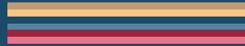


Constitutional Guardians:

The House of Lords

By Dawn Oliver

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CONSTITUTIONAL GUARDIANS:

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Summary

This pamphlet explores the arrangements for guardianship of the UK constitution and its values and the role of the House of Lords in particular. Effective constitutional guardianship is important in any liberal democracy. In most democracies the courts have important roles in deciding whether laws breach the constitution and striking them down if so. This is not a role that the courts are able to perform in respect of legislation passed by the UK Parliament, since it possesses legislative supremacy. Protection of constitutional values in the UK is therefore essentially a matter for parliamentarians, and particularly a responsibility of the second chamber and its committees: party political partisanship is less strong there than in the Commons, the government does not have a majority in the House of Lords, and an independent and professional element in the membership of the Lords enables that chamber to carry out its guardianship roles authoritatively and fairly. However the composition of that chamber presents political problems for the guardianship role which need to be overcome.

I. Liberal Democracies and Constitutional Guardians

Two characteristics are common to all Western liberal democracies: law-based provisions for the free election of government and the legislature, and an effective rule of law, including legal provisions for the independence of the judiciary and the protection of individuals' civil and political rights and liberties.

Most Western liberal democracies have adopted 'written' or 'codified' Constitutions which enjoy special legal protection against being amended or repealed. (In this pamphlet the use of the capital C denotes the formal document.) They provide for elections and the rule of law along with other major aspects of the system of government. They also lay down special legislative procedures such as requirements for two thirds majorities in the chambers of the legislature, or referendums or other safeguards designed to protect the Constitution against being amended or breached without good reason and open debate. And most Constitutions provide for a Supreme or Constitutional Court with power to strike down 'unconstitutional' laws. Such Constitutions are 'procedurally entrenched'. But this is not the case in all such democracies. Neither the UK nor New Zealand

has adopted specially protected Constitutions.¹ Nevertheless the UK and New Zealand are relatively well-functioning, if not perfect, liberal democracies.

It is not easy to define precisely the scope or meaning of the concept 'constitutional' when applied to laws and other norms. Where a country has a written or codified Constitution it is generally assumed that its contents are all 'constitutional' in nature. But no country can include all of its 'constitutional' law in the Constitution. So provisions, for instance for the choice of electoral system and the administration of elections, both crucial in a democracy, are normally contained in 'ordinary' legislation.

Lacking a written or codified Constitution of the kind that almost all democracies have, the UK presents something of a puzzle for those seeking authoritative sources for the meaning of 'constitutional' and thus for constitutional guardianship. Some of these puzzles can be resolved by reference to the work of parliamentary committees with responsibilities for human rights, the rule of law and other matters that are widely regarded as 'constitutional' in nature. The House of Lords Select Committee on the Constitution, which articulates constitutional principles, is particularly important. Its role and the role of the House of Lords generally as constitutional guardians are the foci of discussion in part III below.

1 Israel has written several 'chapters' of a constitution over the years. Each of these chapters is entitled 'Basic Law': the Israeli Supreme Court decided in the case of *United Mizrahi Bank Ltd v. Migdal Cooperative Village* (1995) http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf that measures in Basic Laws cannot be amended except by another Basic Law. See S Navot 'Israel' in D Oliver and C Fusaro *How Constitutions Change*, 2011.

Constitutional Guardianship

Whether or not they have adopted codified, specially protected, Constitutions, all liberal democracies make provisions for ‘guardians’ or watchdogs to secure that constitutional principles and provisions are observed. These guardianship arrangements take various forms, some judicial, some political, and some mixed.

Countries where courts or a specific Supreme or Constitutional Court have the power to enforce observation of important provisions in the Constitution, including human rights protections, are commonly referred to as providing for ‘Judicial Supremacy’. But some countries rely more on political institutions to secure that their constitutional provisions are respected by the legislature *before* new laws are passed – ‘Political Constitutions’ in the memorable phrase invented by JAG Griffith in 1979.² There follow brief summaries of two contrasting models of constitutional guardianship.

US Style Constitutional Judicial Review: Judicial Supremacy

In the famous case of *Marbury v. Madison*,³ the US Supreme Court held that it has power under the US Constitution to strike down (invalidate) any Act passed by Congress that is contrary to the US Constitution. This power is not spelt out clearly in the text of the American Constitution, but it was held by the Court to be essential to give effect to the doctrine of separation of powers as it is established in that Constitution. This process is widely referred to as ‘Judicial Review’. Its practice is known as ‘Judicial Supremacy’.

2 ‘The Political Constitution’ (1979) 42 *Modern Law Review*, 1.

3 1 Cranch 137 (1803).

This US model of constitutional guardianship has been followed in many Western liberal democracies which have adopted new Constitutions, especially since the Second World War. In Europe the Constitutions of Germany (1949), Italy (1948) and Spain after Franco (1978) are major examples.⁴ The French Conseil Constitutionnel was granted 'Judicial Review' power only relatively recently, in 2008. And since 1989 when the 'Iron Curtain' collapsed, Poland, Hungary, Russia, Bulgaria, the Czech Republic, Slovakia, Romania, Slovenia and Bulgaria have all adopted new Constitutions which include provisions for constitutional courts with strike down powers.

Most Commonwealth countries' Constitutions also grant power to strike down 'unconstitutional' laws to their highest courts: Canada, Australia, India and Sri Lanka are examples.

Thus Supreme or Constitutional Courts have major roles as constitutional guardians in many democracies.

But by no means all well-functioning Western liberal democracies' Constitutions provide for US style constitutional Judicial Review: Article 120 of the Netherlands Constitution, for instance, forbids the courts from striking down provisions in Acts of the States General – the Netherlands Parliament. Instead a number of internal and political arrangements, together with the fact the Netherlands is a 'monist' country in which international treaties (for instance the European Convention on Human Rights) have direct effect, are effective in preventing the passage of 'unconstitutional' laws.⁵

4 See also Portugal (1982), Greece (1975).

5 See G ter Kuile *Of Bills and Rights: Human Rights Proofing Legislation: Comparing the United Kingdom and the Netherlands*, 2013.

Scandinavian Style Parliamentary Preview and Guardianship

The Scandinavian countries (Denmark, Finland, Norway and Sweden) make provision for something similar to US style Judicial Review in their Constitutions. This procedure was developed by judges during the Nazi occupation in World War II in Norway, where it was used quite frequently.⁶ It developed much later in the other Scandinavian countries – in Finland only in 2000. However these jurisdictions are only very rarely invoked in those countries. An important characteristic of their constitutional arrangements is that in parallel with American style Judicial Review they make specific provision for committees of their Parliaments to *preview* or scrutinise bills for compatibility with the Constitution in the course of the legislative process, and to report on their findings.⁷

The members of these committees and their advisers are commonly constitutional law experts. They are highly regarded and respected. The upshot of these arrangements is that it is extremely rare for measures to be passed into law that contain ‘unconstitutional’ provisions, and so resort to Judicial Review is rare. In sum, parliamentary scrutiny processes are generally effective in these countries.

6 See C. Smith ‘Judicial review of parliamentary legislation: Norway as a European pioneer’ [2000] *Public Law* 595.

7 X Contiades, ed. *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA*, 2012, ‘Denmark’, ‘Finland’ and ‘Sweden’ chapters; Jaakko Husa ‘Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective’ 48 *American Journal of Comparative Law* (2000) 345; D. Oliver and C. Fusaro, eds. *How Constitutions Change*, 2011, chapter 5 (‘Finland’); Markku Suksi, ‘Finland: The Constitution 2000’ [1999] *EPL*, Vol. 5, Issue 3, pp. 338–349.

II. UK Style Constitutional Guardianship Outlined

The UK subscribes to neither the US nor the Scandinavian models of constitutional guardianship, though it borrows from the Scandinavian approach. This is accounted for by the exceptional nature of the UK constitution: its lack of a written or codified Constitution or a 'top court' with power to strike down legislation. Yet its constitutional norms are in large part legal in nature, being founded on Acts of Parliament and case law. But in addition there are extensive bodies of political 'soft law' and practice that regulate the operation of government and the two Houses of Parliament: these norms act as disincentives to the full exercise of Parliament's 'legislative supremacy' at the behest of the executive. They constitute a system of Political Guardianship that runs alongside and interacts with legal mechanisms. A brief survey of the sources of constitutional norms and how they are protected will put the importance of soft law and the relationships between legal and political constitutional guardianship into context.

Acts of Parliament as Sources of Constitutional Principles

Although the UK lacks a written or codified Constitution of the kind that has been adopted by most other Western liberal democracies, it nevertheless has a lot of important statutory provisions, many of them passed by Parliament centuries

ago, that are generally regarded as ‘constitutional’ in nature.⁸ Here are some examples, giving the most enduring aspects of each measure.

- ◆ The Bill of Rights 1689 abolished some of the powers of the monarch (known as royal prerogative powers) or transferred them to Parliament. These included the right to levy taxation without the consent of Parliament (now granted in the annual Finance Act and other Acts), and the right to suspend or dispense with laws.
- ◆ The Act of Settlement 1701 established security of tenure for the judges.⁹
- ◆ The Representation of the People Acts 1832, 1867 and subsequent ones provide for the suffrage and elections.
- ◆ The European Communities Act 1972 provides for UK membership of the European Union and requires UK courts to give effect to European Law.
- ◆ The Scotland, Government of Wales and Northern Ireland Acts of 1998 established devolved bodies in those parts of the UK. There have been further Acts on devolution since 1998.
- ◆ The Human Rights Act 1998 incorporated most of the rights under the European Convention on Human Rights (ECHR) into UK law.
- ◆ The Constitutional Reform Act 2005 established the UK Supreme Court to replace the Appellate Committee of the House of Lords as the ‘top court’ of the UK and a new independent Judicial Appointments Commission for

8 For the meanings of ‘constitutional’ in the UK see discussion of the House of Lords Select Committee on the Constitution, below.

9 Subject to the ability of Parliament to remove them for bad behaviour.

England and Wales that guarantees appointment of judges on merit.¹⁰

- ◆ The Fixed-term Parliaments Act 2011 set a five year term for Parliaments, subject to provisions for early elections with the support of two thirds of MPs, or if the government lost a vote of confidence in the House of Commons and an alternative government cannot be formed.

There are very many more Acts of the UK Parliament of constitutional importance. These Acts are passed by the normal legislative process, except that in recent years measures of ‘first class constitutional importance’¹¹ are debated by a Committee of the Whole House in the Commons, thus giving all Members of Parliament the opportunity to participate in statutory changes to the UK’s constitutional arrangements.

Once passed a ‘constitutional’ measure can be changed by ordinary legislative process. There is no procedural entrenchment of constitutional law and thus on the face of it no arrangements for the judicially enforceable legal guardianship of these principles exists. The only ‘special’ legally protected status that might attach to constitutional provisions in Acts of Parliament derives from a principle developed by the courts that such provisions cannot be *impliedly* repealed or amended by a later Act: Parliament must

10 The Commission does not consider candidates for the UK Supreme Court, the European Court of Human Rights, the Court of Justice of the European Union or the Court of First Instance.

11 See R Hazell ‘Time for a new Convention: Parliamentary Scrutiny of Constitutional Bills 1997–2005’ [2006] *Public Law* 247.

make its intentions to override constitutional principles clear, for instance by the use of express words.¹²

UK Courts, Case Law and Constitutional Guardianship

Constitutional law in the UK also includes a large body of case law – decisions of the courts over many centuries which establish the rule of law and protections for civil and political rights and freedoms. Among the most important:

- ◆ The *Case of Proclamations*, 1611¹³ deprived the King of the power to change the law without the consent of Parliament.
- ◆ *Entick v Carrington*, 1765¹⁴ required the executive to point to a legal source in support of any claim it made to be entitled to interfere with the property and papers of individuals and forbade the issue of general warrants.
- ◆ *Council of Civil Service Unions v Minister for the Civil Service*, 1985¹⁵ decided that the exercise of royal prerogative powers is in principle subject to judicial review, unless the subject matter was so sensitive as to be ‘non-justiciable’.

However, unlike the position in countries where US style Judicial Supremacy operates, UK courts cannot ‘strike down’ primary legislation passed by Parliament as unconstitutional.¹⁶ Their main function is to review exercises of executive discretion and power

12 See per Lord Steyn in *R. v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, at p. 575; Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115; Laws LJ in *Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin).

13 12 Co Rep 74.

14 19 State Tr 1029.

15 [1985] AC 374.

16 See for example *Cheney v Conn* [1968] 1 All ER 779.

and check them against rule of law criteria: this is the meaning of the phrase ‘judicial review’ in the UK.

The UK system is therefore often referred to as one of Legislative Supremacy. This doctrine of the sovereignty (or supremacy) of the UK Parliament is fundamental to the legal system.¹⁷ It would, in the UK system, be for political institutions to alter the doctrine of sovereignty, not the courts. In effect therefore *UK courts are guardians of the doctrine of Parliament’s sovereignty*, the most fundamental principle of the UK’s constitutional law as against other constitutional principles – for instance the protection of individual rights and liberties.¹⁸ It is obvious that constitutional principles can conflict and may need to be prioritised. And so ways need to be devised to prevent or inhibit abuse of its sovereignty by Parliament and to balance conflicting constitutional principles. It matters a great deal therefore that additional forms of constitutional guardianship, political forms, should, and do, operate in the UK, largely through political, often ‘soft law’, mechanisms.

Soft Law and Political Constitutional Guardianship

Although the UK Parliament can override constitutional principles other than the doctrine of parliamentary sovereignty

17 Another doctrine however requires our courts to give effect to European Law, even if it is incompatible with provisions in Acts of Parliament or any other sources of law. On the face of it this doctrine of the primacy of EU law is incompatible with the sovereignty of Parliament. There is not the space to go into this issue here, save to say that the European Communities Act 1972 required UK courts to give effect to European law and it is in compliance with that requirement that our courts give effect to EU law, disapplying provisions in our Acts of Parliament if necessary.

18 This is a hot topic that there is not the space to go into here. Whether European law is an exception to parliamentary sovereignty or an example of its operation under the European Communities Act 1972 is also debatable.

by passing new laws which the courts will enforce, in practice a range of guardians and techniques exist in the system to protect these principles. They include the development of 'soft law' by Parliament and the Executive, and its adoption 'upstream' in departments when bills and draft bills are being prepared for the legislative process.

The idea of 'soft law' needs some explanation. Many of the most important constitutional norms in the UK are not legal in the sense of being justiciable by the courts at all: they are political, having been created or adopted by the political branches, the executive and Parliament, over many years. They regulate the ways in which governmental powers may be exercised.¹⁹ They operate alongside the hard laws that grant powers to ministers and other public bodies and are subject to review by the courts. Soft law may be found in documents, practices, conventions²⁰ and institutions. Some of these deal with a combination of 'constitutional' norms and practices and requirements for effective government that have been developed over years. Both Houses of Parliament have roles in the development of soft law, and in pressurising government to comply with the norms it embodies.

Part III of this pamphlet focuses on the soft law that has been developed by the House of Lords, especially in the Select Committee on the Constitution and the Delegated Powers and Regulatory Reform Committee. Other, perhaps better known, examples of 'constitutional soft law' include the following:

19 For discussion see D Oliver 'Regulating politics in government' in J Jowell, D Oliver and C O'Connell, eds *The Changing Constitution*, 8th edn, 2015.

20 For discussion of the nature of conventions and why they are obeyed see B Galligan and S Benton, eds, *Constitutional Conventions in Westminster Systems*, 2015; R Brent Taylor 'Foundational and Regulatory Conventions: Exploring the Constitutional Significance of Britain's Dependency upon Conventions' [2015] *Public Law* 614.

- ◆ Constitutional conventions of individual ministerial responsibility to Parliament: Ministers must answer questions in Parliament, give an account of their policies and actions and the work of their departments, acknowledge faults and undertake to put things right. This longstanding convention was revised and imposed as obligations on government in resolutions on ministerial responsibility that were passed by the two Houses of Parliament²¹ in the wake of the Arms to Iraq affair in the mid-1990s.²² Those resolutions were then incorporated into the *Cabinet Manual*, the *Ministerial Code* and other governmental documents.
- ◆ Standing Orders adopted by the two Houses of Parliament set out, for instance, the procedures of the Houses, the legislative process including scrutiny by Public Bill Committees in the Commons, the establishment and powers of select committees and how and on what terms their members are to be elected.
- ◆ *The Cabinet Manual* of 2011 is a guide to the laws, conventions and rules on the operation of government, including ministerial responsibility. Civil servants began drafting it before the 2010 general election. It is not legally binding and nor is it set in stone.²³
- ◆ The *Ministerial Code* of 2015 sets out the procedures and political and ethical standards that should govern minister's conduct of their functions. It dates back to the 1940s, when

21 HC Deb., 19 Mar. 1997, cols. 1046–7; HL Deb., 20 Mar. 1997, cols. 1055–62.

22 See *Report on the Export of Dual-Use Goods to Iraq* (1995–6, HC 115), known as *The Scott Report*, after the chair, Sir Richard Scott; for full consideration of this report see A Tomkins *The Constitution After Scott*, 1998.

23 *Cabinet Manual* 2010, on the Cabinet Office website. See A Blick 'The Cabinet Manual and the Codification of Conventions' (2014) 67 (1) *Parliamentary Affairs* 191.

it was known as *Questions of Procedure for Ministers*. It was first published in 1992 and acquired its current title in 1997. It is revised and reissued by the Prime Minister after each general election.

- ◆ The *Guide to Making Legislation* sets out the procedures to be gone through in government when preparing bills for introduction to Parliament for the legislative process, including consideration of constitutional issues that may arise.²⁴ Some chapters of this Cabinet Office document refer specifically to the work of parliamentary select committees (for instance the House of Lords Constitution Committee,²⁵ the Delegated Powers and Regulatory Reform Committee²⁶ and the Joint Committee on Human Rights²⁷) and require departments to take them into account when formulating proposals for legislation, in order to minimise conflict between government and Parliament and delay in the passage of bills.
- ◆ The Osmotherly Rules, now more commonly referred to as *Departmental Evidence and Responses to Select Committees*, set out how civil servants should give evidence to parliamentary committees and that they do so on behalf of their ministers.²⁸

These are just a few of the important non-legal and therefore ‘soft law’ constitutional norms that underpin the UK constitutional system.²⁹ For the most part they are iterative documents and

24 www.gov.uk/government/publications/guide-to-making-legislation

25 Ibid, at para. 34.12–34.14.

26 Referred to below as the DPRR Committee. See *Guide to Making Legislation*, chapter 16.

27 Referred to below as the JCHR.

28 See <http://researchbriefings.files.parliament.uk/documents/SN02671/SN02671.pdf>

29 See also the discussion of the Salisbury Convention, below.

practices. Documents are revised and reissued from time to time and thus take account of lessons learned, normally from embarrassments or controversies over what is perceived to have been abusive behaviour by government. The revisions may however reflect reservations in government about these norms, as where reference to the duty of ministers to comply with international law was removed from the Ministerial Code when it was revised after the 2015 election.³⁰

A Case Study: Political Guardianship under the Human Rights Act 1998

The arrangements under the Human Rights Act 1998 provide an example of subtle political constitutional guardianship (which runs alongside judicial review which stops short of striking down primary legislation for breach of the rights in the 1998 Act). Under this Act UK courts and political institutions share responsibility in the UK domestic legal system for the protection of rights.³¹ The Act incorporates the principal rights under the ECHR into the domestic law of the United Kingdom so that victims of breaches by public authorities can sue in the courts for remedies, unless the breach was authorised by Act of Parliament.³² The political

30 The previous version of the Ministerial code required ministers to comply with the law ‘including international law and treaty obligations and to uphold the administration of justice’. These words have been removed. See <http://publiclawforeveryone.com/2015/10/26/the-ministerial-code-and-international-law>

31 On the international law plane the UK is bound by the provisions of the European Convention on Human Rights ‘to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention’ (Article 1). They are subject to the jurisdiction of the European Court of Human Rights. Article 46 requires parties ‘to abide by the final judgment of the Court’. However the UK is a dualist state so the ECHR only has direct effect in law because it was incorporated by Act of Parliament.

32 Human Rights Act 1998, sections 6–8.

checks against breach of these ‘Convention rights’ by provisions in new Acts are as follows:

When preparing government bills departments are required by the *Guide to Making Legislation* to provide an ECHR memorandum to the Parliamentary Business and Legislation Committee of the Cabinet.³³ This committee approves government bills before their introduction into Parliament. The memorandum sets out the justifications for the department’s view that a bill does, or does not, comply with the ECHR. When a minister introduces a Bill into Parliament he or she must state either that in their view the provisions of the Bill are compatible with Convention rights, or that although they are unable to make such a statement the government nevertheless wishes to proceed with the Bill.³⁴ The *Guide to Making Legislation* indicates that the bill team should develop the government’s reasoning in relation to any possible rights based issues and states generally how the work of the JCHR should be taken into account by bill teams and ministers.³⁵ This guidance is in part designed to anticipate the rights issues that are likely to be raised in Parliament, particularly by the JCHR.

So each bill has undergone human rights scrutiny in government before it is introduced into Parliament, and the minister in charge of the bill takes responsibility for this process. During its passage through Parliament the Bill will be scrutinised as normal in the House of Commons and in the House of Lords.³⁶

33 For discussion of these memorandums see M Hunt ‘The Joint Committee on Human Rights’ in A Horne, G Drewry and D Oliver, eds *Parliament and the Law*, 2013, pp. 231–233.

34 Human Rights Act, section 19. Note that the government as a whole is responsible in this situation, not only the minister.

35 The Cabinet Office, *The Cabinet Guide to Making Legislation*, chapter 12.

36 This is discussed in Part III of this pamphlet.

In addition the Bill is scrutinised by the JCHR. In practice many Departments provide versions of the ECHR memorandum to this committee. It consists of equal numbers of members of the Commons and the Lords and is chaired by a member of the Commons. They report to Parliament on any concerns they have about compatibility with Convention rights. Here is one of the points at which the UK system resembles ‘preview’ in the Scandinavian approach. The two Houses take account of the work of the JCHR when reviewing and debating the Bill, thus exposing the government to pressure to justify any breaches of the ECHR (or other international human rights instruments). The government ought to respond to the JCHR report and amend the bill or give its reasons for continuing with its proposal in good time. However this is not always possible if the JCHR report is published only a few days before second reading. All correspondence with the government over the Committee’s reports is published on the JCHR website. This correspondence may involve ‘dialogue’ between the government and the JCHR over provisions in the bill.

Once an Act is in force, a victim complaining of breach of their rights under the Act may obtain from a higher court a ‘declaration of incompatibility’ with a Convention right.³⁷ The declaration does not invalidate the offending UK provision: the HRA respects parliamentary sovereignty. But the declaration has political significance: it triggers a legal power in the responsible minister to make a ‘remedial order’, subject to approval by each House of Parliament, that removes the incompatibility.³⁸

The UK has complied with such declarations in all cases but one. The exception is the declaration of incompatibility made

37 HRA, Section 4.

38 Section 10 and Schedule 2 of the Act.

in the case of *Smith v Scott*³⁹ in response to the finding by the European Court of Human Rights that the blanket ban in UK law on the voting rights of all convicted prisoners for the duration of their imprisonment is contrary to the Convention right to vote.⁴⁰ The issue was referred to a Joint Committee in the 2013–2014 parliamentary session. It concluded that the Government ‘should introduce a Bill at the start of the 2014–15 session, which should provide that all prisoners serving sentences of 12 months or less should be entitled to vote in all UK parliamentary, local and European elections; and moreover that prisoners should be entitled to apply, up to 6 months before their scheduled release date, to be registered to vote in the constituency into which they are due to be released.’⁴¹ At the time of writing the Government has not responded substantively to the recommendations of that committee and no remedial orders or other ways of removing the incompatibility have been introduced.

In sum, responsibility for compliance with human rights protections under the ECHR and the Human Rights Act is shared between government, Parliament and the courts. It results

39 2007 SC 345, Registration Court.

40 See *Hirst v United Kingdom (No 2)* [2005] ECHR 681 for the decision of the European Court of Human Rights.

41 See the conclusions of the Parliamentary Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Report*: www.publications.parliament.uk/pa/jt201314/jtselect/jtdraftvoting/103/10302.htm

in a high degree of compliance.⁴² Responsibility for defects in UK law rests in practice with the political branches of the state at the international law level.

The House of Commons as a Constitutional Guardian

The principal roles of the House of Commons include the representation of voters' interests and support of their parties, whether as the incumbent government, a government in waiting or another voice in Parliament. Issues of a constitutional nature may be raised during the legislative process, for instance on the floor of the House, at second reading of bills, in the public bill committees when line by line scrutiny of bills take place, and on Report.

The Legislative Process

However, the Commons' legislative procedures and processes are highly party political and dominated by the party whips. Membership of public bill committees reflects the government majority, and committee members are strongly whipped. Timetables are set for this stage of the bill's progress, and so scrutiny of bills or parts of bills may be perfunctory. Indeed some provisions in bills may not be scrutinised at all in the Committee stage in the Commons, or indeed at any stage of the bill's progress through that

42 Other jurisdictions too have found a path between Judicial Supremacy and Legislative Supremacy, which Gardbaum refers to as 'the new Commonwealth model' (S Gardbaum *The New Commonwealth Model of Constitutionalism*, 2013). This approach is adopted not only by the UK but also by Canada, New Zealand and, in Australia, by the Australian Capital Territory and Victoria. As in the case of the UK Human Rights Act, in these countries' constitutional provisions are subject to 'review' or scrutiny by the top court. But if it finds that measures are in breach of constitutional provisions the court may not strike them down. It may find or declare that the provision is incompatible with the Constitution or the Bill of Rights. The ball then passes back to the politicians for the incompatibility to be removed.

chamber. Governments tend to resist all and any amendments in the Commons, anxious to preserve their dominance, authority and control of the process. Few MPs have expertise in constitutional matters. It is rare for amendments of any kind other than those put forward by or for the government to be accepted by the government in the Commons. This is all part of the culture of resistance that has grown up in government over many years.⁴³

This is not to say that the executive can always bulldoze 'unconstitutional' measures at will through the House of Commons. In the course of preparation of bills departmental lawyers, parliamentary counsel and the Law Officers will be aware that constitutional points may be taken in Parliament. Indeed much soft law serves to focus minds on such issues, including the *Guide to Making Legislation*, mentioned earlier. The party whips will advise the government of expected difficulties, whether coming from opposition parties or their own backbenchers. Ministers know too that members of the House of Lords may object to measures which they regard as 'unconstitutional', the focus of discussion in Part III of this pamphlet. Ministers in charge of a bill may well seek to avoid such problems by modifying their proposals before the bill reaches Parliament.

Commons Select Committees

Some of the select committees in the House of Commons have or have had constitutional issues within their remits, including for instance the Public Administration Select Committee (PASC) from 1999 to 2010, the Political and Constitutional Reform

43 L Thompson, 'More of the Same or a Period of Change? The Impact of Bill Committees in the Twenty-First Century House of Commons' (2012) 66 (3) *Parliamentary Affairs* 19; P Cowley, *The Rebels: How Blair Misled his Majority*, 2005.

Select Committee (the PCRC) of the 2010–2015 Parliament, and in the present Parliament the Justice Committee and the Public Administration and Constitutional Affairs Committee.⁴⁴

Departmental select committees have become increasingly independent of government and party front benches in recent years. Since 2003 the Chairs of these committees receive additional salaries and members cannot be removed by party whips. In 2010 new Standing Orders required members of committees and chairs to be elected by MPs rather than appointed by the whips.⁴⁵ They remain committee members for the duration of the Parliament unless they stand down for some reason, for instance, being appointed ministers or to shadow frontbench positions.⁴⁶ And generally these committees are less partisan than ‘floor of the House’ gatherings of MPs. The PASC under its chair Tony Wright MP was particularly influential in its recommendations on issues such as standards of conduct, appointments and pre-appointment hearings, special advisers, and abolition of and governmental relations with Quangos (quasi-autonomous non-governmental organisations).⁴⁷ The PCRC was particularly active on issues of constitutional law and reform in its five year life, under its Chair, Graham Allen MP. Its work included collaboration with Kings College London in exploring the arguments around codification of the British constitution and it published a number of important, well researched reports. But for

44 See generally R Kelly ‘Select Committees: Powers and Functions’ in Horne, Drewry and Oliver, eds, above.

45 But the JCHR and the Joint Committee on Statutory Instruments remain appointed (with the Chair still then elected by the members of the Committee). Details of the Committees which are elected can be found here: <http://researchbriefings.files.parliament.uk/documents/CBP-7176/CBP-7176.pdf>

46 See Constitution Unit, *Report on the Effectiveness of Select Committees* London: UCL, 2011.

47 See www.publications.parliament.uk/pa/cm201415/cmselect/cmpubadm/1152/115203.htm for a summary of the PASC’s work in the 2010 to 2015 Parliament.

the most part its recommendations – for instance for the adoption of legislative standards with the agreement of the government⁴⁸ – were rejected by the executive.⁴⁹

The place in which the government does not have a majority that enables it to push its measures through and where there is greater expertise on constitutional issues is the second chamber.

48 Political and Constitutional Reform Committee, *Ensuring standards in the quality of legislation*. For discussion of the scope for the Commons to increase their role in constitutional scrutiny see J Simson Caird and D Oliver 'Parliament's Constitutional Standards' in A Horne and A Le Sueur, eds, *Parliament, Legislation and Accountability* (Oxford: Hart Publishing, forthcoming).

49 Political and Constitutional Reform Committee, *Ensuring standards in the quality of legislation: Government Response to the Committee's First Report of Session 2013–14 – Political and Constitutional Reform* (First Special Report of 2013–14 HC 611) 2.

III. The Guardianship Role of the House of Lords

The second chamber of the UK Parliament, the House of Lords, is an anomalous institution in many ways. Unlike most second chambers no element of its membership is elected by the general public.⁵⁰ Most bicameral parliaments are to be found in federal countries. Two of the special roles of second chambers are normally to protect the Constitution of the country⁵¹ and the constitutional and other interests of members of the federation by giving or refusing consent to constitutional amendments or legislation that affects the members. It is therefore something of an oddity of the UK constitution that the parliament is bicameral, since the country does not have a Constitution in the usual sense of a single authoritative legal document which establishes state institutions and their relationships with one another and with citizens; and nor is the UK a federation. So a question arises: why is the UK Parliament bicameral? Does it need to be bicameral? What does the second chamber do that is useful?

A third role of second chambers in many countries is to be the 'house of review' – to give sober second thoughts to proposals by

50 See later discussion of the composition of the House of Lords.

51 See for instance M Russell *Reforming the House of Lords: Lessons from Overseas*, 2000, pp275–283 for discussion of how other second chambers take on explicitly constitutional guardian functions, including scrutiny of constitutional and human rights legislation, and participation in the appointment of judges to the Supreme Court and in other public appointments.

the executive for new legislation.⁵² This in itself is an important constitutional guardianship function, protecting the country from poorly thought out laws and policies. The House of Lords does it well.

The second chamber in the UK performs an important fourth role: Guardianship of the principles and values of the British constitution. The Royal Commission on Reform of the House of Lords, in its report *A House for the Future* (2000)⁵³ recommended that:

One of the most important functions of the reformed second chamber should be to act as a 'constitutional long-stop', ensuring that changes are not made to the constitution without full and open debate and an awareness of the consequences.

The second chamber has developed an important and influential role for itself as a constitutional guardian over the last fifteen years or so, including articulation of constitutional principles and arguing for compliance with them. This process takes place in debates on the floor of the House and in some of its select committees, most notably the Constitution Committee and the Delegated Powers and Regulatory Reform (DPRR) Committee, discussed below.

Legislation and Debates

The primary legislation powers of the two chambers (the passing of Acts of Parliament) are similar, subject to the provisions of the Parliament Acts 1911 and 1949 (on which see below). The legislative stages of bills in both Houses are also similar – first reading of a bill, second reading, committee stage, report stage, and third reading. Once the two Houses are agreed on the text

52 See Russell, 2000, chapter 1.

53 Cm 4534, 2000, chapter 5.

of the bill royal assent is given: an Act of Parliament is passed. If the two Houses do not agree then a process of ‘ping pong’ takes place during which agreement is normally reached. If this does not happen, the government may rely on the Parliament Acts, discussed below, to obtain royal assent to the bill without the consent of the Lords.

There are however important differences between the two Houses.⁵⁴ Unlike the Commons, the Lords are self-regulating and not subject to timetabling of the legislative process. All those who put down their names to participate in debates may do so – though the time available for each contribution may be short if large numbers wish to speak. The peers, including the party-aligned ones who ‘take the whip’, are normally fairly independent-minded individuals. Most of them are of sufficient seniority not to be seeking a political career. They are there for life and have no fear of losing their seats if they disobey party whips. And many exercise the option of not attending Parliament when they do not wish to participate or to obey the whip. In effect the whips have little in the way of sticks or carrots to induce reluctant members of their party to vote as demanded. The government does not have a majority in this House.⁵⁵

Much of the most important work in the House of Lords, as in the Commons, both as part of the legislative process and as ‘The Grand Inquest of the Nation’ is done in its committees. Members of the Lords Committees are appointed for fixed terms and thus build up considerable expertise in their subjects. Generally members include some peers with prior legal or political expertise. Two of these committees with constitutional

54 One difference is the Salisbury Convention, discussed in a later section of this pamphlet.

55 See below for discussion of the composition of the House.

guardianship roles, the Constitution Committee and the DPRR Committee are discussed below.

Debates on the floor of the House, including debates on the second reading, and in the committee stage of bills (which is taken in Committee of the Whole House) generally tend to be less party political or partisan than debates in the House of Commons, reflecting the different backgrounds of the members and the different party balance in the House. Many debates are concerned to elicit from government its rational justifications for provisions in bills and draft bills or more generally for government policies and administration rather than to score party political points. The provision of justification is in itself a constitutional matter: a government that relied on mere assertion of authority to win votes would not be complying with the spirit of the UK constitution, which is that governments are accountable to Parliament and the electorate and should govern in good faith in the general interest.

Overall the members of the Lords are freer than the Commons to exercise their own judgments when voting in the light of the debate. The House is however conscious that it should exercise some restraint. A survey in 2007 found that two-thirds of peers agreed that ‘the House of Lords should not block government bills at second reading’⁵⁶ And it is widely accepted that the government is entitled to have its business dealt with in reasonable time. These two conventions⁵⁷ reflect and represent important

56 Russell, *The Contemporary House of Lords: Westminster Bicameralism Revisited*, 2013, pp. 133 and 165n, and 242. This was more strongly supported by Labour peers than by others – Labour being the government party at that time. Note that this convention is separate from the Salisbury Convention which refers to manifesto bills, discussed below.

57 See Report of the Joint Committee on Conventions *Conventions of the UK Parliament*, 2005–06, HL Paper 265, HC 1212, chapter 2, para 102; and chapter 4 para 153.

related constitutional principles: the primacy of the Commons, the elected chamber; and the need for effective government, of whatever party. This does not mean that the Lords feel under any general obligation to defer to government.⁵⁸ In the period 1999 to 2012 governments were defeated in the Lords on 506 occasions, 458 under Labour and 48 during the first two years of the coalition. But, significantly for the general approach and the Salisbury Convention (discussed below) only three of these defeats took place at second reading stage. Others took place at committee stage (73), on report (241), at third reading (86) or on consideration of Commons amendments (81). In the Commons during that period the government was defeated only seven times.⁵⁹ Normally Lords' defeats lead to some kind of compromise and it is rare for protracted 'ping pong' to take place,⁶⁰ or for the Parliament Acts to be resorted to. The Lords' general role is to give sober second thoughts to government proposals and to scrutinise, revise and improve bills rather than to block or wreck them and thereby to challenge the primacy of the Commons. But they also have important roles both during the legislative process and in debates in upholding constitutional values and principles: they may not be open to compromise on such issues.

A Case Study: Upholding the Rule of Law

A dramatic example of the constitutional importance and effectiveness of debates on bills in the Lords was the row over the Asylum and Immigration (Treatment of Claimants, etc) Bill 2003/4. The bill sought to oust the judicial review jurisdiction of the Administrative Court over decisions of the new one tier Asylum and Immigration Tribunal that the bill was creating. The

58 Russell, 2013, chapter 6.

59 Russell, above, p. 134.

60 Russell, above, chapter 6.

government's purpose was to prevent failed asylum seekers and illegal immigrants from delaying their deportation by repeated appeals and judicial review applications. That policy was popular, though the rule of law issues were probably not widely understood among the public – or indeed in government. Many judges were outraged at the clause, and a deputation led by Lord Chief Justice Woolf went to see the Prime Minister with their concerns. The PM's response was to order a tightening up of the proposed clause to make sure that the courts would not be able to find a way round it.

So what was wrong with the clause? It sought to exclude appeal or judicial review of the Tribunal's decisions by a higher court on grounds of 'lack of jurisdiction', 'irregularity', 'error of law', 'breach of natural justice' or 'any other matter'. These provisions were in clear breach of the rule of law. Not only that, they would have enabled the new Tribunal to get away with acting corruptly and arbitrarily and even to assume jurisdiction over matters completely outside its allotted sphere – health, education and so on.

The ouster clause passed in the Commons where the government had a large majority, despite objections raised strongly in debate.⁶¹ In the House of Lords the opposition parties, cross-benchers and some government (Labour) backbenchers were ready to vote down the clause on constitutional grounds. A number of influential members put down their names to speak on the debate on second reading. Lord Irvine, the previous Lord Chancellor, was among them. He was expected to make an excoriating speech condemning the clause. Alerted to this, at the start of the debate the Lord Chancellor and Secretary of State for Constitutional Affairs, Lord Falconer, withdrew the clause

61 See for instance the report of the Constitutional Affairs Select Committee: www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/211/211.pdf at pp. 18–19.

and undertook to bring forward alternative proposals for review of the decisions of the tribunal. Many members of the House, while welcoming withdrawal of the clause, expressed in strong terms their condemnation of the fact that such a clause had been included in the bill in the first place, and that Lord Falconer should have been a party to it.⁶² In sum the Lords succeeded on an important point of constitutional law on which the House of Commons had failed. They were prepared to press their points despite the popularity of the general policy, on constitutional, not party political, grounds. It was the absence of government majority, taken with the independence and expertise of members of the House that forced the Lord Chancellor and Secretary of State on behalf of the Government to withdraw this outrageous clause.⁶³ The events also illustrate how relations between government and the two Houses operate 'below the radar', in informal discussions and accommodations, and not just in what happens during formal sessions in Parliament.

The Select Committee on the Constitution

The House of Lords Constitution Committee was formed in 2001 on the suggestion of the Royal Commission on Reform of the House of Lords, *A House for the Future*⁶⁴ which saw a role for the House as 'a constitutional longstop'. The Committee examines all Public Bills for constitutional implications and reports to the House, and also investigates and reports on broad constitutional issues. It is supported by two part time academic legal advisers and its own clerk and staff.

62 See *Parliamentary Debates*, House of Lords, 15 March 2004, cols 49–124.

63 See R Rawlings 'Review, Revenge and Retreat' (2005) 68 *Modern Law Review*, pp.378–410; and D Oliver 'Constitutional Scrutiny of Executive Bills' (2004) *Macquarie Law Journal* vol 4, 33.

64 Cm 3534, para 5.22, recommendation 21.

The Committee elaborated on its role in its first report:⁶⁵ it would focus on those aspects of bills that raised ‘significant constitutional issues.’ Such an issue would be ‘one that is a principal part of the constitutional framework and one that raises an important question of principle.’ This is known as ‘The Two Ps Test’. Since then the Committee has published a large number of reports (168 until the end of the 2010–2015 Parliament) which together form a body of ‘legisprudence’: they develop and articulate the concept of ‘constitutional principles’. The point about ‘legisprudence’ is that it emanates in the form of officially published material from politics and from politicians themselves, and not, for instance, from the courts or other bodies external to Parliament or government. It is generated and ‘owned’ by politicians. It articulates principles that often reflect the experience and culture that have built up among politicians in both Houses in response to lessons learned and expressions of public opinion over many years.

The Constitution Committee is normally chaired by an experienced politician. The current chair is Lord Lang of Monkton, a former Cabinet Minister. The Committee’s membership includes distinguished lawyers and experienced ‘elder statesmen.’ For instance the membership appointed after the general election 2015 includes a retired Lord Chief Justice of England and Wales, the former Lord President and Lord Justice General of the Supreme Courts of Scotland, a former Chairman of the General Council of the Bar of England and Wales, and one of the prime movers in the campaign to incorporate the European Convention on Human Rights into UK law in the 1980s and 1990s. There are several former Labour and Conservative Cabinet members and MPs on the Committee, as well as two professors,

65 *Reviewing the Constitution: Terms of Reference and Method of Working*, HL 2001–02, 11, para. 1.

of government and of contemporary British history, and a former trade union leader. Thus the Committee's membership brings together a combination of political and legal experience and expertise. It holds evidence sessions at which experts are called on to comment on the bill or other constitutional issues they are considering. It also engages in correspondence with ministers which is published on the committee website. Here, as in the Joint Committee on Human Rights, there are echoes of the Scandinavian system of intra-parliamentary constitutional preview and guardianship.

Examples of investigations of broad issues that the Committee has conducted include *The Process of Constitutional Change*, published in 2011, shortly after the formation of the first coalition government for many years. The Committee stated that:

The constitution is the foundation upon which law and government are built. Yet the United Kingdom has no agreed process for constitutional change. We do not accept that the government should be able to pick and choose which processes to apply when proposing significant constitutional change. We therefore recommend in this report the adoption of a clear and consistent process. Our recommendations are not intended to restrict the government's right to initiate constitutional change, but to hold ministers to account for their decisions.⁶⁶

This recommendation has not been accepted by the government since 2011. However the fact that it is on the record lays down a marker for governments that issues as to process are likely to be raised by the Committee and other commentators when future

66 2010–2012, 15th Report, HL 177.

proposals for constitutional change are under consideration in government.⁶⁷

Oliver, Hazell and Simson Caird⁶⁸ analysed the reports that the Committee had published from its beginnings in 2001 to the end of the 2010 to 2015 Parliament (168 reports in all) and organised the principles that they articulated into a ‘code’ consisting of five sections:

1. The Rule of Law
2. Delegated powers, delegated legislation and Henry VIII powers
3. The separation of powers
4. Individual rights
5. Parliamentary procedure.

Each of these headings includes a number of sub-categories. For instance ‘The separation of powers’ section breaks down into principles to do with the judiciary, the government and Parliament. Individual rights principles include access to justice and due process and procedural fairness.

The reports generally identify principles which the bill or draft bill does not comply with. By way of examples drawn from reports on proposals for retrospective legislation:⁶⁹

67 As of July 2015 the Committee embarked on an inquiry into ‘The Union and Devolution.’

68 See J Simson Caird, R Hazell and D Oliver *The Constitutional Standards of the House of Lords Select Committee on the Constitution*, 2nd edition, 2015 (UCL Constitution Unit and the Constitution Society).

69 *ibid*, page 6. The footnotes give the sources of these principles.

1.1.1 Enacting legislation with retrospective effect should be avoided.

1.1.2 Provisions that have retrospective effect should be drafted as narrowly as possible.

1.1.3 Individuals should not be punished or penalised for contravening what was at the time a valid legal requirement.

1.1.4 Laws should not retrospectively interfere with obligations when the liberty or criminal liability of the citizen is at stake.

1.1.5 Laws should not deprive someone of the benefit of a judgment already obtained.

1.1.6 Laws should not prevent a court from deciding pending litigation according to its merits on the basis of the law in force at the time when the proceedings were commenced.

1.1.7 Retrospective legislation should only be used when there is a compelling reason to do so.

1.1.8 A legislative power to make a provision which has retrospective effect should be justified on the basis of ‘necessity’, and not of ‘desirability’.⁷⁰

The government is normally expected to respond to each of the Committee’s reports, either by proposing an amendment or by stating its justification for the proposal to which the Report objects.

While Committee reports have been controversial from time to time as to how any of the principles is to apply in practice to a particular measure, the principles themselves are not controversial. The work of the Committee does not challenge the

70 Note that the last of these principles explicitly requires the government to provide the justification.

sovereignty of Parliament. If the government and the Commons (and the Lords, unless the Parliament Acts are to be relied upon – see below) decide to go ahead and pass the measure which the Committee considers to be incompatible with a constitutional principle, the measure will be legally valid and will be enforced in the courts if necessary.

In summary, in publishing its reports the Committee imposes a ‘soft law’ political duty on the government to justify its proposals in constitutional terms. It promotes a culture of justification rather than allowing bald assertions of authority by government to legitimise its measures.⁷¹ It is in this way that the House acts as a guardian of the constitution and its values and principles.

It is difficult to assess how influential the Constitution Committee’s work is upstream at the stages when government and its departments are considering future bills and policies. The Cabinet Office document *Guide to Making Legislation* reminds those involved in preparing bills of the work of the Committee, and that a ‘handling strategy’ must be developed for both Houses. The Cabinet’s Parliamentary Business and Legislation Committee must be informed that these steps have been taken before the bill can go forward. It is a fair inference therefore that the Committee’s work does have effects upstream before a bill or draft bill reaches Parliament. Overall the work of the Committee demonstrates that, despite the lack of a written or codified Constitution for the UK, the principles which underlie it – often ‘soft law’ in nature – can be articulated and are broadly accepted.

71 See E Mureinik, ‘A Bridge to Where?: Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal of Human Rights* 31, 32.

The Delegated Powers and Regulatory Reform Committee (DPRR Committee)

The remit of the DPRR Committee is to scrutinise every bill and to prevent the inappropriate delegation of legislative powers, particularly ‘Henry VIII’ clauses granting to ministers the power to amend or repeal provisions in Acts of Parliament by order rather than by the passage of provisions in new Acts. The grant of such powers, even if authorised by Act of Parliament, is clearly a matter of constitutional importance.

The work of this Committee has very clear effects upstream in government. The Cabinet Office document *Guide to Making Legislation* devotes chapter 16 to how civil servants should handle the committee, and in particular what they should deal with in the memorandums produced for the Committee in which they explain and justify proposals for the delegation of powers.

The Committee itself has set out its own requirements as to the issues these memorandums should cover. In their *Special Report: Quality of Delegated Powers Memoranda (2014–15)*⁷² the Committee criticised their lack of consistency and their variable quality. One of the Committee’s principal concerns about these memorandums was ‘the absence of central oversight [in government], both in terms of monitoring performance and dissemination of best practice (including drawing on the comments made in Committee reports)’.

In response to the Committee’s concerns, First Parliamentary Counsel and the Permanent Secretary at the Cabinet Office arranged for the Office of Parliamentary Counsel to follow the advice of the Committee; the secretariat of the Cabinet’s Parliamentary Business and Legislation Committee would

72 7th Report 2014–15, HL Paper 39.

be designated as responsible for disseminating guidance and best practice in producing memorandums. These changes were welcomed by the DPRR Committee. The Cabinet Office also revised its own guidance on the preparation of these memorandums. The Committee issued revised guidance for departments' information.⁷³ This laid down, for instance, that the explanatory paragraph/s of memorandums should explain in detail the purpose of the delegation of power, why the power is not included in the bill, and the choice of parliamentary scrutiny procedure. These were in effect soft law demands by the Committee as to what should be included in government documents. For instance: 'The memorandum should explain and justify the scope of a power, not only in terms of how the current Government intend to exercise it but also how future governments could exercise it'. The Annex also listed some of the principles applied by the Committee. For instance, that every Henry VIII power should be clearly identified, a full justification should be provided for every 'skeleton' part of a bill, and maximum criminal penalties should be on the face of the bill and not left to delegated legislation.⁷⁴

The DPRR Committee's reports are highly regarded in government. According to the *Guide to Making Legislation* 'It is usual for the Government to accept most, if not all, of the DPRRC's recommendations'. And it warns that 'Careful handling will be required if the Government chooses not to accept the recommendations of the DPRRC'. Ultimately other peers may pursue the government's refusal to accept recommendations and the government has to concede.⁷⁵

73 See Appendix 4 to the report.

74 Delegated Powers and Regulatory Reform Select Committee, 7th Report 2014–15, HL Paper 39, summary.

75 See discussion in M Russell, 2013, pp. 218–220.

In sum, the DPRR Committee undertakes important constitutional scrutiny functions, articulates soft law constitutional norms and enters into correspondence and dialogue with various governmental institutions to secure that its requirements are complied with. The existence of the committee means that Departments' Bill Teams produce memorandums explaining and justifying proposals for delegation of powers: as with the Constitution Committee the DPRR Committee's work has effects upstream in government. And almost always the Committee's recommendations are ultimately accepted.⁷⁶

Overall the contributions of the House of Lords and its Committees as guardians of the constitution are well respected, positive, valuable and largely effective.

The Composition of the Lords: Dealing with Legitimacy Problems

However, the composition of the Lords is extremely anachronistic and this raises issues about its legitimacy and thus the legitimacy of its work – its 'outputs'.⁷⁷ The House currently consists of over 800 peers who are normally members for life, plus 26 bishops and archbishops of the Church of England.⁷⁸ Of the peers, all but 92 are life peers who have been appointed by Prime Ministers over the years in the exercise of unregulated patronage. (The appointments are formally made by the Queen under the royal

76 A third committee in which members of the House of Lords play an important role in guarding the constitution is the JCHR. Its role was referred to in discussion of the Human Rights Act, above. Since the committee is not solely a Lords committee comments on its work have been restricted in this pamphlet.

77 For discussion of the Lords' membership see Russell, 2013, chapter 4; for its legitimacy see chapter 9.

78 The archbishops and bishops are not peers and cease being members on retirement (unless they are then granted peerages, as is commonly done for the Archbishop of Canterbury).

prerogative, but on prime ministerial advice.) The 92 hereditary peers were retained when most of the hereditaries were removed by the House of Lords Act 1999. The number 92 represents ten percent of the previous hereditary peers plus fifteen as office holders at the time of the Act and two royal officers of state. They remained in the House under the 1999 Act as part of a deal between the Prime Minister, Tony Blair and the Leader of the Conservatives in the Lords. The provision was moved in the House by Lord Weatherill, a former Speaker of the Commons. These 92 were retained as reminders that a second stage of major reform of composition should take place.⁷⁹ (This has not happened.) When one of their number dies the remaining ones elect a replacement.

Once appointed peers are there for life unless they choose to retire,⁸⁰ or are removed for misbehaviour. There is no cap on the number of peers and the numbers have in fact drifted upwards in recent years.⁸¹

There is normally no single-party majority in the House of Lords. However, during the Parliament of 2010 to 2015 and the coalition government, the peers taking the Conservative and Liberal Democrat whips sometimes formed a majority of those present and voting. And in the Parliament of 2015 the Labour and Liberal Democrat members together may be able to defeat the government. As of November 2015 the membership in the

79 See Ballinger, *The House of Lords 1911–2011. A Century of Non-reform*, 2012, pp. 169–176; Russell, 2013, p. 72.

80 Retirement became legally possible for the first time under the House of Lords Act 2014.

81 The increase in numbers has drawn strong criticism. See M Russell's Constitution Unit reports 152 and 161 at www.ucl.ac.uk/constitution-unit/publications/tabs/reports

Lords was as follows: Conservatives 249; Labour 212; Liberal Democrats 112; Crossbenchers 180; others 67.⁸²

The lack of a government majority is partly due to the presence of some 22 per cent of independents or 'cross-benchers'. There is general agreement that a cross-bench membership of around 25 per cent would be a positive quality of the House: if other parties oppose the government's measures it must win the votes of independents (and possibly of others) by persuading them of the merits of their proposals rather than by reliance on the whip and party discipline and loyalty.

So the 'input' or in Russell's term, 'moral' legitimacy of the House of Lords is easily challenged. But its 'output' legitimacy is high. This is due to the quality of the work that it does, largely when acting in non-partisan ways either in debates on the floor of the House or in its Committees. The discussion here has focused on committees with responsibilities for constitutional guardianship, but many other committees (for instance the European Union committee and its sub committees, and the Science and Technology Committee) produce excellent reports due to the expertise and experience of their members and of the evidence that they receive.

On the face of it the powers of the House of Lords could enable it to go beyond a 'guardianship' role and to frustrate the Commons and the government of the day on matters of substance that do not raise constitutional issues. It would then of course be exposed to accusations of acting 'unconstitutionally'. However a combination of statutory provisions in the form of the Parliament Acts 1911 and 1949 and of conventions and practices serve to inhibit, even prevent, the Lords from doing so, thus upholding principles of the primacy of the House of Commons and effective government.

82 See Parliament website for up to date figures.

*The Parliament Acts*⁸³

The Parliament Acts of 1911 and 1949 sought to deal with the legitimacy issues over composition of the Lords. They were intended to be temporary pending further reforms to put the House on a more democratic basis.⁸⁴ The Acts secure that the will of the House of Commons prevails if the two Houses have not agreed upon the text of a bill about a year⁸⁵ after that bill was first introduced in the House of Commons.⁸⁶

This aspect of the Parliament Acts has only been relied upon by governments to secure the passage of their bills seven times since 1911. The first two occasions were: the Welsh Church Act 1914 (which disestablished and disendowed the Church of England in Wales), and the Government of Ireland Act 1914. (The latter was not brought into effect because of the outbreak of the First World War. A different Government of Ireland Act was passed in 1920, after the end of the war.) The Parliament Act 1949, which reduced the delaying power or suspensory veto of the House of Lords to one year, was (controversially) passed under the 1911 Act after the required two year delay under that Act.⁸⁷

83 For discussion see for example C Ballinger (2012) chapters 1, 3; M Russell, 2013, chapter 1; R Rogers and R Walters *How Parliament Works*, seventh edition, 2007.

84 Incremental reforms have taken place since 1949, including the Life Peerages Act 1958 facilitating the creation of life peers, and the House of Lords Act 1999 which removed most of the hereditary peers from the House. See further discussion below.

85 The provisions on the period of the delay are complex. In practice it amounts to about a year.

86 Note that the Acts do not apply to a bill that was introduced in the House of Lords. Thus government bills that are expected to be controversial are generally introduced in the Commons, and less controversial bills (e.g. on law reform) tend to be introduced in the House of Lords.

87 The 1949 Act was held to have been validly passed in *R (Jackson) v. Attorney General* [2005] UKHL 56.

After 1949 the first Act to be passed under the Parliament Acts was the War Crimes Act 1991: this retrospectively authorised the criminal prosecution of persons for war crimes committed in Germany between 1939 and 1945 by persons who later became British citizens. The objections in the Lords were based on the breach of the rule of law in its retrospectivity.⁸⁸ Since 1997 the Acts have been relied upon by governments on three occasions: following the Lords' defeats of the European Parliamentary Elections Bill (1999), the Sexual Offences (Amendment) Bill (2002) and the Hunting Bill (2004).

The Parliament Act 1911 also provides that money bills endorsed as such by the Speaker of the House of Commons may not be vetoed or delayed in the Lords. While in practice Consolidated Fund and Appropriation Bills are invariably certified as money bills, many annual Finance Bills are not so certified since they commonly contain provisions that are not covered by the money bill definition in the Acts.⁸⁹ However, since as long ago as the seventeenth century an understanding has developed, based on resolutions passed by the Commons from time to time, that the Commons enjoy 'financial privilege' and the Lords will not amend

88 See discussion of retrospectivity in the section on the Select Committee on the Constitution, above.

89 A money bill is a public bill which, in the opinion of the Speaker, contains only: provisions dealing with the imposition, repeal, remission, alteration or regulation of taxation; the imposition of charges on the Consolidated Fund or the National Loans Fund or on money provided by Parliament for the payment of debt or other financial purposes or the variation or repeal of such charges; supply; the appropriation, receipt, custody, issue or audit of public accounts; or the raising or guarantee or repayment of loans.

or delay provisions in bills that have financial consequences.⁹⁰ The precise extent of this convention in relation to bills is unclear. But it does not apply to SIs with financial implications.⁹¹ This became controversial in 2015, a matter discussed below.

The Parliament Acts also lay down a significant ‘constitutional guardianship’ role for the second chamber: a bill to delay a general election beyond the Parliament’s five year term cannot pass without the consent of the Lords.⁹²

Although governments have only rarely had to rely upon the Parliament Acts to secure the passage of bills, the effects on government policy of the Acts are subtle and operate largely ‘below the radar’. First, the House of Lords often picks up on issues that are also concerning members of the Commons including the government’s own backbenchers, and this may persuade the government to compromise and accept or make amendments in order to accommodate concerns in both Houses. This is an example of the delicate political detective work, negotiation and exercise of emotional intelligence and judgment that take place among Lords and between the two Houses when considering controversial government measures. (This consideration may also be at work where controversial SIs are in issue.⁹³) Secondly, governments tend not to like delay: rather than wait for the year’s suspensory veto to expire a government may prefer to introduce

90 The definition of financial privilege given by the Joint Committee on Conventions referred only to bills, not to SIs: see their report *Conventions of the UK Parliament*, 2005–06, HL Paper 265, HC 1212–1, Summary and Conclusions paras. 21–23. See also M Russell and D Glover *Demystifying Financial Privilege. Does the Commons’ Claim of Financial Primacy on Lords Amendments Need Reform?* Constitution Unit UCL, 2014.

91 See Russell and Glover, 2014.

92 An Act to delay the general election was passed with the consent of the Lords during the Second World War.

93 See discussion of SIs below.

amendments to overcome the Lords' concerns. And lastly, in the final year or so of a Parliament the Lords' delaying power amounts to a veto.

Bills and the Salisbury Convention

One of the reasons why governments have not needed to resort to the Parliament Acts to secure the passage of their primary legislation in the face of opposition from the Lords has been the Salisbury Convention of 1945 – an important 'soft law' element of the British constitution.⁹⁴ This was agreed by the leaders of the two main parties in the Lords after the general election of that year in which a Labour government was elected. At that time there was no provision for the creation of life peers, through the exercise of which the government could have overcome opposition from the enormous inbuilt Conservative majority in the Lords. The Convention stated that the Lords should not block measures that had been included in the governing party's election manifesto. The working of the Convention has evolved over time and it is currently taken to mean that the Lords should not vote down a 'manifesto bill' at second or third reading, or pass 'wrecking' amendments.

However, the Salisbury Convention has weakened over the years. The Life Peerages Act 1958 authorised the creation of life peers: Prime Ministers have used this power to increase the number of their party members in the House and shift the party balance. And there has been an increase in the number of cross-benchers

94 Sometimes known as the Salisbury Addison Convention. For discussion of the Convention see Joint Committee on Conventions Report *Conventions of the UK Parliament*, HL Paper 265, HC 1212, 2005–2006, chapter 3; Ballinger, 2012, pp.52–56, 129, 173–4; for more up to date material see www.parliament.uk/site-information/glossary/salisbury-doctrine; Russell, 2013, pp.83–4.

in the House.⁹⁵ Most hereditary peers departed under the House of Lords Act 1999, noted above. The ‘inbuilt unrepresentative party balance’ aspect of the justification for the Convention has gone. And some members of the Lords take the view that the 1999 House of Lords Act actually legitimates their work,⁹⁶ thus demonstrating considerable loss of support for the Convention in the Lords.⁹⁷

Turnout and voting patterns in elections have also changed. In 1945 and for many elections thereafter the turnout in general elections was much higher than nowadays, and the vast majority of the votes were divided between the two main parties, Conservative and Labour. For instance from 1945 to 1970 the two main parties won more than 87 per cent of the votes cast and the turnout ranged between 72 per cent in 1945 and 84 per cent in 1950. Usually only a few MPs were elected from other parties. This meant that governments could be formed from single party majorities in the Commons and were very likely to have won more votes than any of the other parties, and close to a majority of the votes cast in the election. (In the 1950s the winning party won about 48 per cent of the vote. However, no post war single party

95 The percentage of crossbenchers has dropped since 1999, when they represented 29 per cent of the Lords. This is partly attributable to the fact that the Law Lords are no longer members of the House since the creation of the Supreme Court. However there is a case for the proportion of crossbenchers to be increased from the current 22 per cent to reduce the level of party political competition in the House.

96 See Russell, 2013, p240–241, tables 9.1 and 9.2.

97 Russell, 2013, p 242, table 9.3. See also <http://publiclawforeveryone.com/2015/05/11/replacing-the-human-rights-act-the-house-of-lords-the-parliament-acts-and-the-salisbury-convention> and <http://publiclawforeveryone.com/2015/09/23/the-end-of-the-salisbury-convention>

government has won 50 per cent plus one of the votes cast.⁹⁸) Parties offered their manifestos (which were brief documents) to the public and could, and did, claim that their majority in the Commons gave them a democratic mandate to implement their manifesto policies.⁹⁹ On this basis it would clearly appear to be contrary to the will of a large part of the electorate, if not the majority of voters, if the unelected Lords were to reject or wreck government bills designed to implement manifesto policies: the Salisbury Convention was widely seen as 'democratic'.

The turnout in elections has fallen since the 1970s and governments tend to be formed from one party which won far fewer than a majority of votes cast (though the coalition of 2010 accounted in total for more than half of the votes cast), and of course far less than a majority of the total electorate. In 2015 support for the two main parties was some 67 per cent on a turnout of 66 per cent. The Conservatives won a majority of twelve on 37 per cent of the votes cast, having received the votes of 24 per cent of the total electorate. Thus the claim of a government to have a mandate from the electorate to implement its manifesto policies is no longer remotely based in the facts.

This has affected attitudes to the convention in the Lords. In 2005 for instance the Liberal Democrat party leader, Charles Kennedy MP claimed that it was 'absolutely ridiculous ... [to] fall back on a 60-year-old convention relating to absolutely different political circumstances'.¹⁰⁰ During the Conservative–Liberal Democrat coalition of 2010–2015 the coalition parties' manifesto

98 In the 2010 election the Conservatives and Liberal Democrats, who formed a coalition, won 59.1 per cent of the vote between them, but the Salisbury Convention could not apply where two differing manifestos were at issue.

99 See T Quinn *Mandates, Manifestos and Coalitions: UK Party Politics after 2010*, 2014 (The Constitution Society).

100 House of Commons, *Hansard*, 17 May 2005, col. 51.

policies were traded in the coalition agreement: the letter of the Salisbury Convention could not apply in such circumstances. The (Conservative) Cabinet Office Minister, Mark Harper MP admitted to the Commons in June 2011: ‘the Salisbury-Addison convention does not operate in the same way, if at all.’¹⁰¹

The Salisbury Convention also assumes that voters read or know about, and agree with, all of the policies set out in the manifesto of the party they vote for. Empirical research shows that this assumption will often be mistaken.¹⁰² Overall the evidence is that voters cast their votes less on the basis of manifestos and more on perceptions of party competence and evaluations of party leaders.¹⁰³

The persuasiveness and thus the strength of the Salisbury Convention’s focus on manifestos as constraints on the work of the Lords may also be called in question if the processes and procedures within political parties for drawing up their manifesto promises are or appear to have been defective (for instance in giving rise to unintended consequences or for lack of rational justifications, evidence, costing or coherence) or if the wording of manifestos is unclear or misleading. Manifestos are much longer and more detailed than they were in 1945. Parties tend to offer, sometimes rather late in the run up to the next election, policies targeted at particular sections of the electorate with a view to winning their votes. Examples include the Liberal Democrats’ promise to abolish university student tuition fees before the 2010 election, Labour’s promise to cap electricity prices before the 2015 election, and the Conservatives’ promise to extend the right

101 House of Commons, *Hansard*, 27 June 2011, col 724.

102 See Quinn, above at p.9; I Budge, H Keman and others *Organizing Democratic Choice: Party Representation Over Time*, 2012, pp. 7405; H Clarke, D Sanders and others *Performance Politics and the British Voter*, 2008.

103 Quinn, above at p. 10; Clarke and Sanders, above.

to buy their homes at a discount to housing association tenants shortly before that election.¹⁰⁴ Indeed manifesto pledges may be included as vote winners by a party that does not expect to win office: when it does so and finds itself unable to implement a policy it may be blamed by some for irresponsibility in including unworkable policies in its manifesto and by others for failing to keep its promises in full.¹⁰⁵ Life of course is like that – politicians may feel the need to ‘buy’ votes in these ways. Manifestos are essentially populist documents. But the desire to win votes and elections may drive parties to prioritise their success in elections over careful intra-party policy making and balanced consideration of wider public interests.

In sum, the Salisbury Convention and other associated conventions must be vulnerable to challenge if it becomes clear that the pledge in the manifesto on which the government of the day relies may have misled voters or was not well thought-out or costed or workable.

Given the fact that governments are not nowadays elected on a majority of the votes cast, that turnout has fallen, and that little is known about the care with which manifesto promises are expressed or researched, is there any justification for retaining the Salisbury Convention that manifesto bills should be treated differently from other bills? A survey of 2004/5 found that 72 per cent of peers were willing to oppose (but not necessarily block at second reading) elements in a *manifesto* bill that had

104 At page 52 of the Conservative manifesto.

105 The manifesto promise of the Liberal Democrats before the 2010 election to abolish tuition fees for university students is a good example. As part of the coalition agreement the Liberal Democrats dropped this policy, and were very strongly criticised for doing so. In fact the promise had not been carefully worked out and the ways in which the Universities could be funded had not been set out in the manifesto.

strong public support.¹⁰⁶ If the bill had little public support, 93 per cent of peers believed it was justified to vote against it. In relation to *non-manifesto* government bills, between 96 per cent and 97 per cent believed opposition was justified, whether the bill had strong public support or not. So inclusion in a manifesto coupled with strong public support could lead 28 per cent of peers to hold back from opposing it. In practice the attitudes of Lords to the Salisbury Convention and the mandate doctrine may not be so very different from the general attitude of the House of Lords to its scrutiny powers, discussed above.

Ministers of course still invoke the mandate doctrine, and members of the public seem to accept it as justification for government policies. But members of Opposition parties of course do not accept the mandate doctrine – if it were binding then opposition in the House of Commons would be anti-democratic, even unconstitutional: no-one suggests that. Any justifications for what remains of the Convention rest on recognition in the Lords of the need for careful handling of their relations with government and the Commons, and respect for the primacy of the Commons and the need for strong government, both important principles that need to be weighed against other constitutional principles.

Statutory Instruments and Conventions

The Lords have explicit statutory responsibilities¹⁰⁷ in relation to SIs:¹⁰⁸ depending upon the terms of the Act granting the ministerial power to make SIs the two Houses are empowered

¹⁰⁶ Russell, 2013, p 242, table 9.3.

¹⁰⁷ The Statutory Instruments Act 1946, passed only shortly after the Salisbury Convention was agreed between the main parties in Parliament in 1945.

¹⁰⁸ These are regulations and other forms of delegated legislation that are made by ministers in the exercise of statutory powers.

either to veto them by negative resolution (failing which they come into effect automatically after a set period)¹⁰⁹ or to approve them by affirmative resolution. On debating a motion for an affirmative resolution the House may pass the resolution while expressing regret. It may alternatively amend the motion by inserting a period of delay for consultation and further evidence before the House will pass a resolution, to give the minister in charge of the SI time to reconsider it. The Minister may then decide to resubmit the SI unchanged (and risk defeat in the Lords) or withdraw it and introduce a rethought SI, in the hope that the two Houses will affirm it. Neither House has the power to amend such instruments.

A question arose in October 2015 whether any conventions restrict the role of the Lords in relation to statutory instruments, in particular those that have implications for public expenditure on welfare.

Case Study: The Tax Credits Row 2015110

In its 2015 election manifesto the Conservative party stated that it would seek savings in the welfare benefit bill of some £12 billion over the Parliament. It did not mention tax credits specifically. In September 2015 it laid before Parliament regulations¹¹¹ (a draft SI) that would reduce the eligibility of taxpayers for payment of tax credits. These payments are designed to assist workers on low incomes. The measure would save the government some

109 This would be known as a ‘fatal’ resolution.

110 For discussion see M Russell ‘The Lords and tax credits: fact and myth’, UCL Constitution Unit blog, 22 October 2015; R Fox *Licence to Kill? Should the House of Lords Veto the Tax Credits Statutory Instrument?* Available at <http://blog.hansardsociety.org.uk>

111 The Draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015.

£4 billion in a year. It was to form part of the government's 'high income, low tax, low welfare' policy and to implement the manifesto commitment.

The House of Commons approved the draft SI by affirmative resolution in September. When the draft came up for debate in the House of Lords on October 26 many peers expressed concern about the impact of the loss of potentially large sums in income for those on very low incomes: some estimates were that the average loss would amount to £1,300 a year. The House voted against rejecting the regulations out of hand. Instead it passed two resolutions, one calling on the government to provide financial redress to tax credit claimants whose payments would be reduced, and one to delay the Lords vote on the affirmative resolution until the impacts on recipients of the tax credits had been further considered by the government.

The Lords were immediately widely criticised by Ministers and MPs in the Commons, and in some of the press, for not passing an affirmative resolution and instead delaying their decision: it was claimed that their actions amounted to a breach of the Salisbury Convention, breach of the financial privilege of the Commons, and denial of the primacy of that House. The Chancellor of the Exchequer stated that he would bring forward proposals to deal with the position in his Autumn statement in late November. The Prime Minister appointed Lord Strathclyde, a Conservative member of the House of Lords who had previously led the party in that Chamber, to conduct a review and bring forward proposals for dealing with what was said to be 'a constitutional crisis'.

In the days that followed it emerged that many backbench Conservative members of the House of Commons (as well as members of other parties) shared the concerns that has been

expressed in the House of Lords. In his Autumn statement on 25 November the Chancellor withdrew the tax credit proposals.

At the time of writing the report of Lord Strathclyde is not yet forthcoming. It is possible nevertheless to reflect briefly on the role of the Lords in relation to such SIs, and especially where it fits into the 'constitutional guardianship' function.

The Salisbury Convention applies in terms to manifesto bills, not SIs. Given the weaknesses of the justifications put forward in support of that Convention that were discussed above, it seems unlikely that it could expand to include SIs: an assertion by government that it has authority to make SIs and demand that the Lords pass an affirmative resolution without any need to justify them would reject the role of the chamber as a place for sober second thoughts: this would be a major challenge to an important constitutional principle. It would require primary legislation with the government relying on the Parliament Acts if the Lords refused consent. The Joint Committee on Conventions in its report in 2006 took the view that 'the House of Lords should not regularly reject Statutory Instruments, but that in exceptional circumstances it may be appropriate for it to do so ... The Government appear to consider that any defeat of an SI by the Lords is a breach of convention. We disagree.'¹¹²

Creating new conventions to provide further restraints on the Lords' approach to SIs would be problematic for the reasons of substance set out above. There are also procedural difficulties. If Lord Strathclyde were to propose new conventions there can be no guarantee that the Lords would adopt or agree to them, unless perhaps they were being threatened with the creation of large numbers of new government supporting peers, a most unwise step for any Prime Minister to take. It is unlikely that

112 At paras. 227 and 228.

new conventions could be created by agreement between the parties in the Lords, the mechanism adopted for the Salisbury Convention in 1945. (At that time the Conservatives had a huge majority in the Lords and it was obviously wrong that one party should enjoy permanent privileges there. That is no longer the case, as the earlier discussion of its composition shows.) The issue could be a matter for consideration by a new Joint Committee on Conventions such as the one that reported in 2006.¹¹³ However that Committee's recommendations have been ignored. Why should new ones fare any better?

In sum, the government could have overcome problems in the Lords by introducing the main points in its proposed changes to the tax credit system in primary legislation, in which case the Parliament Acts would apply and the government could have secured the passage of the bill without the consent of the Lords after a delay of one year. The Lords were not in breach of any conventions. They were demanding sober second thoughts from government and the Commons as is the role of a second chamber. How the exercise of that function can be reconciled with the Lords' normal recognition of the primacy of the Commons and the need for effective government (in this instance dealing with the country's finances) is not an easy question to answer. It is not unusual for constitutional principles to collide. This is where relations of comity between the two Houses and the government need to be nourished as important constitutional lubricants.

113 The Joint Committee on Conventions' reports did not discuss financial privilege or the Salisbury Convention in relation to SIs: see the Committee's First Special Report www.publications.parliament.uk/pa/jt200506/jtselect/jtconv/189/189.pdf, and its Report www.publications.parliament.uk/pa/jt200506/jtselect/jtconv/265/265.pdf and www.publications.parliament.uk/pa/jt200506/jtselect/jtconv/265/265ii.pdf

IV. Reflections

Given the principle – dating back in legal form to the Parliament Act of 1911 – that the elected chamber should have primacy over the unelected House of Lords, arrangements have grown up over the years to protect that democratic primacy against frustration by the second chamber, while at the same time putting in place a system of checks to inhibit government and the Commons from ‘abusing’ their primacy by overriding constitutional principles such as the rule of law,¹¹⁴ ministerial accountability to Parliament, and parliamentary sovereignty itself, for instance via Henry VIII clauses.

Since around 2000 in particular the House of Lords has significantly increased its role as constitutional guardian through the work of the new Constitution Committee and the long established Delegated Powers and Regulatory Reform Committee. The guardianship role in the UK is shared with the courts, though their powers to deal with unconstitutional measures in Acts of Parliament are limited by the doctrine of parliamentary sovereignty. The role is also shared by the House of Commons. But the Lords are particularly well placed to develop sophisticated concepts of constitutionalism and to apply soft law ‘legisprudence’ effectively to the policies and laws that governments seek to put into effect. For the time being there seems to be no prospect of the UK acquiring a written,

114 This was discussed above in the sections on the Constitution Committee and the DPRR Committee.

codified Constitution and resolving the issues raised by the lack of a Constitutional or Supreme Court with strike down powers. The continuation and evolution of the guardianship role of the Lords is therefore crucial to the flourishing of the UK's liberal democracy. It is, as it should be, taken into account upstream in government. The role cannot be performed as effectively by the Commons. The House of Lords itself needs to nurture its role and its outcome legitimacy. In doing so it should avoid over-indulging in party politics, not on the basis of the spurious doctrines of the manifesto and mandate, but on the basis of the primacy of the Commons and the public interest in effective government.

In summary, the House remains a chamber of sober second thoughts and that in itself is an important constitutional guardianship role. If the Lords were bound by convention – or by law – not to debate, amend or oppose manifesto and other government bills and SIs a government with a majority in the House of Commons and operating a strong whip system would enjoy authority in both houses without the need for justification. As it is, the Lords accept that members of the government in the Commons are accountable to the electorate, and that this (rather than the contents of the winning party's manifesto) is the basis of the primacy of that House. Lords also generally support the continued existence of the Lords as a largely appointed chamber. So as a matter of practical politics and survival restraint on their part in opposing the government and the Commons is essential, especially for a period after an election when governments rely heavily upon their (spurious) claims to a mandate. It would be disastrous for the Lords and I suggest for the system as a whole if the government and the Commons were to respond to difficulties in the Lords either by swamping it with large numbers of appointed government supporters, or reducing its powers to, say, three months delay before the Parliament Acts can be relied

on. The Lords have therefore generally been careful to oppose government measures in the post-election period on non-party political grounds, focusing on constitutional implications and on the justifications and workability of proposals. However since the formation of a Conservative government after the 2015 election the Labour and Liberal Democrat members in the Lords outnumber the Conservatives. The crossbench membership has fallen to 22 per cent. The Lords are therefore vulnerable to being accused (rightly or wrongly) of being more party political than before when they defeat or criticise government measures.

The problems over composition of the Lords which expose it to criticism are politically hard to resolve. It seems likely that incremental reform will continue to take place rather than legislation for the introduction of elected members. But whatever changes take place, the vital role of the House of Lords as the UK's intra-parliamentary constitutional guardian should not be undermined.

Constitutional Guardians:

The House of Lords

By Dawn Oliver

This pamphlet explores the arrangements for guardianship of the UK constitution and its values and the role of the House of Lords in particular. Effective constitutional guardianship is important in any liberal democracy. In most democracies the courts have important roles in deciding whether laws breach the constitution and striking them down if so. This is not a role that the courts are able to perform in respect of legislation passed by the UK Parliament, since it possesses legislative supremacy. Protection of constitutional values in the UK is therefore essentially a matter for parliamentarians, and particularly a responsibility of the second chamber and its committees: party political partisanship is less strong there than in the Commons, the government does not have a majority in the House of Lords, and an independent and professional element in the membership of the Lords enables that chamber to carry out its guardianship roles authoritatively and fairly. However the composition of that chamber presents political problems for the guardianship role which need to be overcome.



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