

# Parliamentary Conventions

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THE  
CONSTITUTION  
SOCIETY

## About the Author

Jacqy Sharpe is a former Clerk in the House of Commons. Her period as Clerk of the Journals provided her with significant insight into the historical and contemporary context of parliamentary conventions and procedure.

## Message from the Author

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# Executive Summary

“General agreement or consent, as embodied in any accepted usage, standard, etc”<sup>1</sup>

“Rules of constitutional practice that are regarded as binding in operation, but not in law”<sup>2</sup>

“[B]inding rules of behaviour accepted by those at whom they are directed. A practice that is not invariable does not qualify.”<sup>3</sup>

A list of various conventions with a note on how, if at all, they, or the approaches to them, have lately been modified or changed:

CONVENTION	CURRENT POSITION
<b>Conventions relating to behaviour in the House of Commons</b>	
<p><i>Speaking in the House of Commons</i></p> <p>Members should address the House through the Chair and refer to other Members in the third person, by constituency or position.</p> <p>Except for opening speeches, maiden speeches and where there is special reason for precision, Members should not read speeches, though they may refer to notes</p>	<p>Although both questioned and frequently breached, the convention is generally accepted</p> <p>Accepted and generally observed</p>
<p><i>Attendance at debates</i></p> <p>Members are expected to be present from the start of a debate, to remain for at least the following two speeches after their own and to return for the winding-up speeches</p> <p>The Chair, in general, calls Members from alternate sides of the House and gives priority to Members who have attended a substantial part of the debate</p>	<p>Accepted and generally observed</p> <p>Accepted and observed</p>

<sup>1</sup> *The Shorter Oxford English Dictionary*, Sixth edition, Oxford University Press, 2007

<sup>2</sup> *The Cabinet Manual: A guide to laws, conventions and rules on the operation of government*, Cabinet Office, 2011, p3

<sup>3</sup> *Parliament and the Law*, eds Alexander Horne and Gavin Drewry, *Relationship between the Two Houses*, Lord Norton and Lucinda Maer, 2018, p128

CONVENTION	CURRENT POSITION
<p><b><i>Maiden speeches</i></b></p> <p>Normally heard without interruption. May be read. A maiden speaker is congratulated by at least the following two speakers and the front benches</p>	<p>Accepted and observed</p>
<p><b><i>Formal visits to another Member's constituency</i></b></p> <p>Members should notify Members when making a formal visit to their constituency</p>	<p>Although it is often overlooked, the importance of the convention is generally accepted</p>
<p><b>Conventions relating to behaviour in the House of Lords</b></p>	
<p><b><i>Speaking in the House of Lords</i></b></p> <p>Lords should refer to other Members by reference to title or post held.</p> <p>Speeches should not be read, though Members may make 'extended use' of notes</p>	<p>Accepted and observed</p> <p>Accepted and generally observed</p>
<p><b><i>Attendance at debates</i></b></p> <p>Members are expected to be present for the greater part of the debate and for at least the opening and winding-up speeches and the speeches before and after their own</p>	<p>Accepted and observed</p>
<p><b><i>Maiden speeches</i></b></p> <p>Normally heard without interruption. Speech should be short and non-controversial. Congratulated by the next speaker only, plus the front benches if they wish. Other Members should remain in their seats during the speech and the following speaker's congratulations</p>	<p>Accepted and observed</p>
<p><b><i>Valedictory speeches in the Lords</i></b></p> <p>Attract the same courtesies as maiden speeches</p>	<p>Accepted and observed</p>
<p><b><i>Sitting times</i></b></p> <p>House normally rises by about 10pm on Mondays to Wednesdays, 7pm on Thursdays and 3pm on Fridays</p>	<p>Accepted but often ignored</p>

CONVENTION	CURRENT POSITION
<b>Conventions relating to parliamentary procedures in the two Houses of Parliament</b>	
<p><i>Legal advice from the Law Officers</i></p> <p>Not normally disclosed outside government though may be disclosed if a Minister deems it expedient for the information of the House</p>	<p>Challenged by an Humble Address seeking legal advice on the terms of the UK's departure from the EU (13 Nov 2018). Advice disclosed after Ministers found in contempt for failing to comply with the resolution</p>
<p><i>Queen's Consent</i></p> <p>Government seeks consent even for Bills of which it disapproves</p>	<p>Accepted and observed</p>
<p><i>Royal Assent</i></p> <p>A government will always advise the Sovereign to give Royal Assent to a Bill that has been passed by both Houses</p> <p>All Bills which are expected to be passed are included in the Letters Patent by which the Sovereign signifies Royal Assent, i.e. are not intentionally delayed</p>	<p>Accepted and observed</p> <p>Accepted and observed</p>
<b>Conventions relating to parliamentary procedures in the House of Commons</b>	
<p><i>The Speaker</i></p> <p>Confidence in the integrity and impartiality of the Speaker is an indispensable condition of the successful working of procedure in the House of Commons. Speakers enjoy wide discretion in interpreting Standing Orders and the relevance of precedent, and it is for them to decide matters of procedure</p>	<p>Procedural rules such as the Speaker only having a vote when the numbers are equal, and then only in accordance with rules which preclude an expression of opinion, help to reinforce the convention. While the House continues to accept and respect the authority and impartiality of the Speaker, there are some reservations about the extent of the powers which Speakers conventionally exercise</p>
<p><i>Constitutional Bills</i></p> <p>Taken in Committee of the whole House</p>	<p>Accepted and generally observed</p>
<p><i>Forthwith motions</i></p> <p>By convention, put without debate and amendment</p>	<p>The Speaker allowed an amendment to be moved to a forthwith Business of the House motion, though still without debate (9 Jan 2019). His decision was not subsequently challenged on a substantive motion</p>

CONVENTION	CURRENT POSITION
<p><b><i>Money Resolutions</i></b></p> <p>Convention that a government will provide a money resolution for a Private Member's Bill that has received a second reading</p>	<p>Convention modified. Money resolutions now provided on a case-by-case basis</p>
<p><b><i>'Same Question' Rule and Use of 'Notwithstanding' Motions</i></b></p> <p>A motion or amendment which is the same, in substance, as a question which has been decided cannot be brought forward again in the same session</p> <p>Motions to 'notwithstanding' a previous decision of the House and thereby circumvent the 'same question' rule have occasionally been allowed</p>	<p>Observed, though use has been questioned</p> <p>The Speaker declined to allow such a motion to be tabled in respect of a government motion on the EU Withdrawal Agreement (27 March 2019). Unclear how the convention will operate in the future</p>
<p><b><i>Standing Order No. 24 debates</i></b></p> <p>Convention that motions for the purposes of having a general debate would not be amended and, by implication, be neutral in terms</p>	<p>The Speaker allowed an application to be made under SO No. 24 for a motion to disapply SO No. 14(1), which provides for Government business to have precedence, and to programme the stages of a Private Member's Bill (3 Sept 2019)</p>
<p><b><i>Urgent Questions</i></b></p> <p>Neither the submission of an urgent question nor its subsequent rejection by the Speaker should be publicly referred to</p>	<p>Accepted and generally observed</p>
<p><b>Conventions relating to parliamentary procedures in the House of Lords</b></p>	
<p><b><i>Orderliness of Amendments</i></b></p> <p>The Legislation Office advises on the orderliness of amendments to Bills. It is expected that the advice of the Office is taken</p>	<p>Generally accepted and observed. The most recent example of that advice being disregarded was in respect of an amendment to the Electoral Registration and Administration Bill (14 Jan 2013)</p>
<p><b>Conventions concerning relations between the Commons and the Lords</b></p>	
<p><b><i>Primacy of Commons</i></b></p>	<p>Accepted and observed</p>

CONVENTION	CURRENT POSITION
<p><b><i>The Salisbury-Addison Convention</i></b></p> <p>The House of Lords gives a second reading to government Bills which seek to implement manifesto commitments</p> <p>A manifesto Bill is not subject to wrecking amendments which change the Government's manifesto intentions as proposed in the Bill</p> <p>A manifesto Bill is passed and sent (or returned) to the House of Commons in reasonable time to consider the Bill or any amendments proposed to it</p>	<p>Generally accepted and observed</p> <p>Generally accepted and observed</p> <p>Generally accepted and observed. Excluding Bills halted by general elections, and one Bill which the government decided not to proceed with, since 1949 only six government Bills have not been returned to the Commons in time for them to become law in the session in which they were introduced</p>
<p><b><i>Commons Financial Privilege</i></b></p> <p>The Commons has predominant rights in relation to legislation necessary to give legal authority to taxation and expenditure. A Lords Amendment which engages financial privilege, and to which the Commons disagrees, will be returned to the Lords with a Message indicating that it infringes financial privilege. In those circumstances, it is contrary to convention to send back amendments in lieu which clearly invite the same response</p>	<p>Accepted and observed, although there is occasional disagreement about whether specific amendments engage financial privilege</p>
<p><b><i>Delegated Legislation</i></b></p> <p>Lords should not reject Statutory Instruments, or should do so only rarely</p>	<p>Generally observed. Disagreement about the scope of the convention, or whether it is a convention at all</p>
<b>Conventions relating to the interaction between Parliament and Government</b>	
<p><b><i>Collective Ministerial Responsibility</i></b></p> <p>The Government is collectively accountable to Parliament for its actions, decisions and policies</p>	<p>Except when explicitly set aside, collective ministerial responsibility is accepted and generally observed. Question of whether it is "as much a maxim of political prudence as it is a convention of the constitution"</p>

CONVENTION	CURRENT POSITION
<p><b>Confidence Motions</b></p> <p>A Prime Minister is expected to tender the Government’s resignation if defeated on a confidence motion</p> <p>Governments were expected to resign if defeated on a major matter of policy</p>	<p>Unclear how this convention will operate in future</p> <p>No longer seems to apply and cannot be enforced unless the Commons passes a no confidence or early election motion under the Fixed-term Parliaments Act or approves an alternative PM whom the incumbent PM would be expected to recommend to the Sovereign</p>
<p><b>Military Action</b></p> <p>Prerogative power. Convention is that “save in exceptional circumstances, the House of Commons is given the opportunity to debate and vote on the deployment of armed forces overseas”</p>	<p>Accepted and observed</p>
<p><b>Pre-election Planning (Purdah)</b></p> <p>Ministers are expected to observe discretion in initiating any new action of a continuing or long-term character</p>	<p>Accepted and observed</p>
<p><b>Prorogation</b></p> <p>The PM advises the Sovereign to exercise His or Her prerogative to prorogue Parliament</p>	<p>The Supreme Court decision overturned the convention that prorogation, on the advice of the PM, was always lawful</p>
<p><b>Sewel Convention</b></p> <p>Westminster would not normally legislate with regard to devolved matters without the consent of the devolved body</p>	<p>The convention has been disregarded on occasion, most notably in relation to the European Union (Withdrawal) Bill. Disagreement about whether the convention is still extant</p>
<p><b>The Sovereign</b></p> <p>The majority of prerogative powers are exercised by, or on the advice of, Ministers</p> <p>The Sovereign should not be drawn into party politics</p> <p>Retiring PMs expected to offer clear advice to the Sovereign on who should be invited to form the next government</p> <p>Ministers’ communications with the Sovereign should remain confidential</p>	<p>Accepted and observed</p> <p>Accepted and observed</p> <p>Accepted, though the possible effect of the Fixed-term Parliaments Act on the convention is unclear</p> <p>Accepted and generally observed</p>

# I. Introduction

1. Conventions in the British parliamentary system range from the minor, such as those governing some of the internal practices in the House of Commons and House of Lords, to fundamental constitutional conventions relating to prerogative powers, such as the decision to take military action or the prorogation of Parliament. Definitions of what constitutes a convention differ; *this paper defines a convention as any long-standing practice or rule which is accepted, and observed, by those to whom it is directed*. It takes Parliament – its internal workings and relationship with the Executive – as its central focus.

2. The paper begins with a description of various conventions relating to behaviour in the two Houses of Parliament, continues with a discussion of some of the procedural conventions in the Commons and Lords and of the conventions applying to relations between the Lords and Commons and concludes with a brief description of the specific parliamentary and constitutional conventions that form part of the larger context within which parliamentary conventions work. In relation to parliamentary conventions, it adopts the approach that a convention is what Parliament, or either of its constituent Houses, say it is. Accordingly, the discussion of parliamentary conventions is almost entirely confined to parliamentary, as distinct from academic, views.

3. When I began to write this paper, I had a relatively clear understanding of the procedural conventions that I intended to describe. Events over recent months have required a review and reassessment of some of those conventions. Some, indeed, may no longer be “accepted and observed”, by those

to whom they are directed and, accordingly, may no longer be able, accurately, to be described as conventions. And some have exposed the difficulty of defining a convention when there is an apparent disjunction between a convention and Standing Orders or the law.

## II. Conventions Relating to Behaviour in the Two Houses of Parliament

4. The proceedings of the House of Commons and House of Lords are largely guided not, as might be thought, by legislation, but by rules which are encapsulated in the Standing Orders of the two Houses and by precedent, practice and convention, the complexities of which are described in successive volumes of Erskine May's *Parliamentary Practice*.<sup>4</sup>

### Conventions relating to behaviour in the House of Commons

5. The more practical aspects of conventions which guide behaviour in the House of Commons were set out in a letter sent to Members by the Speaker in 2002, at the start of the new Parliament, under the heading *Conventions and Courtesies*.<sup>5</sup> They are now issued by the Speaker and Deputy Speakers at the beginning of a new Parliament, under the less formal title of the *Rules of behaviour and courtesies in the House*.<sup>6</sup>

### Conventions on Speaking

6. One important convention is that Members

should address the House through the Chair and must therefore refer to other Members in the third person. The convention was examined by the Select Committee on the Modernisation of Parliament in 1998.<sup>7</sup> The Committee noted that the rule was one which was frequently broken, mainly, but not exclusively, by new Members, but could not emphasise its importance too strongly. "As the Deputy Speaker succinctly explained in the House on 1 December [1997] to both a new Member and to a Member who had been in the House for some years, 'The conventions exist precisely so that we do not lose our tempers and get carried away'. It is not a difficult rule to understand and to observe... Members do not sit in the House as individual citizens, they are there as representatives of their constituents; and it is in that capacity that they should be addressed."<sup>8</sup> The Committee did not recommend that the convention be changed. The Procedure Committee too, in its report in 2003, did not recommend any change to the convention.<sup>9</sup>

7. In addition, the Modernisation Committee recommended that the annunciators in the House, which show who is speaking, should also include the name of the Member's constituency to enable other Members more easily to comply

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4 For the latest edition, see Erskine May, *Parliamentary Practice*, 25<sup>th</sup> edition, LexisNexis, 2019, or online at <https://erskinemay.parliament.uk/>

5 See, for example, Appendix to the Fourth Report from the Select Committee on Procedure, *Procedures for Debates, Private Members' Bills and the Powers of the Speaker*, HC 333, Session 2002-03

6 See <https://www.parliament.uk/documents/rules-of-behaviour.pdf>

7 Fourth Report from the Select Committee on the Modernisation of Parliament, *Conduct in the Chamber*, HC 600, Session 1997-98

8 *Ibid*, paras 37-38

9 Fourth Report from the Select Committee on Procedure, *Procedures for Debates, Private Members' Bills and the Powers of the Speaker*, HC 333, Session 2002-03, para 30

with the convention.<sup>10</sup> The Committee's report and conclusions were endorsed by the House of Commons on 4 June 1998.<sup>11</sup> The annunciators now provide the relevant constituency information.

8. Members seeking to speak must be present from the start of the debate and are expected to remain in the Chamber for at least the following two speeches after their own. They are also expected to return for the winding-up speeches. The guidance warns that "Members who fail to observe these courtesies will be given a lower – or no – priority on the next occasion they seek to speak."<sup>12</sup>

9. There is a related convention that the Chair should, in general, call Members from alternate sides of the House and that priority should be given to Members who have attended a substantial part of the debate. The Procedure Committee supported that convention and recommended that "the Chair should be under no obligation to call Members who have been absent for most of the debate merely because there is nobody else on their side of the House."<sup>13</sup> This convention too is generally observed without complaint.

10. In order to maintain the cut and thrust of debate, Members are not, in principle, permitted to read speeches, though they may refer to notes. The rule is relaxed for opening speeches and whenever there is a special reason for precision.<sup>14</sup> The rule is also relaxed for maiden speeches, that is a speech by a Member who has not previously spoken. It had been

the custom "that new Members do not participate in proceedings in the Chamber (for example by asking a question) before making their maiden speech. New Members are now advised that whether to observe the custom is a matter of choice for them."<sup>15</sup> It remains the convention that maiden speeches are normally heard without interruption and that at least the following two speakers and the front benches will congratulate the maiden speaker.

## Formal visits to another constituency

11. Another convention applying to Members' conduct is that they should notify the constituency Member whenever they make a formal visit to the Member's constituency. That convention is also set out in the Ministerial Code: "Ministers intending to make an official visit within the United Kingdom must inform in advance, and in good time, the MPs whose constituencies are to be included within the itinerary."<sup>16</sup> The importance of the convention was stressed by the Speaker in March 2019: "The convention of notifying a Member of a prospective visit to his or her constituency is strong...I am concerned that this rather important convention is being quite regularly dishonoured. That seems to me to be wrong."<sup>17</sup>

10 *Op cit*, para 39

11 HC Deb, 4 June 1998, Vol 313, cc 551-594

12 *Op cit*, para 2

13 *Op cit*, para 28

14 Erskine May, 25<sup>th</sup> edition, para 21.4

15 *Ibid*, para 21.9

16 *Ministerial Code*, Cabinet Office, August 2019, para 10.10

17 HC Deb, 25 March 2019, Vol 657, c 58

## Conventions relating to behaviour in the House of Lords

### Conventions on speaking

12. The House of Lords has similar conventions to guide behaviour in the House. These are set out in the *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords*, but, as the House is self-regulating, “the Lord Speaker has no power to rule on matters of order. In practice this means that the preservation of order and the maintenance of the rules of debate are the responsibility of the House itself, that is, of all the members who are present, and any member may draw attention to breaches of order or failures to observe customs.”<sup>18</sup> Lords are referred to in the third person, by reference to title or post held.<sup>19</sup> For most debates a list of speakers is drawn up after consultation through the usual channels – the business managers of the various parties.<sup>20</sup> As in the Commons, a Member who is taking part in a debate is expected to attend the greater part of the debate and to be present for, at the least, the opening and winding-up speeches and the speeches before and after their own.<sup>21</sup> The reason behind this custom, as in the Commons, is that “Members who have missed the speeches before their own will not know what has already been said and so points may be repeated or missed. Members who leave soon after speaking

are lacking in courtesy to others, who may wish to question, or reply to, points they have raised.”<sup>22</sup>

13. “The House has resolved that the reading of speeches is ‘alien to the custom of the House, and injurious to the traditional conduct of its debates’. It is acknowledged, however, that on some occasions, for example ministerial statements, it is necessary to speak from a prepared text.”<sup>23</sup> Speakers may use ‘extended notes’, including on electronic devices in place of paper speaking notes<sup>24</sup>, but, in the interests of good debate, should not follow them closely.

14. The *Companion* also describes the behaviour expected of the House during maiden speeches. “It is usual for a member making a maiden speech not to be interrupted and to be congratulated by the next speaker only, on behalf of the whole House, plus the front benches if they wish. It is therefore expected that a member making a maiden speech will do so in a debate with a speakers’ list, so that the House may know when the conventional courtesies apply.” A maiden speaker is expected to be short and not to express controversial views.<sup>25</sup> Other Members should remain in their seats during a maiden speech and the following speaker’s congratulations and, similarly, Members entering the Chamber should remain by the steps of the Throne or below the Bar.<sup>26</sup>

15. “A member who has given written notice of their resignation under section 1 of the House of Lords Reform Act 2014 may make a valedictory speech

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18 See *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords*, 2017, para 4.01

19 *Ibid*, paras 4.50-4.51

20 *Ibid*, para 4.25

21 *Ibid*, para 4.32

22 *Ibid*, para 4.33

23 *Ibid*, para 4.38

24 *Ibid*, para 4.21

25 *Ibid*, para 4.46

26 *Ibid*, para 4.48

before the resignation takes effect. Such speeches... attract the same courtesies as maiden speeches.”<sup>27</sup>

### **Sitting times**

16. “It is a firm convention that the House of Lords normally rises by about 10pm on Mondays to Wednesdays, by about 7pm on Thursdays, and by about 3pm on Fridays.”<sup>28</sup> In practice, the convention is often disregarded.

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27 *Ibid*, para 4.49

28 *Ibid*, para 3.01

## III. Conventions Relating to Parliamentary Procedures in the Two Houses of Parliament

17. Many parliamentary conventions are concerned with relations between the two Houses of Parliament but there are also some conventions which apply to specific procedural practices in one, or both, of the Houses. Both Houses accept “the convention that the two Houses do not debate the other’s procedures”.<sup>29</sup>

### Legal Advice from the Law Officers

18. “By long-standing convention, observed by successive Governments, the fact of, and substance of advice from, the law officers of the Crown is not disclosed outside government...The purpose of this convention is to enable the Government to obtain frank and full legal advice in confidence.”<sup>30</sup> The opinions of the law officers are therefore not usually laid before Parliament, cited in debate or provided as evidence to a select committee, but they may be disclosed if a Minister deems it expedient for the information of the House.<sup>31</sup> The convention was challenged in November 2018 when the House resolved “That an humble Address be presented to Her Majesty, That she will be graciously pleased to give directions that the following papers be laid before Parliament: any legal advice in full, including that provided by the Attorney General, on the

proposed withdrawal agreement on the terms of the UK’s departure from the European Union including the Northern Ireland backstop and framework for a future relationship between the UK and the European Union.”<sup>32</sup>

19. On 3 December 2018, the Attorney General, Geoffrey Cox, made a Statement to the Commons “intended to inform the debate...on the motion to approve the withdrawal agreement and the political declaration on the future relationship concluded with the European Union by my right hon. Friend the Prime Minister.”<sup>33</sup> He explained that “Ministers are advised by their own departmental lawyers, and the points that arise for consideration by the Law Officers are invariably limited to the relatively few of particular importance to the policy decision of the Government.”<sup>34</sup> His statement was “complemented by a detailed legal commentary, provided for the purposes of the debate”<sup>35</sup>, but a copy of his full legal advice was not provided.

20. The convention was queried during the detailed questioning which followed<sup>36</sup>, but the Attorney General continued to insist “I cannot, without breaching the convention, disclose whether or not I was asked to advise on any particular point.”<sup>37</sup>

29 See, for example, HL Hansard, 14 February 2012, Vol 735, c 682; HC Deb, 20 December 1906, Vol 167, c 1771

30 Erskine May, 25<sup>th</sup> edition, para 21.27; HC Deb, 17 February 1865, Vol 177, cc 354-356

31 Erskine May, 25<sup>th</sup> edition, para 21.27

32 Votes and Proceedings, 13 November 2018

33 HC Deb, 3 December 2018, Vol 650, c 546

34 *Ibid*

35 *Ibid*

36 *Ibid*, cc 546-581

37 *Ibid*, c 567

“The decision as to whether a Law Officer’s advice, should any have been given, should be published is a collective decision of the Government. The Attorney General must consent, but first, it is a collective decision of the Government.”<sup>38</sup>

21. The issue was also considered in the House of Lords.<sup>39</sup> Various views were expressed both on the substance of the Withdrawal Agreement and on the convention that a Law Officer’s opinion is not normally disclosed. Lord Mackay of Clashfern, a former Lord Advocate and Lord Chancellor, said “it has been the legal position for many years that when a legal adviser advises a client, that advice is confidential. It is not for me to criticise what went on earlier in the other place, but it seems to me that it had forgotten that the Attorney-General has an absolute duty to advise the House of Commons. It could have asked him to do so and answer any questions of law that it could think of putting to him. That is the correct way to deal with such a matter... In my view, it is impossible as a matter of law for the legal adviser to say that he will publish legal advice which has been given to someone else in accordance with an obligation of confidentiality. So far as the Government and Parliament are concerned, that is no disadvantage, because they have the advantage that the Attorney-General is the adviser of the House of Commons – as he is the adviser of this House also. He is bound, in connection with that advice, to answer any questions that may be put to him on the relevant law. I cannot see any better system than

that for reconciling the two fundamental problems about the position of a legal adviser.”<sup>40</sup>

22. The following day the House of Commons debated, as a matter of privilege, a motion, “That this House finds Ministers in contempt for their failure to comply with the requirements of the motion for return passed on 13 November 2018, to publish the final and full legal advice provided by the Attorney General to the Cabinet concerning the EU Withdrawal Agreement and the framework for the future relationship, and orders its immediate publication.”<sup>41</sup> The motion was agreed on division.

23. Responding to the vote, the Leader of the House, Andrea Leadsom, said “We have tested the opinion of the House twice on this very serious subject. We have listened carefully, and in the light of the expressed will of the House, we will publish the final and full advice provided by the Attorney General to the Cabinet; but, recognising the serious constitutional issues that this raises, I have referred the matter to the Committee of Privileges so that it can consider the implications of the Humble Address.”<sup>42</sup> The advice was published the following day.<sup>43</sup>

24. The Public Administration and Constitutional Affairs Committee (PACAC) subsequently noted “The actions of the House in finding the Government in contempt has asserted the House’s right for resolutions to be taken seriously. The Government’s eventual publication of the Attorney General’s legal

38 *Ibid*, c 569

39 HL Hansard, 3 December 2018, Vol 794, cc 879-891. See also, HL Library Notes, *Publishing Government Legal Advice*, 6 December 2018, LLN-2018-0115 <https://researchbriefings.files.parliament.uk/documents/LLN-2018-0115/LLN-2018-0115.pdf>

40 HL Hansard, 3 December 2018, Vol 794, c 888

41 HC Deb, 4 December 2018, Vol 650, cc 667-732

42 *Ibid*, c 732. For the Committee of Privileges’ response, see <https://www.parliament.uk/documents/commons-committees/Privileges-Committee/leader-house-humble-addresses-061218.pdf>

43 <https://www.gov.uk/government/publications/exiting-the-eu-publication-of-legal-advice>

advice breaching the usual convention that such advice remains confidential, has demonstrated the importance of, and need to take seriously, resolutions of the House of Commons.”<sup>44</sup> It added “The credibility of the House’s powers depends on their responsible exercise. The House should be both assertive and sensitive in the exercise of its powers. Where the limit on these powers lie is a matter for negotiation between Parliament and Government and both should be careful about setting any precedent with long-term effects in reaction to short-term political pressures.”<sup>45</sup>

25. Following the Supreme Court’s decision on the ‘prorogation’ of 9 September 2019, the Attorney General was asked in an urgent question from Joanna Cherry, the SNP’s Justice and Home Affairs spokesperson, to “make a statement about his legal opinion on the advice given to Her Majesty the Queen to prorogue Parliament.”<sup>46</sup> He replied “Given the Supreme Court’s judgment, in legal terms the matter is settled, and, as the hon. and learned Lady will know, I am bound by the long-standing convention that the views of the Law Officers are not disclosed outside the Government without their consent. However, I will consider over the coming days whether the public interest might require a greater disclosure of the advice given to the Government on the subject. I am unable to give an undertaking or a promise to the hon. and learned Lady at this point, but the matter is under consideration.”<sup>47</sup> The advice had not been

disclosed by the time Parliament was dissolved on 6 November 2019.

### Queen’s Consent

26. Bills which affect the interests or prerogatives of the Crown, Duchy of Lancaster or the Duchy of Cornwall require the signification of Queen’s, and/or Prince of Wales’s (as Duke of Cornwall), consent in both Houses before they are passed. The Government will invariably seek consent for its own legislation and no convention is involved. For Private Members’ Bills (PMBs), it is the convention that the Government will seek consent even for Bills of which it disapproves. “The understanding is that the grant of consent does not imply approval by the Crown or its advisers, but only that the Crown does not intend that, for lack of its consent, Parliament should be debarred from debating such provisions.”<sup>48</sup> This parliamentary convention is adhered to in all but exceptional circumstances, such as a Bill being introduced when there is no further private Members’ time available for it to be debated.<sup>49</sup>

### Royal Assent

27. Once Bills have been agreed to by both Houses of Parliament, they await only Royal Assent before they become law. Two conventions apply: that a government will always advise the Sovereign to give assent to a Bill agreed by both Houses, even if it has opposed the Bill during its passage through

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44 Fifteenth Report from the Public Administration and Constitutional Affairs Committee, *Status of Resolutions in the House of Commons*, Session 2017-19, HC 1587, Summary

45 *Ibid*

46 HC Deb, 25 September 2019, Vol 664, c 652

47 *Ibid*

48 Erskine May, 25<sup>th</sup> edition, para 9.7

49 SO No. 14(8) provides 13 days for the stages of PMBs. Bills on which a government has declined to advise the Sovereign to give consent include the Titles (Abolition) Bill 1964 and the Rhodesia Independence Bill 1970, see Erskine May, 22<sup>nd</sup> edition, p605

Parliament, and that “all bills which are expected to have passed are included in the Letters Patent” by which the Sovereign is to signify Royal Assent<sup>50</sup>, that is, are not intentionally delayed. “The right to refuse the Royal Assent has not been exercised since 1707-08, when Queen Anne refused her Assent to a bill for settling the Militia in Scotland”<sup>51</sup> on the advice of her Ministers. “The bill’s purpose had been to recreate Scotland’s militia, which had not been revived at the Restoration. However, the sudden appearance at this juncture of a Franco-Jacobite invasion fleet en route to Scotland seems to have given the ministers second thoughts, at almost the last minute, about allowing it to reach the statute book.”<sup>52</sup>

28. Reference to the last occasion on which Royal Assent was refused has been cited in editions of Erskine May since 1844, but is not included in the most recent, 25<sup>th</sup>, edition. That may suggest that the convention that a government would never advise the Sovereign to refuse Royal Assent to a Bill passed by both Houses is so embedded as a parliamentary convention that the possibility of an exception no longer needs to be mentioned. There are no examples of Bills which have passed being intentionally excluded from the Letters Patent.

## Conventions relating to Parliamentary Procedures in the House of Commons

### The Speaker

29. The most important convention, which lies at the heart of all proceedings in the House of Commons, rests on the Speaker’s “authority and impartiality”<sup>53</sup>. “Confidence in the impartiality of the Speaker is an indispensable condition of the successful working of procedure, and many conventions exist which have as their object not only to ensure the impartiality of the Speaker, but also to ensure that that impartiality is generally recognised. The Speaker takes no part in debate either in the House or in committee, but makes occasional observations from the Chair”<sup>54</sup>, responds to Members’ points of order and makes rulings from the Chair. “The Speaker votes only when the voices are equal and then in accordance with rules which preclude an expression of opinion upon the merits of the question.”<sup>55</sup> The conduct or rulings of the Speaker may be challenged only on a substantive motion: such formal challenges are very rare.<sup>56</sup>

30. Although there have been no formal challenges to a Speaker’s rulings in recent years, Speaker Bercow’s decision on 18 March 2019 not to permit a third vote on the European Union Withdrawal Agreement engendered many points of order.<sup>57</sup> On

50 Erskine May, 25<sup>th</sup> edition, para 30.36

51 Erskine May, 24<sup>th</sup> edition, p644, footnote 143

52 <https://www.historyofparliamentonline.org/volume/1690-1715/parliament/1705>

53 Erskine May, 25<sup>th</sup> edition, para 4.23. For the Speaker’s exercise of authority in relation to the handling of a ‘prorogation’ which was subsequently declared unlawful by the Supreme Court, see para 175

54 *Ibid*

55 *Ibid*

56 See, for example, HC Deb, 16 February 1961, Vol 634, cc 1773-1841

57 HC Deb, 18 March 2019, Vol 656, cc 775-792. See also section “‘Same Question’ Rule and ‘Notwithstanding’ Motions”

21 October 2019, in the new session of Parliament, the Speaker announced that he would also not allow a second approval motion for the purposes of section 13(1)(b) of the European Union (Withdrawal) Act 2018 to be moved.<sup>58</sup> “In summary, today’s motion is in substance the same as Saturday’s motion, and the House has decided the matter. Today’s circumstances are in substance the same as Saturday’s circumstances. My ruling is therefore that the motion will not be debated today, as it would be repetitive and disorderly to do so.”<sup>59</sup>

31. Sir Bernard Jenkin, the Chair of the Public Administration and Constitutional Affairs Committee, noted, on a point of order, “that the dilemmas you face mean that, on occasion, you will sometimes have to please some and not others, but it is becoming remarkable how often you please one lot and not the other lot. You have also inveighed against most unusual things happening in this House that you did not like, and I would say that it is most unusual for a Speaker so often to have prevented the Government from debating the matters that the Government wished to put before the House. It has been one of your mantras that the House should be permitted to express its view, even when it comes to changing the meaning of Standing Orders, and yet you have denied the House the opportunity to express its view on this matter. The Select Committee on Public Administration and Constitutional Affairs is holding a hearing on the role of the Speaker.”<sup>60</sup>

32. In reply, the Speaker said that “When I was granting him [the hon. Gentleman] and some of his hon. and right hon. Friends the opportunity to challenge, to question, to probe, to scrutinise, and, in some cases, to expose what they thought were the errors of omission or commission of the Government of the day, I do not recall him complaining that I was giving him too many opportunities to make his point and that it was not a fair use of the House’s time—that it was very unfair on his party and a violation of the rights of his Government...nothing in what I have said in any way impinges upon the opportunity for the Government to secure approval of their deal and the passage of the appropriate legislation by the end of the month. If the Government have got the numbers, the Government can have their way, and it is not for the Speaker to interfere. The judgment I have made is about the importance of upholding a very long-standing and overwhelmingly observed convention of this House. That is what I have done.”<sup>61</sup>

33. PACAC’s hearing on 22 October 2019<sup>62</sup> was part of an inquiry “into the role and different functions of the Speaker of the House of Commons. How the office of Speaker has developed and changed. What considerations need to be made about the future of the Office of Speaker”, which was being conducted in advance of the election of a new Speaker on 4 November 2019, and one element of its wider inquiry into *The Role of Parliament in the UK Constitution*.<sup>63</sup>

34. In written evidence to the Committee, Sir David

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58 For the full text of the motion, see House of Commons Order Paper, 21 October 2019, item 1

59 HC Deb, 21 October 2019, Vol 666, c 696

60 *Ibid*, c 699

61 *Ibid*, cc 700-701

62 *The Role of Parliament in the UK Constitution: Role of the Speaker*, Oral evidence, 22 October 2019, HC 32, Session 2019, Q 73

63 Public Administration and Constitutional Affairs Committee website, <https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-administration-and-constitutional-affairs-committee/inquiries/parliament-2017/parliament-constitution-role-of-speaker-inquiry-17-19/>

Natzler, the Clerk of the House of Commons from 2015 to 2019, referred to the difference between impartiality and neutrality. “While impartiality as between the political parties and their policies may be relatively easy to maintain – for example on fiscal or educational policy – it is difficult – although not impossible – to combine a more open and public representative role and an increased governance role with complete impartiality...There is however a difference between neutrality – a refusal to commit as an individual to a particular viewpoint – and impartiality – a commitment to treat people and groups on either side of an argument even-handedly. It may be a challenge to combine a high public profile with acknowledged impartiality in the exercise of a public function but the Speaker is not unique in this respect and it does not in my view require complete silence.”<sup>64</sup>

35. Natascha Engel, the Second Deputy Chairman of Ways and Means between 2015 and 2017, in her oral evidence to PACAC, said “I think having an assessment of all the powers, whether formal or informal, that the speakership now has would be a really helpful exercise, because there may be things in there where the House says, ‘Actually, this is a brilliant innovation and really helpful and, in the future, could really help the House come to decisions in a different way,’ or there may be things where people, when they see what is happening, say, ‘Oh, this is really not what we want.’ Again, this should be a decision of the House. I don’t think any

new Speaker should fear proper, detailed scrutiny of what those powers are, to allow people to decide whether that is what they want.”<sup>65</sup>

36. Speaker Bercow retired on 31 October 2019. The election of a new Speaker took place on 4 November. The candidates’ speeches were a testament to the importance, and acceptance, of the conventions under which a Speaker serves – accountability, impartiality and fairness.<sup>66</sup> As Dame Eleanor Laing<sup>67</sup>, one of the Deputy Speakers, said “It is the role of the Speaker not to create division or rancour in this House, but to seek consensus and to remind us of the things that unite all of us: our rules, our procedures, and our precious conventions.”<sup>68</sup> Chris Bryant said he would take as his motto Speaker Onslow’s statement that he would “be respectful and impartial to all.”<sup>69</sup>

37. Sir Lindsay Hoyle, the now former Chairman of Ways and Means, was subsequently elected Speaker. Before he took the Chair, Mr Speaker-elect promised “I will be neutral. I will be transparent.” He also expressed the “hope that this House will be once again a great, respected House, not just in here but around the world.”<sup>70</sup>

38. Another convention relating to the Speaker is that, at a General Election, the Speaker stands as “the Speaker seeking re-election” in recognition of the fact that he or she is not a member of any party. In recent years, the major parties have not contested

64 Speaker Roles, RTS (01), paras 11-12

65 *The Role of Parliament in the UK Constitution: Role of the Speaker*, oral evidence, 22 October 2019, HC 32, Session 2019, Q 73

66 HC Deb, 4 November 2019, Vol 667, cc 607-615

67 The last three candidates in the ballot were Chris Bryant, Sir Lindsay Hoyle and Dame Eleanor Laing

68 HC Deb, 4 November 2019, Vol 667, c 611

69 *Ibid*, cc 609-610

70 *Ibid*, cc 619-20

the Speaker's seat.<sup>71</sup> However, in September 2019, Andrew Leadsom, the Business Secretary, announced that the Conservative party intended to field a candidate against Mr Speaker Bercow at the next general election.<sup>72</sup> The Speaker's retirement neutralised the challenge to that convention. Mr Speaker Hoyle was not challenged by the major parties in the December 2019 election.

## Constitutional Bills

39. The Cabinet Manual notes that "bills with significant constitutional implications are in the House of Commons, by convention, taken in a committee of the whole House rather than in a public bill committee."<sup>73</sup> That means that all Members have an opportunity to participate in the committee proceedings. The convention on constitutional Bills was followed most recently in respect of legislation relating to the UK's withdrawal from the European Union.

40. However, the decision on whether the convention applies to a specific Bill is taken by the Government and it has not always been followed. As the House of Commons Library noted in 2012, "the definition of bills of 'first-class' constitutional importance is not settled. Indeed the Labour Government (1997-2010) asked the House to split the committal of a number of constitutional bills between Committee of the whole House and Public Bill (formerly Standing) Committee. On

some occasions the Labour Government withdrew such motions but on other occasions clauses were considered off the floor of the House."<sup>74</sup>

## Forthwith Motions

41. Many motions before the House are designated as being put 'forthwith'. It has been the convention that such motions are put without debate and without the possibility of amendment.

42. In 2019, the Speaker, to whom the House entrusts both interpretation of the meaning of Standing Orders and application of the relevant conventions relating to procedure, allowed an amendment to be moved to a Business of the House motion<sup>75</sup> which was required to be put forthwith. The Speaker explained "the motion in the Prime Minister's name is indeed a variation of the order agreed by the House on 4 December. Under paragraph (9) of that order, the question on any motion to vary the order 'shall be put forthwith.' I interpret that to mean that there can be no debate, but I must advise the House that the terms of the order do not say that no amendment can be selected or moved."<sup>76</sup>

43. The decision to call an amendment to the motion engendered many points of order<sup>77</sup> but it also upheld another important convention: that decisions on matters of procedure are for the Speaker to determine and can only be challenged on

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71 Erskine May, 25<sup>th</sup> edition, para 4.23. Sir Richard Onslow is recorded as the last Speaker to be defeated in his constituency (in 1710)

72 *Mail on Sunday*, 8 September 2019

73 Cabinet Manual 2011, para 5.22

74 *Timetabling of constitutional bills since 1997*, House of Commons Library Standard Note: SN/PC/06371, July 2012, Summary, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06371>

75 For the full text of the motion, see House of Commons Order Paper, 9 January 2019, item 2

76 HC Deb, 9 January 2019, Vol 652, c 366

77 *Ibid*, cc 365-381

a substantive motion.<sup>78</sup> No such motion was tabled.

44. In subsequent evidence to the Public Administration and Constitutional Affairs Committee, Sir Malcolm Jack, the Clerk of the House of Commons from 2006 to 2011, noted that there had been “a significant change in the way the term ‘forthwith’ is understood, because in practice, ‘forthwith’ has always meant ‘without amendment’”. The Question is not proposed; it is just put, because usually there are two stages to a Question. Now, we are in a situation where the term ‘forthwith’ has been reinterpreted...by the Speaker’s decision to select the amendment, and also the House’s endorsement of that decision by voting for the amendment.”<sup>79</sup>

## Money Resolutions

45. For many years, it has been the convention that a government would provide a money resolution for any Private Member’s Bill that had been given a second reading by the House, even when it disagreed with the Bill. That position was confirmed by the Government in 2013.<sup>80</sup> In 2014, however, the convention was modified when the Government declined to provide a money resolution for two Bills – the European Union (Referendum) Bill and the Affordable Homes Bill. The Government had

provided the former, identical, Bill with a money resolution in the previous session,<sup>81</sup> but, in October 2014, the Prime Minister, responding to a question on the absence of a money resolution, said “the European Union (Referendum) Bill [of the previous session] passed this House with a massive majority and went into the House of Lords. We should reintroduce it as a Government Bill – that is what ought to happen.”<sup>82</sup> The Affordable Homes Bill was refused a money resolution on the ground that implementing the provisions of the Bill would cost more than one billion pounds.<sup>83</sup>

46. The Parliamentary Constituencies (Amendment) Bill 2018 was also refused a money resolution. In May 2018, the Speaker granted an emergency SO No. 24 debate to the sponsor of the Bill which enabled him to raise the issue in the House.<sup>84</sup> During that debate, Andrea Leadsom, the Leader of the House, said that money resolutions would “be brought forward on a case-by-case basis.”<sup>85</sup> She explained “We will keep the money resolution under review, and once we have seen the existing boundary review’s recommendations and been able to consider them, we will think carefully about what to do next with this private Member’s Bill. It is by no means blocked, but at the moment the Government are considering how to take it forward.”<sup>86</sup>

78 See, for example, HC Deb, 7 May 1952, Vol 500, cc 397-417; 16 February 1961, Vol 634, cc 1773-1841. For a motion critical of a ruling by the Chairman of Ways and Means see HC Deb, 21 April 1993, Vol 223, cc 325-380

79 Oral evidence to the Public Administration and Constitutional Affairs Committee, *The Role of Parliament in the UK Constitution: Mechanisms allowing Parliament to direct the Executive*, HC 1907, Session 2017-19, Q 16

80 HC Deb, 16 July 2013, Vol 566, c 1019

81 *Ibid*

82 HC Deb, 29 October 2014, Vol 587, c 303

83 *Ibid*

84 HC Deb, 21 May 2018, Vol 641, cc 589-640

85 *Ibid*, c 598

86 *Ibid*, c 597

47. Several Members questioned the Government's application of the convention<sup>87</sup> or the requirement to treat the provision of a money resolution as a convention rather than an enforceable rule<sup>88</sup>, but no consensus emerged.

48. By the time Parliament was prorogued on 8 October 2019, the public bill committee on the Parliamentary Constituencies (Amendment) Bill 2018 had met 32 times but had been unable to make further progress due to the absence of a money resolution. It is too soon to know whether the new practice relating to money resolutions will be maintained or whether governments will decide in future to adhere to the original, long-standing, convention.

### 'Same Question' Rule and Use of 'Notwithstanding' Motions

49. In 1604, the Commons resolved "That a question, being once made, and carried in the Affirmative or Negative, cannot be questioned again, but must stand as a Judgment of the House."<sup>89</sup> In more contemporary terms, the rule is that "A motion or an amendment which is the same, in substance, as a question which has been decided during a session may not be brought forward again during that same session."<sup>90</sup> As May notes, "Attempts have been made to evade this rule by raising again, with verbal alterations, the essential parts of motions which have been negatived. Whether the second motion is

substantially the same is ultimately a matter for the judgment of the Chair."<sup>91</sup>

50. On 18 March 2019, the Speaker, in a statement which was "designed to signal what would be orderly and what would not", said that he would not allow the question to be put a third time on a motion to approve the European Union Withdrawal Agreement that was the same or substantially the same. However, "If the Government wish to bring forward a new proposition that is neither the same nor substantially the same as that disposed of by the House on 12 March, that would be entirely in order. What the Government cannot legitimately do is to resubmit to the House the same proposition or substantially the same proposition as that of last week, which was rejected by 149 votes. This ruling should not be regarded as my last word on the subject; it is simply meant to indicate the test which the Government must meet in order for me to rule that a third meaningful vote can legitimately be held in this parliamentary Session."<sup>92</sup>

51. The Speaker referred to the previous cases in which a Speaker has intervened to enforce the rule, as listed in the 24<sup>th</sup> edition of May.<sup>93</sup> He explained that "Absence of Speaker intervention since 1920 is attributable not to the discontinuation of the convention but to general compliance with it; thus, as 'Erskine May' notes, the Public Bill Office has often disallowed Bills on the ground that a Bill with the same or very similar long title cannot be

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87 See, for example, *ibid*, cc 592, 631

88 *Ibid*, c 610

89 CJ (1547-1628) 162

90 Erskine May, 25<sup>th</sup> edition, para 20.12

91 *Ibid*

92 HC Deb, 18 March 2019, Vol 656, cc 775-776

93 Erskine May, 24<sup>th</sup> edition, p397, footnote 45

presented again in the same Session.”<sup>94</sup>

52. Most of the examples listed in May relate to legislation, where the rule has always been strictly applied. The nearest parallels to the European Union Withdrawal Agreement case are a motion from 1870, which sought to move an humble Address on facilitating the emigration of poor families to the then British Colonies,<sup>95</sup> and from 1912, on the effects of the increased cost of living, unaccompanied by a corresponding rise in wages, on the working class.<sup>96</sup> They too required the Speaker to consider whether the motions were substantially the same as ones which had been decided earlier.<sup>97</sup>

53. On October 21 2019, the issue was raised again in respect of a motion to approve the European Union Withdrawal Agreement.<sup>98</sup> The Speaker stated “There are two issues, one of substance and the other of circumstances, to consider...First, I have to judge whether the motion tabled under section 13(1) (b) of the 2018 Act for debate today is the same in substance as that which was decided on Saturday. Page 397 of “Erskine May” is clear that such a motion ‘may not be brought forward again during that same session.’ It is equally clear that adjudication of cases is a matter for the Chair...The second matter for me to consider was whether there had been any change of circumstances that would justify asking the House to reconsider on Monday what it had decided on Saturday. He concluded, as noted above<sup>99</sup>, “In

summary, today’s motion is in substance the same as Saturday’s motion, and the House has decided the matter. Today’s circumstances are in substance the same as Saturday’s circumstances. My ruling is therefore that the motion will not be debated today, as it would be repetitive and disorderly to do so.”<sup>100</sup>

54. A second procedure which, by convention, is often used to allow the House to reconsider a decision already taken by the House, is a motion that ‘notwithstands’ Standing Orders or the usual practice of the House, in effect the rules and conventions which govern its proceedings, in order to alter a decision. Such ‘notwithstanding’ motions often concern relatively uncontroversial matters, such as a change to sitting or recess dates,<sup>101</sup> but they may also be used for more substantial matters.<sup>102</sup>

55. On 27 March 2019, the Speaker said, “I understand that the Government may be thinking of bringing meaningful vote 3 before the House either tomorrow, or even on Friday, if the House opts to sit that day. Therefore, in order that there should be no misunderstanding, I wish to make clear that I do expect the Government to meet the test of change. They should not seek to circumvent my ruling by means of tabling either a ‘notwithstanding’ motion or a paving motion. The Table Office has been instructed that no such motions will be accepted.”<sup>103</sup>

56. The use of ‘notwithstanding’ motions has not

94 HC Deb, 18 March 2019, Vol 656, c 775

95 HC Deb, 17 May 1870, Vol 201, c 824

96 HC Deb, 12 March 1912, Vol 35, c 1043

97 HC Deb, 1 March 1870, Vol 199, c 1002-1077; HC Deb, 22 February 1912, Vol 34, cc 748-865

98 For the full text of the motion, see House of Commons Order Paper, 21 October 2019, item 1

99 See section “The Speaker”

100 HC Deb, 21 October 2019, Vol 666, cc 695-696

101 See, for example, Votes and Proceedings, 9 April 2019

102 See, for example, HC Journal, Vol 269, pp292, 804

103 HC Deb, 27 March 2019, Vol 657, c 370

been totally excluded, however, as the Speaker allowed Sir Oliver Letwin, a backbench Member, to move a motion which included the following provision: “notwithstanding the practice of the House, any motion on matters that have been the subject of a prior decision of the House in the current Session may be the subject of a decision.”<sup>104</sup> As with the decision on whether a motion is substantially the same as one previously decided by the House, it is for the Speaker, in any particular case, to determine whether a practice would breach the conventions or rules of the House.

57. The Government subsequently met the Speaker’s criteria and a third motion was debated on 29 March 2019.<sup>105</sup> It too was defeated.

### Standing Order No. 24 debates

58. Standing Order No. 24 (Emergency debates) provides that, with the agreement of the Speaker, a Member wishing to raise a “specific and important matter that should have urgent consideration”, may seek leave to move that the House has considered the specified matter. In determining whether a matter is proper to be discussed, the Speaker is required to “have regard to the extent to which it concerns the administrative responsibilities of Ministers of the Crown or could come within the scope of ministerial action.”<sup>106</sup>

59. In its report of 2007, the Modernisation Committee recommended that debates under SO No. 24, which were previously held as motions for the adjournment, should instead be treated as general debates. It also recommended that such debates should take place on a motion “That this House has considered [the matter of] [subject]”<sup>107</sup> and that “**There should be a strong convention that such motions moved for the purpose of having a general debate would not be amended.**”<sup>108</sup>

60. The use of SO No. 24 debates has increased substantially in recent years. Sixteen SO No. 24 debates were held between 1979 and 2009; between 2010 and 8 October 2019, the last day of the 2017-19 Parliament, there were 35 such debates.<sup>109</sup> All of the debates observed the requirement of the Standing Order that they be held on a motion “That this House has considered the ...”, and no attempts were made to challenge the convention that where a motion is expressed in neutral terms, no amendments may be tabled to it.<sup>110</sup>

61. Standing Order No. 24 motions are generally moved by shadow Ministers or backbench members from either side of the House, as Ministers have the opportunity to make ministerial statements on whatever day they wish. Exceptionally, in March 2013, the Speaker granted the then Prime Minister the opportunity to seek leave to move a motion

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104 *Ibid*, cc 333-368. A similar motion was moved on 1 April 2019, HC Deb, Vol 657, cc 803-824

105 HC Deb, 29 March 2019, Vol 657, cc 695-775

106 SO No. 24(5)

107 First Report of the Modernisation Committee, *Revitalising the Chamber: the role of the back bencher*, HC 337, Session 2006-07, para 71

108 *Ibid*, para 85 (original emphasis)

109 *Emergency Debates in the House of Commons since 1979*, Parliamentary Information List, No. 04569, 12 September 2019, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04569>

110 See SO No. 24B

under the Standing Order.<sup>111</sup> From the debate that followed, it is clear that that variation in usual practice was welcomed by the House.

62. On 3 September 2019, an application for a SO No. 24 debate was put to, and supported by, the House.<sup>112</sup> The motion which was then moved began with the traditional formulation of “This House has considered the matter of...” but continued by making provision for disapplying SO No. 14(1), which provides for government business to have precedence at every sitting, save as otherwise provided in that Order, for the programming of the European Union (Withdrawal) (No. 6) Bill and, if required, for time to be provided for an identical Bill at the start of the new parliamentary session. Although previous SO No. 24 debates had concentrated on matters of parliamentary business, perhaps most relevantly “whether the House should defer consideration of Lords Amendments to the Health and Social Care Bill until after the disclosure of the NHS transitional risk register”<sup>113</sup> and “the scheduling of parliamentary business by the Leader of the House and the implications of a two-year session for Standing Order requirements”<sup>114</sup>, this was a unique use of the Standing Order. However, it continued to uphold the convention that it is for the Speaker to decide matters of procedure.

63. Jacob Rees-Mogg, the Leader of the House, noted that the Speaker had said as recently as 2018

that a debate “could be held on a substantive and amendable motion only if the Standing Order is itself amended.”<sup>115</sup> In response, the Speaker stated that “if, in the judgment of the Chair, a motion under Standing Order No. 24 is expressed in neutral terms, it will not be open to amendment...there have been previous occasions upon which there have been Standing Order No. 24 motion debates which have contained what I would prefer to call evaluative motions, notably on 18 March 2013<sup>116</sup> and on 11 December 2018<sup>117</sup>...It is in conformity with that practice that I have operated. I have taken advice of a professional kind, and I am entirely satisfied that the judgment that I have made is consistent with that advice.”<sup>118</sup> No attempt was made on either occasion to amend those motions.

64. The Leader of the House suggested “That the approach taken today is the most unconstitutional use of this House since the days of Charles Stewart Parnell, when he tried to bung up Parliament.”<sup>119</sup> In this context, it is interesting to note that it was “Mr Speaker Brand, who, on the morning of Wednesday, 2<sup>nd</sup> Feb. 1881, when the house had held a continuous sitting from the previous Monday, put the question on the motion for leave to bring in the Protection of Person and Property (Ireland) Bill, although members were desirous of continuing the debate.”<sup>120</sup> When challenged about his action by Charles Parnell, Mr Speaker Brand responded “I acted upon

111 *Royal Charter on Press Conduct*, HC Deb, 18 March 2013, Vol 560, cc 630-679

112 *Votes and Proceedings*, 3 September 2019

113 HC Deb, 20 March 2012, Vol 542, cc 655-684

114 HC Deb, 17 July 2017, Vol 627, cc 589-635

115 HC Deb, 3 September 2019, Vol 664, c 93

116 *Royal Charter on Press Conduct*, HC Deb, 18 March 2013, Vol 560, cc 630-679

117 *Exiting the EU: Meaningful Vote*, HC Deb, 10 December 2018, Vol 651, cc 114-115 and 11 December 2019, Vol 651, cc 174-224

118 HC Deb, 3 September 2019, Vol 664, c 94

119 *Ibid*, c 102

120 Erskine May, 12<sup>th</sup> edition, 1917, p 255, footnote 3

my own responsibility and from a sense of duty to the House”<sup>121</sup>, a response strikingly similar to that of Mr Speaker Bercow in the debate on 3 September 2019: “I have sought to exercise my judgment in discharging my responsibility to facilitate the House of Commons – the Legislature.”<sup>122</sup> The closure<sup>123</sup> was incorporated into Standing Orders the following year, after 19 nights’ debate.<sup>124</sup> It is still frequently used today.<sup>125</sup>

65. The Leader of the House also referred to A.V. Dicey’s dictum “that all conventions have ‘one ultimate object, to secure that Parliament or the Cabinet...shall in the long run give effect to the will...of the nation’”, but argued that “These conventions are being disregarded today, and so, by extension, is the will of the nation.”<sup>126</sup>

66. Dominic Grieve, one of the supporters of the motion, totally disagreed that the House was acting unconstitutionally. “[O]ur constitution is adaptable, and I am afraid that it is having to adapt to the reality that the Government do not have a majority and have not had one for some time.”<sup>127</sup>

67. The debate revealed that the disagreement between Members about the motion extended well beyond exclusively constitutional issues, but the vote in favour of the motion (328 to 301) confirmed

that it had the backing of a substantial majority of the House. The narrower question of whether the Modernisation Committee’s recommendation, as approved by the House in 2007,<sup>128</sup> that there should be a strong convention that motions for general debates would not be amended and accordingly, by implication, be neutral in terms, still applies, is less certain. As the then Government noted in its evidence to the Joint Committee on Conventions in 2006, “For convention to work properly...there must be a shared understanding of what it means. A contested convention is not a convention at all.”<sup>129</sup>

68. Responding to an issue raised during business questions in April 2018, the Speaker said, “it is perfectly open to the House to amend Standing Order No. 24, of which there is some uncertainty and often incomprehension. It could be amended to allow for the tabling of substantive motions in circumstances of emergency, which could be amendable and on which the House could vote. If there are Members who are interested in that line of inquiry, they could usefully raise it with the Chair of the Procedure Committee...but it is a matter for Members.”<sup>130</sup> It may well be the case that such an inquiry will be needed to clarify the nature of the convention on the scope of the Standing Order, and also to determine whether the scope now needs to be

121 HC Deb, 2 February 1881, Vol 258, c 8

122 HC Deb, 3 September 2019, Vol 664, c 94

123 A proposal that the House should stop debating and make a decision on the matter under discussion

124 HC Deb, 10 November 1882, Vol 274, cc 1206-1287

125 SO No. 36

126 HC Deb, 3 September 2019, Vol 664, c 101

127 *Ibid*, c 117

128 HC Deb, 25 October 2007, Vol 465, cc 441-502; First Report from the Select Committee on the Modernisation of the House of Commons, HC 337, Session 2006-07, paras 71 and 85

129 Joint Committee on Conventions, *Conventions of the UK Parliament*, First Report, HL Paper 265-II/HC 1212-II, Session 2005-06, Evidence, 13 June 2006, para 19

130 HC Deb, 19 April 2018, Vol 639, c 475

specified more precisely in the Standing Order itself.

## Urgent Questions

69. It is the responsibility of the Speaker to decide whether a question, which has not appeared on the Order Paper, is sufficiently urgent to be asked without written notice and, by convention, “Neither the submission of an urgent question nor its subsequent rejection by the Speaker should... be publicly referred to.”<sup>131</sup> In April 2019, however, the Speaker considered the matter of the reported intention of the Government of Brunei to introduce the stoning to death of members of the LGBT community sufficiently important to refer publicly to the matter himself, though without identifying the Member who had wished to ask the question. “I do not mind telling the hon. Gentleman that there was an application for an urgent question on the matter earlier in the week. As I knew that Foreign Office questions were coming and we were very heavily consumed by other business, I declined it at that time. However, many people would judge that the matter remains urgent, and the opportunities exist for colleagues...to deploy the backstop option in order to ensure that there is a ministerial presence in the Chamber, and to focus on the matter very soon.”<sup>132</sup> That demonstrates that conventions, though generally observed, may be relaxed when circumstances require, particularly where it is clear that such a relaxation has the support of the House. The Government made a statement the following day.<sup>133</sup>

131 Erskine May, 25<sup>th</sup> edition, para 19.17

132 HC Deb, 3 April 2019, Vol 657, cc 1042-1043

133 HC Deb, 4 April 2019, Vol 657, cc 1274-1286

134 *Op cit*, para 8.56

## Conventions relating to parliamentary procedures in the House of Lords

### Orderliness of Amendments

70. As the House of Lords is self-regulating, the Lords Speaker does not rule on the orderliness of any specific practice or amendment. The Legislation Office advises on whether amendments to Bills are in order and it is expected that the advice of that Office will be taken. Should that procedural convention be challenged, the Lords *Companion* sets out the procedure which then needs to be followed. “If a member insists on tabling an amendment which the Legislation Office has advised is inadmissible, that office writes to the Leader of the House, copying the advice to the other Leaders, the Chief Whips and the Convenor [of Crossbench Peers]. The Leader of the House draws the House’s attention to the advice when the amendment is called, and asks the House to endorse the advice of the Legislation Office...there being no authority that can in advance rule an amendment out of order.”<sup>134</sup> The convention is generally observed and the advice of the Legislation Office is rarely challenged.

71. In January 2013, however, the Chancellor of the Duchy of Lancaster (Lord Hill of Oareford) informed the House that he had received advice from the Public Bill Office that an amendment to the Electoral Registration and Administration Bill was inadmissible because it was not relevant to the Bill. “There is no separate Motion or vote on the question of admissibility. When I sit down, it is for the noble

Lord, Lord Hart of Chilton, to decide whether to move his amendment in the light of the sense of the House. When my predecessors have been in this position—and that has not been often; just three times since 1999—the amendment has, on each occasion, not been moved.”<sup>135</sup> In this instance, Lord Hart of Chilton moved the amendment. It was later agreed to by the House.

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135 HL Hansard, 14 January 2013, Vol 742, cc 490-526. See also para 89

## IV. Conventions Concerning Relations Between the Commons and the Lords

72. The main convention applying to the relationship between the two Houses of Parliament, is the acceptance by the Lords of the primacy of the Commons.<sup>136</sup> The Joint Committee of the Commons and Lords, which was established in May 2006 to consider “the practicality of codifying the key conventions on the relationship between the two Houses of Parliament which affect the consideration of legislation,” was required to accept that convention though, in its report, the Committee noted that it detected “a good deal of shading around what it means in the context of legislation, and what role it leaves for the House of Lords.”<sup>137</sup>

73. The Committee was asked to consider four matters in particular: the Salisbury-Addison Convention; the convention that the Lords consider government business “in reasonable time”; the exchange of amendments between the Houses (‘ping-pong’); and secondary legislation. The Committee decided also to consider Commons financial privilege. Its report, *Conventions of the UK Parliament*, was published on 31 October 2006.

### The Salisbury-Addison Convention

74. “The Salisbury-Addison Convention is commonly

understood to mean that the House of Lords gives a second reading to government bills which seek to implement manifesto commitments, and that the House does not table wrecking amendments which might otherwise alter the bill’s intent.”<sup>138</sup>

75. In 1945 the Labour Party secured an overall majority of 156 in the House of Commons. In the House of Lords, however, there was a substantial Conservative majority. During the Lords’ debate on the first King’s Speech of that Parliament, Viscount Cranborne,<sup>139</sup> the Leader of the Opposition in the Lords, acknowledged that the Labour Government had a mandate to introduce its proposals and said that, in his view, “it would be constitutionally wrong....for this House to oppose proposals which have definitely been put before the electorate.”<sup>140</sup> The convention thus “began, and continued, as a compact between the Labour and Conservative parties to deal with the relationship between a Labour Government and a House of Lords with an overwhelmingly large and hereditary Conservative Opposition.”<sup>141</sup> The convention was accepted and observed for almost fifty years.

76. In 1993, however, during a debate on the convention and other practices which qualified

136 Erskine May, 25<sup>th</sup> edition, para 11.4

137 Joint Committee on Conventions, *Conventions of the UK Parliament*, First Report, HL Paper 265-I/HC 1212-I, Session 2005-06, Summary

138 House of Lords Library Briefing, *Salisbury Convention in a Hung Parliament*, June 2017, Summary <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2017-0030>

139 The fifth Marquess of Salisbury from 1947

140 HL Hansard, 16 August 1945, Vol 137, col 47

141 Joint Committee on Conventions, *Conventions of the UK Parliament*, First Report, HL Paper 265-I/HC 1212-I, Session 2005-06, para 65

the role of the House of Lords,<sup>142</sup> Lord Richard, the Leader of the (Labour) Opposition in the Lords and Shadow Leader of the House, acknowledged that there “still seems to be a consensus in the House on the desirability of what, I suppose, I can call the general practice of self-restraint when it comes to legislative-matters. But it is important to acknowledge that as the House has become busier, questions will increasingly be raised, and have been raised, about the viability of its former role.”<sup>143</sup> “The function of the House, though, has changed, as I see it, from being primarily a revising Chamber. One of the main functions the House now has in relation to the other place, is that it is effectively the only place in which the legislature can curb the power of the executive.”<sup>144</sup> Lord Hesketh, the Government Chief Whip, declared himself “an unashamed supporter of the doctrine. It is not merely true that it has served the House well. It has, I think, become essential to our parliamentary system.”<sup>145</sup>

77. In 1996, Viscount Cranborne, the Lord Privy Seal and Leader of the House of Lords, addressed the constitutional position of the House of Lords in a lecture to the think-tank Politeia. He commented that it was a doctrine that “has been raised in the language of politics into a constitutional convention. That means it is definitely part of our constitution.” He acknowledged, however, that were the Lords to be reformed, the House might choose to renounce that doctrine.<sup>146</sup>

78. In 1999, shortly after the enactment of the House

of Lords Act which removed all but 92 hereditary peers from the House of Lords, Lord Strathclyde, the then Leader of the (Conservative) Opposition in the Lords and Shadow Leader of the House, argued, in a lecture to Politeia, that most of the conditions that gave rise to the Salisbury doctrine had gone. He accepted that it needed to be re-examined but thought that the Lords would not suddenly change the essence of the Salisbury-Addison agreement. “It will always accept the primacy of the elected House. It will always accept that the Queen’s Government must be carried on. But equally, it should always insist on its right to scrutinise, amend and improve legislation.”<sup>147</sup>

79. In 1999, in response to an oral question, Baroness Jay of Paddington, Lord Privy Seal and Leader of the House, stated that “the Salisbury/Addison convention has nothing to do with the strength of the parties in either House of Parliament and everything to do with the relationship between the two Houses. The other House – and with it, the Government – is elected on a universal franchise...it must remain the case that it would be constitutionally wrong, when the country has expressed its view, for this House to oppose proposals that have been definitely put before the electorate.”<sup>148</sup>

80. The position of the Salisbury-Addison Convention continued to be discussed over the next few years with publication in 2000 of the report of the Royal Commission on Reform of the House of Lords

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142 The debate was initiated by the Crossbench Peer, Lord Simon of Glaisdale, a former Law Lord

143 HL Hansard, 19 May 1993, Vol 545, col 1804

144 *Ibid*

145 *Ibid*, col 1809

146 Politeia lecture, 4 December 1996

147 Politeia lecture, 30 November 1999, pp8-9

148 HL Hansard, 15 December 1999, Vol 608, c 214

(commonly known as the Wakeham report),<sup>149</sup> a debate in the Lords in 2001, again initiated by Lord Simon of Glaisdale,<sup>150</sup> and the 2004 Hunt report on House of Lords Reform.<sup>151</sup> These were followed by the appointment of the Joint Committee on Conventions of the UK Parliament in May 2006. The Committee held five sessions of oral evidence with representatives of the three main parties, the Convenor of the Crossbench Peers, the Clerks of the two Houses and a distinguished panel of academics. It also received 24 pieces of written evidence.<sup>152</sup>

81. After considering the various arguments, the Committee stated that it was persuaded that the Salisbury-Addison convention had changed since 1945, and particularly since 1999. “The Convention now differs from the original Salisbury-Addison Convention in two important respects. It applies to a manifesto Bill introduced in the House of Lords as well as one introduced in the House of Commons. It is now recognised by the whole House, unlike the original Salisbury-Addison Convention which existed only between two parties.”<sup>153</sup>

82. In the Committee’s view the convention which had evolved was that:

**“In the House of Lords:**

**A manifesto Bill is accorded a Second Reading;**

**A manifesto Bill is not subject to ‘wrecking amendments’ which change the Government’s manifesto intention as proposed in the Bill; and**

**A manifesto Bill is passed and sent (or returned) to the House of Commons, so that they have the opportunity, in reasonable time, to consider the Bill or any amendments the Lords may wish to propose.”<sup>154</sup>**

83. The Committee also considered that the convention had evolved sufficiently to require a new name. It therefore recommended that in future the convention should be described as the Government Bill Convention.<sup>155</sup>

84. The Government accepted all the recommendations relating to the Salisbury-Addison Convention<sup>156</sup>, but said, in relation to renaming the convention, that it would be receptive of other suggestions, for example “the ‘Cunningham Convention’ in recognition of the work of the Committee and a sign that it was defined by the Committee.”<sup>157</sup> The report of the Joint Committee was noted “with approval” by the two Houses of Parliament in January 2007<sup>158</sup>; the name of the Salisbury-Addison Convention remains unchanged.

85. The question of the applicability of the Salisbury-Addison Convention was again raised after the

149 Cm 4534, 20 January 2000

150 HL Hansard, 24 January 2001, Vol 621, cc 264-300

151 Working Group of Labour Peers, chaired by Lord Hunt of Kings Heath, *Reform of the Powers, Procedures and Conventions of the House of Lords*, July 2004. See also HL Hansard, 26 January 2005, Vol 668, cc 1330-1334

152 *Op cit*, Appendix 2

153 *Op cit*, paras 97-98

154 *Op cit*, para 99 (original emphasis)

155 *Op cit*, para 115

156 Government Response to the Joint Committee on Conventions’ Report of Session 2005-06: *Conventions of the UK Parliament*, Cm 6997, December 2006, paras 24-35

157 *Op cit*, para 27

158 HL Hansard, 16 January 2007, Vol 688, cc 573-638; HC Deb, 17 January 2007, Vol 455, cc 808-887

2010 general election, which resulted in a coalition government, and in 2017, when no party secured an overall majority in the Commons. The various views are set out in greater detail in a House of Lords Library briefing.<sup>159</sup> The Conservatives and Liberal Democrats initially asserted that the Convention still held,<sup>160</sup> but others felt the situation was less clear cut. Baroness D’Souza, then Convenor of the Crossbench Peers, writing in November 2010, suggested that there were “three possibilities for the operation (or not) of the Salisbury Convention under the Coalition Government.”<sup>161</sup> She concluded, however, that “the most sensible compromise – which some might see as weaselly – is to observe the *spirit* of the Convention...Conventions should be sufficiently flexible to develop according to circumstances.”<sup>162</sup>

86. Both the Commons Political and Constitutional Reform Committee (PCRC) and the Lords Constitution Committee, which considered the implications of coalition government on the Convention, “concluded that a coalition agreement made after an election had produced a hung parliament did not have the same status as a manifesto.”<sup>163</sup> The PCRC noted that “It is for

individual Members of the House of Lords to decide whether to apply this convention to bills which originate from the coalition Government’s programme for government...we received a range of opinions from a number of witnesses and no definitive consensus has emerged.”<sup>164</sup>

87. The Constitution Committee considered that the convention “does not, strictly speaking, apply to measures in a coalition agreement” but that “if all parties in a coalition made the same or a substantially similar commitment in their manifestos, then they should be entitled to the benefit of the Salisbury-Addison Convention in respect of that commitment...a practice has evolved that the House of Lords does not normally block government bills, whether they are in a manifesto or not. There is no reason why this practice should not apply when there is a coalition government.”<sup>165</sup> The Committee’s report was debated on a ‘take note’ motion on 13 May 2014.<sup>166</sup>

88. During the five years of the Coalition Government there were three attempts to block a government Bill by moving a ‘reasoned amendment’ on second reading<sup>167</sup>; all failed. In general, however, it is the practice of the House of Lords not to oppose any Bill,

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159 *Salisbury Convention in a Hung Parliament*, House of Lords Library Notes, LLN-2017-0030 <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2017-0030>

160 *Ibid*, p7

161 *Ibid*

162 Baroness D’Souza, *Is the Coalition Agreement a Manifesto?*, Lords of the Blog, 17 November 2010

163 House of Lords Library briefing, p8

164 Fourth Report from the Political and Constitutional Reform Committee, *Lessons from the Process of Formation After the 2010 General Election*, HC 528, Session 2010-12, para 57

165 Fifth Report from the Constitution Committee, *Constitutional implications of coalition government*, HL Paper 130, Session 2013-14, paras 98-100

166 HL Hansard, 13 May 2014, Vol 753, cc 1812-1858

167 A Labour Peer’s amendment to the Health and Social Care Bill 2011; a Crossbench amendment to the Marriage (Same Sex Couples) Bill 2013; a Crossbench amendment to the Social Action, Responsibility and Heroism Bill 2014.

whatever its provenance, at second reading.<sup>168</sup>

89. The second aspect of the Salisbury-Addison Convention is that a “manifesto Bill is not subject to ‘wrecking amendments’ which change the Government’s manifesto intention as proposed in the Bill”.<sup>169</sup> In the Lords, as noted earlier, the Legislation Office advises on whether amendments to Bills are in order and it is expected that the advice of that Office will be taken. That advice is generally, though not invariably, accepted.

90. The third aspect of the Salisbury-Addison Convention is that a “manifesto Bill is passed and sent (or returned) to the House of Commons, so that they have the opportunity, in reasonable time, to consider the Bill or any amendments the Lords may wish to propose.”<sup>170</sup> That practice too has been generally observed. Excluding Bills whose progress was halted by a general election, and one Bill which the Government decided not to proceed with,<sup>171</sup> since 1949, when the second Parliament Act was passed, only six government Bills have not been returned to the Commons in time for them to become law in the session in which they were introduced.<sup>172</sup>

## Commons Financial Privilege

91. From the earliest times the Commons has “claimed predominant rights – financial privilege” in relation to legislation necessary to give legal authority to taxation and expenditure.<sup>173</sup> “Practice in respect of the Commons’ financial privileges is based on the resolution of 1671 ‘That in all aids given to the King by the Commons, the rate or tax ought not to be altered by the Lords’”<sup>174</sup> and the wider resolution of 1678: “That all aids and supplies<sup>175</sup>....; and all bills for the granting of any such aids and supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualifications of such grants, which ought not to be changed or altered by the House of Lords.”<sup>176</sup>

92. Bills must be agreed in the same form by both Houses before they can become law. This means that all amendments made by the Lords to a Commons Bill must be considered by the Commons (as must any amendments made by the Commons to Lords Bills). This process is informally known as ‘ping-pong’. If a Lords amendment has a financial effect, it will be designated in the Commons as engaging

168 On 4 September 2019, it seemed likely that there would be opposition in the Lords to the PMB which was in the course of being taken through the Commons in one day after that House had agreed to a motion to suspend the provision in SO No. 14(1) that Government business has precedence at every sitting save as specified in the Standing Order, HL Hansard, Vol 799, cc 1010-1136. In the event, agreement was reached between the various parties and the Bill was given an unopposed second reading, HL Hansard, 5 September 2019, Vol 799, c 1231

169 Joint Committee on Conventions, *Conventions of the UK Parliament*, First Report, HL Paper 265-I/HC 1212-I, Session 2005-06, para 99

170 *Ibid*

171 Northern Ireland Bill 1999, HC Deb, 15 July 1999, Vol 335, c 566

172 War Crimes Act 1991; European Parliamentary Elections Act 1999; Sexual Offences (Amendment) Act 2000; Hunting Act 2004; Trade Union and Labour Relations (Amendment) Bill 1975-76; Aircraft and Shipbuilding Industries Bill 1976-77

173 Erskine May, 25<sup>th</sup> edition, para 33.8

174 *Ibid*, para 37.6

175 That is, taxation (aids) and government spending (supplies)

176 CJ (1667-87) 509

financial privilege. “If a Lords amendment is not ‘covered’ by the money or ways and means resolutions passed at the beginning of a bill’s passage through the Commons, it will be summarily rejected by the Commons, on the instruction of the Speaker, and will not be considered. This is sometimes referred to as an assertion of ‘unwaivable financial privilege’.”<sup>177</sup> In all other cases, designating an amendment as engaging financial privilege does not mean that the Commons is prevented from considering and agreeing to the amendment as the Commons may waive its privileges. However, if the Commons rejects an amendment which engages financial privilege it is returned to the Lords with a Message stating only that it has been rejected “Because it would alter the financial arrangements made by the Commons, and the Commons do not offer any further Reason, trusting that this Reason may be deemed sufficient.”<sup>178</sup>

93. In general, the House of Lords does not challenge the designation of financial privilege, both because it accepts the long-established convention of Commons financial privilege and because most of the designated amendments are accepted by the Commons, but considerable dissatisfaction is occasionally expressed. In 2008, the Commons disagreed to a Lords Amendment (No. 160) to the Planning Bill on the ground of financial privilege. Lord Jenkin of Roding tabled two amendments to that Amendment which the House authorities considered did not breach the convention. The Lord President of the Council, Lady Royall of Blaisdon, informed the House “By convention, any amendment in lieu must not clearly invite the same

response from the Commons. The House authorities have advised that Amendments Nos. 160B and 160C do not breach the convention. With this advice and the conventions between the two Houses in mind, I urge the House to confine its debate to the substance of the amendments of the noble Lord, Lord Jenkin, and to refrain from questioning the reasons asserted by the other place.”<sup>179</sup>

94. Lord Strathclyde noted “the statement made by the noble Baroness the Leader of the House goes to the heart of the relationship that exists between the two Houses when we are dealing with what I would call the conversation between them when we are engaged in the consideration of Commons and Lords amendments. The noble Baroness has rightly pointed out that there is a long established position that this House does not insist on an amendment where the other place cites financial privilege, and no one, least of all me, is trying to change that. However, as my noble friend Lord Jenkin pointed out, that is an immense power for the other place, and as we all know given the way the other place works, it means that it is an immense power for the Government. The issue that will need to be resolved, if not today then at some stage in the future, is how wisely and justifiably that power is used.”<sup>180</sup> He added “I ask the noble Baroness to consider this matter carefully with her colleagues in another place, with Members of this House and, perhaps, with the Clerk of the Parliaments and his opposite number in another place to see how this issue can be resolved. If the rights of your Lordships are well understood—not only in their limits but in their reality and usefulness—then none of us should see

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177 *Commons Financial Privilege*, Michael Pownall, Clerk of the Parliaments [2007-2011], February 2009, para 12, published as Appendix 2 to the Tenth Report of the Constitution Committee, *Money Bills and Commons Financial Privilege*, HL 97, Session 2010-12

178 See, for example, CJ (2012-13) 713

179 HL Hansard, 25 November 2008, Vol 705, c 1359

180 *Ibid*

those rights lightly eroded.”<sup>181</sup> The note from Michael Pownall on Commons Financial Privilege, quoted above, provided the requested advice.<sup>182</sup>

95. The Lords considered the issue of Commons financial privilege again in 2012 when they objected vehemently to the number of Lords amendments to the Welfare Reform Bill which had been designated as engaging financial privilege. Eleven of the amendments which had been made by the Lords were rejected by the Commons and returned to the Lords with a privilege reason.<sup>183</sup> David Beamish, the Clerk of the Parliaments from 2011 to 2017, was then asked to offer guidance to members of the House of Lords on the application of House of Commons financial privilege to the Welfare Reform Bill. His guidance was published on 13 February 2012.<sup>184</sup> After referring both to Sir Michael’s paper of 2008 and the advice published by Robert Rogers, the Clerk of the House of Commons from 2011-2014, on 9 February 2012<sup>185</sup>, David Beamish re-emphasized two points. First, that if a Lords amendment is rejected with a reason and the amendment infringes privilege, that is the only reason that will be given. “Robert Rogers’ note explains this as follows: ‘This is because giving another reason suggests either that the Commons haven’t noticed the financial implications, or that

they are somehow not attaching importance to their financial primacy.’”<sup>186</sup> Second, that a disagreement to an amendment on the ground of privilege is not the end of the matter.<sup>187</sup>

96. Introducing the debate on the amendments,<sup>188</sup> Lord Strathclyde, the Chancellor of the Duchy of Lancaster, said that he hoped three things were clear: “first, that the scope and presence of privilege are solely for the Commons; secondly that the Government have no role in designating whether or not a Lords amendment impinges on privilege; and last, that when the Commons disagrees with a Lords amendment found to involve money, privilege is the only reason that it can possibly cite for rejecting the amendment – there is no discretion to give another reason.”<sup>189</sup> The Lords *Companion* makes it clear that “In such cases the Lords do not insist on their amendment. But they may offer amendments in lieu of amendments which have been disagreed to by the Commons on the ground of privilege.”<sup>190</sup> The Joint Committee on Conventions, whose report was noted with approval by the House of Lords in 2007<sup>191</sup>, concluded that “**If the Commons have disagreed to Lords Amendments on grounds of financial privilege, it is contrary to convention for the Lords to send back Amendments in lieu which clearly**

181 *Ibid*, c 1360

182 *Commons Financial Privilege*, Michael Pownall, February 2009

183 CJ (2010-12) 1131

184 <https://www.parliament.uk/documents/lords-information-office/Note-on-HC-financial-privilege-Welfare-Reform-Bill-2012-02-13.pdf>

185 *FINANCIAL PRIVILEGE A note by the Clerk of the House and the Clerk of Legislation*, 9 February 2012, <https://www.parliament.uk/documents/commons-commission/Financial-Privilege-note.pdf>

186 *House of Commons financial privilege and the Welfare Reform Bill*, David Beamish, 13 February 2012

187 *Ibid*

188 HL Hansard, 14 February 2012, Vol 735, cc 682-781

189 *Ibid*, c 682

190 *Op cit*, para 8.182

191 LJ (2006-07) 150

**invite the same response.**<sup>192</sup>

97. The Lords returned the Bill to the Commons with seven amendments in lieu. All but two of those amendments were agreed by the Commons. The remaining two amendments were returned to the Lords with privilege reasons.<sup>193</sup> They were then agreed by the Lords, without further amendment.<sup>194</sup> The Bill subsequently received Royal Assent.<sup>195</sup> The convention on Commons financial privilege remains intact.

## Conventions relating to Delegated Legislation

98. “The Parliament Act 1911, as amended by the Parliament Act 1949, provides a statutory power under which bills which have passed the House of Commons may in certain circumstances acquire the force of law without passing the House of Lords.”<sup>196</sup> The Acts do not apply to delegated legislation (statutory instruments). Statutory Instruments (SIs) rejected by the Lords cannot therefore have effect even if they have been approved by the Commons. In addition, except in a very small number of cases where the parent Act specifically provides for such amendment, neither House has the power to amend

delegated legislation.<sup>197</sup>

99. Although the House of Lords has affirmed “its unfettered freedom to vote on any subordinate legislation submitted for its consideration,”<sup>198</sup> since 1968, “a convention has existed that the House of Lords should not reject statutory instruments (or should do so only rarely)”<sup>199</sup> Only six SIs were rejected between 1950 and 2015, all but one of them after 1997.<sup>200</sup>

100. In 2001, the Government in its White Paper, *The House of Lords: Completing the Reform*, concluded that the power only to approve or reject an SI was “inconsistent with the Lords’ primary role as an advisory and revising chamber.”<sup>201</sup> It therefore proposed to accept the Royal Commission on the Reform of the House of Lords’ recommendation “that the House of Lords should be given a power to require the Commons to consider or reconsider Statutory Instruments, instead of their present power only to reject or pass them forthwith.”<sup>202</sup> As proposed by the Royal Commission, the House of Lords would be able to delay an SI by up to three months. “If, before the end of the period, the Government decides it wishes to proceed with the Instrument, and the Commons confirms its

192 *Op cit*, para 252 (original emphasis)

193 CJ (2010-12) 1161

194 LJ (2010-12) 2065

195 LJ (2010-12) 2128

196 Erskine May, 25<sup>th</sup> edition, para 11.7

197 E.g., Census Act 1920, s1(2); Civil Contingencies Act 2004, s27(3)

198 HL Hansard, 20 Oct 1994, Vol 558, cc 356-383

199 *Strathclyde Review: Secondary legislation and the primacy of the House of Commons*, Cm 9177, December 2015, Executive Summary

200 Ninth Report from the Constitution Committee, *Delegated Legislation and Parliament: A response to the Strathclyde Review*, HL Paper 116, Session 2015-16, para 27

201 *The House of Lords. Completing the Reform*, Cm 5291, 7 November 2001, para 31

202 *Ibid*

approval of that decision, the Statutory Instrument will become or remain law.”<sup>203</sup> The recommendation was not implemented, and the convention remained unchanged.

101. In 2006, the Joint Committee on Conventions, concluded “**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...**It is not incompatible with the role of a revising chamber to reject an SI, since (a) the Lords (rightly or wrongly) cannot exercise its revising role by amending the SI or in any other way, (b) the Government may bring the SI forward again immediately, with or without substantive amendment...and (c) the power to reject SIs gives purpose and leverage to scrutiny by the Joint Committee on SIs, and by the new Lords Committee on the Merits of SIs.”<sup>204</sup> It listed a number of situations in which it would be consistent with the Lords’ role in Parliament as a revising chamber, and Parliament’s role in relation to delegated legislation, to threaten to defeat an SI.<sup>205</sup> Although the list was not prescriptive, it did not suggest that any such situation would be likely to touch on the Commons’ financial privilege.

102. On 26 October 2015, the Lords effectively rejected the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015, by passing amendments declining to consider the Regulations until specified conditions had been

met.<sup>206</sup> This caused considerable outrage in the House of Commons, mainly because that decision was considered to breach the financial privileges<sup>207</sup> of the Commons although the Regulations had been laid under section 66(1) of the Tax Credits Act 2002 which provided that they must be approved by a resolution of each House of Parliament, not under legislation which specified that they should be laid only before the House of Commons, a practice invariably followed in respect of SIs relating to taxation.<sup>208</sup>

103. At the following day’s Treasury Questions, George Osborne, the Chancellor of the Exchequer, said “Last night, unelected Labour and Liberal peers voted down the financial measure on tax credits approved by this elected House of Commons. That raises clear constitutional issues that we will deal with.”<sup>209</sup> Andrew Tyrie, the Chair of the Treasury Committee, considered that “in overturning the settled will of the elected Chamber, the unelected Lords has exercised the powers of a Chamber of Parliament in the tax area, whereas for at least 100 years it has been well established that it has, and should have, only the legitimacy of a consultative assembly.”<sup>210</sup>

104. The following day a motion to annul a second SI, the Electoral Registration and Administration Act 2013 (Transitional Provisions) Order 2015, was narrowly defeated.<sup>211</sup> Lord Strathclyde was then commissioned by the Government “to lead a review

203 *Ibid*, para 32

204 *Op cit*, paras 227-228, original emphasis

205 *Ibid*, para 229

206 HL Hansard, 26 October 2015, Vol 765, cc 976-1042

207 See para 89 above

208 Erskine May, 25<sup>th</sup> edition, para 31.8

209 HC Deb, 27 October 2015, Vol 601, c 177

210 *Ibid*, c 178

211 By 246 to 257 votes

into how to secure the decisive role of the elected House of Commons in the passage of legislation”, in particular “in relation to its primacy on financial matters, and secondary legislation.”<sup>212</sup> In his subsequent report, Lord Strathclyde noted that “The Lords convention on statutory instruments has been fraying for some years and the combination of less collective memory, a misunderstanding of important constitutional principles, a House more willing to flex its political muscles, and some innovative drafting of motions against statutory instruments has made it imperative that we understand better the expectations of both Houses when it comes to secondary legislation and, in particular, whether the House of Lords should retain its veto.”<sup>213</sup> He concluded “It is a regret to me that the fine convention on statutory instruments has been stretched to breaking point. Conventions exist because they provide a basis for orderly government. They will survive only so long as there is a continued understanding of why they were originally brought into being.”<sup>214</sup>

105. Lord Strathclyde considered that the rejection of the Tax Credits Regulations broke new ground. “It suggests that the convention is now so flexible that it is barely a convention at all.”<sup>215</sup> He identified three options for providing the House of Commons with a decisive role on SIs. The first would be to remove the House of Lords from the statutory instrument procedure altogether. The second would be to retain the present role of the House of Lords but for that House “in a resolution or standing orders, to set out

and recognise...the restrictions on how its powers to withhold approval or to annul should be exercised in practice and to revert to a position where the veto is left unused.”<sup>216</sup> A third option would be “to create a new procedure – set out in statute – allowing the Lords to invite the Commons to think again when a disagreement exists and insist on its primacy. This would better fit the established role of the House of Lords as regards primary legislation.”<sup>217</sup> Lord Strathclyde recommended the third option which would, in effect, have replaced convention by statute.

106. The Strathclyde review itself was subjected to detailed examination in both Houses of Parliament. The Lords Constitution Committee, in its report on *The Legislative Process: The Delegation of Powers*, said that “When used appropriately, [delegated powers] allow Parliament to focus on the important policy frameworks and decisions in primary legislation, and to leave the detail of implementation to secondary legislation.”<sup>218</sup> It noted that the Government has a list of functions for which delegated powers may be appropriate but considered that “it has become increasingly apparent that the determining factor as to whether to include a delegated power in a bill is whether Parliament will accept the delegation, rather than any point of principle.” The Committee concluded that “If the Government’s current approach to delegated legislation persists, or the situation deteriorates further, the established constitutional restraint shown by the House of Lords towards

212 HC Deb, 4 November 2015, Vol 601, HCWS 292

213 *Secondary Legislation and the primacy of the House of Commons*, Cm 9177, December 2015, Foreword

214 *Ibid*

215 *Ibid*, Executive Summary

216 *Ibid*

217 *Ibid*

218 Sixteenth Report from the Constitution Committee, HL Paper 225, Session 2017-19, Summary

secondary legislation may not be sustained.”<sup>219</sup>

107. In its response to the Committee’s report, the Government said “Parliament will ultimately determine whether it considers a particular delegation of power by a bill to be appropriate. If a constitutional standard of general application can be said to operate in this area, it is that a delegation of power is appropriately granted if Parliament, when scrutinising the bill before it, is content for the matters in question to be dealt with in secondary legislation. The Government therefore agrees with the emphasis that the Committee puts on the constitutional obligation of Parliament to decide whether a proposed delegation of power is acceptable.”<sup>220</sup>

108. The Strathclyde Review was debated by the House of Lords in January 2016.<sup>221</sup> In opening the debate, Lord Strathclyde set out his definition of conventions. “Conventions require us to behave in ways that we would rather not. They require us to sign up to a series of obligations that constrain the way the powers of the House of Lords are used. To work, they need to be binding on those who agree them; and they are of course based on trust, because there is no legal basis for them.”<sup>222</sup>

109. Baroness Smith of Basildon, Shadow Leader of the House, noted that the House seldom used

its powers to their limits, but “that does not mean they should not exist”. The dispute was not about the primacy of the Commons over the Lords; it was about the Executive seeking to brush the Lords aside.<sup>223</sup>

110. Lord Wallace of Tankerness, Leader of the Liberal Democrats in the Lords, confirmed that his party supported the motion approved in 1994: “That this House affirms its unfettered freedom to vote on any subordinate legislation submitted for its consideration” and that it continued “to reject the notion that any Government who achieve a majority in the Commons should have the absolute power to prosecute their business without the burden of proper checks and balances.”<sup>224</sup>

111. Lord Norton of Louth<sup>225</sup> argued that “Conventions are non-legal rules that determine a consistent, indeed invariable, pattern of behaviour.”<sup>226</sup> It was the usual practice of the Lords not to withhold agreement to SIs, but it was not the invariable practice. The House “does not regard itself as bound, and has not been bound, by a moral imperative that we should not reject statutory instruments. So long as that is the case there is no convention.”<sup>227</sup> There was thus no breach of convention. He considered that the problem derived “from the fact that we exercised our power in respect of a statutory instrument that engaged the

219 *Ibid*

220 Government response to the Committee’s report on *The Legislative Process: The Delegation of Powers*, 25 January 2019, para 6 <https://www.parliament.uk/documents/lords-committees/constitution/Correswithministers/250119%20Government%20response%20to%20Leg%20Process%20Report.pdf>

221 HL Hansard, 13 January 2016, Vol 768, cc 272-380

222 *Ibid*, c 274

223 *Ibid*, c 279

224 *Ibid*, c 281

225 Professor of Government in the Department of Politics and International Studies, the [University of Hull](#)

226 HL Hansard, 13 January 2016, Vol 768, c 315

227 *Ibid*

financial privileges of the Commons.”<sup>228</sup>

112. The debate ranged widely but, as the various contributions made clear, there was little agreement on the scope of the convention or even on whether a convention existed at all.

113. The Lords Delegated Powers and Regulatory Reform Committee published a report on the Strathclyde Review in March 2016.<sup>229</sup> It noted that “The House of Lords’ votes on the Tax Credits Regulations challenged the Government, not the House of Commons, and the effect of the options set out in the Strathclyde Review would be to tilt the balance of power away from Parliament generally and towards Government. These are very important issues which...warrant further consideration.”<sup>230</sup>

The Committee recommended **“that further work should be carried out by the two Houses working together, most appropriately as a Joint Committee, to consider the scrutiny of delegated legislation by Parliament as a whole.”**<sup>231</sup>

114. The Lords Secondary Legislation Scrutiny Committee also considered the Strathclyde Review. It argued that “The Strathclyde Review asserts that the Lords convention on secondary legislation has been “stretched to breaking point”, hence the need for change. Whilst we acknowledge that opinions vary about the appropriateness of the Tax Credits Regulations votes, we do not share this view of the convention, and we recommend that the House of

Lords should retain its power to reject secondary legislation – albeit to be exercised in exceptional circumstances only.”<sup>232</sup>

115. The Commons Public Administration and Constitutional Affairs Committee too was not convinced by the Strathclyde Review. In its report of May 2016, it argued “The Government should not produce legislative proposals aimed at implementing the Strathclyde Review’s recommendations. Such legislation would be an overreaction and entirely disproportionate to the House of Lords’ legitimate exercise of a power that even Lord Strathclyde has admitted is rarely used. The Government’s time would be better spent in rethinking the way it relies on secondary legislation for implementing its policy objectives and in building better relations with the other groupings in the House of Lords.”<sup>233</sup>

116. The Queen’s Speech in May 2016, made no mention of proposed legislation though it stated that “My Ministers will uphold the sovereignty of Parliament and the primacy of the House of Commons.”<sup>234</sup> In the view of Sir Malcom Jack and Richard Reid, writing in 2018, “The absence of a bill in the Queen’s Speech on the Strathclyde Review vindicates the recommendation of the Commons Public Administration and Constitutional Affairs Select Committee in its report that such a step would be an ‘overreaction and entirely disproportionate’.

228 *Ibid*, c 316

229 25<sup>th</sup> Report from the Delegated Legislation and Regulatory Reform Committee, *Special Report: Response to the Strathclyde Review*, HL Paper 119, Session 2015-16

230 *Ibid*, para 13

231 *Ibid*, para 80 (original emphasis)

232 Thirty-second Report from the Secondary Legislation Scrutiny Committee, *Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation*, HL Paper 128, Session 2015-16, Summary

233 Eighth Report from the Public Administration and Constitutional Affairs Committee, *The Strathclyde Review: Statutory Instruments and the power of the House of Lords*, HC 752, Session 2015-16, Conclusion, para 15

234 HC Deb, 18 May 2016, Vol 611, c 5

Nevertheless, the Review, as the three Lords select committees have acknowledged, provides the opportunity for Parliament to look at the whole system of secondary legislation in the round.”<sup>235</sup>

117. Later that year, on 17 November 2016, the Government announced that it did “not believe that we need to introduce primary legislation at this time. We recognise the valuable role of the House of Lords in scrutinising SIs, but there is no mechanism for the will of the elected House to prevail when they are considered, as is the case for primary legislation. The Government are therefore reliant on the discipline and self-regulation that this House imposes upon itself. Should that break down, we would have to reflect on this decision.”<sup>236</sup> The matter of scrutiny of delegated legislation by Parliament has not to date been referred to a Joint Committee. The issue of whether the Lords’ practice on handling SIs is, in fact, a convention remains undecided.

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235 *Financial Privilege: the Undoubted and Sole Right of the Commons?*, Sir Malcolm Jack KCB, PhD FSA and Richard Reid PhD, The Constitution Society, June 2016, para 126

236 HL Hansard, 17 November 2016, Vol 776, c 1539

## V. Conventions Relating to the Interaction Between Parliament and Government

118. The conventions relating to the interaction between Parliament and Government are not something which can be defined or determined solely by Parliament, although each affects Parliament to a greater or lesser extent. This section describes some of the more important constitutional conventions.

### Collective Ministerial Responsibility<sup>237</sup>

119. “Collective responsibility is a fundamental convention of the British Constitution, whereby the Government is collectively accountable to Parliament for its actions, decisions and policies.”<sup>238</sup> **“The principle of collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained.”**<sup>239</sup> The principle has been explicitly set aside<sup>240</sup> on several occasions, including on tariff policy in 1932; direct elections to the European Assembly in 1977; various issues under the 2010–15 Coalition Government, such as the 2011 referendum on the alternative voting

system for general elections, as agreed in the 2010 Coalition Agreement; and the referenda on the UK’s membership of the European Economic Community in 1975 and the UK’s membership of the European Union in 2016.<sup>241</sup>

120. In 1975, for example, the Prime Minister, Harold Wilson, noted that “The circumstances of this referendum [on continued membership of the European Economic Community] are unique, and the issue to be decided is one on which strong views have long been held which cross party lines. The Cabinet has, therefore, decided that, if when the time comes there are members of the Government, including members of the Cabinet, who do not feel able to accept and support the Government’s recommendation; whatever it may be, they will, once the recommendation has been announced, be free to support and speak in favour of a different conclusion in the referendum campaign.”<sup>242</sup>

121. The Prime Minister explained the position further in answer to a written question in April 1975: “those Ministers who do not agree with the Government’s recommendation in favour of continued membership of the European Community are, in the unique circumstances of the referendum, now free to advocate a different view during the referendum campaign in the country. This freedom

237 For a fuller description of collective responsibility, see House of Commons Library Briefing, 14 November 2016, CBP-7755 <https://researchbriefings.parliament.uk/ResearchBriefing/CBP-7755#fullreport>

238 *Ibid*, section 1

239 *Ministerial Code*, Cabinet Office, August 2019, para 2.1 (original emphasis)

240 Often referred to as an ‘agreement to differ’

241 Commons Library Briefing, CBP-No 7755, section 3

242 HC Deb, 23 January 1975, Vol 884, c 1746

does not extend to parliamentary proceedings and official business. Government business in Parliament will continue to be handled by all Ministers in accordance with Government policy.”<sup>243</sup>

122. In 2016, the Prime Minister, David Cameron, stated that, while it was his intention that there would be “a clear Government position” on the European Union membership referendum, it would “be open to individual Ministers to take a different personal position while remaining part of the Government.”<sup>244</sup> The Prime Minister provided guidance to ministerial colleagues in a minute of 11 January 2016 on how the agreement to differ would work in practice. His minute described the arrangement as being “wholly exceptional” and applying only to the question of whether the UK should remain in or leave the EU. All other EU or EU-related business would “continue to be subject to the normal rules of collective responsibility and party discipline.”<sup>245</sup>

123. Collective responsibility in relation to implementation of the referendum decision to leave the European Union appeared to remain suspended until July 2018, when Mr Cameron’s successor, Theresa May, wrote to Conservative MPs. “During the EU referendum campaign collective responsibility on EU policy was temporarily suspended. As we developed our policy on Brexit

I have allowed cabinet colleagues to express their individual views. Agreement on this proposal [for progressing negotiations towards a new relationship with the EU after the UK’s departure] marks the point where that is no longer the case and collective responsibility is now fully restored.”<sup>246</sup> In 2019, her successor, Boris Johnson, confirmed that the principle of collective responsibility applied. He made no provision for an ‘agreement to differ’.<sup>247</sup>

124. The fact that collective responsibility can be set aside led Professor Vernon Bogdanor to conclude that it is “as much a maxim of political prudence as it is a convention of the constitution. It is generally sensible for the government to observe it...On other occasions, however, it may be the lesser evil to suspend it.”<sup>248</sup> And as Professor Woodhouse observed, collective responsibility also “provides Parliament with the means of holding the government as a body accountable.”<sup>249</sup>

125. In 2013, Chloe Smith, the Parliamentary Secretary, Cabinet Office, replying to a debate on collective ministerial responsibility in the context of coalition government, noted “Collective ministerial responsibility is about how Ministers behave towards the public and Parliament, rather than towards the Crown. However, the basic point remains the same: Ministers need to be able to have frank discussions and disagreements in private,

243 HC Deb, 7 April 1975, Vol 889, c 351W

244 HC Deb, 5 January 2016, Vol 604, c 28

245 Office of the Prime Minister, ‘EU Referendum: Prime Minister’s personal minute to all ministerial colleagues’, 11 January 2016 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/491181/EU\\_Referendum\\_PM\\_Minute.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/491181/EU_Referendum_PM_Minute.pdf)

246 Letter from the Prime Minister to Conservative MPs, 9 July 2018, <https://brexitcentral.com/theresa-may-selling-chequers-proposal-conservative-mps/>

247 Ministerial Code, August 2019, para 2.1

248 Bogdanor V, *The New British Constitution*, 2009, p 136, quoted in the House of Commons Library paper

249 Woodhouse D, *Ministers and Parliament: Accountability in Theory and Practice*, 1994, pp 3-4, quoted as above

while maintaining a common purpose once a decision has been taken.”<sup>250</sup> “The current version of the ministerial code makes it clear that collective responsibility can be explicitly set aside on occasion. Even before the inclusion of that provision in the code, there was an established practice of doing so on specific issues. Most notably, it has long been the case that collective responsibility does not apply to issues of individual conscience.”<sup>251</sup> She also emphasised that the key, when collective ministerial responsibility was set aside, was to ensure that Parliament was informed in a way that was appropriate to the instance in hand.<sup>252</sup>

126. In 2014, the Lords Constitution Committee, in its report on *Constitutional Implications of Coalition Government*, acknowledged that “**Collective responsibility has served our constitution well. It promotes collective decision-making and ensures Parliament is able to hold the Government effectively to account for its actions, policies and decisions. It should continue to apply when there is a coalition government.**”<sup>253</sup>

127. Whether collective responsibility is a constitutional convention, “a maxim of political prudence”,<sup>254</sup> or more a means of delivering confidence, unanimity and confidentiality,<sup>255</sup> it remains the case that Parliament considers collective responsibility to be an important and

binding principle.

## Confidence Motions

128. “**The fact that the government of the day must retain the confidence of the House of Commons is a constitutional principle which determines the relationship between Parliament and Government. The Government’s authority to govern is dependent on maintaining the confidence of the House of Commons. This principle remains fundamental to our system of Parliamentary democracy.**”<sup>256</sup>

129. In written evidence to the Lords Constitution Committee’s inquiry into the Fixed-term Parliaments Act (FPA), Sir Malcolm Jack described the features of the convention on confidence motions as it predated that Act. These included:

“(a) the Government acceded to a demand from the Leader of the Opposition for a No Confidence Motion on the basis that the Official Opposition was an alternative Government. Such a Motion was taken in Government time.

(b) Government itself could make a matter of policy a Confidence issue.

(c) Defeat on a Motion of No Confidence led to resignation of the Prime Minister and Dissolution

250 HC Deb, 13 February 2013, Vol 558, cc 302WH

251 *Ibid*, c 303WH

252 *Ibid*, c 304WH

253 Fifth Report from the Constitution Committee, HL Paper 130, Session 2013-14, para 77 (original emphasis)

254 Bogdanor V, *The New British Constitution*, 2009, p136

255 Marshall G, *Ministerial Responsibility*, 1989, pp2-4, Loveland I, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction*, Seventh Edition, 2015, pp269-274, quoted in the House of Commons Library paper

256 Fourteenth Report of the Public Administration and Constitutional Affairs Committee, *The Role of Parliament in the UK Constitution Interim Report: The Status and Effect of Confidence Motions and the Fixed-term Parliaments Act 2011*, HC 1813, Session 2017-19, para 8 (original emphasis)

under prerogative power (1924) (1979).<sup>257</sup>

Defeats on the Queen’s Speech<sup>258</sup> or on the budget have traditionally also been regarded as matters of confidence.

130. In March 1979, the Labour Government was defeated on a motion of no confidence. The Prime Minister, James Callaghan, immediately announced “now that the House of Commons has declared itself, we shall take our case to the country. Tomorrow I shall propose to Her Majesty that Parliament be dissolved as soon as essential business can be cleared up, and I shall then announce as soon as may be—and that will be as soon as possible—the date of Dissolution, the date of the election and the date of meeting of the new Parliament.”<sup>259</sup> Margaret Thatcher, the Leader of the Opposition, made it clear that “As the Government no longer have authority to carry on business without the agreement of the Opposition”, the Opposition would facilitate essential business “so that the Dissolution can take place at the very earliest opportunity and the uncertainty ended.”<sup>260</sup> That demonstrated both the Government’s acceptance of the convention that a successful motion of no confidence must be followed as quickly as possible by a general election and the Opposition’s acceptance of its role in facilitating that outcome.

131. The passage of the FPA has radically changed the position on motions of no confidence. “The passing of a motion in the statutory terms ‘That this House has no confidence in Her Majesty’s Government’

would have specific legal consequences for the continuation of the Government, but a differently phrased motion would not.”<sup>261</sup> The Act allows fourteen days for a government acceptable to the House to be approved. If a motion stating ‘That this House has confidence in Her Majesty’s Government’ has not been passed by the end of the period of 14 days after the day on which the specifically-worded no confidence motion was passed, an early general election will take place.<sup>262</sup> That provision has not yet been used.

132. In 2018, the Public Administration and Constitutional Affairs Committee, in its report on *The Status and Effect of Confidence Motions and the Fixed-term Parliaments Act 2011*, noted that “The Act provides no guidance on what occurs during the 14-day period following a Fixed-term Parliaments Act 2011 no confidence motion being passed. As the Clerk of the House told us, what occurs during this period is a matter of politics, and not of procedure.”<sup>263</sup> However, the Committee considered that “While it is correct that only by the statutory provisions of the Act can a motion of no confidence lead to an early general election, this has in no way affected the ability of the House to express no confidence in the Government through other means. Outside the terms of the Act, if the House were to express no confidence, unless that authority could be restored, the Prime Minister would be expected to give notice that he or she will resign, but only when he or she is in a position to recommend to the Sovereign an alternative person to form a new administration. In

257 Sir Malcolm Jack, written evidence (FPA 0002), July 2019, para 2

258 CJ 179 (1924) 32

259 HC Deb, 28 March 1979, Vol 965, c 589

260 *Ibid*, c 590

261 Erskine May, 25<sup>th</sup> edition, para 18.44

262 Fixed-term Parliaments Act 2011, section 2

263 Fourteenth Report, HC 1813, Session 2017-19, Summary

the event that no alternative person can be found, it remains available to the House to bring about an early general election under section 2(1) of the Act.”<sup>264</sup> If the House were unable to secure a two-thirds majority for such a motion that would not, of course, be an option.

133. In August 2019, Professor Bogdanor, in evidence to the Constitution Committee, had noted that “Had the Act not been on the statute book, it might have proved possible to resolve the parliamentary deadlock in 2019. Theresa May could have made the Withdrawal Agreement a matter of confidence. Then, either the rebels would have come to heel, or she would have sought a dissolution. As it was, the Commons refused to endorse the deal; it also refused to vote no confidence in the government. This led to a situation predicted in my book<sup>265</sup> whereby a government was able to continue in office but without being able to secure its major policy.”<sup>266</sup>

134. “The Cabinet Manual declares – para. 14 – that, after a successful no confidence vote, ‘a Government or Prime Minister...is required by constitutional convention to resign’, and in para. 16, the Prime Minister ‘is expected to tender the Government’s resignation immediately’. But suppose the Prime Minister were to ignore the convention and seek to play out time by remaining in office for 14 days after which an election would be due. Or, perhaps he or she might seek to circumvent the 14 days by seeking an immediate election through the two-thirds mechanism, assuming that the official opposition

would support this. The position is very unclear.”<sup>267</sup>

135. The acuity of Professor Bogdanor’s analysis was demonstrated on 3 September 2019 when Prime Minister Boris Johnson, in a change from his predecessor’s position, made the vote on a non-government motion to allow time for debate on the European Union (Withdrawal) (No. 6) Bill a matter of confidence. Twenty-one Conservative members voted against government policy in favour of the motion<sup>268</sup> and immediately had the party whip withdrawn.<sup>269</sup> However, as the convention that defeats on matters of policy would be treated as issues of confidence which would lead to a general election, has been superseded by the FPA, an election could not follow immediately.

136. Giving oral evidence to the Lords Constitution Committee’s inquiry into the Fixed-term Parliaments Act in September 2019, Lord Norton of Louth said “If you think about the two provisions for triggering an election, a two-thirds majority and the 14-day provision, under the old convention a Prime Minister who lost the confidence of the House could either go for Dissolution or resign, as with Callaghan, and the assumption is Dissolution, but the alternative is to resign which means handing over to the Opposition and giving it the opportunity. I think that was what the provision was meant to do—to give somebody else the opportunity—but at the same time they would need to show they had the confidence of the House, hence the 14-day provision, which is not the best way of

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264 *Ibid*

265 *The Coalition and the Constitution*, 2011, Bloomsbury Publishing

266 Written evidence, FPA 0004, August 2019, para 3

267 *Ibid*, para 4

268 HC Deb, 3 September 2019, Vol 664, cc 132-136

269 That meant they were effectively expelled from the parliamentary Conservative party. Ten members had the whip restored on 29 October 2019

providing for it, but I think that was the motivation to try to replicate what had gone before.”<sup>270</sup>

137. Professor Robert Hazell, the Constitution Unit, Department of Political Science, University College London, suggested “There is less ambiguity than perhaps some people believe. The duties on the Prime Minister are very clear if he has lost a formal no confidence Motion under the Act. The first is to remain in office... On day one or day two of the 14 days he must remain in office and he can seek to restore confidence in his Government because there will be a reason for the successful no confidence Motion...The Prime Minister remains the incumbent Prime Minister and, in effect, has first crack at seeking to re-establish confidence in his Government.

138. “He may not choose to do that. He may, as Lord Norton said, seek to sit out the 14 days and then Parliament would be dissolved, leading to an election. If he were to do that, it is open to the House of Commons during the 14 days to seek to establish whether an alternative person could command confidence. That might be an alternative person from within the governing party or it might be from the Opposition or another party. The House of Commons has various means. If it could identify such a person to signal to the Palace and to the public that it would have confidence in an alternative Prime Minister, and if it clearly signalled that through a Resolution, a Motion on an humble Address or an Early Day Motion, I would fully

expect the incumbent Prime Minister to tender his resignation and recommend to the Queen that she appoint the alternative who had been identified by the House of Commons. That much I think we can state pretty confidently.”<sup>271</sup>

139. By established convention, the Government has always acceded to the demand from the Leader of the Opposition, though not from minor parties, to allot a day for the discussion of a motion of confidence. On 23 September 2019, however, the Prime Minister promised “if in fact the party opposite does not have confidence in the Government, it will have a chance to prove it. It has until the House rises...today to table a motion of no confidence in the Government...And we can have that vote tomorrow. Or if any of the smaller parties fancy a go, they can table that motion and we will give them the time for a vote.”<sup>272</sup> No motion was tabled.

140. The FPA also removed the prerogative power of dissolution. The Prime Minister sought a general election under the provisions of that Act on three occasions, but was unable to secure the required two-thirds majority in favour.<sup>273</sup> On 29 October 2019 he accordingly presented a “Bill to make provision for a Parliamentary General Election to be held on 12 December 2019.”<sup>274</sup> The Bill was passed by both Houses in two days<sup>275</sup> and received Royal Assent on 31 October 2019.<sup>276</sup>

141. In the light of recent experience of the working

270 Oral evidence to the Constitution Committee’s inquiry into the Fixed-term Parliaments Act, 4 September 2019, Q 1

271 *Ibid*, Q 13. For the complete oral and written evidence to the Committee, see <https://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/inquiries/parliament-2017/fixed-term-parliaments-act/publications/>

272 HC Deb, 25 September 2019, Vol 664, cc 776-777

273 HC Deb, 4 September, Vol 664, cc 291-315; 9 September, Vol 664, cc 616-639; 28 October 2019, Vol 667, cc 54-79

274 [https://publications.parliament.uk/pa/bills/cbill/2019-2020/0010/cbill\\_2019-20200010\\_en\\_1.htm](https://publications.parliament.uk/pa/bills/cbill/2019-2020/0010/cbill_2019-20200010_en_1.htm)

275 HC Deb, 29 October 2019, Vol 667, cc 233-330; HL Hansard, 30 October 2019, Vol 800, cc 960-996

276 Lords Minutes, 31 October 2019

of the FPA, Parliament may wish in the future to consider amending, or even repealing, the Act, in favour of reinstating the conventions on motions of confidence and the prerogative on dissolution which had been accepted and observed for many years<sup>277</sup>.

### Military Action

142. “The decision to deploy the Armed Forces in situations of armed conflict is currently a prerogative power. In the event of a declaration of war or the commitment of British forces to military action, constitutional convention requires that authorisation is given by the Prime Minister, on behalf of the Crown. Decisions on military action are taken within the Cabinet with advice from, among others, the National Security Council and the Chief of the Defence Staff.”<sup>278</sup> In recent years, however, the Government has sought a parliamentary vote before taking such action. In 2003, the House passed a resolution supporting “the decision of Her Majesty’s Government that the United Kingdom should use all means necessary to ensure the disarmament of Iraq’s weapons of mass destruction” and offering “wholehearted support to the men and women of Her Majesty’s Armed Forces now on duty in the Middle East.”<sup>279</sup>

143. In 2006, the Lords Constitution Committee

conducted an inquiry into Parliament’s role in waging war, producing both a report<sup>280</sup> and a follow-up report.<sup>281</sup> In its main report, the Committee recommended “that there should be a parliamentary convention determining the role Parliament should play in making decisions to deploy force or forces outside the United Kingdom to war, intervention in an existing conflict or to environments where there is a risk that the forces will be engaged in conflict.”<sup>282</sup> In the follow-up report, the Committee concluded that “a cross-party political consensus appears to be emerging that the current arrangements are unsustainable. Accordingly, we are optimistic that our recommendations will be revisited in the very near future.”<sup>283</sup>

144. That optimism proved well-founded. In May 2011, the Commons Political and Constitutional Reform Committee published a short report in which it noted that on “31st March 2011 we took evidence from academic legal experts on the role of Parliament in decisions to commit British forces to armed conflict abroad. This is an area in which considerable work was carried out before the 2010 general election, by both the Government of the day and select committees, but without any concrete result. This Report calls on the current Government urgently to bring forward a text for parliamentary decision, as a first step to bringing greater clarity to

277 Under s7 of the FPA the Prime Minister is required to appoint a committee in 2020 to review the operation of the Act

278 Commons Library paper, *Parliamentary approval for military action*, CBP 7166, 8 May 2018, Summary <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7166>

279 HC Deb, 18 March 2003, Vol 401, c 911

280 Fifteenth Report from the Constitution Committee, *Waging war: Parliament’s role and responsibility*, HL Paper 236, Session 2005-2006

281 Third Report from the Constitution Committee, *Waging war: Parliament’s role and responsibility: Follow-up*, HL Paper 51, Session 2006-07

282 *Op cit*, para 108

283 *Op cit*, para 9

this key area of constitutional decision-making.”<sup>284</sup> It recommended that “the Cabinet Manual should include a clear reference to Parliament’s current role in decisions to commit forces to armed conflict abroad.”<sup>285</sup>

145. In its response to that report, the Government stated “The Leader of the House said on 10 March 2011 that ‘We propose to observe that convention except when there is an emergency and such action would not be appropriate. As with the Iraq war and other events, we propose to give the House the opportunity to debate the matter before troops are committed.’ This remains the Government’s position.” It also noted that the Cabinet Manual now contained a reference to Parliament’s current role in conflict decisions.<sup>286</sup>

146. The Constitution Committee again considered the subject in 2013. It considered that “the full Cabinet should continue to be the ultimate decision-maker within Government on whether to use armed force overseas” and that “the Government’s internal arrangements should be set out in detail in the Cabinet Manual.”<sup>287</sup> On Parliament’s role, it concluded “that the existing convention – that, save in exceptional circumstances, the House of Commons is given the opportunity to debate and vote on the deployment of armed forces overseas – is the best means by which the House of Commons can exercise political control over, and confer

legitimacy upon, decisions to use force.” It did not recommend formalisation “by way of legislation or a resolution.”<sup>288</sup> Following its report, the Cabinet Manual was revised to include a short section on the parliamentary process in relation to military action.<sup>289</sup>

147. In 2013, Parliament was recalled during the summer adjournment to debate the use of chemical weapons in Syria. The motion before the House of Commons noted, among other provisions, that “every effort should be made to secure a Security Council Resolution backing military action before any such action is taken”, and “that before any direct British involvement in such action a further vote of the House of Commons will take place.”<sup>290</sup> Both the motion, and an Opposition amendment to it, were defeated.

148. Edward Miliband, the Leader of the Opposition, then asked “will the Prime Minister confirm to the House that, given the will of the House that has been expressed tonight, he will not use the royal prerogative to order the UK to be part of military action before there has been another vote in the House of Commons?” In response, the Prime Minister said “the House has not voted for either motion tonight. I strongly believe in the need for a tough response to the use of chemical weapons, but I also believe in respecting the will of this House of Commons. It is very clear tonight

284 Eighth Report from the Political and Constitutional Reform Committee, *Parliament’s role in conflict decisions*, HC 923, Session 2010-12, Summary

285 *Ibid*, para 3

286 Twelfth Report from the Political and Constitutional Reform Committee, *Parliament’s role in conflict decisions – further Government Response*, HC 1673, Session 2010-12, Government Response

287 Second Report from the Constitution Committee, *Constitutional arrangements for the use of armed force*, HL Paper 46, Session 2013-14, Summary

288 *Ibid*

289 *Op cit*, paras 5.36-5.38

290 HC Deb, 29 August 2013, Vol 566, cc 1425-1556

that, while the House has not passed a motion, the British Parliament, reflecting the views of the British people, does not want to see British military action. I get that, and the Government will act accordingly.”<sup>291</sup>

149. The Lords also debated the issue on a motion to take note of the use of chemical weapons in Syria.<sup>292</sup> In opening the debate, Lord Hill of Oareford, Leader of the House and Chancellor of the Duchy of Lancaster, noted “Our Parliament has on relatively few occasions been asked to consider whether to endorse the principle of the use of military force. It is inevitable that today’s debate here, and particularly in the other place, will be viewed from the perspective of the debates held before our interventions in Libya and indeed in Iraq. Given that perspective, we are right in Parliament and as a nation to be cautious and to strive to be consensual. That is why we have published the summary of our legal position and the key judgments of the Joint Intelligence Committee. It is why we have deferred our decision until the United Nations inspectors have completed their immediate work and briefed the Security Council. It is why we want to try to secure a UN Security Council resolution.”<sup>293</sup>

150. Baroness Royall of Blaisdon, Shadow Leader of the House, said that it was right “that it is the Commons that should debate and vote on the issue of armed force, both to hold the Government to account and in order to confer legitimacy on any

military intervention, but it is also right that our own House should in parallel debate the issue. The Constitution Committee said in its timely report, *Constitutional Arrangements for the Use of Armed Force*: ‘We consider that the House of Lords is well placed to debate deployment decisions, but that the approval of such decisions should be for the House of Commons.’”<sup>294</sup>

151. After a thoughtful and considered debate, and shortly after it had learned of the Prime Minister’s response to the Commons votes, the Lords approved the ‘take note’ motion.

152. Commenting after the debates, Dr Andrew Blick noted: “Simply holding a vote in advance of the military action was an important development, because it firms up the developing convention that entry into armed combat should be subject, whenever possible, to prior parliamentary (and in particular House of Commons) approval. There are still some uncertainties surrounding how this convention applies in every case – for instance, the vote on the Libyan operation took place only after it had commenced. But undeniably it now exists.”<sup>295</sup>

153. In August 2019 the Public Administration and Constitutional Affairs Committee published a report on *The Role of Parliament in the UK Constitution: Authorising the Use of Military Force*.<sup>296</sup> It concluded that while “the involvement of Parliament at the earliest possible stage of decision-making is vital, we consider that any statutory formalisation of

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291 *Ibid*, cc 1555-1556

292 HL Hansard, 29 August 2013, Vol 747, cc 1719-1826

293 *Ibid*, c 1720

294 *Ibid*, c 1724

295 Dr Andrew Blick, Centre for Political and Constitutional Studies, Kings College London, 2 September 2013, published on <http://www.democraticaudit.com/2013/09/02/war-peace-and-parliament-experts-respond-to-the-governments-defeat-on-syrian-intervention/>

296 Twentieth Report from the Public Administration and Constitutional Affairs Committee, HC 1891, Session 2017-19

this expectation would create new risks.”<sup>297</sup> “We therefore recommend a resolution that would acknowledge the core convention and work in conjunction with the agreed changes to practices in the communications between the Government and the House of Commons.”<sup>298</sup> The Committee also set out a draft of such a resolution.<sup>299</sup> In its response to the report, the Government said it “believes that the current arrangements strike an appropriate balance between respecting the role of Parliament in relation to the authorisation of military force, and allowing the Government to act flexibly as circumstances demand. The Government does not believe that codification of this convention would be appropriate. To require Ministers, and in turn military commanders, to consider the text of a resolution of the House to determine whether circumstances engaged one of the provisions which created an exception to the convention, would not be appropriate in a fast-moving operational crisis.”<sup>300</sup>

### Pre-election Period (Purdah)

154. Purdah “is the term used to describe the period between the time an election is announced and the date the election is held.”<sup>301</sup> “During the election period, the Government retains its responsibility to govern, and Ministers remain in charge of their departments. Essential business must be

297 *Ibid*, Conclusions and recommendations, para 14

298 *Ibid*, para 16

299 *Ibid*, para 32

300 First Special Report from the Public Administration and Constitutional Affairs Committee, *Government Response to the Committee’s 20th Report of Session 2017–19: The Role of Parliament in the UK Constitution: Authorising the Use of Military Force*, HC 251, Session 2019, p11

301 <https://www.parliament.uk/site-information/glossary/purdah/>

302 Cabinet Office, General Election Guidance 2017, 20 April 2017, p3 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/610239/general-election-guidance-2017.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/610239/general-election-guidance-2017.pdf)

303 HC Deb, 5 November 2019, Vol 667, c 645

304 *Ibid*

carried on. However, it is customary for Ministers to observe discretion in initiating any new action of a continuing or long term character. Decisions on matters of policy on which a new government might be expected to want the opportunity to take a different view from the present government should be postponed until after the election, provided that such postponement would not be detrimental to the national interest or wasteful of public money.<sup>302</sup> Purdah may perhaps be regarded as a practice rather than a convention, but it is generally observed by governments during an election.

155. On the final sitting day before the dissolution of Parliament in advance of the December 2019 election, Ivan Lewis, the independent Member for Bury South, asked the Speaker “In the remaining hours before purdah, what steps are available to the House to require the Secretary of State for Transport to publish the Oakervee review of High Speed 2?”<sup>303</sup> The Speaker said “That is not a matter for the Chair, but the hon. Gentleman has done the right thing: he has put it on the record, and I hope those on the Government Front Bench are listening and may come back about that while we still have time.”<sup>304</sup> The report was not published before Parliament was dissolved.

156. Dominic Grieve, Chair of the Intelligence and Security Committee (ISC), then raised an urgent

question about the Prime Minister's "refusal to give clearance to the report on Russia by the Intelligence and Security Committee of Parliament."<sup>305</sup> He asked "why the Prime Minister had not given confirmation within the standard 10 days, enabling publication of the report prior to the election...highlighted the public interest in the report because of its relevance to the integrity of the democratic process,... expressed disappointment that the Committee had not been given reasons for the delay, and suggested that in the future, the ISC may wish to reform procedures to ensure that the same thing did not happen again."<sup>306</sup> Other Members also pressed the issue. In reply, Christopher Pincher, the Minister for Europe and the Americas, stated that the "Prime Minister has a duty under the 2013 Act to look carefully and considerately at such reports. That is what No. 10 is doing, that is what the Prime Minister will do, and when that work is completed the report will be published."<sup>307</sup> The report was not published before Parliament was dissolved and, in compliance with practice during *purdah*, will not be published during the election period.<sup>308</sup>

## Prorogation

157. Prorogation "is a prerogative power exercised by the Crown on the advice of the Privy Council. In practice this process has been a formality in the UK

for more than a century: the Government advises the Crown to prorogue and the request is acquiesced to."<sup>309</sup> Although the prerogative power remains intact, previous understanding of the accompanying convention was turned upside down by the Supreme Court's judgment on 24 September 2019.<sup>310</sup> The paper does not try to make a direct comparison between the convention as understood before 24 September and the current position but, for clarity, instead sets each out separately.

### *The Pre-24 September 2019 Position*

158. Prorogation is the formal name given to the period between the end of a session of Parliament and the State Opening of Parliament that begins the next session. Contrary to the apocalyptic headlines which accompanied the announcement, on 28 August 2019, of the forthcoming prorogation, it does not constitute the 'suspension of Parliament', though it does entail the suspension of all parliamentary business and brings proceedings in both Houses to an end for the current parliamentary session. Since the 1980s prorogation between sessions has normally been for less than a week,<sup>311</sup> although it lasted 20 days in 2014, as it "overlapped with European parliamentary elections and (de facto) Whitsun recess".<sup>312</sup> In earlier years, including two of the prorogations during the momentous

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305 *Ibid*, cc 647-658

306 House of Commons Library Briefing, *The Intelligence and Security Committee*, No. 02178, 5 November 2019, Summary

307 *Ibid*, c 658

308 Brandon Lewis, Minister of State in the Home Office, on Sky News, 17 November 2019

309 House of Commons Library Briefing, *Prorogation of Parliament*, CBP-8589, 11 June 2019, Summary

<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8589>

310 [2019] UKSC 41

311 *Ibid*

312 *Ibid*, p8

events of the First World War,<sup>313</sup> prorogations were sometimes much longer.

159. By convention, the Prime Minister chooses the date of prorogation. This is then approved by the Privy Council. It would be unprecedented in modern times for a Sovereign to ignore the advice of the Prime Minister and to reject his or her request for prorogation. There is no formal convention about the appropriate length of prorogation but, as the House of Commons Library note explains, “A prolonged prorogation reduces the influence of Parliament over the way the country is governed.... Long prorogations (or requests for them) can give rise to fundamental questions about whether the Government of the day still commands the confidence of the House of Commons and therefore whether it can legitimately continue to govern.”<sup>314</sup>

160. “Prorogation being a prerogative power, there is no obvious **legal** mechanism by which Parliament could prevent its exercise otherwise than by passing legislation to constrain it.”<sup>315</sup> Such legislation would almost certainly require Queen’s consent as it would affect the prerogative of the Crown. It would also be likely to alter or revoke the convention which currently gives the Prime Minister discretion to decide the date of prorogation.

161. The application of the convention on prorogation in September 2019, as distinct from the

Crown’s prerogative power, met with substantial criticism and opposition, both inside and outside Parliament.

162. In the House of Commons, an e-petition arguing that “Parliament must not be prorogued or dissolved unless and until the Article 50 period has been sufficiently extended or the UK’s intention to withdraw from the EU has been cancelled”<sup>316</sup> had received over 1,700,000 signatures by 9 September 2019, when the petition was debated in Westminster Hall.<sup>317</sup>

163. In the Chamber, Members complained that prorogation would deprive Parliament of “the effective opportunity to carry [its role of scrutiny] out”<sup>318</sup> and that it was “not normal for Parliament to be prorogued for five weeks”.<sup>319</sup> And even the Speaker was reported as having described the prorogation as “a constitutional outrage”.<sup>320</sup>

164. On 9 September, the proposed date of prorogation, the Speaker granted an SO No. 24 debate on a motion that an Humble Address be presented to Her Majesty, requesting that she direct Ministers to lay before the House no later than 11pm on 11 September all correspondence, whether formal or informal, relating to the prorogation of Parliament and “all the documents prepared within Her Majesty’s Government since 23 July 2019 relating to operation Yellowhammer”<sup>321</sup>

313 54 days in 1914 (the original prorogation was extended by 15 days) and 46 days between 22 December 1916 and 7 February 1917

314 *Ibid*, Summary

315 *Ibid* (original emphasis)

316 <https://petition.parliament.uk/petitions/269157>

317 HC Deb, 9 September 2019, Vol 664, cc 191-222WH

318 HC Deb, 3 September 2019, Vol 664, c 92

319 *Ibid*, c 102

320 See, for example, *The Independent*, 28 August 2019

321 *HMG Reasonable Worst Case Planning Assumptions for no-deal Brexit*, 2 August 2019

and submitted to the Cabinet or a Cabinet Committee.”<sup>322</sup> In moving the motion, Dominic Grieve, the Member for Beaconsfield, said “I very much hope that there could be no question other than that they will be provided, because it is the custom and practice and the convention that such Humble Addresses are responded to positively by the Government.”<sup>323</sup>

165. In response to an intervention, Dominic Grieve added “Far from this Prorogation being a desire to reset the Government for the purposes of holding a Queen’s Speech, and nothing else, there is available plenty of evidence that what actually happened was a concerted get-together within Government to try to ensure that this House would be prevented from taking action to stop a no-deal Brexit, and that the origins of that long predated the first time the Government mentioned Prorogation”, but he also emphasised “that these are allegations, and in an ideal world, I would have preferred not to make allegations, even within the context of the privilege that this House provides.”<sup>324</sup>

166. Michael Gove, the Chancellor of the Duchy of Lancaster, advised the House that “The Cabinet Secretary, when he appeared before the Procedure Committee, made it clear that this convention that advice should be private has applied to Governments of all parties throughout the history of the civil service. He said that the Humble Address—the particular procedure that we are debating today—has a chilling effect that is to the severe

detriment both of the operation of government and the public record of Government decisions.”<sup>325</sup> The motion was agreed at the end of a two-hour debate by 311 to 302 votes. The papers relating to operation Yellowhammer were released on 11 September 2019.<sup>326</sup>

167. There was no emergency debate in the House of Lords, but on a question about the timing of the Queen’s Speech, Lord Foulkes of Cumnock complained that “a Prorogation of five weeks, with no opportunity for parliamentary scrutiny of the Executive, is both unprecedented and unconstitutional.”<sup>327</sup>

168. In addition to Parliament’s debates on the prorogation, the issue was also considered by the courts.

### *The 24 September 2019 decision*

169. In Scotland, a petition for judicial review was lodged with the Court of Session in Edinburgh by a cross-party group of 75 parliamentarians which challenged “(i) the lawfulness of the Order; and (ii) the lawfulness of the advice to prorogue which was given to Her Majesty by the Prime Minister.”<sup>328</sup> In his ruling on 4 September 2019, Lord Doherty said “I do not accept the submission that the prorogation contravenes the rule of law, and that the claim is justiciable because of that. In my opinion there has been no contravention of the rule of law. The power to prorogue is a prerogative power and the

322 For full text, see Votes and Proceedings, 9 September 2019

323 HC Deb, 9 September 2019, Vol 664, c 522

324 *Ibid*, c 526

325 *Ibid*, c 552

326 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/831199/20190802\\_Latest\\_Yellowhammer\\_Planning\\_assumptions\\_CD\\_L.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831199/20190802_Latest_Yellowhammer_Planning_assumptions_CD_L.pdf)

327 HL Hansard, 3 September 2019, Vol 799, c 915. See also cc 915-919

328 [2019] CSOH 70, para 1

Prime Minister had the vires to advise the sovereign as to its exercise. The executive is accountable to Parliament and the electorate for the advice to prorogue. Parliament is the master of its own proceedings, rules and privileges and has exclusive control over its own affairs. The separation of powers entails that the courts will not interfere. It is for Parliament to decide when it will sit and it routinely does so. It is not for the courts to devise further restraints on prorogation which go beyond the limits which Parliament has chosen to provide.”<sup>329</sup>

170. The judgment was appealed to the Inner House of the Court of Session where the judges were unanimous in finding that “the PM’s advice to HM the Queen is justiciable”, and that it was motivated by the “improper purpose of stymying Parliament.” They added: “The Court will accordingly make an Order declaring that the Prime Minister’s advice to HM the Queen and the prorogation which followed thereon was unlawful and is thus null and of no effect.”<sup>330</sup>

171. In the High Court of England and Wales, the main issue the judges were required to decide was “whether the decision of the Prime Minister to seek the prorogation of Parliament is justiciable (is capable of challenge) in Her Majesty’s courts or whether it is an exclusively political matter.”<sup>331</sup> They concluded “In our view, the decision of the Prime Minister to advise Her Majesty the Queen to prorogue Parliament is not justiciable in Her Majesty’s courts.”<sup>332</sup>

172. The decisions of both Courts were appealed to the Supreme Court. After a hearing lasting three days, the Supreme Court issued its judgment. “The prorogation itself takes place in the House of Lords and in the presence of Members of both Houses. But it cannot sensibly be described as a ‘proceeding in Parliament’. It is not a decision of either House of Parliament. Quite the contrary: it is something which is imposed upon them from outside. It is not something upon which the Members of Parliament can speak or vote. The Commissioners are not acting in their capacity as members of the House of Lords but in their capacity as Royal Commissioners carrying out the Queen’s bidding. They have no freedom of speech. This is not the core or essential business of Parliament. Quite the contrary: it brings that core or essential business of Parliament to an end.

“This court is not, therefore, precluded by article 9 or by any wider Parliamentary privilege from considering the validity of the prorogation itself.”<sup>333</sup>

173. The Court concluded “that the Prime Minister’s advice to Her Majesty was unlawful, void and of no effect. This means that the Order in Council to which it led was also unlawful, void and of no effect and should be quashed. This means that when the Royal Commissioners walked into the House of Lords it was as if they walked in with a blank sheet of paper. The prorogation was also void and of no effect. Parliament has not been prorogued. This is the unanimous judgment of all 11 Justices.

174. “It is for Parliament, and in particular the

329 *Ibid*, paras 27-28

330 Summary of Court Opinions, 11 September 2019, <http://www.scotland-judiciary.org.uk/9/2261/Joanna-Cherry-QC-MP-and-others-for-Judicial-Review>. For the full judgment, see [2019] CSIH 49

331 [2019] EWHC 2381 (QB), para 1

332 *Ibid*, para 68

333 R (on the application of Miller) (Appellant) v The Prime Minister (Respondent); Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland), [2019] UKSC 41, paras 68-69

Speaker and the Lord Speaker to decide what to do next. Unless there is some Parliamentary rule of which we are unaware, they can take immediate steps to enable each House to meet as soon as possible. It is not clear to us that any step is needed from the Prime Minister, but if it is, the court is pleased that his counsel have told the court that he will take all necessary steps to comply with the terms of any declaration made by this court.”<sup>334</sup>

175. The judgment raised some interesting procedural conundrums for both Houses. “The House of Commons was not prorogued (the Supreme Court had determined that). It was not suspended (because suspensions cannot continue indefinitely, access to the Chamber was not restricted and the Mace was not on the Table). It could only be adjourned. That adjournment derived from the reality of the situation and the terms of the House’s own Standing Orders, which set and limit its sitting times.” In the Lords, “As with the Commons, there had been no motion put to adjourn the House and therefore - with prorogation struck down - the House was in limbo.” The Speakers of both Houses instructed that their Houses be recorded as adjourned.<sup>335</sup>

176. The Commons Votes and Proceedings were corrected to expunge all records of the event<sup>336</sup>; in the House of Lords, “The Lord Speaker (Lord Fowler) informed the House that, in the light of the judgment of the Supreme Court of 24 September, the Clerk of the Parliaments will delete the following

items of business from the minute of proceedings of 9 September: Royal Commission, Royal Assent, Queen’s Speech and Prorogation. Instead, the minutes would record that the House adjourned at 1.40 am on that day.”<sup>337</sup> Despite the Supreme Court’s ruling that prorogation is not a proceeding, the Hansards of the two Houses still record all the events associated with the ‘prorogation’, though the Commons Hansard for 9 September<sup>338</sup> now records the sitting as having been adjourned. Each Hansard also contains the statements made by the respective Speakers on 30 September.<sup>339</sup>

177. The prerogative and convention on prorogation, namely that the Queen approves prorogation on the advice of Her Prime Minister, was followed in respect of the subsequent prorogation on 8 October 2019. The Commons Votes and Proceedings not only recorded the event but also referred immediately after to “**Other** proceedings”(emphasis added), thereby suggesting that although, in law, prorogation is not considered to be ‘a proceeding’, practice and convention indicate that, at least informally, it is still regarded as such in the House of Commons.

178. In evidence to the Constitution Committee’s inquiry into the Fixed-term Parliaments Act, Professor Hazell had presciently noted that “Section 6(1) of the FTPA says ‘This Act does not affect Her Majesty’s power to prorogue Parliament’. The power of prorogation remains a prerogative power, exercised on the advice of the Prime Minister. Its

334 *Ibid*, Summary, p3 <https://www.supremecourt.uk/cases/docs/uksc-2019-0192-summary.pdf>. For the full judgment, see [2019] UKSC 41

335 Hansard Society blog by the Clerks of the Journals of the House of Commons and House of Lords, 7 October 2019, <https://www.hansardsociety.org.uk/blog/as-if-the-commissioners-had-walked-into-parliament-with-a-blank-sheet-of>

336 Votes and Proceedings, 25 September 2019

337 Lords Minutes, 25 September 2019

338 HC Deb, 9 September 2019, Vol 664, c 650; HL Hansard, 9 September 2019, Vol 799, c 1404

339 HC Deb, 25 September 2019, Vol 664, c 651; HL Hansard, 25 September 2019, Vol 799, c 1405

exercise has normally been uncontroversial, to end a parliamentary session. But given the risk of possible abuse, it would seem wise to ensure that Parliament cannot be prorogued against its will. One way to do this would be to make the prerogative power exercisable at the request of Parliament rather than on the advice of the Prime Minister. Another would be to put prorogation on the same footing as the power of adjournment, and to enable Parliament to be prorogued when the House of Commons passes a motion to that effect.”<sup>340</sup>

179. Despite the smooth prorogation of 8 October, which had been presaged in the Supreme Court’s judgment, the events which followed the announcement of the ‘prorogation’ of 9 September 2019 suggest that although the Royal Prerogative on prorogation remains intact, the convention on prorogation, as previously understood, has been damaged and perhaps even irreparably broken. It also suggests that what constitutes ‘a proceeding’, which has always been subject to judicial interpretation,<sup>341</sup> may need to be further clarified, if necessary, in legislation.

180. The PACAC held a session of oral evidence on 8 October 2019, the last day of the 2017-19 Session, on the implications of the Supreme Court judgment. The evidence, unsurprisingly, exposed strong differences of opinion.<sup>342</sup> This paper does not attempt to summarise the views of the five

witnesses<sup>343</sup> as that would take it beyond its remit, but, as the Chair, Sir Bernard Jenkin, acknowledged, “it was a most illuminating session.”<sup>344</sup>

181. One member referred to Lord Sumption’s article in *The Times*, in which he had said that “Political conventions are a better, more flexible and more democratic alternative to law. But if we are to avoid a wholly legal constitution, we must honour them”, and had then referred to “the ‘constitutional vandalism’ of the Prime Minister and went on to say that the natural result of that was that, ‘conventions have hardened into law. That is the effect of the Supreme Court’s decision.’” In answer to a question on whether “this judgment had generally protected or will act as a protection to conventions in the future”, Lord Sumption said, “I hope that Ministers and others will learn that if they deliberately play fast and loose with the conventions on which our system is founded, they will end up with a much harder set of rules, which would be very unfortunate. They would be less flexible, they would involve more judicial intervention.”<sup>345</sup>

182. Professor Ekins did not consider that “we should overhaul constitutional convention at large. There may be particular instances where a convention has broken down, which are not satisfactory, and we do progressively introduce new rules of law when conventions fail. I think the Fixed-term Parliaments Act is something of a cautionary tale: it

340 Professor Robert Hazell, written evidence (FPA0003)

341 Erskine May, 25<sup>th</sup> edition, paras 13.12

342 Oral evidence, Prorogation and the Constitutional implications of the Supreme Court’s judgment, HC 2666, Session 2017-19

343 Professor Paul Craig, Emeritus Professor, St John’s College, University of Oxford; Professor Richard Ekins, Professor of Law, University of Oxford, Head of Policy Exchange’s Judicial Power Project; Professor Anne Twomey, Professor of Constitutional Law, University of Sydney; Professor Meg Russell, Director of the Constitution Unit, University College London; Lord Sumption, a former Justice of the Supreme Court

344 Q 42

345 *Ibid*, Q71

is not replacing convention but it is codification that gives rise to unpredicted consequences.”<sup>346</sup>

183. Professor Craig added “I have no basis for believing that constitutional convention should generally be converted into law. There are all sorts of good reasons why particularly some constitutional conventions would be almost impossible to convert into meaningful legal rules and, in so far as we could do so, the downside of doing so would far exceed any benefit of doing so.”<sup>347</sup>

184. Professor Twomey considered that “as a general principle...convention is preferable [to the rules and practices for Prorogation in particular being codified and enshrined in an Act of Parliament] because it is flexible...Perhaps, if you have a mechanism by which Members themselves by majority can bring back Parliament during a Prorogation, that would solve the problem without having to be any more prescriptive in relation to rules about Prorogation. The Government can prorogue as and when they wish, but if a majority of the House wants to bring the Parliament back early, it can petition the Speaker to do so. Just having that measure of flexibility would solve the problems without being overly prescriptive.”<sup>348</sup>

185. Finally, Professor Russell noted that “Our system clearly rests more on convention than many other systems do and that requires people to respect the conventions—to use the flexibility when it is appropriate but not to abuse the conventions and the traditions and not to see the law as the only constraint upon them—but all constitutions depend to some degree on convention and all depend on

people behaving reasonably and respecting the rules and traditions.”<sup>349</sup>

186. On 25 September 2019, the Attorney General had told the Commons “the Supreme Court has made new law. Let us be absolutely clear: from now on, the prerogative power of Her Majesty, advised by the Prime Minister, can be the subject—the justiciable subject—of the court’s control, and that was a judgment that the Supreme Court was perfectly entitled to make. What the implications are for the future of our constitutional arrangements will have to be reflected upon in the coming months and years, but it is never wise to reflect upon a court case and its implications in the immediate aftermath of that case. It will have to be done carefully and deliberately, and this House will have to decide, ultimately, whether these matters and these powers are for this House to regulate and control, or whether they are for the judiciary; but, at the moment, the Supreme Court has spoken, and that is the law.”<sup>350</sup>

187. The decision on whether prorogation was not sufficiently close to Parliament’s core and essential business to attract the protection of the Bill of Rights is something which the House may also wish to consider. As the Attorney General pointed out “It would, of course, be open to the House to decide to legislate otherwise, and no doubt that is one of the implications of this judgment that will have to be reflected upon in the coming months and years. I know that there was a widespread view that it was indeed a proceeding in Parliament, but the Supreme Court is as entitled to redefine, or at least to take a view of, its definition of the protection afforded

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346 *Ibid*, Q24

347 *Ibid*, Q26

348 *Ibid*, Q22

349 *Ibid*, Q73

350 HC Deb, 25 September 2019, Vol 664, c 656

by the Bill of Rights as it is to invent a new legal principle, as it did in this judgment.”<sup>351</sup>

188. The arguments on the issues identified by the Attorney General are now for Parliament to consider and address.

### The Sewel Convention

189. “Even in the case of devolved matters, the United Kingdom Parliament retains the power to legislate on any matter affecting Scotland, Wales or Northern Ireland, although in November 1998 the Government expressed the view that it ‘would expect a convention would be adopted that Westminster would not normally legislate with regard to devolved matters without the consent of the devolved body’ (the ‘Sewel Convention’).”<sup>352</sup> This understanding was placed on a statutory footing in the Scotland Act 2016 and the Wales Act 2017.<sup>353</sup>

190. The statutory provision does not, however, prevent the UK Parliament from legislating without the consent of the devolved legislatures. This was recognised in the *Miller* case, the central issue of which was “whether the UK government could rely upon the prerogative treaty-making powers to trigger Article 50 TEU in the light of the EU referendum, or whether an Act of the UK Parliament was required to authorise notification of

withdrawal.”<sup>354</sup> Notwithstanding that the convention had been written into legislation, the Supreme Court accepted “the UK Parliament is not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts: rather, it is recognising the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement.”<sup>355</sup> It added “[W]e do not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.”<sup>356</sup>

191. Lack of legislative consent does not affect Parliament’s ability to debate legislation, but “Since October 2014, in any case where the Government had indicated that legislative consent would be sought in respect of provisions of a bill and that consent has been refused, reference has been provided to the decision of the relevant legislature not to grant consent.”<sup>357</sup> Where any of the devolved assemblies has passed a motion of consent, that is indicated by a rubric to the item in the House

351 *Ibid*, c 659

352 Erskine May 25<sup>th</sup> edition, para 11.11

353 Section 28 of the Scotland Act 1988, inserted by s 2 of the Scotland Act 2016; s 107 of the Government of Wales Act 2006, inserted by s 2 of the Wales Act 2017

354 Professor Gordon Anthony, *Devolution, Brexit, and the Sewel Convention*, The Constitution Society, p5

355 *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5, para 148

356 *Ibid*, para 151

357 Erskine May 25<sup>th</sup> edition, para 27.6. See, for example, House of Lords Business Paper, 13 April 2016, Bills in Progress (Housing and Planning Bill); House of Commons Order Paper, 3 May 2016 (Housing and Planning Bill: Consideration of Lords Amendments)

of Commons Order Paper and the House of Lords Business.<sup>358</sup>

192. Following complaints of lack of time to debate amendments to the European Union (Withdrawal) Bill on the subject of devolution,<sup>359</sup> Ian Blackford, Leader of the Scottish National Party in the House of Commons, sought and obtained leave for an emergency debate on the issue of the Sewel Convention.<sup>360</sup> Opening the subsequent debate,<sup>361</sup> he argued that “What has been proven by the events of the last week is that the Sewel convention is, sadly, unworkable.”<sup>362</sup> “If the UK Government have a free hand to bend the rules, and to state when a situation is normal and when it is not, in order to undermine the Sewel convention, we can never, ever protect the powers of our Parliament.”<sup>363</sup> Mr Blackford noted that the “Scotland Office stated back in 2005 that the UK Government ‘considers that the continuation of the Convention is vital to the success of devolution.’ What has changed? The only thing that has changed is that the Scottish Parliament has not given its consent and the UK Government, showing utter disrespect, have decided to proceed.”<sup>364</sup>

193. The debate exposed the SNP’s dissatisfaction with both specific provisions in the European Union (Withdrawal) Bill and the use of the Sewel convention. Paul Grady, the SNP member for Glasgow North, complained that the decision “to

vote through amendments to the European Union (Withdrawal) Bill that the Scottish Parliament had expressly refused its consent to is a fundamental change to the nature of the devolution settlement. It fundamentally undermines 20 years of devolution.”<sup>365</sup>

194. Tommy Shephard, the SNP member for Edinburgh East, argued that “a convention that has existed for 20 years is being torn up, which is extremely important because the genesis of the Sewel convention was to give assurance to those who wanted to believe that devolution actually meant something, that power would be exercised by the devolved authorities. The convention was there to say that it was not a matter of the Scottish Parliament making a decision that could be overridden. If we set the precedent where this is reversed, the situation is that it can be at any time in the future.”<sup>366</sup>

195. Lesley Laird, Shadow Secretary of State for Scotland, said that “Since Brexit, it has become clear that the intergovernmental and constitutional mechanisms in the UK are inadequate, and the debate that we are having about the Sewel convention serves only to reaffirm that case.”<sup>367</sup>

196. On the other side of the argument, Ian Murray, the Labour member for Edinburgh South, quoted Lord Sewel when he set up the Sewel convention

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358 *Ibid.* See also First Report from the Lords Procedure Committee, *House of Lords Reform Act 2014: consequential changes to the procedures of the House; Recess tabling of written questions; Legislative Consent Motions*, HL Paper 20, Session 2014-15, paras 13-15

359 For points of order, see HC Deb, 12 June 2018, Vol 642, cc 848-862

360 HC Deb, 14 June 2018, Vol 642, cc 1146-1147

361 HC Deb, 18 June 2018, Vol 643, cc 79-131

362 *Ibid.*, c 80

363 *Ibid.*, c 82

364 *Ibid.*, c 87

365 *Ibid.*, c 105

366 *Ibid.*, c 122

367 *Ibid.*, c 119

as having said, the convention “should not be used for major policy issues on which there is a major political disagreement.”<sup>368</sup>

197. Alistair Carmichael, the Liberal Democrat spokesperson, argued that “one weakness of our constitutional settlement is that we have no mechanism for Parliament to speak to Parliament. All the mechanisms are about Government speaking to Government. The other weakness of our constitutional settlement is that there is no mechanism for an honest broker in the middle of disputes between the Governments. That is where we now need to focus our attention. We need to move away from this mix of black letter law and constitutional convention, and ultimately, everything should be written down in a constitution.”<sup>369</sup>

198. David Lidington, the Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office, noted that Lord Sewel himself had “observed that there has been no power grab and that there is no constitutional crisis.”<sup>370</sup> He also confirmed that the Government “have given a binding political commitment, embodied in a formal intergovernmental agreement, to continue to apply the Sewel convention”, and that the IGA “makes it clear that the Sewel convention will be fully respected.”<sup>371</sup>

199. Ronnie Cowan, the SNP member for Inverclyde, considered that “the Sewel convention – the unwritten rule that Westminster would not legislate

on devolved matters in Scotland without the consent of the Scottish Parliament – is now worthless.

Previously, it had been considered unthinkable that Sewel would ever be overturned. In the aftermath of Scotland’s 2014 referendum, the Smith commission was initiated to placate the Scottish voters who voted against independence but wanted more power for the Scottish Parliament. The commission achieved agreement from all five of the participating Scottish political parties, including the Tories, that the Sewel convention would be put on a statutory footing.”<sup>372</sup> That recommendation has not yet been implemented.

200. It is clear from the debate on the Sewel convention that there is disagreement about whether the convention is still extant and whether it should be replaced by statutory provision. The Sewel convention is yet another convention which may need to be revisited.

## The Sovereign

201. In 2004, the Public Administration Committee published a report on *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* in which they identified three main groups of prerogative powers: The Queen’s constitutional prerogatives, the legal prerogatives of the Crown, and prerogative executive powers.<sup>373</sup>

202. The Committee defined The Queen’s constitutional prerogatives as “the personal discretionary powers which remain in the

368 *Ibid*, c 96

369 *Ibid*, cc 101-103

370 *Ibid*, c 120

371 *Ibid*, c 121

372 *Ibid*, c 125

373 Fourth Report of the Public Administration Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, HC 422, Session 2003-04

Sovereign's hands. They include the rights to advise, encourage and warn Ministers in private; to appoint the Prime Minister and other Ministers; to assent to legislation; to prorogue or to dissolve<sup>374</sup> Parliament; and (in grave constitutional crisis) to act contrary to or without Ministerial advice. In ordinary circumstances The Queen, as a constitutional monarch, accepts Ministerial advice about the use of these powers if it is available, whether she personally agrees with that advice or not. That constitutional position ensures that Ministers take responsibility for the use of the powers."<sup>375</sup>

203. "By convention, the Sovereign does not become publicly involved in the party politics of government, although he or she is entitled to be informed and consulted, and to advise, encourage and warn ministers. For this reason, there is a convention of confidentiality surrounding the Sovereign's communications with his or her ministers. The Sovereign retains prerogative powers but, by constitutional convention, the majority of these powers are exercised by, or on the advice of, his or her responsible ministers, save in a few exceptional instances (the 'reserve powers')."<sup>376</sup>

204. In September 2019, the former Prime Minister, David Cameron, revealed in his newly published memoirs and accompanying interviews that he had had discussions with the Royal Household suggesting that the Queen could boost the case for Scotland to remain in the UK with a well-timed intervention. A source subsequently told the BBC that "it serves no one's interest" for such conversations to be made public.<sup>377</sup> Maintaining and respecting the convention on confidentiality is still

viewed as essential.

205. "Historically, the Sovereign has made use of reserve powers to dismiss a Prime Minister or to make a personal choice of successor, although this was last used in 1834 and was regarded as having undermined the Sovereign. In modern times the convention has been that the Sovereign should not be drawn into party politics, and if there is doubt it is the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly to the Sovereign who is best placed to be able to command the confidence of the House of Commons. As the Crown's principal adviser this responsibility falls especially on the incumbent Prime Minister, who at the time of his or her resignation may also be asked by the Sovereign for a recommendation on who can best command the confidence of the House of Commons in his or her place... Recent examples suggest that previous Prime Ministers have not offered their resignations until there was a situation in which clear advice could be given to the Sovereign on who should be asked to form a government. It remains to be seen whether or not these examples will be regarded in future as having established a constitutional convention."<sup>378</sup>

206. The passing of the Fixed-term Parliaments Act has made the operation of this convention more problematical. Although passing a motion of no confidence might make the resignation of the incumbent Prime Minister seem inevitable, it does not make clear how identifying the leader of another government, which could secure the support of the

374 The Fixed-term Parliaments Act 2011 removed the prerogative to dissolve Parliament

375 *Op cit*, para 5

376 Cabinet Manual 2011, Introduction, para 6

377 BBC News, 19 September 2019

378 Cabinet Manual 2011, paras 2.9-2.10

House within 14 days, could be achieved. However, it remains the convention that a retiring Prime Minister is expected to offer clear advice to the Sovereign on who should be invited to form the next government.

## VI. Conclusion

207. There are various definitions of what constitutes a convention. This paper defines *a convention as any long-standing practice or rule which is accepted, and observed, by those to whom it is directed*. In relation to parliamentary conventions, it adopts the approach that a convention is what Parliament, or either of its constituent Houses, say it is.

208. In recent years, many long-established conventions have been questioned and some indeed may no longer be “accepted and observed” by those to whom they are directed or be able accurately, to be described as conventions. And some, as noted above, have exposed the difficulty of defining a convention when there is an apparent disjunction between an accepted convention and Standing Orders or the law. As this paper demonstrates, many conventions would benefit from being revisited and re-examined as to whether they are still accepted or whether they need to be replaced or modified by other formulations.

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