost.

[87] For the use made of the Parliament Act procedure see *post* paras 9–024 to 9–027.

[88] A Money Bill as defined in Standing Orders, which definition is wider than that in the Parliament Act 1911, must be introduced into the House of Commons in accordance with the privileges of the Commons and constitutional convention.

[89] The Parliament Acts assume separate sittings of the House of Lords and the House of Commons.

Speaker that the Bill is a Money Bill. Before so certifying the Speaker is to consult, if practicable, two members to be appointed from the Chairmen's Panel[90] at the beginning of the session by the Committee of Selection.

Section 2

(1) If any public Bill[91] (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years)[92] is passed by the Commons in two[93] successive sessions (whether of the same Parliament or not),[94] and, having been sent to the Lords at least one month before the end of the session, is rejected by the Lords in each of those sessions, that Bill shall, on the second[95] rejection by the Lords, unless the Commons direct to the contrary, be presented to the Sovereign for the Royal Assent and thereupon become an Act of Parliament without the consent of the Lords. But the foregoing provision is not to take effect unless one year[96] has elapsed between the date of second reading[97] in the first of the sessions in the Commons and the date of its passing the Commons in the second[98] session.[99] **8–035**

(2) When a Bill is presented to the Sovereign for assent under this section, the signed certificate of the Speaker[1] that the requirements of this section have been complied with shall be endorsed thereon.

(3) A Bill shall be deemed to be rejected by the Lords if it is not passed by them without amendment or with amendments agreed to by both Houses.

(4) A Bill shall be deemed to be the same Bill as a former Bill sent up to the Lords in the preceding session if, when sent to the Lords, it is identical with the former Bill or contains only such alterations as are certified by the Speaker to be necessary owing to lapse of time since the date of the former Bill, or to represent amendments made by the Lords in the former Bill in the preceding session and agreed to by the Commons.

The Commons may, if they choose, in the second[2] session suggest further amendments without inserting them in the Bill, and such suggested amendments, if agreed to by the Lords, shall be treated as amendments agreed to by both **8–036**

[90] Composed of the Chairmen of Standing Committees of the Commons.
[91] Not including a Bill for confirming a Provisional Order, s.5.
[92] This exclusion from the Parliament Act 1911 was the only Lords' amendment agreed at a late stage of the proceedings on the Bill.
[93] Amendment made by the Parliament Act 1949.
[94] Prescribing more than one session enables both Houses to think again: a compromise is possible, or the Bill may be dropped.
[95] Amendment made by the Parliament Act 1949.
[96] *ibid.*
[97] The Parliament Acts assume the practice of having three readings.
[98] Amendment made by the Parliament Act 1949.
[99] A minimum time limit is also prescribed because the government could arrange one-day sessions.
[1] It has been suggested that it would be more satisfactory if a certificate of such importance were issued by a Joint Committee of the two Houses or a High Court judge.
[2] Amendment made by the Parliament Act 1949.

Houses; but the exercise of this power by the Commons shall not affect the operation of this section in the event of rejection of the Bill by the Lords.

Section 3.

The Speaker's certificate "*shall be conclusive for all purposes,*[1] *and shall not be questioned in any court of law.*"[2] It may be noticed that the Parliament Acts do not describe the Speaker's functions thereunder as "duties."[3]

Section 4.

When a Bill is sent up for the Royal Assent without the consent of the Lords the enacting formula is as follows:

> "Be it enacted by the Queen's most excellent Majesty, *by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of the Parliament Act 1911 and 1949, and by the authority of the same, as follows.*"

Section 5.

"Public Bill" does not include a Bill for confirming a Provision Order.[4]

Section 6.

"Nothing in this Act shall diminish or qualify the existing rights and privileges of the House of Commons."[5]

Section 7.

"Five years shall be substituted for seven years as the time fixed for the maximum duration of Parliament under the Septennial Act 1715."

Measures not covered by the Parliament Acts

8–037 These include:

(i) a Bill to extend the maximum duration of Parliament (section 2(1));

(ii) Bills to confirm Provisional Orders (section 5);

(iii) Finance and other Supply Bills not certified as "Money Bills";

(iv) private Bills;

(v) Statutory Instruments[6] or other subordinate legislation; and

[1] This expression could cover the Lords and the Sovereign.

[2] In *Anismimic v. Foreign Compensation Commission* [1969] 2 A.C. 147 the House of Lords decided that where a statute states that an instrument such as an order or certificate shall be "conclusive evidence" or words to that effect, this implies that the instrument has been properly made, and does not extend to some purported order or certificate which was beyond the power of the maker to make. This principle could be applied to a certificate signed by the Speaker in misconstruction of the power conferred on him by the Parliament Act 1911.

[3] *cf. ante*, para. 7–003.

[4] "Public bill" is not otherwise defined by the Parliament Acts.

[5] This preserves the various privileges of the Commons, especially in relation to financial measures, *e.g.* that they should only be introduced in the lower House, and that the Lords should not amend a Money Bill. See *post*, para. 12–003.

[6] If the Lords reject a Statutory Instrument the Minister can introduce a new version, which the Lords are not likely to reject, *e.g.* Statutory Order imposing further economic sanctions on Rhodesia in 1968.

(vi) Bills introduced into the Lords.[9]

The 1968 reform proposals[10]

8–038 The main proposal in the abortive Parliament (No. 2) Bill 1968, would have reduced the period of delay to six months from the day on which the House of Lords disagreed in the case of a public Bill sent up by the Commons, other than a Money Bill, a Bill to extend the maximum duration of Parliament or a Bill to confirm a Provisional Order. A resolution of the Commons to present such a Bill for the Royal Assent without the Lords' consent would not have been affected by prorogation or dissolution. Sections 2 and 5 of the Parliament Act 1911 and the whole of the Parliament Act 1949 would have been repealed.

The 2000 reform proposals[11]

8–039 The Wakeham Report concluded that the balance between the two Houses which had evolved over many decades should not be radically disturbed.[12] It supported neither a return to the fully bicameral nature of the pre-1911 Parliament, nor the removal of the Lords' suspensory veto over most primary legislation whereby it could no longer require the Government to justify a legislative proposal to the Commons for a second time. One change recommended in the Report was to amend the Parliament Acts to exclude the possibility of their being further amended by the use of the Parliament Act procedures. The purpose of such an amendment would be to give the Lords a veto over any attempt to constrain its existing powers in respect of primary legislation; it would also reinforce the Lords' veto over any Bill to extend the life of a Parliament.

[9] This limitation can be side-stepped. If a Government wishes to use the Parliament Act procedure in respect of a Bill introduced in the Lords, then it can introduce a virtually identical Bill in the Commons and sent it to the Lords before the end of the first session, as was done with the Criminal Justice (Mode of Trial) No. 2 Bill 2000, after the Lords had passed a wrecking amendment to the first Bill. The No. 2 Bill was eventually dropped by the Government.

[10] For the proposals relating to the composition of the House of Lords, see *post* para. 9–038.

[11] Report of the Royal Commission on the Reform of the House of Lords, (the Wakeham Report), "A House for the Future". Cm. 4534. See *post* paras 9–035 to 9–043 for further details of the proposals made in the Report.

[12] See *post* paras 9–024 to 9–027 for a discussion of the use made of the Parliament Act procedure.

CHAPTER 9

THE HOUSE OF LORDS[1]

Introduction

9–001 The composition and powers of the House of Lords has been a continuing matter of debate over the last 100 years. The election of a Labour Government in 1997 with a manifesto commitment to reform the Lords resulted in the enactment of the House of Lords Act 1999, the first stage of a promised extensive reform of the second chamber. In advance of the enactment of this Act the Government published a White Paper,[2] and established a Royal Commission to make recommendations on the role, functions and composition of a reformed second chamber. The Royal Commission reported in January 2000,[3] and its recommendations have been debated in both Houses.[4] The Queen's Speech in June 2001 stated that, following consultations, legislation would be introduced to implement the second phase of reform.

Historical introduction

9–002 The origin of the House of Lords is to be found in the Great Council (*magnum concilium*) of Norman times, and even in the earlier Witenagemot.[5] The *magnum concilium* of the Norman and early Plantagenet Kings was a council of the chief men of the nation, summoned by the King because of their wealth or skill. Wealth and power went with the holding of land, which was in the main hereditary. The next development is the notion of "peerage." A person who had received a summons to Parliament and had taken his seat, acquired not only a right to be summoned in future but a hereditary right to be summoned which descended to his heirs.

The older method of creating peerages was by writ of summons to Parliament, followed by the person summoned taking his seat. Baronies were created in this way in the reign of Edward I. A peerage by writ, as it was called, descended to the heirs general, *i.e.* male and female, lineal and collateral. The usual method of creating peerages in more recent times was by letters patent, which gave the grantee a right to a summons. A peerage by patent descends in accordance with the limitation in the patent, which is generally (though not invariably) to the lineal heirs male. Hereditary peerages[6] were of England and Scotland (created before the Union of England and Scotland), of Great Britain (created after the Union with Scotland and before the Union with Ireland) and of the United Kingdom (created since the Union with Ireland). Few hereditary peerages were

[1] Erskine May, *Parliamentary Practice* (22nd ed., 1997) Chaps 21, 25.

[2] "Modernising Parliament: Reforming the House of Lords", Cm. 4183, hereafter the 1999 White Paper.

[3] Royal Commission on the Reform of the House of Lords, *A House for the Future*, Cm. 4534, hereafter in this Chap. referred to as the Royal Commission.

[4] H.L.Deb. vol. 610, cols. 911–1036 (March 7, 2000); H.C.Deb. Vol. 352 (June 19, 2000).

[5] See Pike, *Constitutional History of the House of Lords*, (1894), especially Chap. 4, for further details.

[6] A person entitled to attend Parliament was under no obligation to apply for a writ of summons if he did not wish to do so, and it was the custom that a writ was only issued to a consenting party: *Re Parliamentary election for Bristol South-East* [1964] 2 Q.B. 257.

created in recent years.[7] Hereditary peeresses in their own right were only allowed to sit and vote in the House of Lords by virtue of section 6 of the Peerage Act 1963.[8]

The most recent development is the House of Lords Act 1999. By section 5(1) of this Act, writs of summons in the right of a hereditary peerage have no effect after the 1998–1999 session as section 1 of the Act excludes holders of hereditary peerages from membership of the House of Lords.[9] The House of Lords Act 1999 does not affect the institution of the peerage itself. The heirs of peerages will inherit their titles according to the existing rules of succession, but they will not inherit a seat in Parliament. **9–003**

Peerage claims

The House of Lords, acting on the advice of its Committee for Privileges,[10] could itself and of its own motion determine the validity of the creation of a new peerage and the question whether the grantee was entitled to a writ of summons. The House also had the privilege of deciding whether anyone other than the original grantee was entitled to sit.[11] Claims to peerages which are in abeyance[12] or where the title is disputed will continue to be made by petition to the Crown, and the practice whereby such matters, after a preliminary ruling by the Lord Chancellor, are referred by the House of Lords to the Committee of Privileges will also continue to apply. Lapse of time is no legal bar to a peerage claim.[13] As a consequence of the House of Lords Act, future peerage claims will be concerned only with entitlement to the title. **9–004**

Disclaimer of hereditary peerages

The main object of the Peerage Act 1963 was to permit the disclaimer of hereditary peerages[14] with the result that the person concerned was relieved of the disqualification from voting for and being elected to the House of Commons. Section 1 allowed the holder of a hereditary peerage (other than an Irish peerage)[15] to disclaim the peerage for his life.[16] The effect of the House of Lords Act 1999 is that those hereditary peers who are no longer members of that House may vote in elections for, and be elected to, the House of Commons without the **9–005**

[7] In January 1999 there were 759 hereditary peers, of whom nine were of first creation.

[8] *Viscountess Rhondda's Claim* [1922] 2 A.C. 339.

[9] With the exception of those excepted from section 1 by the Standing Orders of the House, see *post* para. 9–09. In addition to the nine hereditary peers of first creation in the House in 1999, six other hereditary peers were offered life peerages. The Committee of Privileges in the House of Lords was invited to consider whether the House of Lords Bill, if enacted, would affect the right of hereditary peers who had answered their writ of summons before the House of Lords Bill received the Royal Assent. The unanimous view of the Committee was that the Bill would remove the right of hereditary peers to sit and vote: H.L. Paper 106 (1998–99).

[10] The Committee for Privileges consists of 16 peers and four Lords of Appeal.

[11] *Viscountess Rhondda's Claim* [1922] 2 A.C. 339.

[12] *e.g.* because it descended to two or more females in the same degree.

[13] In *Earldom of Annadale and Hartfell* [1986] A.C. 319, an earldom was revived after 193 years.

[14] Report of Joint Committee on House of Lords Reform (1962) H.L. 23 and H.C. 38; *Re Parliamentary Election for Bristol South-East* [1964] 2 Q.B. 257. The Peerage Act did not deal with courtesy titles, which are matters of the Queen's pleasure and not of law.

[15] Irish peers have not been represented in the Lords since the death of the last representative peer of Ireland in 1961. See Lord Dunboyne, "Irish Representative Peers", [1967] P.L. 314.

[16] Those who succeeded to a peerage after the 1963 Act generally had a year in which to disclaim. However, anyone who was a member of the House of Commons had only one month from succession in which to disclaim; similarly a candidate for election to the House of Commons who succeeded to a peerage had, if he was elected to that House, one month in which to disclaim.

need to relinquish their peerages. The provisions of the Peerage Act remain in force for the benefit of those peers who wish for other reasons to disclaim their title for life.

Disclaimer of a peerage is irrevocable. A peer who disclaims is divested of the peerage and any offices or privileges attaching thereto. Disclaimer does not affect any rights of property (section 3). The anomaly that the Act makes disclaimer of a peerage operate for life only and does not affect succession on death, is less significant since the House of Lords Act 1999.

The future of the peerage

9–006 The Royal Commission recommended that those who become members of the reformed second chamber would not receive a peerage, and that the automatic link between a peerage and membership of the second chamber should be broken.[17] This would not prevent a Prime Minister from recommending an award of a peerage in recognition of a person's merit and achievements; such an honour would not be a bar to subsequent membership of the reformed second chamber.

I. Composition of the House of Lords[18]

9–007 The composition of the House of Lords changed with effect from the start of the 1999–2000 session. This composition has been described as "transitional" and is likely to be further altered.

Lords Spiritual[19]

9–008 The 26 Lords Spiritual now consist by statute of the Archbishops of Canterbury and York, the Bishops of London, Durham and Winchester, and 21 other diocesan bishops of the Church of England in order of seniority of appointment.[20] They are summoned on their "faith and love." In the Middle Ages archbishops and bishops could attend Parliament both as holders of important offices of state and as tenants-in-chief or holders of baronies. Their presence was not due to any theory of the "three estates" of clergy, barons and commons.[21] Until the Reformation the Lords Spiritual formed a large part, sometimes a majority, of the House of Lords. It was not certain at the time of Elizabeth I. when Acts of Supremacy and Uniformity were passed, whether a Bill that was opposed unanimously by the Lords Spiritual was valid.[22] The bishops were excluded during the Commonwealth period. Although in modern times the presence of the Bishops became associated with the establishment of the Church of England, in law the two are quite separate.[23]

[17] Royal Commission *op. cit* Recommendation 127.

[18] For an account written before the 1999 reforms see N. Baldwin, Chap. 2 in *The House of Lords its Parliamentary and Judicial Roles* (B. Dickson and P. Carmichael, eds, 1999).

[19] The Lords Spiritual are not peers.

[20] The number was fixed by the Bishoprics Act 1878. Although the See of Sodor and Man forms part of the Province of York the Bishop of Sodor and Man is not entitled to set in the Upper House as one of the Lords Spiritual, the Isle of Man not forming part of the United Kingdom.

[21] "Those who pray, those who fight, those who work": Maitland, *Constitutional History* (1908), p. 75.

[22] Maitland, "The Reformation," in *Cambridge Modern History*, Vol. II, p. 571.

[23] 1999 White Paper.

"Elected" Hereditary peers

Prior to the House of Lords Act 1999, the bulk of the Lords Temporal[24] consisted of the holders of hereditary peerages. The 1999 Act removed the right of hereditary peers to sit and vote in the House of Lords.[25] However, to take account of the fact that no final decision on the composition of the Lords would be made or implemented before the hereditary peers were removed from the House, the original House of Lord Bill was amended (the "Weatherill amendment") to allow a small number of hereditary peers to sit temporarily in what has become known as the "transitional House". By section 2 of the 1999 Act no more than 90 people[26] can be excepted from the exclusion of hereditary peers provided for in section 1, and standing orders of the House can make provision for these exceptions. The standing orders provide several categories of excepted peers to be elected by their peers with the number to be elected in each category. In the case of each category only the hereditary peers from the party concerned can vote. The categories provided are: Labour peers (2), Conservative peers (42), Liberal Democrat (3), Cross-benchers (28).[27] In addition 15 peers are to be elected by the whole House from those ready to serve as, for example, Deputy Speaker. The standing orders make provision for the elections procedure and for by-elections.[28] It is envisaged that elected hereditary peers would be statutorily excluded from whatever is the final form of the composition of the House of Lords.[29] **9–009**

Life peers and life peeresses[30]

In order to increase the number of those who could be expected in the circumstances of the day to attend and take part in debates regularly—especially those who were not Conservatives—the Life Peerages Act 1958 gave Her Majesty power by letters patent to confer on any person (man or woman) a peerage for life, entitling him or her to rank as a baron and (unless disqualified by law) to receive writs of summons to attend the House of Lords and to sit and vote therein. No limit was set to the number of life peers, and it is for the Prime Minister of the day to decide on how many life peerage nominations are to be made to the Queen, and to who to recommend to receive them.[31] It is the decision **9–010**

[24] In January 1999 there were 750 hereditary peers, of whom nearly 200 never attended. In the 1997–98 session 20 per cent of hereditary peers attended more than two-thirds of the House's sessions, and 67 per cent less than one-third. The equivalent figures for life peers was 40 per cent and 34 per cent. See 1999 White Paper, p. 14.

[25] For a discussion of the reasons for the 1999 reforms see the White Paper, in particular Chap. 5. The Committee of Privileges in the House of Lords considered two motions challenging different aspects of the Bill: *Lord Gray's Motion* [2000] W.L.R. 664, H.L. Paper 108 (1998–99); *Lord Mayhew's Motion* [2000] 2 W.L.R. 719, H.L. Paper 106 (1998–99).

[26] Anyone excepted as holder of the office of Earl Marshall or as performing the office of Lord Great Chamberlain, does not count towards the 90 (s.2(2)), this means that in effect 92 of the hereditary peers remain in the House of Lords.

[27] That is those members of the House who are independent and do not take a party whip.

[28] Ballot papers had the names of all the candidates for each party or group. Peers were required to vote for exactly the number of vacancies in the relevant party or group marking against each name the figure 1, 2, 3, etc. to indicate preference. Every vote had equal value and the candidates with the largest number of votes were elected. Preferences were only taken into account if there was a tie.

[29] The "Wetherill 92" remain in the Lords by virtue of a S.O. and primary legislation would not in fact be needed to remove them.

[30] O. Hood Phillips, "Lords and Ladies for Life" (1958) 1 *Oxford Lawyer* 21.

[31] Peerages may be created for a variety of different reasons, *e.g.* "working peers", Queens's Birthday List, Dissolution Honours List. See R. Brazier *Constitutional Practice* (3rd ed. 1999) Chap. 11, pp. 238–240 for details of the different lists.

of the Prime Minister as to how many peers from each party are appointed at any time. In March 2001 there were 564 life peers who had been appointed under the 1958 Act.[32]

The Appointments Commission

9–011 This Commission was established in 2000[33] and is a non-statutory,[34] advisory, non-departmental public body composed of seven members; one member representing each of the three main political parties the remainder,[35] including the chairman, to be politically impartial. The main role of the Commission is to take over from the Prime Minister the function of nominating sufficient Cross bench peers at least to fill any vacancies among this group. It is required to publish criteria for suitability for nomination and to actively invite nominations by the general public and encourage nominations from professional associations, charities and other public bodies that it judges appropriate. The White Paper stated that the Prime Minister would not be entitled to refuse a nomination the Commission had approved, and could only influence nominations in exceptional circumstances, such as those endangering the security of the realm.[36] At least until there is further reform of the composition of the Lords, nominations for peerages from the political parties will continue to be made by the parties to the Prime Minister who will decide the number of vacancies each party may fill.

The Commission takes over the functions of the Political Honours Scrutiny Committee in vetting the suitability of all nominations to life peerages.[37] In particular it will scrutinise candidates on the grounds of propriety in relation to political donations.[38]

Lords of Appeal in Ordinary

9–012 In the middle of the nineteenth century attention was drawn to the death of qualified lawyers in the House of Lords, which in one of its capacities is the highest court of appeal. The only solution, if the appellate jurisdiction of the House of Lords was to be retained, was to make a limited number of judges Lords of Parliament for life, or at least during their tenure of office; and, as at common law a peer could not be created for a term of years, and as the House had ruled that a peer for life would not be allowed by parliamentary custom to take his seat,[39] two Lords of Appeal in Ordinary were introduced by the Appellate Jurisdiction Act 1876. Their maximum number has been gradually increased to 12.[40]

[32] The party affiliation of these peers in March 2001 was Conservative 175, Labour 194, Liberal Democrat 57, Cross bench 132. From the 1997 election to June 2000, Mr Blair created 202 peers, the highest annual rate of peerage creation since 1958.

[33] It creation was proposed in the 1999 White Paper, p. 33. It made its first nominations in June 2001.

[34] In announcing the establishment of the Appointments Commission the Government indicated that in the final reform of the Lords, it would become statutory.

[35] Appointed by the Prime Minister.

[36] 1999 White Paper, p. 33, para. 12.

[37] One of the last decisions by this committee was the approval in March 2000 of a peerage for the Conservative Michael Ashcroft, allegedly on the unprecedented condition that he returned to residence in the United Kingdom from Belise.

[38] As recommended in the Fifth Report of the Committee on Standards in Public Life: "*The Funding of Political Parties in the United Kingdom*" Cm. 4057.

[39] *Wensleydale Peerage Case* (1856), 5 H.L.C. 958. An account of this case is given in Pike, *op. cit.* pp. 372–384.

[40] Administration of Justice Act 1968, s.1(1)(a).

As members of the upper House, the "Law Lords" (including retired Lords of Appeal[41] and judges who are peers) take part in debates on legislation affecting the law and the courts. This is not just limited to assisting the House with technical points of law; on several occasions in recent years it has involved strong political argument in opposition to aspects of proposed legislative reform.[42] There has been a convention since the 1920s that when the Law Lords speak on controversial non-legal matters they do so in a personal capacity.[43]

Disqualification from membership of the House

In addition to hereditary peers disqualified under the 1999 Act, the following are disqualified from sitting and voting in the House of Lords: **9–013**

(i) a person convicted of treason is disqualified till the expiry of his sentence of imprisonment or the receipt of a royal pardon[44];

(ii) bankrupts: the disqualification ceases on the bankruptcy being discharged[45];

(iii) a member who has been expelled by sentence of the House acting in its judicial capacity (*i.e.* on impeachment), unless pardoned by the Crown.[46]

Aliens[47] and persons under 21 years of age (Standing Order No. 2, 1685) are also disqualified from membership of the House; since the 1999 Act these disqualifications will merely serve as limitations as to those who can be given life peerages.[48]

Standing Orders relating to attendance

The House has power to enforce attendance, although this has not been exercised since 1841; but it is not within the power of the House to exclude members who habitually do not attend.[49] At the time of the passing of the Life Peerages Act 1958, Standing Order No. 20 was amended so as to provide that "Lords are to attend the sittings of the House or, if they cannot do so, obtain leave **9–014**

[41] Lords of Appeal in Ordinary were at first Lords of Parliament during tenure of office only, but since the Appellate Jurisdiction Act 1887 they are entitled to sit in the House for life with the dignity of baron. They sit as Crossbench peers. The Royal Commission recommended, in line with its general recommendations on retirement age in the reformed second chamber, that they should retire at 75. (Royal Commission Recommendation 58).

[42] Examples include attacks on what became the Courts and Legal Services Act 1990, the Criminal Justice Act 1991, and the Crime (Sentences) Act 1997. For further details see J. A. G. Griffith, *The Politics of the Judiciary* (5th ed., 1997); *cf.* the 1999 White Paper which states that "by convention (the Law Lords) do not become involved in politically contentious issues." p. 39.

[43] Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800–1976* (1979), p. 308.

[44] Forfeiture Act 1870, as amended by the Criminal Law Act 1967.

[45] Insolvency Act 1986, s.427.

[46] The House of Lords as a legislative chamber cannot disqualify one of its members. On the application of the Mental Health Act 1983 to Peers, see *post*, para. 13–027.

[47] Act of Settlement 1701, s.3. This disqualification does not extend to Commonwealth citizens or citizens of the Republic of Ireland: British Nationality Act 1981; s.52(6) and Sched. 7.

[48] The Royal Commission, recommended that there should be no minimum age for the reformed chamber (Royal Commission Recommendation 73).

[49] Report by the Select Committee: *The Powers of the House in Relation to the Attendance of its Members* (1956) H.L. 7.

of absence." This reform was designed to discourage sporadic forays by "backwoodsmen" hereditary peers. Leave of absence could be given for a session, or the remainder of a session or the remainder of the Parliament. If a Lord having been granted leave of absence wishes to attend during the period, he is expected to give at least one month's notice, after which the leave comes to an end. Prior to the 1999 Act, 56 hereditary and seven life peers had leave of absence.[50] Leave of absence is unlikely to be significant in the future; in March 2001 three life peers were on leave of absence. The average attendance has increased in recent years and in 1999–2000 was about 350.[51]

In general, members of the House of Lords do not receive salaries,[52] but since 1957 have been entitled to claim certain allowances and expenses on a daily basis, plus travelling expenses.

Officers of the House

The Lord Chancellor[53]

9–015 The Speaker of the House of Lords is the Lord High Chancellor of Great Britain, who is Keeper of the Great Seal.[54] He may not leave the country without first notifying the Queen in order that Commissioners may be appointed to affix the Great Seal in his absence. He has been called the Keeper of the Queen's Conscience since the time of Elizabeth I. The Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions) Act 1974, however, for the avoidance of doubt, declares that the office of Lord Chancellor is tenable by an adherent to the Roman Catholic faith.[55]

The Lord Chancellor presides over the House from "the Woolsack," a seat traditionally stuffed with wool, the emblem of England's medieval prosperity. The Speaker of the Lords need not be a peer, the Woolsack being notionally outside the limits of the Chamber.[56] As the officer who issues the writs for parliamentary elections and summoning of peers he is present *ex officio*. Because the Lord Chancellor is appointed by the Crown and not elected, the House of Lords never delegated to him authority to keep order, to control the order of speeches or to rebuke recalcitrant members. These powers are exercised by the House itself, usually under guidance from the Leader of the House, and in debate peers address the House and not the occupant of the Woolsack. The Lord Chancellor in debate speaks as a politically minded peer, standing a few feet

[50] In addition 67 hereditary peers could not attend as they had not sought a Writ of Summons. The figures for leave of absence have been higher in the past.

[51] See N. D. J. Baldwin, "The Membership of the House" in *The House of Lords at work* (D. Shell and D. Beamish, eds, 1993) for a study of attendance in the 1988–9 session.

[52] For, *e.g.* the Leader of the Opposition in the Lords, the Lord Chairman of Committees, and the Lords of Appeal in Ordinary all receive salaries.

[53] See Lord Schuster, "The Office of the Lord Chancellor" (1949) 10 C.L.J. 175; R.F.V. Heuston, *Lives of the Lord Chancellors* Vols. I (1964) and II (1987); Lord McKay, "The Chancellor in the 1990s", (1991) 44 C.L.P. 241; Diana Woodhouse, "The Office of Lord Chancellor", [1998] P.L. 617.

[54] He receives a salary payable as Speaker of the House of Lords, and a judicial salary which is charged on the Consolidated Fund.

[55] If the office is held by a Roman Catholic the Privy Council may provide for his ecclesiastical functions and patronage of livings to be performed by the Prime Minister or any other Minister. He is the patron of some hundreds of benefices in the Church of England.

[56] Before the reign of George III the Speaker of the Lords was sometimes a commoner called Lord Keeper (of the Great Seal), *e.g.* Sir Nicolas Bacon (1558) and his son Sir Francis Bacon (1617).

away from the Woolsack.[57] On a division he votes first, and has no casting vote. When the House is in Committee the Lord Chancellor speaks from the Government front bench.

9–016 The Lord Chancellor is the senior legal and constitutional adviser of the government, a Minister of the Crown and almost invariably a member of the Cabinet. His role as a member of the executive is "more or less significant, depending on the Lord Chancellor himself, the Prime minister, and the government's legislative programme."[58] Today the appointment of Lord Chancellor has been described as "in effect that of a minister of Justice".[59] In his executive role the present Lord Chancellor, Lord Irving, not only has responsibility for the administration of justice, but also for the implementation of the Government's constitutional reform programme.

The Lord Chancellor plays the leading part in the appointment, or recommending the appointment of judges, magistrates and legally qualified chairmen of statutory tribunals in England. For reasons of history rather than principle, he has responsibility for the Land Registry, the Public Record Office and the Public Trust Office,[60] and has general responsibility for court records. He also certifies, in cases of doubt, who is the Leader of the Opposition in the House of Lords for the purpose of the latter's salary.[61]

9–017 The Lord Chancellor has the prime responsibility under the Law Commissions Act 1965[62] for keeping law reform and the revision of statute law under constant review, especially by appointing and considering the reports of the Law Commission. It was after the Courts Act 1971 came into force that the Lord Chancellor and his department assumed one of its major roles and responsibilities. All higher courts and the county courts in England and Wales are directly administered by the Lord Chancellor's Department through the Courts Service.[63] In 1991 responsibility for magistrates' courts was also transferred to him.[64] The Freedom of Information Act 2000[65] requires the Lord Chancellor to issue a code of practice setting out practices which he considers public authorities (and other authorities whose records are subject to the Public Records Act 1958) should follow in relation to the keeping, management and destruction of their records.

The Lord Chancellor is the head of the judiciary in England and Wales,[66] presiding over the House of Lords sitting as the final court of appeal (the Appellate Committee), and over the Judicial Committee of the Privy Council when he is present. It is the Lord Chancellor who determines the composition of the relevant Committee, but in practice this is delegated to the Senior Law Lord. He therefore performs legislative, executive and judicial functions of great

[57] He moves two paces to the left of the Woolsack, which brings him to the place assigned to him by Henry VIII.

[58] Diana Woodhouse, *op. cit.* at p. 618.

[59] http://www.open.gov.uk/lcd/lc-const.htm. However some of the functions and duties that would normally fall to a Minister of Justice are exercised by the Attorney General or the Home Secretary, see *post*/paras 18–010, 18–014.

[60] Which became an executive agency in 1994.

[61] Ministerial and other Salaries Act 1975.

[62] The Home Secretary is concerned with reform of the criminal law.

[63] It became a separate executive agency in 1995.

[64] See now the Police and Magistrates' Court Act 1994, which provides for these courts to be locally administered, although the Lord Chancellor is accountable to Parliament for their operation.

[65] *post* para. 26–029.

[66] In Northern Ireland, the Lord Chief Justice is President of the High Court and the Court of Appeal. The Head of the judiciary in Scotland is the Lord President (and Lord Justice General).

importance. Although the Lord Chancellor may not frequently sit in the Appellate Committee[67] the question arises whether it is appropriate for him to do so at all, particularly in the light of the role the Appellate Committee could have in hearing cases on the Human Rights Act 1998 where there is a government interest, or the Judicial Committee on devolution disputes.[68] His position has been made less tenable by the decision of the European Court of Human Rights in *McGonnell v. United Kingdom*[69] that it was a violation of Article 6 for someone to sit as a judge who had other legislative or executive roles.

9–018 The Lord Chancellor is also President of the Supreme Court, an *ex-officio* judge of the Court of Appeal and President of the Chancery Division of the High Court.[70] He does not in practice sit in these latter courts, the senior judge of the Chancery Division now being called Vice-Chancellor; but he is responsible for regulating their business through the Rule Committee. Unlike other senior judges, the Lord Chancellor does not have security of tenure, nor does he necessarily have previous judicial experience before his appointment.[71]

The *Chairman of Committees*, who holds office for the session, is appointed by the House from its members, and takes the Chair when the House is in Committee, and is Deputy Speaker of the House. He also superintends all matters relating to private Bills and certain subordinate legislation. In addition a number of Lords are appointed as Deputy Chairman of Committees.

The other officers of the House are permanent officers[72] who have no party affiliations and whose duty is to the House, not to the Government of the day. The terms of service of the permanent staff are similar to those of civil servants but they are servants of Parliament not of the Crown. From 1976 to 1993 the staff of the House of Lords were covered by "analogous treatment" rather than directly by the various pieces of employment statute law that had included an express application to the staff of the Commons. Since 1993 they have been included within the various statutory protections.[73]

9–019 The offices of *Gentlemen Usher of the Black Rod and Serjeant-at-Arms of the House of Lords* were amalgamated in 1971. The holder executes warrants of commitment or attachment under the rules of the House, carries the black wand surmounted by a golden lion which is used as the Mace of the Lords, and desires

[67] See Lord Hailsham *A Sparrow's Flight* (1990), where he contrasts his judicial role with that of his father who was Lord Chancellor earlier in the twentieth century. See A. Bradney, "The Judicial Role of the Lord Chancellor", Chap. 8 in *The House of Lords its Parliamentary and Judicial Roles* (B. Dickson and P. Carmichael, eds, 1999).

[68] See *post* para. 26–029.

[69] (2000) E.H.R.R. 289. The Royal Court of Guernsey in hearing a planning appeal was presided over by the Baliff of Guernsey, who was a professional judge, President of the legislature and head of Guernsey's administration. The Lord Chancellor has stated that he will use his discretion not to sit in devolution or human rights cases where he considered it would be "inappropriate or improper" to do so, H.L.Deb., Vol.593, Oct 20, 1998, *W.A.* 138; see the statement by the Lord Chancellor on the *McGonnell* case, H.L.Deb. Vol. 610 Col. 656, Thursday March 2, 2000. Dawn Oliver, "The Lord Chancellor, the Judicial Committee of the Privy Council and Devolution", [1999] P.L. 1.; Richard Corns, "*McGonnell v. United Kingdom*, the Lord Chancellor and the Law Lords", [2000] P.L. 166.

[70] Supreme Court Act 1981, s.1(2) and s.5(1)(a).

[71] It is also the case that before appointment the Lord Chancellor need not have been an active politician.

[72] For further details of the officers discussed below and other officers of the House see Erskine May *Parliamentary Practice* (22nd ed. 1997), Chap. 12.

[73] See G. Lock, "Statute law and case law applicable to Parliament", Chap. IV in *The Law and Parliament* (Oliver and Drewry, eds, 1998), p. 59.

the attendance of the Commons when necessary. He is responsible for accommodation, service and security in the House of Lords area of the Palace of Westminster.

The *Clerk of the Parliaments* is appointed by the Crown, and is removable only on an address from the House.[74] He is head of the Parliament Office, which consists of the permanent staff of the House. The minutes and journals of the House are prepared under his direction, he gives advise to Members of the House on order and procedure and pronounces the Royal Assent to Bills.

II. Modern Functions of the House of Lords[75]

9–020 Most legislatures contain—in addition to a representative assembly directly elected by popular vote—a Second Chamber, upper House or Senate, elected indirectly or by some different method, or nominated.

This in spite of the apparent dilemma propounded by the Abbe Sieyes, that if a Second Chamber dissents from the First, it is mischievous, while if it agrees it is superfluous. In a federation a Second Chamber is regarded as essential in order to preserve the rights of the individual states. In a unitary state a Second Chamber is generally thought desirable in order to admit into the legislature persons with special kinds of experience or representing ethnic, religious or other minorities, and also to provide opportunity for second thoughts about policy and legislation. As this country has no written constitution, if we had a unicameral legislature our governmental system and laws would be at the mercy of a majority of one in the House of Commons, and moreover the House of Commons could prolong its own life indefinitely.

The functions and powers of the House of Lords in recent years may be considered under nine headings.[76] Most of these functions would continue or be strengthened under proposals by the Royal Commission, and these will be considered below. Additional functions proposed by the Royal Commission will be examined later.

(1) *Pre-legislative scrutiny*

9–021 The scrutiny of draft Bills by parliamentary committees is a new function for both Houses of Parliament. Joint committees consisting of members of both Houses were appointed in 1998–99 to consider draft legislation on the Financial Services and Markets Bill, and the Local Government (Organisation and Standards) Bill. The Lords and the Commons each established a select committee to consider the draft Freedom of Information Bill 1999.

[74] Clerk of Parliaments Act 1824, s.2.

[75] B. Hadfield, "Whether or Whither the House of Lords" (1984) 35 N.I.L.Q. 313; Erskine May *Parliamentary Practice* (22nd ed. 1997), Chap. 21; "Organisation and conduct of business in the House of Lords," D. Shell, *The House of Lords* (1992); *The House of Lords at work* (D. Shell and D. Beamish, eds, 1993); *The House of Lords, its Parliamentary and Judicial Roles*, (B. Dickson and P. Carmichael, eds, 1999); Griffith and Ryle, *Parliament: Functions, Practice, and Procedure*, (2nd ed., 2001), edited by R. Blackburn and A. Keynon.

[76] Broadly derived from the Bryce Conference 1917–18, Cd. 9038 and the White Paper of 1968 on Reform of the House of Lords; Cmnd. 3799.

(2) *Revision of Public Bills sent from the Commons*

9–022 The House of Lords spends over half its time revising Bills from the Commons. The importance of this function arises from the lack of time available in the Commons to debate legislative proposals. In some cases where, for example, discussion has been curtailed by the guillotine, clauses may not have been discussed at all in the lower House. The lack of procedural restraints in the Lords, a more leisurely timetable than in the Commons, and a less partisan approach assist the Lords in its task of revising legislation. An average of two thousand amendments to Bills are moved each year, the majority of which are tabled by the government so it is not surprising that the majority of the Lord's amendments are accepted by the Commons.[77] However this global figure disguises the fact that on average half of the government's Bills are not amended at all.[78] The Lords has reformed its procedures to further enhance its ability properly to perform this task of revision.[79]

Not all amendments put forward in the Lords by a government are accepted, and defeats were inflicted on the Conservative Government during the period 1979–1997. In most cases the Government accepted the defeat or at least the principle involved despite its Commons majority.[80] In 1980, for example, the Duke of Norfolk led the successful opposition to a clause in the Education Bill which allowed local education authorities to impose transport charges for children travelling to school in rural areas. In 1984 the House forced the Government to compromise on its plans for transitional arrangements pending the abolition of the Greater London Council and the metropolitan councils contained in the Local Government (Interim Provisions) Bill. However the House of Lords was not in the end successful in changing the Local Government Finance Bill 1988, which replaced domestic rates by a "community charge" or "poll tax." The Bill had been challenged in the Commons with the government majority falling to 25, despite a majority of over 100 in the House. Despite continued opposition in the Lords, it was passed with the second highest turnout in the history of the Lords.[81] The House of Lords was unable to require the Commons and the Government to look again at a pieces of legislation that had been widely perceived to be unfair, and which in the event was repealed (on the initiative of a Conservative Government) in 1992.

9–023 Defeats averaged 12 per year between 1993 and 1996,[82] and have increased since the 1997 election of a Labour Government. The government was defeated 39 times in its first year of office,[83] 29 times in its second year and 27 times in its third year. In 1999–2000 during the first six months of the "transitional"

[77] See Michale Rush, "The House of Lords: The Political Context" Chap. 2 in *The House of Lords its Parliamentary and Judicial Roles* (B. Dickson and P. Carmichael, eds 1999), *op. cit.*

[78] See D. Shell, *op. cit.* p. 143–144., and Drewry and Brock, "Government Legislation: An Overview", Chap. 3 in *The House of Lords at work* (D. Shell and B. Beamish, eds 1993) *op. cit.*

[79] For example by the use of Public Bills Committees and the creation of a Delegated Powers and Deregulation Committee, *post.* para. 29–018.

[80] D. Shell, "The House of Lords and the Thatcher Government" (1985) 38. *Parliamentary Affairs* 16. See H.L.Deb., vol. 566, col. 90, October 1995, for details of government defeats in the House of Lords from 1970–1995.

[81] The Conservative majority was boosted by the attendance of over 100 peers who were irregular attenders, that is not members of the "working House."

[82] M. Rush, Chap. 1 in *The House of Lords its Parliamentary and Judicial Roles* (B. Dickson and P. Carmichael, eds 1999) *op. cit.* Between 1979 and 1990 of the 155 defeats suffered by the Government, 148 of them were on legislation; see D. Shell, *op. cit.*

[83] Five of which were on the European Parliamentary Elections Bill. This was a longer than average parliamentary year.

House, the Government suffered 15 defeats on legislation. The Government abandoned its attempt to include in the Local Government Bill 2000 the repeal of section 28 of the Local Government Act 1986 (the section which prevents local authorities from promoting homosexuality). In 1999 a wrecking amendment to the Criminal Justice (Mode of Trial) Bill 2000 caused the Government to withdraw the Bill before it had even been to the Commons.[84]

Difficulties arise when, from the point of view of the Government, revision becomes interference with the will of the people as expressed in the Commons. In the last resort the Lords cannot prevent the enactment of a Bill which it has insisted in amending contrary to the will of the Commons, but only delay its enactment.

(3) *The delaying of legislation*

9–024 Although of constitutional importance, the power possessed by the Lords to delay the enactment of legislation has been less significant than its role in revising legislation. The power of the House of Lords to delay legislation is regulated by constitutional convention and the Parliament Acts 1911 and 1949.[85] The Salisbury Convention was enunciated in 1945 when there was a Labour Government but few Labour peers in the House of Lords.[86] The convention as it developed provided that a government Bill which gives effect to a manifesto commitment would not be opposed at either the second or third reading; it may also apply to prevent "wrecking amendments", that is those which would destroy or alter a Bill beyond recognition.[87] This convention has reduced conflict between the two Houses during periods of Labour Government, and allowed a government without a majority in the Lords to secure its business. In the debate on the War Damage Bill 1965 the Marquess of Salisbury, a Conservative elder statesman, suggested that the House of Lords should only insist on its amendments: (i) if the question raises issues important enough to justify such drastic action; and (ii) if the issue is one which can be readily understood by the people and on which the Lords can expect their support, an issue on which the House of Lords would really be acting as the watchdog of the people.[88] In 1969 the Conservative Opposition moved a number of "wrecking" amendments in Committee to a Redistribution of Seats Bill, which they regarded as gerrymandering and therefore unconstitutional, and the amendments were passed by a majority greater than the number of hereditary peers present. The Lords then rejected a revised Bill, which the Government dropped.

9–025 Differences between the two Houses can normally be resolved without recourse to the Parliament Acts. When the House of Lords sends back a Bill with

[84] A Number 2 Bill was then introduced into the Commons, but this was also eventually withdrawn.

[85] For details see *ante* para. 8–03.

[86] It built on an earlier version of the mandate developed by the Third Marquess of Salisbury in the late 19th century.

[87] See Lord Carrington, *Reflect on Things Past: the Memoirs of Lord Carrington* (1988) p. 77–78, and the statement by Viscount Cranborne in H.L. Deb. Vol. 593, col. 1162 (15 Oct. 1998). The wrecking amendment to the Criminal Justice (Mode of Trial) Bill 1999 was said not to fall within the convention as the Bill had not been a manifesto commitment.

[88] H.L. Deb., Vol. 266, Cols. 784–785 (1965). Thus the Lords did not insist on their amendment to the War Damage Bill 1965, the purpose of which was to nullify the decision of the House of Lords as to war damage in *Burmah Oil Co v. Lord Advocate* [1965] A.C. 75.

amendments, a Committee of the House of Commons (if it disagrees with the amendments) sends the amended Bill back with a statement of its reasons for so doing, and a settlement is often reached by conferences between party leaders.

The Royal Commission suggested that although the Parliament Act procedure has been little used, it was probable that: "decisions—by both the Government and the House of Lords—about the handling of the most contentious Bills over the past 88 years have been influenced by the existence of the Parliament Acts. The threat of using, or the ability to override, the House of Lords' power of veto has influenced attitudes towards individual amendments to Bills as well as their overall principle."[89] Apart from the 1949 Act itself, only two other Acts have received the Royal Assent in accordance with the provisions of the Parliament Act 1911,[90] and three under the Parliament Act 1949: the War Crimes Act 1991 the European Elections Act 1999 and the Sexual Offences (Amendment) Act 2000.[91]

9–026 The War Crimes Act applies retrospectively to crimes committed during the second world war. As a Bill it was rejected by the Lords partly because of the difficulties of successful prosecutions after such a gap in time, and also because of its retrospective effect. In the Lords it was argued that the Salisbury Convention did not apply because the Bill was concerned with a moral issue, and had not been mentioned in the manifesto. Within the Lords views were divided as to which would do most damage to the future of the House: to reject it contrary to the will of the elected Commons or pass it contrary to the majority view in the Lords that it was a bad measure. The War Crimes Bill was passed by the Commons on a free vote, and the Opposition Labour Party supported the Government on the basis that the will of the Commons should prevail. This was the first Bill rejected by the Lords where the second and third readings in the Commons had had cross-party support, and the first use by a Conservative Government of the Parliament Act procedures.[92]

The European Elections Bill provided for a system of proportional representation for the election of United Kingdom members of the European Parliament. The system proposed gave voters a choice between parties but not between candidates; the Lords, contrary to the views of the Commons, insisted on its amendments which would have introduced a form of open list which would have allowed electors to vote for individual candidates, and the Bill was lost at the end of the 1997–98 session. The Bill was reintroduced in the new session, and voted down by the Lords at the second reading. It was then presented for the Royal Assent under the Parliament Acts, in time for its implementation for the 1999 European elections.

9–027 The threat of the use of its formal delaying power is potentially more important when a minority government is in office, since it is more difficult for such a government to claim an electoral mandate for its policies. During the minority Labour governments from February to October 1974 and from 1976–1979, the Lords did not use its delaying powers, but extensively amended legislation

[89] *op. cit.* Royal Commission para. 4.4.

[90] The Government of Ireland Act 1914 and the Welsh Church Act 1914, both of which were suspended by the outbreak of war. The former was eventually superseded by the Government of Ireland Act 1920; the latter became law with some modifications in 1919.

[91] Which lowered the age of consent for males in homosexual relationships from 18 to 16.

[92] G. Ganz, "The War Crimes Act 1991—Why No Constitutional Crisis?", (1992) 55 M.L.R. 87.

although usually giving way after the Bill was introduced in the Commons for a second time.[93]

The Royal Commission considered that it was important that the second chamber should be able to challenge a Government's legislative proposals and to force it to justify them to the Commons for a second time, taking account of cogent objections from the second chamber to the legislation. It concluded that other methods of resolving disputes between the two chambers of Parliament, such as the use of a referendum or a joint session of both chambers, offered no significant advantage over the continuation of the current position. It recommended that the suspensory veto arrangement which had emerged from the Parliament Acts 1911, 1949, should continue.[94]

(4) *The initiation of public legislation and private members' bills*

9–028 One role of the House of Lords has been described as the initiation of "non-controversial" legislation.[95] It is true that law reform measures and consolidation bills, bills giving effect to international agreements to which the United Kingdom has become a party and other issues which do not involve matters of party political controversy will start their legislative passage in the House of Lords. However for reasons of administrative convenience, namely to ensure that the volume of legislation passing through both Houses is evenly spread throughout the session, a variety of Bills, some of which are potentially controversial, are now introduced in the Lords. Recent examples include the Human Rights Act 1998, and the Youth and Criminal Evidence Act 1999.

There has been a fall in the number of Private Members' Bills introduced by peers, in part caused by pressure of time on the Lords. About two per session receive the Royal Assent; it is usual for Private Members' Bills originating from the Commons to be passed by the Lords.[96]

(5) *Scrutiny of private bills*[97]

(6) *Scrutiny of delegated legislation*[98]

9–029 In October 1994 the House of Lords affirmed its unfettered freedom to vote on any subordinate legislation submitted to it for its consideration.[99] In February 2000 the Greater London Authority (Election Expenses) Order came before the Lords and was rejected.[1] On the same day a motion for an Address for the annulment of the Greater London Authority (Election Rules) was agreed to, the first time the House had rejected a measure that required negative approval, that is a measure that would become law *unless* the Lords voted against it.

[93] See for, *e.g.* the Aircraft and Shipbuilding Industries Act 1977 and the Dock Work Regulation Act 1976.
[94] *op. cit.* Royal Commission paras. 4.3–4.12.
[95] See, *e.g.* Bryce Conference *op. cit.* and the 1968 White Paper, *op. cit.*
[96] See Natzler and Millar, "Private Members' Bills", Chap. 6 in *The House of Lords at work* (D. Shell and D. Beamish, eds 1993).
[97] *post*, para. 11–038.
[98] *post*, para. 29–018. The Royal Commission proposed a variety of reforms designed to improve the role played by the second chamber in the parliamentary scrutiny of Statutory Instruments.
[99] H.L. Deb. Vol. 558, col. 356, October 20, 1994.
[1] The first affirmative order to be rejected by the House since the Southern Rhodesia (United Nations Sanctions) Order 1968.

(7) *Scrutiny of the Executive*[2]

9–030 *Debates* in the Lords do not affect the fate of governments,[3] the practice being to "move for papers" and then to withdraw the motion rather than press it to a vote.

As in the Commons, *Question Time* is when the House is at its fullest and most lively. Questions to Ministers are of less significance than in the House of Commons. There are few ministers in the Upper House[4] and their Lordships do not have to concern themselves with the problems of constituents. The demand to ask questions has meant that it is rare for space to be available less than three or four weeks ahead, in consequence most questions are not current by the time they come up. Four oral questions (Starred Questions) only may be asked each day for half an hour at the start of business. Questions may be tabled up to a month ahead, and are allocated on a "first come first served" basis. To enable topical questions to be asked there are two topical starred questions each week on Wednesday and Thursday. The questions to be asked are determined by lot from questions tabled the previous Tuesday. Unstarred questions may also be put at the end of the day's business and may result in mini debates for one to one and a half hours. In addition over 4000 written questions were asked in 1999, compared to 2653 in 1997.

To enable Ministers to give important news first to Parliament, both Houses make provision for Ministers to make *Statements*. Most statements originate in the Commons, and by current practice it is for the Leader of the House to decide whether to have such a statement repeated in the Lords. After a statement 20 minutes are available for questioning the Minister.

European Union Matters The chief mechanism by which Parliament can scrutinise and control developments in the European Union is by bringing Ministers to account for decisions to which they contribute in the Council of Ministers. In the House of Lords this is the task of the *European Union Committee*.[5] The Royal Commission praised the work of this Committee and recommended that additional staff and resources should be made available to it.[6] It also recommended that a regular time should be set aside for dealing with Questions for Oral Answer on E.U. matters. (Recommendation 51).

(8) *Full and free discussion of large and important questions*

9–031 The House of Lords, by virtue of the wide and varied background of its members, particularly since the introduction of life peerages, and its freedom from the constraints of party discipline provides a place where controversial issues of any kind may be debated. Most Wednesdays are for general debates, with one Wednesday a month being set aside for two short debates, the topics being chosen by ballot from those put forward by backbench peers. About one-

[2] See also para. 29–018 on the House of Lords Delegated Powers and Deregulation Committee which plays a role in scrutinising executive powers.

[3] The House of Lords defeated the Government on a motion of confidence in January 1968 concerning the withdrawal of forces east of Suez and defence cuts. This had no practical effect.

[4] The Royal Commission suggested that a new mechanism should be developed which would require Commons Ministers to make statements to and deal with questions from members of the second chamber. (Recommendation 45). One possibility suggested was a Committee of the whole of the second chamber meeting off the floor of the chamber. (Royal Commission para. 8.8).

[5] The work of this committee is discussed in *ante* para. 6–032.

[6] Royal Commission Recommendations 46, 47. In Chap. 8 it made a variety of recommendations designed to improve scrutiny of E.U. business and for forging links between M.E.P.s and Westminster.

fifth of the time of the House is devoted to general debate. Ad hoc committees of the House, such as those which considered a proposed Bill of Rights,[7] Murder and Life Imprisonment,[8] Medical Ethics, and the Public Service,[9] contribute to this aspect of the work of the House of Lords. In March 2001 the House agreed to establish a Stem Cell Research Committee to consider and report on the issues connected with human cloning and stem cell research. Public opinion can be informed and educated by debate and the taking of evidence in these committees. Government can assess by public reaction the desirability of legislation on controversial matters where considerations of policy and principle are likely to take second place to a fear of offending vocal pressure groups. There was unanimous support from the Royal Commission for a continuation of the role of the reformed second chamber in providing a distinctive forum for national debate.

(9) *Select Committees*[10]

9–032 The House of Lords has the power to appoint select committees to examine any matter which in the opinion of the House, requires investigation. Until the 1970s such committees were concerned with the running of the House, but from that time the House began to use select committees to scrutinise public policy. In addition to ad hoc select committees (above) and the committees on E.U. law and on Delegated Powers and Deregulation, one of the most important committee is that on Science and Technology, first appointed in 1979 following the disbandment of the Science and Technology Committee in the Commons. Recent inquiries have looked at the management of nuclear waste,[11] and the scientific and medical evidence concerning cannabis.[12] This committee's reports are highly regarded at home and abroad, due "to a considerable extent to the expertise available to the House of Lords when Committee members are selected".[13] On the recommendation of the House of Lords Liason Committee[14] two additional committees were established in 2001: a Constitutional Committee to examine the constitutional implications of all public bills that come before the House and to keep under review the operation of the constitution, and an Economic Committee, to consider economic affairs.

9–033 The Lords have several other functions that are not of political importance. They are hereditary advisers of the Crown and have in theory the right of individual audience with the Sovereign; but this right is not now exercised except by Ministers who are Privy Councillors. Being part of the High Court of Parliament, the House of Lords retains certain judicial functions: it is the court of final appeal, it has the privilege of determining who is entitled to sit and vote in the House, it has the power to enforce its privileges and to punish for contempt, and it would try impeachments if they were still brought.

[7] (1978) H.L. 176.
[8] (1988–9) H.L. 78.
[9] (1997–8) H.L. 55.
[10] Cliff Grantham, Chap. 10 in *The House of Lords at work* (D. Shell and D. Beamish, eds. 1993) *op. cit.*
[11] Third Report, H.L. 41 (1998–99).
[12] Ninth Report, H.L. 151 (1997–98).
[13] Royal Commission, para. 8.29.
[14] H.L. 81 (1999–2000).

III. Reform of the House of Lords[15]

Historical Background

9–034 Reform of the House of Lords was considered by several committees in the twentieth century. A Select Committee chaired by Lord Rosebery reported in 1908 but was not acted upon. The need to reform the composition of the House of Lords was recognised in the preamble to the Parliament Act 1911 which recited that Parliament intended eventually "to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis." This was followed by the Bryce Report in 1918. Cabinet Committee reports in 1922 and 1927 and a variety of Private Members' Bills over the next 10 years. During the passage of what became the Parliament Act 1949, discussions were held between the parties on reform of the both the powers and composition of the Lords, but the talks broke down on the period of delay the Lords could impose. Although a variety of reforms were made in the 1950s and 1960s it was not until 1966, when the Labour Party in its manifesto pledged to reform the House of Lords, that further moves were made. In 1967–8 inter-party talks were held on the reform of both the powers and composition of the House of Lords, and although they were broken off by the government[16] a White Paper based on the earlier discussions was issued.[17] The Parliament (No. 2) Bill was introduced by the Labour Government in 1968 with the substantial agreement of the leaders of each side in both Houses. However, an alliance of backbenchers from the two main parties ensured its defeat. In the 1970s the Labour Party supported the abolition of the House of Lords. Although in 1978 a Conservative committee under the chairmanship of Lord Home made proposals to reform the Lords, further reform of the Lords was not pursued in the subsequent years of Conservative government. Since 1992 the Labour Party policy has been to reform rather than abolish the Lords, and its 1997 Manifesto contained a pledge to do so in two stages.

The House of Lords Act 1999 and the Royal Commission on the Reform of the House of Lords

9–035 In January 1999 the Government published a White Paper, *Modernising Parliament: Reforming the House of Lords*[18] which set out the Government's step by step approach to reform of the Lords. The first stage was the enactment of the House of Lords Act 1999, which provided for the removal of the hereditary peers, and the establishment of a "transitional House". To facilitate stage two, the Government established a Royal Commission to make recommendations on the role and functions of a second chamber, and on the method or methods of

[15] Constitution Unit: *The Reform of the House of Lords*, (1996); *The Checks and Balances in Single Chamber Parliaments: A Comparative Study*, (1998); *The Rebalancing the Lords* (1998). Bogdanor *Power and the People-A Guide to Constitutional Reform* (1997); Richard and Welfare, *Unfinished Business, Reforming the Lords* (1999); *Constitutional Reform-The Labour Government's Constitutional Reform Agenda* (Blackburn and Plant, eds, 1999). Bogdonor, "Reform of the House of Lords: A Sceptical View," (1999) 70 *Political Quarterly*, pp. 382–374; McLean, "Mr Asquith's Unfinished Business," (1999) 70 *Political Quarterly*, pp. 382–389; Shell, "The Future of the Second Chamber", (1999) 70 *Political Quarterly*, pp. 390–395.

[16] After the Lords at the suggestion of the Conservative Opposition leadership, rejected the Southern Rhodesia (United Nations Sanctions) Order 1968.

[17] Cmnd. 3799, (1968).

[18] Cm. 4183, (1999).

composition required to enable it to fulfil its role and functions. The report of this Commission was to be considered by a joint committee of both Houses, but no such committee was set up, and it appears that the establishment of such a committee is unlikely. It remains to be seen how the Government plans to give effect to the consultation promised in the 2001 Queen's Speech on the legislative implementation of the second stage of reform.

The Royal Commission recommendations[19]

The term of reference for the Royal Commission required it to have regard to the position of the Commons as the pre-eminent chamber of Parliament, and to take account of devolution, the Human Rights Act and relations with the European Union. **9–036**

The roles and functions of the reformed second chamber

The Royal Commission stated that a new second chamber should have four main roles: **9–037**

(i) It should bring a range of different perspectives to bear on the development of public policy.

(ii) It should be broadly representative of British society with a membership that reflected the various regions, vocations, cultures, ethnic groups, professions and religions found in Britain.

(iii) It should be one of the main "checks and balances" within the constitution, complementary to the House of Commons in identifying points of concern and able to require the Government and the House of Commons to "think again".

(iv) It should provide a voice for the nations and regions of the United Kingdom at the centre of public affairs.

The Royal Commission did not consider that would be any need for a radical change in the balance of powers between the two Houses of Parliament.[20] In addition to the functions considered above (in respect of several of which Royal Commission recommendations for improvements were noted) the Royal Commission suggested that the new second chamber should have an enhanced role in protecting the constitution. This would not require the second chamber to have additional powers, rather two new committees would be established: a Constitutional Committee (with a number of sub-committees) to scrutinise the constitutional implications of all legislation and to keep the operation of the constitution under review, and a Human Rights Committee to scrutinise all Bills and Statutory Instruments for human rights implications.[21] A second new role, reflecting a change in its composition, would be to give a voice at the centre of national affairs to the nations and regions of the United Kingdom. Finally it proposed the establishment of a Treaty Select Committee to scrutinise the 25 to 40 treaties laid before Parliament each year under the Ponsonby Rule. This Committee would

[19] Shell, "Reforming the House of Lords: the Report and overseas comparisons", [2000] P.L. 193; Meg Russell, *Reforming the House of Lords: Lessons from Overseas*, (2000).

[20] See *ante*, para. 8–039.

[21] The Constitution Committee was established in February 2001, and a Joint Committee on Human Rights in January 2001.

establish whether a Treaty raised issues which merited debate or reconsideration before ratification.[22] All these proposals could be implemented without legislation or other reforms of the House. These proposals have implications for the size of a reformed second chamber, since they would increase its workload.

Composition of the "new second chamber"

9–038 The Royal Commission considered that before it could make recommendations on composition, it needed to decide what characteristics the second chamber's members, individually and collectively, should possess. It concluded that it required three characteristics:

(i) It should be authoritative: able to scrutinise the executive, hold the Government to account and shape legislation, but not be in a position to challenge the ultimate authority which the House of Commons derives by virtue of being directly elected. The view of the Royal Commission was that it was an error to suppose that a second chamber's authority could only stem from democratic election, and suggested that authority could come from the characteristics of the membership of the reformed second chamber.

(ii) It should be sufficiently confident to use its powers in the most effective and appropriate manner: it was the view of the Royal Commission that throughout the twentieth century the House of Lords had been inhibited by both its lack of authority and lack of confidence.

(iii) It should be broadly representative of British society as a whole, and as such could provide an alternative source of authority for the second chamber without threatening the democratic authority of the House of Commons.

The Royal Commission considered and rejected both a wholly (or largely) directly elected second chamber, and a chamber indirectly elected from the devolved institutions, local government electoral colleges or British Members of the European Parliament. It also rejected a chamber randomly selected or co-opted. Instead it recommended a chamber of around 550[23] consisting (in addition to the Bishops and Law Lords) of appointed and regional members all serving terms of three electoral cycles or 15 years.[24] It proposed that a fifth of the members should be cross-benchers.[25] It did not recommend the appropriate title for members of the new chamber, nor for the chamber itself, suggesting that, "the situation should be left to evolve".[26]

[22] Royal Commission Recommendation 56. The Liason Committee has recommended that the House should wait and see how new arrangements in the Commons for the scrutiny of treaties develops. H.L. 30 (2000–01).

[23] The actual size and political balance of the chamber would be determined by the Appointments Commission *ante* para. 9–011, thus removing a significant power from the Prime Minister of the day.

[24] By limiting the length of time any member could sit in the second chamber, the Royal Commission sought to avoid the chamber becoming elderly, and avoid awkward imbalances between the parties which could be difficult for the Appointments Commission to correct. Former members of the second chamber would not be entitled to stand for election to the House of Commons until 10 years after the end of their term of membership.

[25] This was thought be to enough to ensure that no single political party could achieve a working majority.

[26] Royal Commission, para. 18.11.

Appointed members would make up the bulk of the new chamber. These members would no longer be appointed by the Monarch on the recommendation of the Prime Minister, since that system left "too much power in the hands of the Prime Minister of the day".[27] Members would be appointed directly by a statutory, independent *Appointments Commission*[28] which would have a general duty to appoint members and be empowered to appoint individual members on its own authority. In consequence all members of the second chamber, whether appointed, regional, Lords of Appeal in Ordinary or representative of the Church of England would be appointed by this body.[29] The remit of the Appointments Commission would be to create a second chamber which was broadly representative of British society on a range of stated dimensions and which possessed the characteristics outlined above. It would be for this Commission to exercise its own judgment in selecting appropriate numbers of appointees affiliated to political parties. Such individuals normally, but not necessarily, would be nominated by the parties, but the Commission would look for characteristics which justify their appointment on wider grounds.[30] The Commission would be required to achieve and maintain on overall balance between those members affiliated to political parties (both regional and directly appointed members) which matched the distribution of votes between the parties at the most recent general election.[31] **9–039**

The Commission would be expected to publish, and regularly update, a statement indicating the broad characteristics it would expect of members of the new second chamber, and actively seek nominations.[32] It would vet nominations for propriety and high-level security checks should be undertaken on all short-listed candidates.[33] It would be required to make an annual report to Parliament which would be the main means whereby it would be held to account.[34]

Regional members should make up a significant minority of the new chamber,[35] chosen on a basis which reflected the balance of political opinion within each of the nations and regions of the United Kingdom. This is the only section of the reformed House which the Royal Commission recommended should be elected, but it was unable to agree on the method of selection, and put forward three possible models, all based on the large constituencies used in connection with the European elections.[36] **9–040**

Representation of religious faiths. The Royal Commission was in favour of religious faiths being represented in the chamber, but recommended that the concept of religious representation should be broadened to embrace Christian denominations other than the Church of England, and should include other faith communities.[37] It proposed that the Appointments Commission should ensure

[27] Royal Commission *op. cit.* para. 32.
[28] See *ante* para. 9–011 for the non-statutory Appointments Commission established in 2000.
[29] However it would have no discretion over the appointment of the latter three categories of members, and could not substitute its own judgment (Royal Commission Recommendation 82).
[30] *op. cit.* Royal Commission Recommendation 98.
[31] *op. cit.* Royal Commission Recommendation 70.
[32] *op. cit.* Royal Commission Recommendation 94–97.
[33] *op. cit.* Royal Commission Recommendation 99.
[34] *op. cit.* Royal Commission paras. 13.21–13.23.
[35] The Royal Commission was split on the numbers, the majority favouring a total of 87, but other possible figures were 65 and 195.
[36] *op. cit.* Royal Commission pp. 121–129.
[37] *op. cit.* Royal Commission Recommendation 108.

that at least five members of the second chamber should be broadly representative of the different non-Christian faith communities,[38] and that the total representation of the various Christian denominations throughout the United Kingdom should be 26. In consequence it recommended that the Church of England should have 16 representatives, the other 10 being allocated by the Appointments Committee to members of other Christian denominations in England, Scotland, Wales and Northern Ireland.[39]

9–041 *The Lords of Appeal in Ordinary* would continue to be members of the reformed second chamber, but would as with all members of the reformed second chamber be required to retire at 75. The Royal Commission noted that the Devolution Acts and the Human Rights Act increased the risk of legislation being justiciable in the future. To ensure that those exercising judicial functions could be seen to be impartial it recommended that the Lords of Appeal should publish a statement of principles which they intend to observe when debating and voting in the second chamber.[40]

9–042 *The existing life peers* provided a problem for the Royal Commission. By a majority it recommended that legislation should be enacted to allow those life peers who had been appointed before the publication of the Report and who so wished,[41] to be deemed to have been appointed to the reformed second chamber for life. Those appointed after the publication of the Report and before the second stage of reform, would be deemed to have been appointed for 15 years.

Resources

9–043 To ensure that the new second chamber could fulfil the functions envisaged for it, the Royal Commission recognised that the financial arrangements which applied to members had to be economically viable for those outside the south east of England and without a separate source of income.[42] It recommended that the system should continue whereby financial support should be linked to attendance in Parliament, but did not make any specific recommendation, suggesting that it should be for the Senior Salaries Review Body to consider the appropriate payment.[43] It also recommended additional office and secretarial resources should be made available to the second chamber corporately, rather than to individual members.[44]

The overall result of the reforms proposed by the Royal Commission would, in its view, result in a second chamber that was both more democratic and more representative that the present House of Lords. More democratic because the membership as a whole would reflect the balance of political opinion within the country; more representative because it would contain members from all parts of

[38] *op. cit.* Royal Commission Recommendation 109.

[39] It left it to the Church of England to determine how its reduced number of representatives should be identified.

[40] *op. cit.* Royal Commission Recommendation 59.

[41] Those who did not so wish should be allowed to retire form the second chamber (Royal Commission Recommendation 104). The Royal Commission suggested that within 20 years of the commencement of the legislation necessary to implement the Report, only a handful of members would remain in the second chamber by virtue of a life peerage.

[42] To take account of this, it recommended that the rules on the payment of expenses in respect of travel and overnight costs should be reconsidered to ensure that it was economically viable for those who live outside London to regularly attend Parliament (Royal Commission Recommendation 126).

[43] *op. cit.* Royal Commission Recommendations 119–123. It also recommended that Chairmen of significant committees should receive a salary in respect of their additional duties.

[44] *op. cit.* Royal Commission Recommendation 125.

the country and from all walks of life, broadly equal numbers of men and women and representatives of all the country's main ethnic and religious communities.[45]

IV. The House of Lords as the Final Court of Appeal[46]

Before the Appellate Jurisdiction Act 1876[47]

9–044 The early doctrine was that ultimate jurisdiction in the administration of justice lay with "the King in his Council in Parliament," and in the fifteenth century it was held[48] that this jurisdiction in error belonged not to Parliament as a whole, but to the House of Lords which had been part of the Council. Error from the equitable jurisdiction of the Court of Chancery was not established until the case of *Shirley v. Fagg*.[49]

Since the dispute with the Commons over the case of *Skinner v. East India Company*[50] the Lords have not attempted to exercise an original jurisdiction in civil cases. The only criminal jurisdiction exercised at first instance by the House of Lords was the trial of peers for treason and felony, and trial on impeachment.[51]

The House of Lords assumed appellate jurisdiction in civil cases from Scottish courts (the Court of Session) soon after the Union, although this jurisdiction was not expressly conferred by the Union with Scotland Act 1707. The earliest case to attract public attention was *Greenshields v. Magistrates of Edinburgh* in 1711.[52]

The Union with Ireland Act 1800 conferred on the House of Lords appellate jurisdiction in civil cases from Irish courts.

Lay peers in the House

9–045 Few of the Lords had adequate legal qualifications, and the House discouraged reports of its proceedings,[53] so that the House of Lords was scarcely regarded as a regular and ordinary court of justice before the end of the eighteenth century.[54] The last reported occasion on which lay peers attempted to take part in the strictly judicial proceedings of the House was *O'Connell v. The Queen*[55] on a writ of

[45] *op. cit.* Royal Commission para. 11.41.
[46] Le Sueur and Cornes, "What Do the Top courts Do?", (2000) 53 Current Legal Problems p. 53.
[47] Holdsworth, *History of English Law*, I. Bk. i. Chap. 4.
[48] (1485) Y.B. 1 Hen. VII. P. pl. 5.
[49] (1675) 6 St.Tr. 1122.
[50] (1666) St.Tr. 710.
[51] *ante*, Chap. 7.
[52] Robertson 12; Dicey and Rait, *Thoughts on the Union Between England and Scotland*, (1920), pp. 194–195; A.D. Gibb, *Law from Over the Border*, pp. 9–11; A.S. Turberville, *The House of Lords in the Eighteenth Century*, pp. 94–95, 139–141.
[53] Regular reports of House of Lords cases began with the authorised reports of Dow (1812–1818).
[54] Pollock's Preface to Volume 1 of the Revised Reports; Turberville, *op. cit.*; "The House of Lords as a Court of Law, 1784–1837" [1946] 52 L.Q.R. 189.
[55] (1844) 11 Cl. & Fin. 155, 421–426. The legally qualified peers present were Lord Lyndhurst L.C., and Lords Brougham, Campbell, Cottenham and Denman. The lay peers present included Lord Wharncliffe, the Earl of Stradbroke, the Marquess of Clanricarde and the Earl of Verulam. Clarke and Finelly cite previous examples of lay peers taking part in judicial decisions in 1695, 1697, 1703 (*Ashby v. White*), 1769, 1773, 1775 and 1783.

error from the Court of Queen's Bench in Ireland, in which the conviction of Daniel O'Connell for criminal conspiracy was quashed. This case may be said to have established the convention or practice that lay members do not take part when the House of Lords is sitting as a court of appeal. The Lord Chancellor, Lord Lyndhurst, ignored the votes of the lay peers. A discussion followed, during which the legally qualified peers emphasised the argument that a peer who had not heard the whole proceedings should not vote. The lay peers eventually withdrew on the ground that only those qualified should vote. It appears, however, that Earl Spencer, a layman, sat in about 1860[56]; and that the second Lord Denman (son of the Chief Justice and a barrister of fifty years' standing) sat throughout, spoke and voted in *Bradlaugh v. Clarke*,[57] his vote (which was ignored) not affecting the result.[58]

Three is the quorum under Standing Orders of the House of Lords in both its legislative and judicial capacities, and it appears that the leading case of *Rylands v. Fletcher*[59] was heard by Lord Cairns L.C. with one other legally qualified peer (Lord Colonsay, former President of the Court of Session) and a lay peer—probably a Lord Spiritual—within call to form a quorum.[60]

-046 There was wide criticism in the last century both of the House of Lords as a court of appeal and of the system of two-tier appeals. The attempt by virtue of the prerogative to create Baron Parke[61] a life peer with the right to sit and vote in the House of Lords had failed.[62] Lord Selborne, Liberal Chancellor, introduced the Supreme Court of Judicature Bill 1873, which in its original form would have given the final appeal in English cases to a new Court of Appeal while retaining the Lords' jurisdiction in Scottish and Irish cases. The opposition to the abolition of the House of Lords' jurisdiction was largely due to the fear that this would undermine the remaining powers of the hereditary House. Also, the Scots and Irish would not want their appeals to go to an English Court of Appeal. This Act, as amended to retain the Lords' jurisdiction, came into force at the beginning of 1876.[63]

From the Appellate Jurisdiction Act 1876[64]

9–047 Meanwhile a Bill introduced by the Conservative Chancellor, Lord Cairns, met most of the criticisms that had been made of the House of Lords as an appellate court. This became the Appellate Jurisdiction Act 1876. It provided for appeals in civil cases to be heard by the House of Lords from the new English Court of

[56] See *Re Lord Kinross* [1905] A.C. 468, 476.

[57] (1883) 8 App.Cas. 354.

[58] Lord du Parcq, "The Final Court of Appeal" (1949) C.L.P. 4–6; *cf.* R.E. Megarry in (1949) 65 L.Q.R. 22–24. Lord Denman is not mentioned in the law report: Megarry, *Miscellany-at-law* (1955), pp. 11–13. Lord Denman also attempted to vote in *Bain v. Fothergill* (1874) L.R. 7 H.L. 158, but his vote was not counted. It has been questioned whether lay peers sat in *Hutton v. Upfill* (1850) 2 H.L.C. 674, 647n., and *Hutton v. Bright* (1852) 3 H.L.C. 341.

[59] (1868) L.R. 3 H.L. 330.

[60] R. F. V. Heuston, "Who was the Third Lord in *Rylands v. Fletcher*?" (1970) 86 L.Q.R. 160.

[61] He was not a peer, but a baron (*i.e.* judge) of the Court of Exchequer.

[62] *Wensleydale Peerage Case* (1856) H.L.C. 958.

[63] Supreme Court of Judicature Acts 1873–1875.

[64] See L. Blom-Cooper Q.C. and G. Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (1972), and Chap. 6 "The Appellate Function" in *The House of Lords, its Parliamentary and Judicial Roles* (B. Dickson and P. Carmichael eds 1999). Robert Stevens, *Law and Politics: The House of Lords as Judicial Body 1800–1976* (1979); Alan Paterson, *The Law Lords* (1982); Dickson, Chap. 7 "The Lords of Appeal and their Work 1967–1996", in *The House of Lords its Parliamentary and Judicial Roles* (B. Dickson and P. Carmichael, eds 1999) *op. cit.*

Appeal, in addition to appeals from the courts of Scotland and Ireland (section 3).

The Act of 1876 created salaried Lords of Appeal in Ordinary, who must either have held high judicial office for at least two years or be practising barristers of not less than 15 years' standing (section 6). Their number, at first two, has been gradually increased by subsequent statutes. It provided that there should be present at the hearing of an appeal at least three of the following Lords of Appeal: (1) the Lord Chancellor, (2) the Lords of Appeal in Ordinary, and (3) such peers of Parliament as hold or have held "high judicial office" as therein defined. The last group includes ex-Lord Chancellors (section 5). In important cases the court usually consists of five members.

The Act further provided that the House of Lords may hear appeals during any prorogation of Parliament (section 8), and that arrangements may be made for the hearing of appeals by the Lords of Appeal in the name of the House of Lords during a dissolution of Parliament (section 9). The origin of the court is preserved, however, in the form to be used on an appeal, viz. a petition to the House of Lords praying that the matter may be reviewed before Her Majesty the Queen in her Court in Parliament (section 4). The Lords give their opinions in the form of speeches, and an appeal is won or lost on a vote in the House.

9–049 One effect of the Appellate Jurisdiction Act 1876 was to increase the importance of the House of Lords as a court of English common law. Previously it had been more important for Scottish appeals, while English appeals had usually been cases in equity.[65]

Appeals to the House of Lords in criminal cases, as distinct from jurisdiction on writ of error, were not introduced until the Criminal Appeal Act 1907, which created the Court of Criminal Appeal. Criminal appeals since 1966 lie from the criminal division of the Court of Appeal.

Appeals from Irish courts since 1922 are confined to Northern Ireland, but include criminal cases.

Lord Cairns had suggested a Judicial Committee of the House of Lords, sitting throughout the year in a separate courtroom. This did not occur until a change of practice at the end of the last war. The court used to sit in the House of Lords debating chamber when the House was not sitting for legislative business.[66] In 1948, the noise of the re-building consequent to the damage suffered to the Palace of Westminster during the war interrupted proceedings, and it was decided to move the judicial sittings from the temporary Chamber of the House, to a quieter committee room upstairs. For this purpose the Law Lords were constituted into an Appellate Committee consisting usually of five Law Lords.[67] This arrangement was so successful that it became permanent in 1951, and in 1960 authority was given for the creation of a second Appellate Committee to sit

[65] Robert Stevens, "The Final Appeal: Reform of the House of Lords and Privy Council, 1867–1876" (1964) 80 L.Q.R. 343.

[66] The House used to start non-judicial business at a quarter to four, when judicial business had concluded.

[67] Petitions for leave to appeal are referred to an Appeal Committee, consisting of three Law Lords: Practice Direction House of Lords: Petitions: Leave to Appeal) [1979] 1 W.L.R. 497. Since 1988 their decision is taken on the basis of written submissions only. The work of this Committee is substantial, with a steady increase in the last thirty years in the number of petitions and days on which the Committee sits; see B. Dickson Chap. 7 in *The House of Lords its Parliament and Judicial Roles* (B. Dickson and P. Carmichael, eds 1999) *op. cit.*

concurrently if necessary.[68] Standing Orders allow for the House to be recalled specifically for judicial business, and today Law Lords sit throughout the law terms.

9–050 The Lord Chancellor presides if present. However, the creation of the Judicial Committee enabled the Lords to start the transaction of public earlier in the afternoon, and this, in addition to the more recent increased work load of the Lord Chancellor's Department, has mean that the Lord Chancellor infrequently sits judicially. In his absence hearings are presided over, since 1984 by one of two Law Lords nominated by him for that purpose.

The decision of an Appellate Committee is reported to the House in the Chamber (usually on a Thursday afternoon) a reminder that it is the Court of Parliament that hears and determines appeals. However it has been the practice since 1962 that the opinions of the Lords of Appeal are no longer, as a general rule, delivered orally in the House. Their Lordships confine themselves to stating that, for the reasons given in their opinions, they would allow or dismiss the appeal. The question is then put from the Woolsack by the presiding Law Lord and the answer made.[69] The opinions of the Committee are of no binding force until agreed by the House. Copies of the opinions are available for counsel an hour beforehand. This practice is similar to that employed by the Judicial Committee of the Privy Council and saves time for both judges and counsel.

9–051 In cases of difficulty their Lordships may summon the judges of the Queen's Bench Division[70] for advice, but this has only been done four times since the creation of Lords of Appeal in Ordinary in 1876. The advice of the judges was usually accepted as in *Mersey Docks and Harbour Board v. Gibbs*,[71] but not always, as in *Allen v. Flood*,[72] this being the last English case in which the judges were summoned. The last occasion in a Scottish appeal was *Free Church of Scotland (General Assembly) v. Lord Overtoun*.[73]

The dual role of the Law Lords as members of the legislature and judiciary may require reconsideration in the light of the Human Rights Act, and in particular the decision of the European Court of Human Rights in *McGonnell v. United Kingdom*.[74] The prior involvement of any Law Lord in debates on Bills with human rights implications, or with potential application to Scotland, could give rise to alleged breaches of Art. 6,[75] should that judge sit in any subsequent case concerned with that legislation.[76]

[68] The tradition of hearing appeals in the Chamber of the House has not totally disappeared. At the end of the summer recess, before the resumption of the parliamentary session, for a period of one week the Law Lords hear appeals in the Chamber of the House.

[69] The Law Lords have allowed the broadcasting of the proceedings whereby they report their opinions to the House. In two of the recent Pinochet case their Lordships, for the first time, gave oral summaries of their written speeches: Rozenberg, "The *Pinochet* case and cameras in court", [1999] P.L. 178–184.

[70] The House had no authority to summon Chancery judges unless they were peers.

[71] (1866) L.R. 1 H.L. 93.

[72] [1898] A.C. 1. See further, R.F.V. Heuston, "Judicial Prospography," (1986) 102 L.Q.R. 90.

[73] [1904] A.C. 515.

[74] (2000) E.H.R.R. 289.

[75] Which provided for "a fair and public hearing . . . by an independent and impartial tribunal. . . ."

[76] In *Hoekstra v. H.M. Advocate*, [2000] A.C. 216, 2001 S.L.T. 28, an Appeal Court decision was quashed because one of the judges had made adverse comments about the E.C.H.R. in a Scottish newspaper.

The Appellate Committee and Judicial Committee of the House of Lords as Constitutional Courts?[77]

9–052 The Appellate Committee and Judicial Committee are generalist courts, which may as part of their case load deal with "constitutional" issues.[78] It could be argued that the United Kingdom's membership of the European Communities has given the House of Lords a role as a constitutional court, but it is one it shares with other U.K. courts. However, cases such as *R. v. Secretary of State for Transport, ex p. Factortame (No. 2)*[79] and *R. v. Secretary of State for Employment, ex p. the Equal Opportunities Commission*,[80] where the House of Lords accepted that where European Community law issues arise, the legislative supremacy of the United Kingdom is subject to an exception, have given an important lead to lower courts. This general constitutional role will increase with the coming into force of the Human Rights Act 1998, as all courts have to take account of E.C.H.R. case law (section 2), and again the lead given by the Lords will be important. The Judicial Committee of the Privy Council has in effect become the Constitutional Court for Scotland and Northern Ireland. A "devolution issue" may be resolved by direct reference to the Privy Council.[81] It will play a similar role for Wales, also having jurisdiction to decide devolution issues, but since the Welsh Assembly has no primary legislative powers it is probably less accurate to describe it in this context as a constitutional court for Wales.

[77] Robertson, "The House of Lords as a Political and Constitutional Court: Lessons from the Pinochet case", Chap. 2 in *The Pinochet Case: a Legal and Constitutional Analysis* (D. Woodhouse ed. 2000).

[78] *e.g. D.P.P. v. Jones* [1999] 2 A.C. 240 on freedom of assembly, *Reynolds v. Times Newspapers Ltd* [1999] 3 W.L.R. 1010, on freedom of speech.

[79] [1991] 1 A.C. 603, HL.

[80] [1995] 1 A.C. 603, HL, and see Patricia Maxwell, "The House of Lords as a Constitutional Court-The Implications of ex parte E.O.C.", Chap. 10 in *The House of Lords its Parliament and Judicial Role* (B. Dickson and P. Carmichael, eds 1999) *op. cit.*

[81] See para. 5–015.