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Constitutional & Administrative Law

A W Bradley, K D Ewing
& C J S Knight

Pearson

CONSTITUTIONAL AND ADMINISTRATIVE LAW

radical reform of the House, (i) no one party should have an overall majority in the Lords (as was previously the case when the large body of hereditary peers gave the Conservatives a guaranteed majority), but (ii) the governing party should be the largest party, with the political composition of the Lords to be broadly reflective of 'the share of the vote secured by the political parties in the last general election'.[252]

But although admirable, this principle will be difficult to implement in a system where existing members can be removed only by retirement, non-attendance or misconduct, and where balance can be achieved only by new appointments. Thus, although the House has been reformed by the 1999 Act and although a large number of Labour peers were created, it was not until 2005 that Labour became the largest party, despite Labour having been in government since 1997. Similarly, although Labour lost the election in 2010, by 2013 it was still the largest party in the House, with 213 members, compared to the Conservatives of whom there were 160, the Liberal Democrats of whom there were 85, and 'other parties' of whom there were 12. The remaining places were occupied by 151 'crossbenchers' (who sit as independents), 21 peers who were said to be 'non-affiliated', and 24 (not 26) Bishops. By 2017 the Conservatives were again the largest party but with only 252 members in a House of some 799 members in total.

The legislative role of the House of Lords makes it inevitable that the government should have some presence in the chamber, to ensure that business is conducted efficiently and that an account is given of government proposals. In recent years the practice has been for only two or three Cabinet ministers to be drawn from the House of Lords, though these do not now necessarily include the Lord Chancellor. By convention the Prime Minister must be a member of the House of Commons, and the same is true of other senior Cabinet posts: it is inconceivable in particular that the Chancellor of the Exchequer could be a member of the House of Lords.[253] But there is no reason in principle why other ministers should not be based in the Lords, and the life peerage provides an opportunity for the Prime Minister to bring into his or her government an individual who may not be a member of Parliament (as in the case of Lord Mandelson by Mr Brown).

The 1958 Act also provides an opportunity for the Prime Minister to retain the services of a minister who may have lost his or her Commons seat in a general election (as in the case of Mrs Lynda Chalker, who lost her seat in 1992 but who was elevated to the peerage, retaining her position as minister for overseas development in Mr Major's government). In 2017 there were in fact 15 ministers who held seats in the Lords, with the ministerial teams of many departments including a member of the Lords. However, only one of these was a member of the Cabinet (the Leader of the House). There were also nine government whips in the Lords, this position sometimes combined with junior ministerial responsibilities. Previous governments in contrast have tended to draw more freely on the House of Lords for recruitment to the Cabinet, and it is perhaps paradoxical that as the size of the Lords increases, so the number of House of Lords ministers declines.

Obligations of membership

Unlike the House of Commons, many members of the House of Lords are not engaged full time in the business of the House or activities incidental thereto. Indeed, it is one of the strengths of the House that its many part-time members are occupied in other pursuits, on the experience of which they may draw in their work in the upper chamber. But there must

[252] HM Government, *The Coalition: Our Programme for Government* (2010), p 27.

[253] Lord Carrington was Foreign Secretary in the House of Lords in Mrs Thatcher's government until he resigned in 1982, following the invasion of the Falkland Islands.

be some obligation of attendance and participation, particularly on the part of the life peers who have voluntarily assumed the benefits of office, and complaints are sometimes made that not all members play as full a part in the work of the House as they should. House of Lords Standing Order 23 – introduced on 16 June 1958 – provides that 'Lords are to attend the sittings of the House or, if they cannot do so, obtain leave of absence, which the House may grant at pleasure'.

At a time of concern about the expanding size of the House of Lords, steps were taken in the modest but grandly titled House of Lords Reform Act 2014 to allow for peers to resign – an irrevocable event which means they may not sit at any time in the future. The Act also provides for the automatic expulsion of peers who not having obtained leave of absence fail to attend the House in the session in question. In both cases – retirement and expulsion – the individual in question does not lose his or her title, the 2014 Act being the latest uncoupling of the peerage from automatic membership of the Lords. There appears to be no way by which a peerage granted under the Life Peerages Act 1958 can be revoked, but the gradual uncoupling of membership of the House from the status as a peer is welcome.[254]

The same process can be seen at work in the provisions of the 2014 Act (as well as those of the House of Lords (Expulsion and Suspension) Act 2015) which allow for the removal of those who commit a serious offence or act in breach of the House of Lords Code of Conduct. The House previously had no power to expel a member, though it did have the power to suspend for breach of the rules governing conduct.[255] This power was exercised in 2009 in relation to two Labour peers who had been reported by the *Sunday Times* as being willing to use their position to promote commercial interests for financial advantage.[256] More recently a number of other peers were suspended in 2010 and 2011 following irregularities over expenses, in the latter case the suspensions coinciding with the imprisonment of the members in question.[257]

Since 1957 a daily attendance allowance has been paid and travel costs are met; attending peers also receive allowances for overnight stays away from home, as well as for secretarial and research assistance. It was the breach of the rules relating to these allowances that led to the disciplinary suspensions referred to above. These allowances notwithstanding, there is a sense that membership of a part-time legislative chamber on an unpaid basis is difficult for people from outside London and the south-east. To this end, it is noteworthy that the ill-fated House of Lords Bill 2012 (on which see below) proposed that peers (whether elected or nominated under the scheme in the Bill) should be paid. Remarkably, however, it also proposed that payment should be linked to the member's participation in the work of the House, with a determination to be made by Independent Parliamentary Standards Authority as to what counts as participation for these purposes.

Further reform

The House of Lords Act 1999 was designed to be only the first step in the process of reform. But as was discovered by the Royal Commission on the Reform of the House of Lords which reported in 2000, it is difficult to produce a solution for a reformed House which commands

[254] See also House of Lords Act 1999 (removal of hereditary peers) and Constitutional Reform Act 2005 (removal of Supreme Court judges).

[255] HL 87 (2008–09). Powers of expulsion were included in the government's Constitutional Reform and Governance Bill 2009. But they were not enacted.

[256] HL 88 (2008–9). And see ch 9.

[257] The length of the suspensions varied, but one case was until the end of the parliamentary session in question and another was for 12 months, in that case coinciding with a prison sentence relating to the same matter.

agreement across the political spectrum.[258] Democratic instinct suggests that the only credible solution is a wholly or largely elected (directly or indirectly) Upper House (perhaps one renamed as a Senate).[259] But the difficulty with this is that it could end up with a House wholly dominated by the political parties and, depending on election results, with the same party in control of both the Commons and the Lords. In that case, there would be little prospect of effective scrutiny or revision of government business. Conversely, election could lead to a House with a majority different from that of the Commons, leading to the alternative result of stalemate or gridlock in the legislative process.

It is thus a curious paradox that a nominated House without an electoral mandate is able to produce a revising chamber which simultaneously provides a greater measure of independent scrutiny of government than the House of Commons, without at the same time undermining the political supremacy of the House of Commons, or unduly impeding or frustrating the implementation of the government's programme.[260] Any change to these arrangements ought logically to begin by asking what it is we expect the House of Lords to do and to tailor composition to function. If the purpose is to act as a restraint on government, the case for an elected chamber would be irresistible (provided election were guaranteed to produce a House with a different political majority from the Commons). If, however, the purpose is (as currently) that of revision and scrutiny, there may be a case for other methods of composition, which is not to say that the current arrangements for the nominated House can easily be justified.

It has, however, proved to be impossible to build a consensus around the next stage of reform, perhaps because there is no consensus on the role of a second chamber in the British constitution. Deep divisions were on display in 2007 when the Commons voted for a wholly or largely (80 per cent) elected House of Lords, to be followed only a few days later by the House of Lords voting for a wholly nominated chamber.[261] A House of Lords Reform Bill was introduced in 2012, all three main political parties having promised further House of Lords reform in the general election campaign in 2010. The latter measure provided for the phased introduction of a second chamber of 360 directly elected members, plus 90 appointed members, 12 Bishops and an indefinite number of 'ministerial members'. The elected members would be directly elected by a system of proportional representation for terms of 15 years each, with elections taking place every five years for a third of the seats in the reformed Chamber.

It was not proposed under these plans to affect the primacy of the House of Commons or alter the powers of the House of Lords. Indeed, it was expressly provided that the Parliament Act 1911–1949 would remain in force, a provision that seemed unnecessary in the light of the lack of any intention to repeal them.[262] The electoral system would be similar to that used for European parliamentary elections at the time, with Great Britain being divided into ten regional constituencies from which members would be elected from party lists (and in Northern Ireland by single transferable vote from a single constituency). But although a government Bill designed to implement a provision in the Coalition agreement, this apparently well-thought-out and elegant solution to an intractable problem was withdrawn after Second Reading, in the face of strong opposition from Conservative backbenchers.

[258] For good accounts of the difficulties, see Bogdanor, *Politics and the Constitution*, ch 14; Brazier, *Constitutional Reform*, ch 11; and Shell, *The House of Lords*.

[259] See Richard and Welfare, *Unfinished Business*. See also R Blackburn, in Blackburn and Plant, *Constitutional Reform*, ch 1 and Billy Bragg, *A Genuine Expression of the Will of the People*.

[260] The elected option was rejected by the Royal Commission on the Reform of the House of Lords which had been appointed in 1999, although it did recommend that there should be an elected element: Cm 4534, 2000.

[261] HC Deb, 6 March 2007, col 1389, 7 March 2007, col 1524; HL Deb, 12 March 2007, col 451, 13 March 2007, col 626.

[262] On the continuing significance of the Parliament Acts, see Pannick [2012] PL 230.

J. Conclusion

The Coalition government attempted unsuccessfully to change the rules relating to the composition of Parliament, ostensibly to make the House of Commons more representative of popular opinion, and to make the House of Lords more democratic. The failure of both initiatives – for different reasons – may make it difficult to revive campaigns for electoral reform or an elected House of Lords, at least for the foreseeable future.

The United Kingdom thus unusually retains a legislature in which the lower house is elected by first past the post in single-member constituencies, and the upper house is wholly unelected. In this broad sense, the United Kingdom thus began the 21st century with a legislature similar in structure to the one in which it began the 20th century. Yet behind these formal structures a great deal has changed, with universal suffrage for the House of Commons creating controversial and politically loaded problems about eligibility to vote, the registration of electors, the distribution of boundaries, and the regulation of candidates and political parties.

The position of the House of Lords is no less controversial or politically loaded. The removal of the great bulk (but not all) of the hereditary peers has been accompanied by a large increase in the number of peers appointed under the Life Peerages Act 1958 in order to create a House more representative of party strength in the country. While this is a laudable goal, the current method by which it is advanced is unlikely to be sustainable for long.

CHAPTER 8

Role and functions of Parliament

The building occupied by Parliament is in a state of decay and urgently in need of repair.[1] In recent years, nevertheless, the work of Parliament has been critical as the nation responded to political and public health crises. The House of Commons in particular was at the heart of the Brexit storm, with political parties divided and the government unable to command the support of its backbenchers.[2] This was followed by Covid-19, in which ministers assumed the authority to 'govern by decree', by means of regulations and guidance which did not need parliamentary approval.[3] As Parliament gradually adapted to the public health crisis, it was able to operate only by transforming its procedures. Standing orders were revised so that proceedings could be conducted virtually, with only a skeleton operation in London.

The context within which Parliament operates is thus constantly changing, though rarely as dramatically as it has changed in recent years. Nevertheless, the role and functions of Parliament remain the same, from which it is important that there should be no distractions because of either political crises or public health emergencies. At a simplistic level, Parliament's job is to make the laws by which we are governed. In doing its job, Parliament purports to be broadly representative of the mood of the nation, as determined at the most recent general election. Law will thus have a sharp partisan edge, being the product of the political process. But beyond this rather simple account, Parliament has many other jobs the nature of which are unclear, as would be expected of an institution which has no expressly defined role, and which has had an existence for an unbroken period of many hundreds of years.

A. Functions of Parliament

Contemporary discussions of the place of Parliament in the Westminster system might begin with its role in (i) providing the personnel of government, as (ii) the institution through which the government in turn must govern to secure its money and its business, while (iii) having a responsibility to hold the government to account in the conduct of the nation's affairs. The effectiveness of these sometimes conflicting roles depends to some extent on the adversarial nature of Parliament, which – although apparently unattractive to many – is a necessary feature of the Westminster system if its contradictions are to be reconciled: one side of the House supplies the government and will generally ensure safe passage of its business; the other will principally be responsible for scrutiny and accountability. Both are important.

[1] Parliamentary Buildings (Restoration and Renewal) Act 2019. See HC 549 (2020–21) (Public Accounts Committee).

[2] See pp 227–9 (Box).

[3] K D Ewing (2020) 31 *King's Law Journal* 1.

A classic statement of the importance of parliamentary control of government and its limitations was made by the political philosopher, John Stuart Mill:

> Instead of the function of governing, for which it is radically unfit, the proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which anyone considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust, or fulfil it in a manner which conflicts with the deliberate sense of the nation, to expel them from office, and either expressly or virtually appoint their successors.[4]

This high-principled analysis is still of value and finds an echo in the important report of a Select Committee on House of Commons Reform that 'Government should get its business, the House should get its scrutiny and the public should get listened to'.[5]

Analysis of this kind also has important implications for Parliament. If it is the means through which the Executive governs and from which the Executive draws constitutional and legal authority, Parliament needs procedures for the granting of supply and the passing of law. And equally, if it is a duty of Parliament to 'watch and control', it needs procedures and resources to match the scale of the task. It also needs Members of Parliament (in both Houses) to do more than simply sustain the government in office by voting through the measures laid before them: there is a need for committed parliamentarians as much as for committed ministers. In addressing in this chapter the procedures that underpin the work of Parliament, we concentrate on three major areas of its work:

- We begin with its role in voting supply, which Parliament is expected both to scrutinise and authorise simultaneously. We begin with supply because of its importance: without money the government would be unable to do very much.
- Thereafter, we consider the legislative process, and the means by which the government gets its business through a Parliament where government business has priority over that of private members.
- Finally, we examine the role of Parliament in the scrutiny of government, and the different procedures that have been developed for this purpose. Here significant changes have taken place or have been proposed in recent years, often in response to criticism of parliamentary shortcomings.

In concentrating on these three core functions, we do not suggest that they exhaust the functions of Parliament. Thus, Parliament also has an important role to play in the redress of grievances, which is an aspect of the scrutiny of administration generally. Also relevant is the Parliamentary Ombudsman, whose work will be considered in Chapter 23D. Parliament's other main role is to act as a constitutional watchdog, and to this end influential select committees dealing with constitutional questions have been formed by both the House of Commons and the House of Lords. This is a matter to which we return later in this chapter, while the related work of the Joint Committee on Human Rights is addressed in Chapter 14.

Beyond that, it is sometimes said that Parliament represents the 'conscience of the nation',[6] which places it in a unique legal and political position. In the United Kingdom, unlike in other countries, it is Parliament that has the last word on controversial moral questions, and it is to Parliament that the courts look for guidance and leadership.[7]

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[4] Mill, *Representative Government*, ch 5.

[5] HC 1117 (2012–13), para 20.

[6] *R (Nicklinson)* v *Ministry of Justice* [2013] EWCA Civ 961, [2013] WLR(D) 326, para 155. See appeal at [2014] UKSC 3.

[7] Ibid, para 112.