THE POLITICS OF PARLIAMENTARY PROCEDURE AT WESTMINSTER

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Abstract: The UK Parliament is in a state of flux, reflecting radical changes in British society and its political life, as well as rising demands to be more effective and accountable to public opinion. The rules and procedures by which Parliament operates, and political conflicts and pressures are resolved, are a vital element in the study and understanding of UK constitutional law. This article analyses the nature, scope and effects of parliamentary practice and procedure at Westminster, and how they are utilised by government ministers, the opposition and backbench members, for their respective political ends. It considers the impact of recent procedural changes and likely future developments.

Keywords: *UK Parliament; parliamentary procedure; law and convention; standing orders; legislation; House of Commons; ministerial responsibility; select committees; House of Lords; public engagement; parliamentary reform*

I. Introduction

How the internal workings of the United Kingdom Parliament operate in practice, and how grand theories of constitutionalism — rule of law, sovereignty and democracy — relate to the practical realities of everyday Westminster politics, remains an obscure yet increasingly important element in the country's constitutional law. Parliamentary procedure is of a diverse and multitudinous nature, and almost all its labyrinth of rules are enforceable by each House itself, not the courts. In times of rising political tensions, as undoubtedly exist in the UK at present — with negotiations on departure from the European Union (EU) underway, and the instability of a minority party in government struggling to maintain the confidence of the House of Commons — the constitutional process and resolution of challenges facing the country and its political class will be settled through the use, and possible misuse, of parliamentary procedure.

Furthermore, because the UK lacks a written constitution, parliamentary procedure assumes a higher legal and political significance compared to most countries. For it means there is no body of entrenched basic laws governing and controlling the affairs of the executive and government of the country. The courts

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are subordinate to Parliament and may only interpret parliamentary enactments[1] and statutory powers of the executive, not overrule them on any constitutional grounds.[2] Neither may the judiciary adjudicate on or inquire into the internal workings of Parliament, this being a cardinal principle of the seventeenth century constitutional settlement enshrined in art.9 of the Bill of Rights 1689.[3] Instead the common law doctrine of parliamentary sovereignty provides that Parliament is the supreme and dominant legal and political authority on all matters in the state.[4] The consequence of this is that it is within Parliament itself, and its working procedures that the primary constitutional architecture exists for controlling and limiting the power and activities of central government and the political executive as well as itself.

This article provides an analysis of the species of rules and procedures that regulates and facilitates the internal workings of the Westminster Parliament. It focuses especially on the House of Commons, being the democratic component of Parliament on whose continuing confidence the life of the government depends, with the House of Lords today being an essentially revising assembly and the monarchy performing a purely ceremonial role.[5] It considers the legal nature and political importance of Westminster parliamentary procedures and the constitutional fundamentals that have served to shape them. Parliament, and the House of Commons in particular, hardly ever acts as a cohesive entity in itself and is best understood as a clearing house of political pressures and competing interests. For this reason, the analysis proceeds from the perspective of the three political players at Westminster — the government, the opposition and backbenchers.[6] It discusses the most politically potent procedures available to each of these three groups for the performance of their constitutional functions and evaluates how each manipulates and uses the procedures of Parliament to their own political advantage and to what effect. The extent to which recent procedural changes have strengthened the overall performance of Parliament is considered, and an assessment given of current problems and challenges facing Westminster that are likely to drive future further reform.

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1 As stated by Lord Diplock in *Duport Steels Ltd v Sirs* [1980] 1 WLR 142: "It cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them."

2 Generally, see HWR Wade and CF Forsyth, *Administrative Law* (Oxford: Oxford University Press, 11th ed., 2014) and Paul Craig, *Administrative Law* (London: Sweet & Maxwell, 8th ed., 2016).

3 Article 9 states: "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

4 For classic works, see AV Dicey, *The Law of the Constitution* (London: Macmillan, 1885); Ivor Jennings, *The Law and the Constitution* (London: University of London, 1933); and for recent commentary, see Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Cambridge: Cambridge University Press, 2010).

5 Technically Parliament comprises these three bodies, with the consent of each required to an Act of Parliament subject to the restriction on the powers of the Lords imposed by the Parliament Acts 1911–1949, among them being a one year power of delay only over ordinary public Bills.

6 The political term "backbencher" signifies a Member of Parliament not being a government minister or an opposition frontbench spokesperson: see Peter G Richards, *The Backbenchers* (London: Faber and Faber, 1972).

II. Parliamentary Government

It is basic to a comprehension of parliamentary procedure that the executive — Prime Minister, Cabinet colleagues and all other government ministers — have a seat in and are active participants within the parliamentary arena. This constitutional fact and requirement rests on no legal footing, but is a convention and long-standing tradition of an absolutely binding nature in our political morality. In common parlance, parliamentary government signifies a fused executive–legislature relationship, with the two branches of state having separate functions and business purposes, but with their personnel overlapping. This is unlike the strict separation of powers in countries that follow the model of the United States of America with its separately elected President and Congress.[7]

The consequence of this arrangement is that the political executive in the UK governs *through* Parliament and is held accountable to it in a very direct and personal way for all its policies and actions. It is a relationship that has spawned a theory (or theories) of political conduct circumscribing the working of the executive known as the doctrine of ministerial responsibility, considered further below. In legal substance, these theories are for the most part mere conventions, but they are of such profound importance to the manner and working of the UK government that they must be regarded as an essential component of our constitutional law, albeit not enforceable in the courts.[8] The guarantee of parliamentary government is the requirement for Parliament to be maintained in virtual continuous existence, and the principle of annuality of its proceedings operating since 1688.[9] This in turn is guaranteed in law by way of certain statutory authorities essential to the performance of government only ever being authorised and conferred on an annual basis, notably revenue ("ways and means", as effected through annual Finance Acts) and the greater part of public expenditure ("supply", granted through annual Appropriation Acts).

Government ministers (of which there are up to 95[10]) constitute a minority of the overall membership of the House of Commons (currently comprising 650 members), yet through the party system and the parliamentary majority that keeps them in office they dominate the House and its proceedings. In terms of understanding the functioning of Parliament therefore, one accepts that all legislative measures put forward by the government will pass the democratically elected House (and the Upper House too, which as considered below is a revising chamber only), with only rare exceptions.[11] To call this system an "elective dictatorship", however, as some

7 See MJC Vile, *Constitutionalism and the Separation of Powers* (Indianapolis: Liberty Fund, 2nd ed., 1998).

8 Generally, see Geoffrey Marshall, *Constitutional Conventions* (Oxford: Clarendon Press, 1984).

9 See Robert Blackburn, *The Meeting of Parliament* (Aldershot: Dartmouth, 1990) pp.3–6.

10 House of Commons Disqualification Act 1975 s.2. In UK constitutional practice, the Cabinet and ministers are drawn from the party or parties who command a majority in the House of Commons.

11 For a statistical analysis of four Parliaments, see Robert Blackburn and Andrew Kennon, *Parliament: Functions, Practice and Procedures* (London: Sweet & Maxwell, 2nd ed., 2003) pp.456–464.

do,[12] is too simplistic and misleading by half, and it distorts the true influence and functioning of Parliament as a political and constitutional process.

To speak in terms of checks and balances therefore when describing the parliamentary and constitutional system in the UK can be misleading, since ultimately governments in Britain almost always get their own way, or at least until the next General Election day. A better and more realistic terminology for understanding the parliamentary process is to say that its role and function is not to exercise direct power, command or obstruct government policy and action, but to influence it by generating advice, criticism and scrutiny.[13] Parliament is principally a reactive body, responding to whatever ministers propose or have done, whether in legislative form or as executive action.[14] The parliamentary process, and the procedures that facilitate its workings, is all about pressures, the release and resolution of tensions and the uninhibited exchange of views.

III. The Status of Parliamentary Law

The regulation of Parliament rests upon a complex and historically derived network of Acts of Parliament, constitutional conventions, resolutions of each House and rulings of the Speakers, all of which interlock and mutually support one another. Each category of rule has a distinct nature in terms of its standing as law. The provisions to be found in Acts of Parliament are of a regular statutory nature and are recognised and enforced by the courts in the normal way unless their jurisdiction is expressly excluded, as is the case for example with certain certificates issued by the Speaker of the House of Commons.[15] Constitutional conventions by contrast are non-justiciable, being in the nature of political maxims, and the consequences of non-compliance are matters to be dealt with through the parliamentary and political process.[16] Resolutions by each House on procedural matters, of which there are a multitude, are also non-justiciable in the courts[17] and enforceable exclusively by the House itself under its own inherent authority to regulate its internal affairs.[18] Collectively, all these rules and practices as they have developed over the centuries are a special jurisdiction sometimes referred to as "the law and custom of Parliament".

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12 Lord Hailsham, *Elective Dictatorship* (BBC, Richard Dimbleby Lecture, 1976).

13 See Bernard Crick, *The Reform of Parliament* (London: Weidenfeld and Nicolson, 1964) p.77.

14 Some limited powers of initiation exist in law-making by way of Private Members' Bills and on policy reform issues through Select Committees, both considered below.

15 Parliament Act 1911 s.3: "Any certificate of the Speaker of the House of Commons given under this Act shall be conclusive for all purposes, and shall not be questioned in any court of law."

16 On the enforcement of conventions, see AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (Harlow: Longman, 16th ed., 2015) pp.24–25; Marshall, *Constitutional Conventions* (n.8).

17 Article 9 of the Bill of Rights 1689; see Erskine May: Parliamentary Practice (London: Butterworths, 24th ed., 2011) pp.233–240.

18 See Bradley, Ewing and Knight, *Constitutional and Administrative Law* (n.16) pp.11, 18 and Ch.9.

Most Acts of Parliament on parliamentary affairs deal with matters of election and membership. For the House of Commons, there is the Representation of the People Act 1983 dealing with the universal franchise, the first-past-the-post method of election and matters of electoral administration and the Parliamentary Constituencies Act 1986[19] which provides for boundary review of the 650 constituencies, from each of which one member of the Commons is elected. Governing the House of Lords, there is the Life Peerages Act 1958 providing for the creation of lifetime members, the House of Lords Act 1999 reducing the number of hereditary peers to 92 and the House of Lords Reform Act 2014 providing for retirement and expulsion of members. Other important statutes include the Parliamentary Papers Act 1840 giving legal protection in all civil and criminal proceedings to persons employed in the publication of parliamentary proceedings and the House of Commons Disqualifications Act 1975 which prohibits certain office holders from standing for election as a Member of Parliament (MP). The most important of all statutes on the bicameral nature of Parliament and the legislative relationship between the two Houses is the Parliament Act 1911, as amended by the Parliament Act 1949. This embodies the supremacy of the elected House of Commons over the appointed, and still partly hereditary, House of Lords, by restricting the power of the Lords over Bills sent to it from the Commons to that of a one-month period of delay over Money Bills and a one-year delay over ordinary public Bills.[20]

The conventions, habits and purely political customs operating in each House are of a vastly different character in terms of their constitutional significance. A few are utterly fundamental to the UK system of parliamentary government, such as the convention that all government ministers must have a seat in one of the two Houses, and in the case of the Prime Minister and Chancellor of the Exchequer in the House of Commons specifically.[21] This rule is the premise upon which all other conventions of political accountability depend and follow. Generally described as the constitutional doctrine of ministerial responsibility, a wide range of purely political principles apply, some relating to ministers collectively and some to each minister individually. Collective ministerial responsibility is understood to mean the unanimity with which all government ministers speak to Parliament on matters of public policy and administration and that the government collectively will resign office if subjected to a motion of no confidence carried in the House of Commons.[22]

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19 Amended by the Parliamentary Voting System and Constituencies Act 2011.

20 Parliament Act 1911 ss.1–2 (as amended).

21 See Peter Hennessy, *The Prime Minister: The Office and Its Holders Since 1945* (London: Palgrave Macmillan, 2001).

22 The last occasion of a No Confidence motion of this nature was in 1979: see opposition procedures below. At that time, before the Fixed-term Parliaments Act 2011, the incumbent Prime Minister had a choice as to whether to resign office or call a General Election, and the then Prime Minister James Callaghan chose an Election. Since 2011, however, as discussed further below, the statutory terms of the Fixed-term Parliaments Act apply, so that following a No Confidence resolution, there is an opportunity for an alternative government to be formed and confirmed by a resolution of Confidence carried in the House of Commons within 14 days, in default of which there will be an Election: s.2.

A minister by convention must answer to Parliament for all the acts and decisions taken by his department of state and its officials. Some customary expectations of ministerial accountability have on occasion been reinforced by parliamentary resolutions, usually in response to some political episode in which there was dubious compliance by one or more government minister. A particularly significant occasion was in 1997 following a major controversy over the disclosure of secret government sales of arms to Iraq during the 1980s, when independent inquiries concluded that ministerial replies and statements to the House of Commons at that time had been "inaccurate and misleading".[23] In response, the House of Commons resolved what it held to be the fundamental principles of ministerial accountability, set out as follows:[24]

> "That, in the opinion of this House, the following principles should govern the conduct of Ministers of the Crown in relation to Parliament:
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> (1) Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their Departments.
> (2) It is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister.
> (3) Ministers should be as open as possible with Parliament, refusing to provide information only when disclosure would not be in the public interest, which should be decided in accordance with relevant statute.[25]
> (4) Similarly, Ministers should require civil servants who give evidence before Parliamentary Committees on their behalf and under their directions to be as helpful as possible in providing accurate, truthful and full information in accordance with the duties and responsibilities of civil servants as set out in the Civil Service Code."

Many of the conventions governing the relationship between the executive and Parliament have in recent times been codified in some written and publicly available document, although not in a completely comprehensive manner, certainly not as a matter of law that would necessitate a written constitution.[26] Chief among these is the Ministerial Code produced by the Cabinet Office and periodically updated, previously called Questions of Procedure for Ministers following its confidential

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23 Report on the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions (Scott Report), HC (1995–1996) 115, para.D8.16; also Commons Public Service Committee, *Ministerial Accountability and Responsibility*, HC (1995–1995) 313.

24 Commons Hansard, 19 March 1997, cols.1946–1947; Lords Hansard, 20 March 1997, col.1057.

25 Now Freedom of Information Act 2000, replacing earlier Government Code of Practice and Access to Government Information (2nd ed., 1997).

26 On which see Robert Blackburn, "Enacting a Written Constitution for the United Kingdom" (2015) Statute Law Review 1–27.

introduction in 1945.[27] It is essentially a list of instructions from the Prime Minister to ministers, a quasi-job description, covering a strangely broad mix ranging from fundamental rules of ministerial conduct ("Decisions reached by the Cabinet or Ministerial Committees are binding on all members of the Government"[28] and "Ministers must uphold the political impartiality of the Civil Service"[29]) to management matters (such as how many Parliamentary Private Secretaries a minister may appoint and what they are and are not entitled to do[30]) and managing their daily agenda ("Cabinet and Cabinet Committee meetings take precedence over all other Ministerial business apart from the Privy Council, although it is understood that Ministers may occasionally have to be absent for reasons of Parliamentary business and international commitments."[31]).

This and other similar documents issued by the Cabinet Office[32] have no legal or constitutional status as such. They have not been approved by Parliament, although a form of consultation or parliamentary inquiry and report may be persuasive in shaping their later content and editions.[33] As self-proclaimed statements of how the executive does and intends to act — and in the case of the Ministerial Code being issued under the direct authority of the Prime Minister — in practice, they are binding on ministers and those public officials to whom they apply.[34] They therefore represent a considerable soft source of constitutional power and influence. They shape the conduct of government, providing forms of practice that may then harden into customary precedents, expectations and convention. They may, and often are, mistakenly relied upon by journalists and the media as a legal source of constitutional authority in their own right, simply by virtue of being an official document issued by the most senior department of state, albeit that they were originally intended to be used for internal purposes only.[35]

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27 Its current edition is December 2016; see generally Amy Baker, *Prime Ministers and the Rule Book* (London: Politico, 2000).

28 *Ibid*., s.2(3).

29 *Ibid*., s.1(2)(j).

30 *Ibid*., s.3(6)–3(12).

31 *Ibid*., s.2(5).

32 Including especially the Cabinet Manual (Cabinet Office, 2011) discussed below.

33 *Ibid*. Thus, a draft chapter of what became the Cabinet Manual was submitted to the Commons Justice Committee for consideration, HC (2009–2010) 396; later, the Manual was the subject to scrutiny by both the Commons Political and Constitutional Reform Committee, HC (2010–2012) 734, and the Lords Constitution Committee, HL (2010–2012) 107.

34 As the first Report of the Committee on Standards in Public Life (Nolan Report) (Cmnd 2850, 1995) p.48 said:

> "QPM has no particular constitutional status, but because it is issued by each Prime Minister to ministerial colleagues at the start of an administration or on their appointment to office and any changes can only be authorised by the Prime Minister, it is in practice binding on all members of a Government."

35 For commentary, see Andrew Blick, *The Codes of the Constitution* (Oxford: Hart Publishing, 2015) Ch.4.

The Standing Orders (SOs) of each House of Parliament, particularly those relating to their public business, provide the essential day-to-day working details of procedure at Westminster. They are updated regularly, often annually, to accommodate any new resolutions modifying, adding or subtracting matters of parliamentary practice.[36] At the time of writing, there are 163 SOs governing the House of Commons, and among these are the procedures governing the most important institutions and processes of Parliament. The first section deals with the election of the Speaker, the most senior officer of the House always chosen from among its members and one of the great offices of state, who is elected at the start of each new Parliament.[37] The rules of debate, voting and maintaining order are extensively elaborated upon.[38] Matters vital to the legislative process, including when and how amendments may be taken on a government Bill, and the operation of programming of Bills (time allocation), are dealt with in detail.[39] The terms of reference, composition and powers of the departmentally related Select Committees are provided for, being the most important procedural reform and innovation in modern times, dating from 1979.[40] SO 14 declares the crucial element in shaping the business of the House that "Save as provided in this order, government business shall have precedence at every sitting". It then prescribes what the House has reserved each session and each week for particular types of business, including 17 days for whatever business the Leader of the Opposition wishes to be debated,[41] at least 27 days for debate in the House on backbench business[42] and 13 Fridays each session for a consideration of Private Members' Bills.[43] These timetabling matters are interwoven into the cardinal convention that the business of Parliament, as conducted over each five-year fixed-term between General Elections, is always conducted on an annual basis, referred to as sessions.[44]

Parliamentary procedures exist and are shaped over time to facilitate the functioning of the House of Commons from the perspective and different vantage points of its principal political players, which — as set out at the start of this article — are the government (its front bench ministers, seated to the right of the Speaker in the House of Commons), the opposition (its front bench shadow ministers, seated to the left of the Speaker) and all other members across all parties known as "backbenchers".

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36 The current editions are Standing Orders of the House of Commons (Public Business), 10 February 2016; and Standing Orders of the House of Lords (Public Business), 18 May 2016 (HL Paper 3).

37 *Ibid*., HC SO 1-1B.

38 *Ibid*., HC SOs 21–47.

39 *Ibid*., HC SOs 57–83.

40 *Ibid*., HC SOs 121–152.

41 *Ibid*., HC SO 14(2)–14(3).

42 *Ibid*., HC SO 14(4)–14(7).

43 *Ibid*., HC SO 14(8)–14(13).

44 Fixed-term Parliaments Act 2011 s.1 (subsequent to which the sessional year now normally operates from May to May, earlier being November). See Blackburn and Kennon, *Parliament: Functions, Practice and Procedures* (n.11) pp.256–272; and Erskine May: Parliamentary Practice (n.17) Ch.8.

IV. Government Domination

The chief interest of the government is simply to have its legislation pass through Parliament as efficiently and speedily as possible. In preparation for each annual session, the appropriate number of government Bills (often around 25 in number, depending on their length and complexity) will be selected to present to Parliament, being those believed to be capable of passing through each House within the time available. The Cabinet minister in charge of each department of state will submit requests to the Prime Minister and the dedicated Cabinet Committee that is responsible for the overall planning and organisation of the government's legislative programme. Currently, this is the Parliamentary Business and Legislative Committee, and its terms of reference are "to consider issues relating to the Government's parliamentary business and implementation of its legislative programme".[45] This steering body comprises the senior government ministers most directly concerned with the political, legal and financial implications of enacting the proposed government Bills. It is chaired by the Leader of the House of Commons (also Lord President of the Privy Council) and its members include the Leader of the House of Lords (also Lord Privy Seal), Deputy Leader of the House of Commons, Secretary of State for Scotland, Secretary of State for Wales, Secretary of State for Northern Ireland, Chief Secretary to the Treasury, Minister for the Civil Service, Attorney General, Advocate General for Scotland, Chief Whip and Lords Chief Whip. When agreed, a short statement setting out the policies and objectives of the government in the forthcoming year is included in a speech delivered by the monarch in person at the formal opening of the parliamentary year ("Queen's Speech"[46]), which is then debated in both Houses. Since the Fixed-term Parliaments Act 2011 fixed the duration of a Parliament and the period between General Elections at five years, the start of each session has been in May or June.

By virtue of the government's working majority in the House of Commons sustaining its position in office,[47] all of its Bills generally pass onto the statute book within the annual session. In 2014–2015, for example, 26 government Bills were introduced, 22 starting in the House of Commons and 4 in the House of Lords, and all 26 Bills proceeded to receive the Royal Assent. The normal length and stages of a Bill, however, unless it is treated as an emergency measure,[48] are lengthy and surrounded

45 See Cabinet Office, "List of Cabinet Committees" (16 September 2010), available at www.gov.uk/government/publications/the-cabinet-committees-system-and-list-of-cabinet-committees.

46 For the 2017 Queen's Speech, see Lords Hansard, 21 June 2017, cols.5–7.

47 Post-1945, Parliaments have normally possessed an overall majority in the House of Commons for one party who forms the government. Where this has not been the case, an inter-party pact (as in 1977–1979) or a coalition (as in 2010–2015) has been entered into providing the government with its working majority in the Commons, without which an early election will be called (as in 1974). At the time of writing, the minority Conservative government sustains a working majority in the Commons though its pact, known as a "confidence and supply" arrangement, with the Democratic Unionist Party.

48 See Lords Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards* (2008–2009) p.116.

by established parliamentary procedures.[49] These are that a Bill in each House must pass through five procedural stages, a formal First Reading, a Second Reading debate in the chamber, a committee stage at which the Bill is scrutinised clause by clause, a Report stage at which amendments agreed at Committee stage are debated and may be voted upon and finally a Third Reading (when further amendments may be tabled and voted upon) before it passes and goes to the other House.

As an extraordinary measure, the current 2017–2019 session of Parliament is scheduled to last for two years instead of the usual one. This is due entirely to the complexity and special importance of the legislation and statutory instruments that the government needs to bring forward and have enacted in preparation for the UK's exit from the EU. Announcing this immediately following the General Election, the government explained:

> "Parliament will sit for two years instead of the usual one to give MPs enough time to fully consider the laws required to make Britain ready for Brexit. This includes the Great Repeal Bill, which by converting existing EU law into UK statute will enable the smoothest possible transition at the point of leaving…
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> By doubling the length of the session the government is providing the space for MPs and peers to scrutinise and debate the government's approach to both Brexit and its domestic agenda without interruption. Next week the government will confirm the legislation required to deliver Brexit, including new laws on immigration, as set out in the government's white paper on Brexit earlier this year."[50]

Over the past 100 years, there have occasionally been sessions of over 12 months, and since 1945, a pattern emerged of a long session (about 18 months) following a spring General Election being established at a time when the annual session ran from autumn to autumn. This was expected to be repeated following the May 2010 General Election, but in September that year, the Leader of the House of Commons announced that the first session of the new Parliament would be extended to two years to facilitate a move from autumn to spring start of sessions. The two sessions of 2010–2012 and 2017–2019 stand out as exceptions to the customary annuality in parliamentary business.

The challenge for any government — indeed the problem of Parliament generally — is time. If all 650 members spoke on every parliamentary item of

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49 On the legislative process, generally see Blackburn and Kennon, *Parliament: Functions, Practice and Procedures* (n.11) pp.318–345.

50 Prime Minister's Office, "Government to Confirm Two-Year Parliament to Deliver Brexit and Beyond" (17 June 2017). For some criticism of the process including the modification of Standing Orders providing for Opposition Days and Backbench Business, see Commons Hansard, 17 July 2017, cols.589–635.

business, or if every opponent of a Bill was permitted to speak as long as they liked to frustrate its passage (known as filibustering), the business and working of Parliament would collapse. The resolution of time spent on debate lies in a purely informal procedure, known as "the usual channels".[51] In advance of the government Leader of the House announcing the business for the following week, the party managers (known as "whips") negotiate and reach agreement on timetabling matters, especially the length of a debate on a motion, the time to be spent debating particular Bills and the number of sittings for a legislative committee. In other words, cross-party dealings and agreement are reached outside the chamber in private parliamentary offices. Surprisingly, the key figure in this shadowy process is the Private Secretary to the government Chief Whip, who is a permanent civil servant. He acts as an intermediary between all the parties involved in timetabling, including the Leader of the House, the government Chief Whip, the opposition Chief Whip and the relevant parliamentary Clerks, and where necessary he advises on tactics for promoting agreement. As the late Cabinet minister Richard Crossman wrote in his Diaries at a time when he was Leader of the House:

> "Freddie Warren [then Private Secretary to the government Chief Whip] is still in control of the parliamentary timetable. The more I see of him the more astonishing I find the influence he exerts. He really is the bridge between the Opposition and the Government… It's this which really keeps the House of Commons running and enables us to have so few misunderstandings between the two Chief Whips on either side."[52]

This is the stuff of politics at Westminster, and the bargaining power on each side of the Commons depends also on the arithmetic of seats held by each party. If the government allows time for motions or business of importance to the opposition, in return the opposition will support curtailment of time spent on the enactment of a government Bill.

In extreme cases where relations through the usual channels become hostile or break down altogether — especially likely if the numerical balance of members between government and opposition parties is very close — the opposition can threaten to withdraw its "pairing" arrangement or proceed to do so.[53] This "pairing" system is another informal procedure under which at the start of a new Parliament, individual members from the respective parties enter into a pact so that if one of them tells the other they are unable for any reason to be at Westminster to vote on a Bill or important motion, the other will refrain from voting. If the arrangement is withdrawn, it causes considerable inconvenience, with many members living or

51 See Blackburn and Kennon, *Parliament: Functions, Practice and Procedures* (n.11) pp.409–411; Michael Rush and Clare Ettinghausen, *Opening Up: The Usual Channels* (London: Hansard Society, 2002).
52 Richard Crossman, *The Diaries of a Cabinet Minister*, Vol. 2 (London: Jonathan Cape, 1976) p.625.
53 See Blackburn and Kennon, *Parliament: Functions, Practice and Procedures* (n.11) p.292.

having their constituencies far away from London, and on occasion, it has caused seriously ill parliamentarians to leave their sick bed and be transported by private ambulance to the chamber to pass through the voting lobby to prevent a government defeat.[54]

In default of an informal agreement through the usual channels, the government has three formal parliamentary procedures at its disposal, which it can use to push through the Commons on a motion relying on its majority, which will curtail debate and proceedings. These are the closure motion, the "guillotine" (more properly called time allocation motions) and programming of Bills.

Closure motions terminate debate by a member moving, "That the question now be put", proceeding to a vote.[55] The Speaker will then permit the vote unless he believes it is being deployed to infringe the rights of a minority in the House (for example, to voice any opinion) or is otherwise an abuse of the rules of the House. It has traditionally been the one occasion when a quorum on voting is required, in this case of 100 members voting in support.[56] In practice, a closure motion is rarely used by the government for its own business and usually operates to end opposition debates or enable a Private Members' Bill to progress. So for example during the 2013–2014 session, of the 23 occasions on which a closure motion was carried, it was used 17 times to curtail debate on an opposition motion and four times during the consideration of a backbench legislative proposal.[57]

Although controversial in times past, it has always been open to the government to curtail debate on a particular stage of a Bill through passage of a "guillotine" (time allocation motion). The relevant SO today provides that if such a motion is passed, then the legislative proceedings must proceed to a vote within three hours.[58] However, time allocation motions have now largely been superseded by a comprehensive treatment of curtailing debate on government Bills known as "programming motions". This procedure was established by the Labour government under Tony Blair in 1997, which set up a Modernisation Committee[59] in the House of Commons to design and regularise the time management of government legislative business. This was a highly unusual select committee because its chair was the Leader of the House, and deputy chair the shadow Leader, clearly signifying this

54 For accounts of the close voting in the House of Commons during 1977–1979 under a minority Labour government, see James Callaghan, *Time and Chance* (London: HarperCollins, 1987) and David Steel, *A House Divided: The Lib-Lab Pact and the Future of British Politics* (London: Weidenfeld and Nicolson, 1980).

55 HC SO 36.

56 The other procedure today requiring a quorum is the statutory mechanism for an early parliamentary election resolution of the House of Commons under s.2 of the Fixed-term Parliament Act 2011, being two-thirds of the membership of the House.

57 European Union (Referendum) Bill 2013–2014, HC 63: the motions were on 5 July 2013 for its Second Reading and on 8 November and twice on 22 November for consideration of an amendment (the Bill failed, but a referendum on UK membership of the EU was passed as a government Bill in the later 2015–2016 session).

58 HC SO 83.

59 Its full title being "Select Committee on Modernisation of the House of Commons: The Committee" no longer exists, not being reappointed after the 2010 General Election.

was a government implementation process, not a normal independent inquiry of cross-party backbenchers whose recommendations may be routinely rejected by the government.[60] After a trial period, this procedure was made permanent from the beginning of the 2003–2004 session.[61] Programme orders are generally proposed to the House and carried immediately after Second Reading stage. They specify by when each or any stage of the Bill should be completed, or how much time is to be spent on a stage.[62]

Simply stated, the rationale of programming from the government's perspective is to ensure that government legislative business is conducted in an orderly and predicable manner, so as not to disrupt its overall legislative agenda and other business for the session. From the opposition parties' and backbenchers' perspectives, it removes their reserve capability to disrupt or hold up a government Bill to which they are strongly opposed or seek to amend by prolonging debate. However, it does mean that, especially at committee stage where the whole contents of the legislation is being scrutinised, their attention and debate will be evenly spread over all those clauses that are most contentious, avoiding any last-minute rush leaving some clauses unconsidered before a government-imposed guillotine. In advance of a programme motion being put to the House, the usual channels will negotiate and seek to agree on how much time should be devoted to each stage of the government Bill.[63]

V. Techniques of Opposition

Superficially, one can divide parliamentary business into different categories of work in the chamber, suggesting that there are different functions being performed for each one: debates, questions, ministerial statements, taxation and expenditure, legislation, statutory instruments and so on. However, in political reality, whatever subject matter of business being conducted at any given time, in large measure, a similar political process is taking place — that of government and opposition. Opposition[64] is institutionalised into the very heart and soul of the House of Commons, and its acute form is the most distinctive quality of the working of the Westminster Parliament. The Commons is possessed of an official position of Leader of the Opposition, who by statute receives a public salary, will be made a Privy Counsellor by the monarch and is given due prominence at ceremonial state occasions. More importantly, in terms of parliamentary procedure, he or

60 Generally, see Meg Russell and Meghan Benton, *Selective Influence: The Policy Impact of Commons Select Committees* (London: Constitution Unit, 2011).

61 See Modernisation Committee, Programming of Bills, HC (2002–2003) 1222; Procedure Committee, Programming, HC (2013–2014) 767.

62 For the Standing Orders on programming, see HC SO 83A–83I.

63 For details of all programming motions in the 2013–2014 session, for example, see HC Sessional Returns 2015–2016, pp.6–26.

64 See Ivor Jennings, *Parliament* (Cambridge: Cambridge University Press, 2nd ed., 1957) Ch.VI.

she is vested with certain important parliamentary privileges in speaking and holding debates in the House. In a very real way, the opposition frontbench and its leader are charged with leading the most vital functions of Parliament, and as the alternative government-in-waiting, they have a powerful vested interest in doing so. The official opposition challenges and criticises the policies and activities of the executive in whatever business is being conducted — it scrutinises and demands rational explanation and it draws attention to weaknesses it perceives in the government's case, always robustly holding ministers to account. To perform this work effectively, the opposition puts forward its own alternative policies against which those of the government can be compared and judged.

The opposition leader has considerable control over procedures to nominate and hold debates of his or her choice, with the aim of airing opposition views and putting the government under pressure. Under SOs, 20 days each session are allotted for proceedings on opposition business, 17 of which are at the disposal of the Leader of the Opposition, the other three being at the disposal of the leader of the second largest opposition party.[65] The opposition leader can manage these events flexibly to suit his or her political advantage, such as by taking one or more of the days as two half-day debates to stretch their reach. They will choose the topic with great care, usually taking some major controversy of the time on which the government is particularly vulnerable to attack.[66] In the 2015–2016 session, for example, whole day opposition debates were selected and held on social care which had emerged as a major policy issue for the elderly on which the government had not acted,[67] and several issues arising out of the shock referendum result for the UK to leave the EU, including the government's plans for Brexit[68] and parliamentary scrutiny of leaving the EU.[69]

In addition, there are opportunities for the opposition to choose the subjects for debate in the week following the Queen's Speech setting out the government's business for the session. After the first day of debate, in which the Leader of the Opposition is called to speak in reply, the government informally accepts the right of the official opposition to choose whatever issues and policies in or arising from the Queen's Speech it wishes to debate. This and other informal arrangements are settled and negotiated through the usual channels, away from public view. How this process operates can be gleaned from the following parliamentary exchange in the chamber:

> "Mr Frank Dobson [opposition spokesman]: Will the Leader of the House find time for a debate on human rights at a time when half the countries of the world have political prisoners, a third of them use torture and Britain

65 HC SO 14(2).
66 See Blackburn and Kennon, *Parliament: Functions, Practice and Procedures* (n.11) pp.480–484.
67 Commons Hansard, 16 November 2016, cols.299–351.
68 *Ibid.*, 7 December 2016, cols.220–328.
69 *Ibid.*, 12 October 2016, cols.313–415.

> still persists in exporting leg irons to several of them? Finally, will he tell us when we are to have the first Opposition day debate? We have now had 20 days of Government business of one sort or another since the last Opposition day debate and we did not get a fair share in the last Session. When shall we have the first bit of our share in this Session?
>
> Mr John Wakeham [Government Leader of the House]: The Hon. Member for Holborn and St. Pancras (Mr Dobson) is a hard person to please. We have just completed six days of debate on the Loyal Address, during which the Opposition chose the subjects for debate. However, I recognise that, under our SOs, the Opposition are entitled to days, and I shall see to it that those are provided. I shall do my best to arrange a debate as soon as possible. The exact date is best discussed through the usual channels."[70]

The most politically lethal procedural weapon at the disposal of leaders of the opposition is their ability to table a motion of censure[71] on the government, which if passed in the Commons has the effect of forcing the Prime Minister to resign. Today, and in recent times, this opposition motion has invariably taken the form, "That this House has no confidence in Her Majesty's government".[72] In substance, this tests the competence of the Prime Minister to command a majority in the House, enabling it to continue in government and pass its budgetary and legislative measures. The actual passage of such a resolution has been rare, since governments have generally maintained their working majorities.[73] The last time a censure motion of this kind passed the Commons was on 28 March 1979 at the tail end of a minority Labour administration under James Callaghan, taking place after the Liberal Party withdrew its pact of support[74] and a series of by-election defeats on the government side. On that occasion by constitutional convention, Mr Callaghan was obliged to either resign office or call a General Election (effected in law through advising the Queen to dissolve Parliament), the latter of which he immediately proceeded to do. He was

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70 *Ibid.*, 1 December 1988, col.886.

71 Often referred to as a No Confidence motion.

72 When the opposition leader is aware, he or she will clearly lose the censure motion, regarding it simply as an opportunity to ventilate deep dissatisfaction with some matter of state; further words are often added to the motion indicating the issue on which the opposition particularly condemns the government: for example, on 27 March 1991, the then Leader of the Opposition Neil Kinnock moved: "That this House has no confidence in Her Majesty's Government in the light of its inability to rectify the damage done to the British people by the poll tax" (Commons Hansard, cols.238–358).

73 For this reason, the frequency of its use as a parliamentary tactic has fluctuated in modern times: for example, over the period 1979–2001, two were moved in the 1979–1983 Parliament, one in the 1983–1987 Parliament and two in the 1987–1992 though Parliament, but none in the 1992–1997 and 1997–2001 Parliaments nor since. Greater use of the emergency adjournment motion procedure under SO 24 has become the preferred procedural option for ventilating some major disquiet. This is available to the opposition frontbench as well as backbenchers at the discretion of the Speaker and has the advantage of not climaxing with a vote endorsing the government.

74 See Steel, *A House Divided: The Lib-Lab Pact and the Future of British Politics* (n.54).

then defeated at the poll, enabling Margaret Thatcher to form her first Conservative administration. The exchange in the Commons after the vote was as follows:

> "Mr James Callaghan [Prime Minister]: Mr Speaker, now that the House 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 then I shall 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.
>
> Mrs Margaret Thatcher [Leader of the Opposition]: As the Government no longer have authority to carry on business without the agreement of the Opposition, I make it quite clear that we shall facilitate any business which requires the agreement of the Opposition so that the Dissolution can take place at the very earliest opportunity and the uncertainty ended."[75]

Since 2011, the Fixed-term Parliaments Act has now modified the effect and nature of the parliamentary procedures surrounding censure motions of this kind.[76] This statute codified the traditional form of censure motion, set out above, and stipulates that if carried in the House, it will trigger an early parliamentary election, unless the obverse of such a motion occurs, namely a confidence motion expressed in the form "That this House has confidence in Her Majesty's Government" is passed in support of an alternative Prime Minister. A positive confidence motion in these circumstances would be preceded by the Leader of the Opposition negotiating a pact with one or more of the minor parties and signifying this fact to Buckingham Palace for his or her formal appointment as Prime Minister.[77] There are no special SOs governing the procedure to table and make time for censure motions, but by informal convention the government will always make time available for debate on the motion, and as Erskine May puts it, "a reasonably early day is invariably found".[78]

VI. The Strengthened Role of the Backbencher

Even if ultimately the government dominates the Commons through its working majority, the political pressures brought to bear on ministers through the parliamentary process are substantial. If it is the opposition leader and frontbench

75 Commons Hansard, 28 March 1979, cols.589–590.

76 Generally, see Philip Norton, "From Flexible to Semi-Fixed: The Fixed-Term Parliaments Act" (2014) 1(2) Journal of International and Comparative Law 203.

77 In a national emergency situation (economic crisis as in 1931 or major war as in 1940), the cross-party negotiations could result in agreement that some person other than the then Leader of the Opposition should be appointed Prime Minister.

78 Erskine May: Parliamentary Practice (n.17) p.344.

that lead the full frontal attack on the policy programme and activities of the government, it is the ordinary backbench members across the House who perform the bulk of detailed scrutiny and accountability of public policy and administration. As discussed below, the range and effect of these backbench procedures have been very greatly enhanced in the early years of the twenty-first century.

The rigour and intensity of scrutiny is naturally greatest from members belonging to the opposition parties, but backbench members of the government's party have their own voice, opinions and special areas of interest, not least in representing the special interests of their local constituency.[79] Backbench members may dissent from the party line in votes where a profound conflict of views exists and well-established opportunities exist for cross-party co-operation among backbenchers, notably in the working of select committee inquiries, considered below. Use of parliamentary procedures enable ordinary members of the House to interrogate and demand answers of ministers, champion local grievances and conduct inquiries into the detailed policies and administration of departments of state. The pressures brought to bear upon the executive through use of these procedures, facilitated by a raft of reforms and a greater activism among backbenchers to make use of them, have risen dramatically in very recent times and greatly strengthened the role and influence of backbenchers.

The full network of procedural opportunities available to Private Members (as backbenchers are formally termed in parliamentary law) and how they may be used in practice is extensive and sometimes complex, so that even senior and experienced members of each House can struggle with their application. A typical exchange in the House of Commons during passage of a government Bill was as follows:

> *"Sir Elwyn Jones*: I will withdraw the amendment.
>
> *The Chairman*: The Amendment cannot be withdrawn because it is being discussed with No. 65. It would have been possible to have had two Divisions.
>
> *Sir Elwyn Jones*: One of these days I shall understand these things — after 26 years."[80]

Those parliamentarians who make the greatest impact on government and in advancing their political careers will be those who have best understood and mastered how and when a procedure operates to best effect.

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79 For research and studies of intra-party dissent, see Philip Norton, *Conservative Dissidents* (London: Temple Smith, 1978) and Philip Cowley, *The Rebels* (London: Politico, 2005).

80 During passage of the Courts Act 1971, Standing Committee A, col.454, quoted in JAG Griffith, *Parliamentary Scrutiny of Government Bills* (London: George Allen and Unwin, 1974).

The range of procedures in a backbencher's armoury[81] include parliamentary questions (requiring an answer from the minister, which can be orally made in the chamber or submitted in writing); topical procedures (such as early day motions, applications for emergency debates, private notice questions and exploiting weekly business question time statements and points of order procedures to ask questions that in reality are statements challenging the minister on some political issue of concern to them); opening a debate on a matter of a member's choosing prior to daily adjournments or before recess on application to the Speaker's Office, or through an application to the Backbench Business Committee for use of time available each week for backbench business; presenting a Private Member's Bill; and by being involved on a select committee.

Of these, questions to ministers remain the most important opportunity for backbenchers and also the oldest. The earliest question to a minister of the Crown being recorded was in 1721, and the first question and answer printed was in 1835. The scheme for a rota across ministries for orally answering questions was established in the 1920s and has grown into the system that today operates every Monday, Tuesday, Wednesday and Thursday.[82] A remarkable instance of the strengthening of backbench work in very recent times has been the massive increase in the volume of written questions put to ministers, each requiring a considered response from the minister, who has a team of officials dedicated to handling this form of business. A peak was reached in the 2005–2006 session when there were 96,050 written questions, and even in the most recent full session, 2015–2016, there were 35,956 written questions alongside 4,742 oral questions being tabled of which 3,603 were answered in the chamber.[83]

An important procedural development established in 2007[84] has been that of topical questions, providing for 15 minutes in each hour of questioning to be devoted to matters arising that day or very recently, whereas a specified number of sitting days' notice is normally required for tabling specific questions.[85] A procedure also exists for tabling an urgent question (earlier called private notice questions), an application for which must be made to the Speaker early in the day, as provided for in SOs.[86] In recent years, the Speaker has been much more willing to allow these interventions, there being only one permitted every few months until 2010, but 77 allowed in the 2015–2016 session. The rules governing many detailed matters on questions are a mixture

81 For a comprehensive account, see Blackburn and Kennon, *Parliament: Functions, Practice and Procedures* (n.11) Chs.10, 11.

82 HC SO 21. The best-known oral questioning is that of the Prime Minister which takes place for 30 minutes every working week at noon on Wednesdays.

83 Data from Commons Sessional Returns 2016–2017, p.4. To quell the rising volume, SOs now limit a member to five written questions each working day: HC SO 22(4)(b).

84 Its first use was in Commons Hansard, 12 November 2007, cols.391–396.

85 See SO 22 on notice periods. The topical procedure operates by way of a supplementary question being allowed following a standard question asking the minister to make a statement on his departmental responsibilities: see Erskine May: Parliamentary Practice (n.17) p.354.

86 HC SO 24, with the Speaker having discretion to permit the question or not.

of Speaker's rulings (on the order questions are taken, for example), resolutions of the House and SOs.

Time and opportunities for backbench-initiated motions for debate and for the consideration of draft legislative proposals are reserved and protected by SOs of the House. These have been very greatly strengthened by two recent innovations, being Westminster Hall debates permitting parallel sittings of the House provided for by sessional order on 24 May 1999[87] (now made permanent by SO[88]) and the creation of a Backbench Business Committee on 15 June 2010.[89] In the 2015–2016 session, 461 hours of debate was held in Westminster Hall, all of which represents new additional time for backbench-initiated business to that available prior to 1999.[90] The new Backbench Business Committee represents all members who are not ministers or shadow ministers and provides a system for the orderly selection of agenda items for debate on the days reserved under SOs for backbench business, being 35 days each session, 27 of which taken in the Commons chamber (as opposed to Westminster Hall). Since 2007, the Committee has overseen a new procedure for topical debates,[91] choosing matters from among those suggested by backbenchers across the House to be set down and debated in 90-minute sessions.

Meanwhile, long-standing, if time-constrained, procedures exist for presenting legislative proposals as Private Members' Bills. Three methods are available to a backbencher, the most important involving a ballot taken at the start of each session of all members wishing to participate for use of time in the 13 Friday sittings reserved each session for such business, generally enabling 20 Bills to be introduced.[92] The other two opportunities are obtaining leave to bring in a Bill under the "ten minute rule" procedure (enabling a short speech in the chamber in support)[93] and a simple presentation of the Bill without debate "from behind the Chair" (seeking formal First Reading).[94] Of the 100 or so Bills introduced each session, only a small number reach the statute book (6 of 113 in the 2015–2016 session). However, this is not a failure of the procedural opportunity, since the intention and objective behind the majority of these never had any expectation of the Bill being enacted. It is a vehicle for attracting publicity and discussion on some particular issue, often involving the expression of a minority grievance. Some of these Bills may also, in rough form, provide the embryonic beginnings of legislation influencing government policy and later being adopted by the government in a further developed or refined form. A recent controversial example is the European Union (Referendum) Bill 2013–2014[95] introduced by James

87 Commons Journal 1998–1999, pp.343–345.
88 SO 10.
89 SO 152J.
90 Commons Sessional Returns 2015–2016, p.36.
91 Provided for in HC SO 24A.
92 SO 14; see Blackburn and Kennon, *Parliament: Functions, Practice and Procedures* (n.11) pp.539–558.
93 SO 23.
94 HC SO 57(1).
95 HC 11.

Wharton under the ballot procedure, whose purpose was later taken up by the government in its European Union Referendum Act 2015.

A major source of backbench pressure upon government today, and one that has steadily grown and developed in strength since its introduction in 1979, is the departmentally related select committee system. Both Commons and Lords possess the inherent authority to create their own committees, and the earliest scrutiny committee was the Public Accounts Committee established in 1861 by William Gladstone to examine government spending. The jurisdiction and powers of these select committees are set down in SOs, being "to examine the expenditure, administration and policy of the principal government departments".[96] As the Leader of the House of Commons in 1979, Norman St John Stevas, said when presenting the motion to bring in the select committee system:

> "The objective of the new Committee structure will be to strengthen the accountability of Ministers to the House for the discharge of their responsibilities. Each Committee will be able to examine the whole range of activity for which its Minister or Ministers have direct responsibility."[97]

Margaret Thatcher, then the new Prime Minister, supported St John Stevas's procedural reform proposals on the basis that her parliamentary colleagues would keep a close eye on government departmental spending, ensuring value for money. What was less widely appreciated by her and many others at the time was that the inclusion of the words "public policy" within the select committee remit would enable backbenchers to conduct select committee inquiries beyond matters of mere administrative and financial efficiency into an evaluation of major policy issues of state and the strategies and objectives adopted and being pursued by ministers.

Although few essentially public policy inquiries were conducted in the early years, and initially some ministers were surprised when being asked about policy matters when giving evidence to a committee, once granted this gift to backbench power and opportunity for holding ministers to account could hardly be withdrawn. To the contrary, backbenchers seized on this opportunity for empowering their work and exerting pressure on government and have dramatically increased the frequency and range of their inquiries. To accommodate, and perhaps consolidate, this broadening role, the Liaison Committee, comprising chairpersons of all the select committees, have produced a recommended list of "core tasks" for committees, drawing on earlier versions since 2002:

> "We believe it continues to be useful to define core tasks for committees, to guide committees in deciding their programme, but not to constrain their freedom to decide their own priorities.

96 HC SO 152.
97 Commons Hansard, 25 June 1979, col.44.

REVISED CORE TASKS FOR DEPARTMENTAL SELECT COMMITTEES

Overall aim: To hold Ministers and Departments to account for their policy and decision-making and to support the House in its control of the supply of public money and scrutiny of legislation

1) *Strategy*. To examine the strategy of the department, how it has identified its key objectives and priorities and whether it has the means to achieve them, in terms of plans, resources, skills, capabilities and management information
2) *Policy*. To examine policy proposals by the department, and areas of emerging policy, or where existing policy is deficient, and make proposals
3) *Expenditure and Performance.* To examine the expenditure plans, outturn and performance of the department and its arm's length bodies, and the relationships between spending and delivery of outcomes
4) *Draft Bills*. To conduct scrutiny of draft bills within the committee's responsibilities
5) *Bills and Delegated Legislation*. To assist the House in its consideration of bills and statutory instruments, including draft orders under the Public Bodies Act
6) *Post-Legislative Scrutiny*. To examine the implementation of legislation and scrutinise the department's post-legislative assessments
7) *European Scrutiny*. To scrutinise policy developments at the European level and EU legislative proposals
8) *Appointments*. To scrutinise major appointments made by the department and to hold pre-appointment hearings where appropriate
9) *Support for the House*. To produce timely reports to inform debate in the House, including Westminster Hall, or debating committees, and to examine petitions tabled
10) *Public Engagement*. To assist the House of Commons in better engaging with the public by ensuring that the work of the committee is accessible to the public."[98]

The workload now carried out by select committees is extensive and is continuing to develop. In the 1980–1981 session, 792 committee meetings took place and 173

98 Commons Liaison Committee, *Select Committee Effectiveness, Resources and Powers*, HC (2012–2013) 697, p.11; and for commentary, see Alex Brazier and Ruth Fox, "Reviewing Select Committee Tasks and Modes of Operation" (2011) 64(2) Parliamentary Affairs 361; Matt Korris, *Building on Success — Why We Need to Review the Select Committee System* (London: Hansard Society, 2011).

reports were produced, whereas in 2015–2016, the figures were 1,277 and 226, respectively.[99]

The nature of the composition of a select committee is fundamental to the character and effectiveness of its operation. The number of members is usually 12, with a few rising to 14, and its party complexion reflects the balance between the parties in the House. After years of controversy over the manner in which the party whips were controlling memberships — effectively drawing up their own tally of members, excluding backbenchers who might be too critical of government or off-message to their mainstream party policy, and agreeing through the usual channels which party chose the chair of each — pressure for reform built up towards the end of the last century. In its report of 2000, the Liaison Committee stated:

> "There is widespread disquiet, both amongst Members and outside the House, about a system which is not open, and which is not clearly independent of the Government and the party managers. Those being scrutinised should not have a say in the selection of the scrutineers. We believe that the present system does not, and should not, have the confidence of the House and the public."[100]

This was buttressed by a wide-ranging inquiry into procedural reform by an ad hoc committee of the House of Commons in 2009,[101] leading to implementation of the current procedural arrangements. These are that chairpersons are elected by a cross-party ballot of all members of the House, and ordinary committee members are chosen by a ballot from the party to which they belong. The party whips still retain a residual power to negotiate between them and propose to the House the question of to which party a chair of each committee will belong, but this has to some extent become a matter of convention (for example, that chairs of the Public Account Committee always come from the main opposition party) and has not been contentious.[102]

The impact and influence of the select committees on government have been substantial, greatly strengthening the role of the backbench component of the Commons. It is a key procedure that has gathered momentum and grown in its usage in terms of the frequency, intensity and impact of their inquiries. Recent research has shown that around 40 per cent of select committee recommendations are accepted by government, with a further similar proportion leading to government policies being developed implementing their recommendations in a

99 See Blackburn and Kennon, *Parliament: Functions, Practice and Procedures* (n.11) p.591; Commons Sessional Returns 2015–2016, pp.58–60.

100 Commons Liaison Committee, Independence or Control? HC (1999–2000) 748, para.28.

101 Commons Reform of the House of Commons Committee, Rebuilding the House, HC (2008–2009) 1117.

102 For the motion and resolution on the allocation of chairs for the 2015–2017 Parliament, see Commons Hansard, 3 June 2015, cols.720–721.

revised form.[103] Their indirect forms of influence can be seen in highlighting issues requiring attention and contributing to policy debates and generating a greater care among departmental officials in their framing of green and white papers for fear of any weaknesses being exposed by the select committee shadowing their work. A development adding to, and reflecting, their growing status has been the Prime Minister's agreement since 2002 to hold an oral evidence session with the Liaison Committee every six months to discuss domestic and international affairs.[104]

The robustness of their work looks set to be strengthened even further in the near future, with enlarged enforcement powers against those who commit a contempt of Parliament by withholding or falsifying evidence given to them or failing to appear as requested for their oral proceedings. At the end of the 2015–2017 Parliament, the Clerk of the House prepared a memorandum of evidence for the Privileges Committee's inquiry into the subject, with a draft legislative clause setting out a procedure whereby the Speaker of the Commons might refer such contempt to the courts:

> "Failure to attend Commons Select Committee —
>
> (1) This section applies if the Speaker of the House of Commons certifies that an individual — (a) was summoned by a Select Committee of the House of Commons to attend the Committee to answer questions or to provide information or documents, and (b) has failed to attend, or to answer questions or to provide information or documents.
> (2) The Speaker may certify in writing to the High Court that the individual has failed to comply with the summons.
> (3) Where a failure to comply is certified under subsection (2), the court — (a) shall inquire into the matter, and (b) may make an order, or (c) may deal with the individual as if for a contempt of court.
> (4) The court may act under subsection (3)(b) after hearing — (a) any witness who may be produced on behalf of the Committee, (b) any statement that may be offered on behalf of the individual, and (c) any witness who may be produced on behalf of the individual.
> (5) The court may consider the nature and purpose of the Committee's summons and proceedings for the purposes of determining what action (if any) to take under subsection (3)(b) (but not for any other purpose, and this section does not diminish or qualify any existing right or privilege of the House of Commons)."[105]

103 Russell and Benton, *Selective Influence: The Policy Impact of House of Commons Select Committees* (n.60).

104 Commons Hansard, 26 April 2002, col.465W.

105 Commons Committee of Privileges, Select Committees and Contempt, 2016–2017, written evidence SEL0001 (February 2017).

VII. Bicameralism or Disguised Unicameralism?

There has been much talk of the House of Lords being in a state of crisis in recent decades. This has mostly arisen from the burgeoning size of its composition, the manner and choice of personnel being appointed by the Prime Minister, and a series of failed government attempts at reform. The questionable standing of the Lords due to its unelected membership serves to shape its proceedings and use of procedures. It is presently composed of 685 life peers appointed under the Life Peerages Act 1958, 90 hereditary peers excepted from the disqualifying provisions of the House of Lords Act 1999 and 20 Bishops: 800 members in total, making it the largest legislative body in Europe, America or the Commonwealth. There is no one party dominance in the House, with 253 peers taking the Conservative whip, 201 Labour, 102 Liberal Democrat and 219 cross-bench or non-affiliated members. The most recent incremental reform has been the House of Lords Reform Act 2014, providing for the voluntary resignation of members and grounds for disqualification including for non-attendance.

Since there is such an obvious imbalance in power and authority between the two Houses of Parliament, a convincing theory of Westminster bicameralism is difficult to sustain. The Parliament Act 1911 that removed the House of Lords' right of veto over legislation, replacing it (as amended in 1949) with a one-year power of delay (that in practice is hardly ever used),[106] proclaimed the intention to reconstitute the Second Chamber on democratic principles,[107] but despite a century of spasmodic attempts at reform, a stalemate has always remained. The most recent attempts were in 2000–2003 following a Royal Commission inquiry and government proposals that failed due to confused voting in the Commons on the options with none gaining a majority[108] and in 2014 with a coalition government's House of Lords Bill that was withdrawn when it became clear insufficient Conservative backbenchers would support it.[109]

Originally, the House of Lords was the most important and powerful of the two chambers, representing the aristocracy and bishops who effectively ruled the country under the Crown. However, progressively since 1688, it has lost its function of representation and failed to replace this with a sound reason for its

106 There have been seven occasions, being Government of Ireland Act 1914, Welsh Church Act 1914, Parliament Act 1949, War Crimes Act 1991, European Parliamentary Elections Act 1999, Sexual Offices (Amendment) Act 2000 and Hunting Act 2004.

107 The preamble to the Act reads:

> "Whereas it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation…".

108 Royal Commission on Reform of the House of Lords, A House for the Future (Cm 4534, 2000); Lord Chancellor's Department, The House of Lords: Completing the Reform (White Paper, Cm 5291, 2001); Commons Hansard (4 February 2003) cols.152f (debate) and 221f (voting).

109 House of Lords Reform Draft Bill (Cm 8077, 2011); Commons Hansard (3 September 2012) col.35.

existence in our constitutional law. Members are still not paid for their attendance and participation in the proceedings of the House, and there remains lingering confusion on whether an individual is granted a peerage as an honour in recognition of their past contribution to the country or because his membership of the House requires a proper job of work to be done. No political consensus on the political role and purpose of a second parliamentary chamber has emerged, and the two main parties alternating in office have had no vested interest in strengthening the House of Lords since any scheme of reform that made the Lords more credible would encourage greater invention over government business and pose added difficulties for the party in government in getting its legislation onto the statute book.

When Harold Wilson's Labour government in the 1960s attempted reform, its white paper described the functions of the House of Lords as being —

(1) the provision of a forum for full and free debate on matters of public interest;
(2) the revision of public Bills brought from the House of Commons;
(3) the initiation of public legislation, including in particular those government Bills which are less controversial in party political terms and Private Members' Bills;
(4) the consideration of subordinate legislation;
(5) the scrutiny of the activities of the executive; and
(6) the scrutiny of private legislation.[110]

This clearly displayed an attitude, evident in most government thinking in the modern era, that regards the second chamber as a supplementary rather than independent body, crediting it with no special functions of its own since the functions listed are precisely those already being performed by the House of Commons. Its procedural stages emulate the Commons too, although there are differences reflecting the less adversarial nature of proceedings and conventions precluding it from addressing financial affairs of state.[111]

As Walter Bagehot wrote in 1867: "Though beside an ideal House of Commons the Lords would be unnecessary, and therefore pernicious, beside the actual House a revising and leisured legislature is extremely useful, if not quite necessary."[112] In practice, this remains true: the Lords just happens to be a useful adjunct to the Commons and indeed is arguably the best legislative scrutinising body Westminster possesses. Given that government Bills regularly pass through the Commons under time allocation motions with ventilation of views and detailed examination of clauses not fully complete, the Lords provides extra space for review, and among

110 House of Lords Reform (Cmnd 3799, 1968) para.8. Later government accounts of the Lords functions have been expressed in broadly similar terms.
111 Generally see Blackburn and Kennon, *Parliament: Functions, Practice and Procedures* (n.11) Ch.12.
112 Walter Bagehot, *The English Constitution* (1867, London: Fontana ed, 1963) p.134.

its vast membership, there are pockets of expertise suitable to the task.[113] If the degree of control and influence exercised by the Lords over government affairs might appear limited, in practice, the House has proved remarkably successful in securing amendments to legislation. Over 1,500 amendments each year are made to government Bills in the House of Lords, and although many of these are initiated as a result of governmental changes of mind, a great many are still the result of ministers yielding to pressure of argument from peers and acceptance of a need for improved drafting.[114]

VIII. Future Directions: Democratising Parliament

The procedural workings of Parliament are not isolated from the outside world and in many respects are shaped and changed by external developments in the country's social and political condition. Whatever its causes, whether the decline in social deference and class, financial crisis and loss of confidence in the political elite or the impact of the 24 hour mass media and the internet's social networks, the demands and expectations of Parliament have grown exponentially in the past half-century. In particular, there have been repeated calls for greater democratisation in the process of British politics to restore Parliament's standing.[115]

One response to this has been for parliamentarians to formulate new procedural ways to engage and involve the public in political life. An example is the expansion of the procedure for public petitions, traditionally presented by one or more members of the public to an MP, seeking such relief as is within the competence of the House to grant.[116] The origins of the procedure were set out in two resolutions of the Commons in 1669:

> "That it is the inherent right of every commoner in England to prepare and present petitions to the House of Commons in case of grievance, and the House of Commons to receive the same; [and]
>
> That it is an undoubted right and privilege of the Commons to judge and determine, touching the nature and matter of such petitions, how far they are fit and unfit to be received."[117]

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113 See Griffith, *Parliamentary Scrutiny of Government Bills* (n.80); Robert Blackburn, "The House of Lords" in Blackburn and Plant (eds), *Constitutional Reform* (1999); Blackburn and Kennon, *Parliament: Functions, Practice and Procedures* (n.11) Pt.IV.

114 Between 1999 and 2012, the government was defeated on 506 occasions at various procedural stages of a government Bill during their passage through the Lords: see Meg Russell, *The Contemporary House of Lords* (2013) Ch.6.

115 See for example, Power Inquiry, *An Independent Inquiry into Britain's Democracy* (2006); Hansard Society, *Democracy and Intervention* (2007); British Social Attitudes, *Attitudes towards Politics* (2013); for commentary, Vernon Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009) Ch.12.

116 Erskine May: Parliamentary Practice (n.17) p.484.

117 Commons Journal 1667–1687, p.126. SOs (HC SOs 153–157) now regulate public petitions.

It has been for the member then to decide whether to present the petition or not, which he may do publicly before the day's adjournment, or by leaving the document behind the Speaker's chair, in either case accompanying it if he or she wishes with an opinion on the subject, which need not necessarily be one of support.

On 8 May 2014, the House of Commons approved a motion to create a "collaborative" e-petition procedure enabling members of the public to petition the House of Commons to press for action from the government. This new additional procedure combined the receipt of e-petitions by government and Commons, keeping the pre-existing procedures for each to receive petitions in place. The joint e-petitions website then went live on 20 July 2015, overseen by a new Petitions Committee in the Commons.[118] Petitions that attract 100,000 supporters are eligible for debate in Parliament, held in Westminster Hall.[119] Two recent examples covered extensively in the media were a debate arising from a petition from over 200,000 people to legalise cannabis,[120] and one from over 1.8 million people to prevent President Donald Trump from making a state visit to the UK.[121]

Trials have been run for a new public reading stage for government Bills, being a form of online public consultation built into the legislative process in the Commons.[122] Three pilot public reading stages have been held during 2010–2013, after which the Leader of the Commons confirmed that: "the Government remain committed to promoting public engagement in Parliament and specifically in the legislative process".[123] For example, during passage of the Protection of Freedoms Act 2011, a public reading stage was conducted between 15 February and 7 March (the formal First Reading being on 11 February and Second Reading on 1 March), after which the Home Office prepared "an anonymised synopsis of the views expressed" from the 500 or so comments received and passed this onto the public bill committee for its consideration.

Regarding the scope of parliamentary control over the executive generally, democratic arguments and pressures appear to have now largely won the case that the ancient Crown prerogative powers should progressively be codified in law. These cover some of the most basic tasks of government, recognised as vested in the Crown at common law under which they are exercised by ministers without the need to consult or obtain the consent of Parliament.[124] In origin,

118 See HC SO 145A.

119 For a debate to be held, the Petitions Committee makes a recommendation to the Backbench Committee who decides if it warrants a debate in the sessional time available.

120 12 October 2015 in Westminster Hall, "That this House has considered an e-petition relating to making the production, sale and use of cannabis legal."

121 18 January 2016 in Westminster Hall, "That this House has considered e-petitions 114003 and 114907 relating to the exclusion of Donald Trump from the UK."

122 This followed a recommendation in a report of the Commons Committee on Reform of the House of Commons, Rebuilding the House, HC (2008–2009) 1117.

123 Commons Hansard, 17 January 2013, cols.44WS–45WS: Leader of the Commons, Andrew Lansley.

124 See Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999) Ch.4.

they covered the whole terrain of national security and defence, government appointments and regulation of public administration, the administration of justice as well as a limited sphere of making legally effective orders. Particular landmarks coalescing the cross-party pressures advocating greater measures of codification and parliamentary control were the *Taming the Prerogative* report of the Committee on Reform of the House of Commons in 2004[125] and then Prime Minister Gordon Brown's green paper *The Governance of Britain* in 2007.[126] Over the past 10 years, for example, management of the civil service has been put on a statutory footing;[127] treaty-making is now regulated by statutory procedures for parliamentary scrutiny prior to ratification;[128] and prerogative decision-making on General Election timing has been replaced by statutory procedures for five-yearly Parliaments with an early election requiring the House of Commons' consent.[129] A convention emerged in 2013 that executive decisions to engage in armed conflict overseas should normally be debated and voted on in the House of Commons.[130] Reform of the Crown prerogative remains unfinished business, and further measures of parliamentary control can be expected in the near future.[131]

A highly significant development since the early 1980s has been the externalisation from the House of Commons of the choice of its parliamentary party leaders. Originally, it was for members of the Commons to choose from among themselves who is their leader and therefore Prime Minister or leader of the opposition as Prime Minister-in-waiting. For earlier constitutional writers, the choice of political leaders was one of the most important functions of the House of Commons.[132] Members of Parliament were regarded as the proper selectorate of a Prime Minister, qualified by their close personal working knowledge of candidates and their strengths, weaknesses and personal foibles. However, since the early 1980s, all political parties have produced new rules and procedures giving the final choice of leader to the mass membership of the party in the country. The Conservative Party provides for its MPs to select two preferred names, which are then put before the whole party membership for the final choice,[133] and the Labour

125 HC (2003–2004) 422.
126 Cm 7170, 2007.
127 Constitutional Reform and Governance Act 2010, Part I.
128 *Ibid.*, Part 2.
129 Fixed-term Parliaments Act 2011.
130 The Prime Minister (then David Cameron) gave an undertaking not to use the royal prerogative to engage in military action in Syria following a vote in the House of Commons against such a decision: 29 August 2013, cols.1425, 1555–1556. See also Commons Political and Constitutional Reform Committee, Parliament's Role in Conflict Decisions, HC (2010–2012) 923; Parliament's Role in Conflict Decisions: an Update, HC (2013–2014) 649.
131 See Ministry of Justice, "Review of the Executive Royal Prerogative Powers" (2009).
132 See for example HJ Laski, *Parliamentary Government in England* (London: George Allen and Unwin, 1938) pp.158ff, and earlier Bagehot, *The English Constitution* (n.112) pp.151–152.
133 *Procedure for the Election of the Leader of the Conservative Party* (2016).

Party[134] and Liberal Democrats[135] have one party member one vote systems with the role of parliamentarians limited to making nominations.

This can be viewed as a positive and democratic development, but it is one that supports the developing presidential tendency in British politics. Under a US-style separation of powers between the executive and legislature, it is the country that directly chooses their President, and the President requires the consent of a separately elected Congress to enact laws and approve major public policy decisions. In contrast, the virtue of the Westminster system of a fused executive/legislature relationship has rested precisely on the very direct form of personal dependency and accountability of a Prime Minister to the House of Commons. The drift of successive leadership rule changes, handing over their choice of leader to an extra-parliamentary electorate of those paying a party subscription fee, and confuses these two systems, emphasising the negative elements of each. It dilutes parliamentary control of the executive, and it provides an incomplete method of popular selection of the British Head of Government.

A further democratic development of great political importance has been the arrival of the referendum as part of the political culture of the country and legislative framework of the Westminster Parliament. Until 2010, there had been very few referendums, being widely regarded as alien to the British tradition of parliamentary democracy.[136] Mostly, these have been of a regional nature: in 1973 in Northern Ireland on remaining part of the UK or joining the Irish Republic; in 1979 on devolution to Scotland and Wales; in 1998 on the Greater London Authority; in 1998 on the Northern Ireland Agreement; and in 2004 on proposals for a regional assembly for the North East of England. However, in both 1975 and 2016, referendums were used to resolve tensions within the governing party on continuing membership of Europe (the European Economic Community and EU, respectively), and the frequency and range of their use has strikingly increased in recent years: in 2011 on extending the powers of the Welsh National Assembly; in 2011 on the voting system, offering voters the option of the Alternative Vote at General Elections; and in 2014 in Scotland on the question of its independence. A democratic case can be made for referendums, but as applied in Britain there are inherent problems. One of these is that there is no agreement on when or over what type of policy issue the procedure of a referendum should be used, and a government-dominated Parliament can call a referendum on any matter of its choice. More fundamentally, many have claimed that referendums are a derogation of the proper political responsibility of the

134 Members of the House of Commons and European Parliament together count for one-third of votes cast: Labour Party, *Rule Book* (2016) pp.14–15.

135 Constitutions of the Liberal Democrats (as amended, 2009).

136 For early discussion of the advantages and disadvantages, see AV Dicey, "Ought the Referendum to Be Introduced into England?" in *The Contemporary Review* (1890) p.489 ("The referendum diminishes the importance of parliamentary debate and therefore detracts from the influence of Parliament", p.502).

country's elected parliamentarians to debate and decide complex questions of national policy of the day.[137]

Whether one accepts or rejects such a view depends on one's interpretation of democracy itself, raising issues of majoritarianism and the proper relationship between Parliament and the people. Concepts of representation and responsibility are two sides of the same coin in the theory and practice of parliamentary democracy, and in the 100 years since universal suffrage was enacted by the Representation of the People Act 1918, the emphasis in the UK's political culture and tradition has been on responsibility and accountability and less so on the purity of representation. Largely for this reason, the country has accommodated its distortion of popular opinion in its parliamentary representation by retaining its first-past-the-post method for electing members of the House of Commons instead of adopting a system of proportional representation.[138] In the coming decades, we can expect to see new developments designed to promote greater public engagement and closer representation in the political process, and these in turn will mould future changes in parliamentary procedure at Westminster.

137 See for example, former Cabinet minister Kenneth Clarke's views on the 2016 referendum on EU membership ("There is no constitutional standing for referendums in this country"), Commons Hansard, 31 January 2017, cols.829ff.

138 For discussion, see Robert Blackburn, *The Electoral System in Britain* (London: Macmillan, 1995) Ch.8.