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Is the Lex Parliamentaria *Really Law?*

The House of Commons as a Legal System

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INTRODUCTION

THE INTERNAL WORKINGS of Parliament are crucial for the way our democracy works, but they receive very little attention from lawyers. The main reason lawyers are uninterested in Parliament seems to be that, as a result of each House's exclusive cognisance over its own proceedings, reinforced by Article IX of the Bill of Rights 1689, Parliament's internal decisions are not reviewable by the ordinary courts. Common lawyers tend to equate the boundaries of the law with the boundaries of case law, and a field in which no cases can ever arise is one that lies outside the law as they understand it.

Academic lawyers, whose vision ought to be broader, have their own reason for ignoring the internal procedures of Parliament. They tend to treat what happens in Parliament as entirely 'political'.[1] They usually conceive of Parliament as a freewheeling institution constrained only by 'constitutional conventions', the standard view of which is that they are vague principles rather than rules, established by practice and tradition rather than by enactment and enforced by social pressure and criticism rather than by compliance with the judgments of a specific authoritative decision-maker.[2]

In previous times, Parliament's internal rules and practices were said to constitute a '*lex parliamentaria*',[3] but lawyers both in the universities and in the professions have long abandoned that phrase and have followed Dicey in treating the rules or principles governing Parliament's internal working as 'not in reality laws at all'.[4]

[1] eg, Adam Tomkins, *Our Republican Constitution* (Oxford, Hart Publishing, 2005).
[2] See, eg, P Morton, 'Conventions of the British Constitution' (1991–92) 15 *Holdsworth LR* 114. See generally David Feldman, 'Constitutional Conventions' in Matt Qvotrup (ed), *The British Constitution: Continuity and Change—A Festschrift for Vernon Bogdanor* (Oxford, Hart Publishing, 2013) 93–120. Tomkins (n 1) 3–4 treats Prime Minister's Questions as a 'tradition'.
[3] eg George Petyt, *Lex Parliamentaria: or a Treatise on the Laws and Customs of the Parliaments of England* (London, Timothy Goodwin, 1690). Petyt treats Parliament as 'the highest Court in England' and the King, Lords and Commons as 'judges' (2), a reflection of the 'High Court of Parliament' theory, the medieval roots and subsequent fate of which were famously traced by CH McIlwain, *The High Court of Parliament and its Supremacy: An Historical Essay on the Boundaries between Legislation and Adjudication in England* (New Haven, CT, Yale University Press, 1910). Nothing in this chapter turns on that theory.
[4] AV Dicey, *Lectures Introductory to the Law of Constitution* (London, Macmillan, 1885) 25.

Regardless of whether the Diceyan view of constitutional conventions is correct in general, however, the idea that the internal procedures of the Houses of Parliament are vague principles established by tradition and enforced only by criticism seems wrong. Each House operates a set of procedural norms, many of which are precise, established by specific decisions and enforced through recognised mechanisms. For example, in the Commons procedural rules may be consciously created or altered by resolution of the House and are enforced by the Speaker and the Clerks. Enforcement occurs not just through criticising those who violate the rules but through sanctions against individuals and, more importantly, through the institutional fact that attempts to make decisions in ways not authorised by the rules have no effect.[5] Matters might seem more Diceyan in the Lords, where rulings on procedural issues are made by the House itself by means of resolutions rather than by its Speaker (indeed the whole concept of a 'point of order' is not recognised in the Lords),[6] but nevertheless one can point to specific, enforceable rules that have real effects.

It is true that in both Houses the rules are not codified and the rules written down in the form of resolutions are not the whole story. As we have seen in chapter 11, the standing orders of the House of Commons fail to mention the most basic rules of procedure, for example that bills go through three readings. The standing orders do not describe the House's procedures but rather regulate a process presumed already to be known and accepted on all sides. But that does not mean that these rules are vague or enforceable only by social pressure. On the contrary, a bill that has not completed its stages will not be sent to the Lords or to the sovereign for assent and so will not be enacted. The situation is similar to that of the common law itself. The fact that the common law is not codified and that the origins of many of its most basic rules are difficult to track down does not make it any less applicable and enforceable.

A LEGAL SYSTEM

More generally, one can make a case that Parliament, especially the Commons, operates its own legal system, albeit one largely uninfluenced by the legal system operated by the judges.[7] Parliament, especially the Commons, operates systems of decision-making based on previously announced rules in which decision-making proceeds by reasoning about those rules. These decisions are not managerial or 'political', in the sense of decisions taken solely on the basis of what seems most to the advantage of the decision-maker. They are taken on the basis of what the rules appear to demand.

[5] See Malcolm Jack (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* 24th edn (London, LexisNexis, 2011) 418, 426.

[6] ibid, 72.

[7] In *Stockdale v Hansard* (1839) 112 ER 1112, 1200 Coleridge J moved away from the previous fiction that the judges were 'ignorant' of the 'Law of Parliament' and some judges have ever since sought to assert the supremacy of judicial law over parliamentary law (eg *R v Chaytor* [2010] UKSC 52). For the most part, however, the separation established by the Bill of Rights still holds. The converse, of course, does not hold. The judges system is heavily influenced by the parliamentary system. See further David Howarth, 'The Politics of Public Law' in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge, Cambridge University Press, 2015).

Calling the system of decision a legal system is not to say that the process of reasoning it employs is solely about the meanings of words. The reasons for a decision might include consideration of the consequences of deciding one way or another. But that is true in the courts too. 'Policy' reasons, 'purposive' interpretations and judicial pragmatism are hardly unknown in the courts.[8] It might also weigh heavily with decision-makers in the Commons that their conclusions can be overturned by resolutions of the House passed by simple majority and that prospect might discourage making decisions that will immediately be repudiated. But even so, decisions of the Speaker are far from invariably convenient for the government. One thinks immediately of the ruling of Mr Speaker Bercow, technically sound but politically very unwelcome for the government, that motions put to the House to approve the draft Criminal Justice and Data Protection (Protocol No 36) Regulations 2014 and related matters did not cover the issue of opting into the European Arrest Warrant.[9] In any case, because of the doctrine of parliamentary supremacy, the situation of common law judges within their legal system is not very different from that of the Speaker in the Commons. Parliament can (and does) reverse the effect of court judgments of which it disapproves.[10] All legal systems exist in the time that elapses between making a decision based on the existing rules and those rules being changed.

One might even argue that Parliament's internal procedural rules, and especially those of the Commons, possess the characteristics of a legal system in more precise senses. They contain, for example, the full panoply of HLA Hart's secondary rules, the rules Hart claimed turned a collection of rules into a legal system: a rule of recognition, which distinguishes between rules that are part of the system and rules that are not; a rule of change, which lays down how recognised rules are altered; and a rule of adjudication, which lays down how authoritatively to resolve uncertainties about how recognised rules apply in particular cases.[11] The parliamentary rules of change and adjudication are quite straightforward. Each House has a rule of change, that resolutions carried by majority can create new rules and abolish or alter old ones. As for rules of adjudication, in the Commons the rule is that the Speaker decides what the rules mean and in the Lords the House itself acts as adjudicator, fusing the legislative and judicial roles.[12] The parliamentary rule of recognition is more complex but still capable of being formulated. Rules are recognised as procedural rules of the House if they have been created by a resolution of the House or if they have been

[8] See, eg, John Bell, *Policy Arguments in Judicial Decisions* (Oxford, Oxford University Press, 1983); Lord Bingham of Cornhill in *Reyes v R* [2002] UKPC 12 at 7 (purposive interpretation).

[9] HC Debates, Official Report, 10 November 2014, cc 1199–1200.

[10] eg, Compensation Act 2006 s 3, attempting to reverse the effect of *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572; Criminal Evidence (Witness Anonymity) Act 2008, reversing the effect of *R v Davis* [2008] UKHL 36; Terrorist Asset-Freezing (Temporary Provisions) Act, reversing the effect of *HM Treasury v Ahmed* [2010] UKSC 2; and Police (Detention and Bail) Act 2011, reversing the effect of *R (Chief Constable of Greater Manchester Police) v Salford Magistrates' Court and Hookway* [2011] EWHC 1578. There might be some limit to this kind of legislation when it involves the government acting as a judge in its own cause. See *R (on the application of Reilly (No 2) and Hewstone v Secretary of State for Work and Pensions* [2014] EWHC 2182 (Admin), holding that the Jobseekers (Back to Work Schemes) Act 2013, which reversed the effect of *R (on the application of Reilly and another) v Secretary of State for Work and Pensions* [2013] EWCA Civ 66, [2013] 1 WLR 2239, was incompatible with Art 6 of the European Convention of Human Rights.

[11] HLA Hart, *Concept of Law*, 2nd edn (Oxford, Clarendon Press, 1994) 94–99.

[12] In the Commons the Speaker may refer an issue to the House to decide itself, but the power is now rarely, if ever, used. See *Erskine May* (n 5) 455.

recognised or would be recognised as a rule in the course of adjudication by the authoritative adjudicator for that House. Thus not only resolutions and standing orders are recognised rules but also the practices and usages of the House that in the Commons the Speaker and in the Lords the House itself uses or would use to resolve disputes. One might object that it might not be entirely clear in advance of any particular dispute what will eventually count as a rule of the House, but the rule recognition used by the common law similarly has to incorporate common law rules and principles whose origin, scope and formulation are also not entirely clear in advance.

DIFFERENCES FROM THE COMMON LAW

In other ways, however, what happens in the Commons diverges markedly from the common law. Speakers of the House do not operate a very strict theory of precedent. In the words of May's *Treatise*, Speaker's rulings constitute precedents by which subsequent Speakers 'are guided'.[13] They are 'an important source' for future rulings.[14] That is not the language of *stare decisis* as the common law understands it. In the courts, precedents are binding and constitute the law itself. Even more different is the form and content of judgments. Speakers have developed a rule, only occasionally departed from, that they give no reasons for their decisions. They simply announce the result. The process of reasoning behind the Speaker's decision is usually known only to the Clerks who advised on it. If a Member wants to know the reasons for a decision, the Member has to find and talk privately to the right Clerk (who will reveal 'what Mr Speaker might have had in mind'). But nothing will ever appear in the Official Report beyond the bare decision. In addition, before judgment very little in the way of argument is permitted. Members raise points of order in the Chamber in the form of short questions, and are usually cut short if they try to argue at length for a particular ruling. A more elaborate form of argumentation can be attempted by writing a letter to the Speaker giving notice of the point of order before raising it in the Chamber, but any attempt to put the text of such a letter on the record will almost certainly be cut off by the Chair, for example by making reference to the (otherwise rarely enforced) rule against 'reading' speeches.[15] After rulings are made, contesting the result or the reasoning by which it might have been arrived at is treated as challenging the authority of the Chair, a rule members only occasionally manage to evade by prefacing their remarks with the words 'without in any way challenging your ruling, Mr Speaker'.

The laconic form of rulings and the lack of argumentation prior to and after judgment seem designed to preserve a high degree of mystery around the process and thus to maintain the authority of the chair by the rather crude mechanism of cutting off the possibility of rational debate about the rules. But minimising discourse around the rules brings with it the disadvantage that reasons for the rules will not be understood and thus the rules themselves will not be understood. Moreover, decisions unsupported by reasons can look random and irrational even when they are not. One of the functions of the *Treatise*,

13 ibid, 62.
14 ibid.
15 See, eg, HC Debates Official Report, 29 January 2008, c 236.

therefore, is to put these decisions into some kind of order and to give, or at least imply, the reasons that led to them. That is the logic behind making the Clerk of the House of Commons its editor and other Clerks the editors of its chapters. The Clerk is the Speaker's senior adviser for procedural issues. Indeed for some Speakers one suspects that little in the way of independent judgment occurs between the Clerk's advice and the announcement of the result to the House. The *Treatise* is thus no ordinary textbook. It is a peculiarly authoritative account of the rules, written by people whose advice on the meaning of those rules is almost invariably accepted.

Another difference between Parliament's internal legal system and the common law is its relationship to statute law. The courts frequently claim to have certain inherent powers, for example to dismiss actions as an abuse of process,[16] but if a statute takes away or limits those powers, the courts are bound to and will follow the statute. Parliament, even though it is the source of all statutes, takes a different view. Although normally it would follow its own statutes, where statutes contradict Parliament's own rules, Parliament reserves the right to follow its own rules on internal procedure in preference to the statute. The courts have accepted that Parliament can do this. In *Bradlaugh v Gossett*[17] the Commons resolved not to allow Charles Bradlaugh, the duly elected member for Northampton, to take the oath (Bradlaugh was an atheist to whose presence in Parliament a great number of members vociferously objected). The court took the position to be that the law, the Parliamentary Oaths Act 1866, required the oath to be taken (admittedly not the only possible interpretation of the Act), and proceeded on the basis that the House had resolved to exclude Bradlaugh in contravention of the Act. Nevertheless, the court refused to take any action against the House. In the course of controlling its own procedures the House was entitled to interpret statutes in any way it chose, even in ways that were plainly erroneous. The court would not even inquire as to whether the House had interpreted the statute at all. Outside Parliament statutes take precedence over resolutions of the House. Inside Parliament, the opposite can obtain.

TOO DIFFERENT TO COUNT AS A LEGAL SYSTEM?

Do these differences make Parliament's procedural rules any less a legal system? Two possible lines of argument might be taken. The first concerns whether the rules are sufficiently stable to count as 'previously announced'. Not having a system of strict precedent is no bar in itself. Many countries outside the common law world have no formal system of precedent—indeed the French Code civil explicitly forbids 'general and regulatory' decisions by judges[18]—and yet they have legal systems. But lacking both a strict system of precedent and a comprehensive written code might be thought to create a problem. If unwritten practices can come in and out of validity as rules by the unfettered discretion of

16 See, eg, IH Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23.
17 *Bradlaugh v Gossett* (1883–84) LR 12 QBD 271.
18 Code civil, Art 5. In reality French law does have a de facto system of precedent, treating previous cases as guidance though not as binding, and as a source of argument though not as a source of law. See, eg, John Bell, Sophie Boyron and Simon Whittaker, *Principles of French Law*, 2nd edn (Oxford, Oxford University Press, 2008) 25 et seq.

the Speaker, how can the rules be known in advance? The answer to that point, however, lies in the special status of the *Treatise*, as an authoritative account of the rules produced by people on the inside of the decision-making process. Although, in theory, a Speaker called upon to make a decision in which unwritten practices and background assumptions are in play could ignore the past and start again, those advising the Speaker on the basis of the writings of their own predecessors are unlikely to propose unstable switchbacks of position. As a consequence one can expect switchbacks to occur no more frequently than in a common law system.[19]

In the case of the House of Lords an additional problem exists. The fusing of legislative and adjudicatory functions in the House of Lords, by which the House itself both lays down rules and says what they mean, could lead to a situation in which it matters not at all what the rules say. The House can effectively ignore its own rules whenever it interprets them. The problem is not entirely theoretical. In November 2010, for example, the Lords decided whether to refer the Parliamentary Voting Systems and Constituencies Bill to examiners on the question of hybridity after a debate and vote that divided almost purely on party lines.[20] In practice, however, the House of Lords has not yet descended into arbitrariness.

The second objection concerns the process in the Commons by which decisions are made. There can be little doubt that reasoning about the rules takes place and that it bears some relationship to the result reached. Members who ask for an explanation of a ruling in the privacy of the Clerk of Legislation's office invariably receive one that bears a strong resemblance to legal reasoning. It might not be an explanation that satisfies the Member and the Member might suspect that the result determined the reasoning rather than the other way round, but the same is often also true of litigants contemplating the judgments of courts. The important point is that an explanation in terms of the rules is felt to be necessary at all. When a member asks for an explanation, the decision is not clothed in the language of pure power but instead in some form of reasoning.

The trouble, however, is that in the public aspect of the process, the ruling as announced to the House, no reasoning based on the rules, or indeed reasoning of any kind, usually appears. Can a system of decision operating without offering any public reasons count as a legal system? The answer, however, is that it can. Juries give verdicts without reasons and in many countries, especially in the highest courts of civil law countries, judgments can be very short. In France, for example, the Cour de cassation renders judgment in a single, admittedly very long, sentence, consisting of little more than a statement of the facts, a list of the relevant provisions of the codes and the result. Not giving reasons might be bad

[19] Sometimes switchbacks can happen in the course of the same decision, but usually only in the interests of restoring longer-term consistency. See, eg, HC Debates Official Report, 2 December 2009, cc 1234–49. A Member moved the previous question, a procedural motion that 'the question be not now put', the effect of which is, if passed, the House moves on to its next business without resolving the question under consideration; or, if negatived, the House moves immediately to a vote of the question under consideration. The practice of the House is entirely clear: such a motion can be moved without notice and has to be put to the House. The Deputy Speaker in the chair, however, was unaware of that practice and, believing that the situation was identical to that when a Member moves the closure, purported to reject the motion. He then called to speak a Member who purported to move an amendment that it was the whole point of moving the previous question to prevent being debated. The situation was resolved by the Deputy Speaker being replaced in the chair by the Speaker, who then allowed the previous question to be debated as if the amendment had never been moved.

[20] HL Debates Official Report, 15 November 2010, c 522.

practice. It might even amount to an illegal practice.[21] But it arguably remains a bad practice of a legal system, not a practice that takes the system beyond the boundaries of the legal.

DEFICIENCY OF REASONS AND ITS CURES

The situation remains, however, that the mode of rendering judgment in the Commons is far from satisfactory, a position that might stand in the way of acceptance of the idea that the Commons has its own legal system. In 2008, during the committee stage of a bill to give parliamentary approval to the provisions of the Treaty of Lisbon, a point of order was raised several times as to why before resolving itself into committee the House was not asked, as seemed required by Standing Order No 66, to dispose of an instruction to the committee, notice of which had been duly given. The point of order was brushed aside without explanation. Then, suddenly, without more than a few hours warning and again without explanation, the Speaker called a debate on the instruction.[22] One day the Standing Order did not apply. The next day, it did. Both decisions looked equally baffling. In private, however, some explanation was offered. The trouble was that the explanations kept changing and none of them made no sense to the Members who heard them.[23] Indeed they made so little

[21] See, eg, Mark Elliott, 'Has the Common Law Duty to Give Reasons Come of Age Yet?' [2011] *Public Law* 56. Where judicial decisions are concerned, and thus where Art 6 of the European Convention of Human Rights is engaged, failure to give reasons might even amount to a violation of human rights: *Hadjianastassiou v Greece* (1993) 16 EHRR 219.

[22] HC Debates Official Report, 4 March 2008, c 1598.

[23] The painful detail is perhaps not worth reliving, but for the sake of the historical record some account of it should be given. Originally (see HC Debates Official Report, 29 January 2008, c 236) the explanation for the refusal to allow a debate on the instruction was that although the instruction was in order it had not been selected under a power granted by Standing Order No 32(4), which says that the power to select amendments applies to notices of instruction. The trouble with that explanation is that Standing Order No 66 requires that where the instruction is to a committee of the whole House, the instruction has to be 'disposed of' before the House goes into committee. It is far from clear how merely not selecting an instruction can count as 'disposing of' it. If anything the opposite is the case. The alternative interpretation is that Standing Order No 32(4) is limited by Standing Order No 66, so that the power to select does not apply to instructions to committees of the whole House at the point just before the House goes into committee (although it does apply otherwise). After the reversal of fortunes (which followed an act of civil disobedience by an aggrieved member, see HC Debates Official Report, 26 February 2008, c 925), another explanation was offered to the author, namely that the instruction could not be called because the House had passed a timetable motion defining an 'allotted day' as a day on which 'the first business is a motion in the name of the Crown to approve the Government's policy towards the Treaty of Lisbon [or a motion in the name of a minister amending the timetable order]'. It was claimed that this order excluded taking an instruction as first business. How that worked, however, was very unclear. A definition is not the same as a prohibition. A definition, moreover, cannot suspend standing orders. The argument seemed to be a very elaborate four-stage one: (1) applying Standing Order No 66 would mean making the instruction 'first business', so (2) according to the definition of 'allotted' the day would no longer count as 'allotted', which meant (3) the timetable motion would not apply and chaos would ensue and so (4) since the House could not possibly have intended chaos to result, Standing Order No 66 could not apply. The sudden reversal of the fate of the instruction, it was explained, resulted from the House's decision to pass an amendment to the timetable order that excised the reference to 'first business' and replaced it with a reference to the business 'including' a government motion on the Lisbon Treaty. Oddly, the minister who introduced the amendment somehow forgot to mention that it would have the effect of resurrecting the instruction. If he had mentioned that effect, different Members might have voted for his amendment. But the trouble with this whole line of argument is that it is entirely unnecessary if one had quite reasonably interpreted 'first business' as meaning 'first government business'. It is also worth mentioning that the 24th edition of *Erskine May* seems to make no reference at all to Standing Order No 66.

sense that if they had been offered in public, it is difficult to believe that they could have withstood scrutiny. The problem with not having to explain the reasons behind a decision in public is that it allows weak reasoning to survive.

The best way to improve the situation would be for the Speaker to give detailed reasons for procedural decisions. If the point is one that needs to be decided immediately, the Speaker could adopt the judicial practice in urgent cases of announcing a decision straightaway without reasons, but giving full reasons later. The prospects of such a reform seem distant, however. Many would advise against it on the ground that giving detailed reasons would invite debate and thus would threaten the Speaker's authority. That is a bad argument as a matter of principle—authority that fears discussion seems peculiarly ill-suited for the chair of a democratic assembly—but experience suggests that it will probably prevail.

Assuming that the forces of institutional conservatism succeed, one other way forward exists that could possibly increase the system's level of rationality without committing the Chair to argumentation that might not stand up later. That would be for academic lawyers to start to treat the decisions of the Speaker as cases and to write about them as they already write about the decisions of the courts. The starting point would be to compose case notes in the form familiar to readers of the standard legal journals. Case notes in that tradition describe and discuss a single decision, explaining how it fits, or does not fit, with previous decisions and discussing its implications for the future. The absence of reasoning is no bar to such an exercise since the minimum material needed to underpin a case note is a set of facts and a decision. Eventually, when many case notes exist, one might be able to move on to producing compilations of them in various forms. One form, which would mirror the style of case reports in civil law jurisdictions, would be a simple chronological series of decisions and notes.[24] Another form would be a case-book, a collection of cases and commentary selected for their significance and arranged by theme, extended by adding other materials (for example, the Standing Orders, academic articles, extracts from the *Treatise*). The classic use of a case-book is as an aid to teaching, but case-books can also stand as reference works in their own right. It would amount to a kind of *Erskine May* upside down, in which the material usually relegated to the footnotes becomes primary and the text becomes secondary. Another possibility is to use the cases to underpin an account of the system as a whole, as the basis of an anthropology of Parliament, not so much in the form of an ethnography such as we have an example of from Emma Crewe in this book (chapter 3) as that of a functional account of how Parliament solves problems.[25]

AN EXAMPLE

What would such case notes look like? To illustrate the concept we might turn to a decision of Mr Speaker Bercow, delivered in the House on 10 July 2012, during proceedings on

[24] I am informed that the Journal Office of the Commons used to produce a series of decisions of the Chair (albeit without academic commentary) until fairly recently. Perhaps as a first step this publication could be revived.

[25] For an excellent ethnography of parliament, see Emma Crewe, *The House of Commons: An Anthropology of MPs at Work* (London, Bloomsbury, 2015). For a classic of functional legal anthropology, see Karl Llewellyn and E Adamson Hoebel, *The Cheyenne Way* (Norman, Oklahoma University Press, 1941).

the ill-fated House of Lords Reform Bill. As undoubtedly a bill of 'first rate constitutional importance' the bill was to be referred, by a resolution proposed by the government, to a committee of the whole House. In order, however, to protect the bill from attempts to wreck it by endless extension of debate in committee and to avoid having to assemble daily majorities for closure motions, the government put down a motion to programme the bill, under Standing Order No 83A, proposing to restrict debate to a specific number of days (in this case ten in committee and two on report) and specifying in the normal way which clauses and schedules were to be discussed on which days. But after having given notice of moving their programme motion, the government came to the conclusion that the motion had no chance of being carried. Despite the fact that the government could expect a large majority for the second reading of the bill itself, the programme motion faced a hostile combination of the official opposition and a very considerable number of rebels on the government's side. The government therefore announced that when the time came later that evening to move the programme motion, it would simply not move it.

The question then arose of what would happen next. Standing Order No 63 says that, unless the House resolves otherwise, bills are automatically referred to a Public Bill Committee, usually a small committee of around fifteen members, but occasionally larger. That would plainly be unsatisfactory for a constitutional Bill, and so Members began to focus on Standing Order No 63(2), which says that a motion to commit a bill to, inter alia, a committee of the whole House

> may be made by any Member and if made immediately after the bill has been read a second time shall not require notice, and, though opposed, may be decided after the expiration of the time for opposed business, and the question thereon shall be put forthwith.

Could that provision be used at least to commit the bill to a committee of the whole House? We can quote the point of order and the ruling in full.

> **Mr Peter Bone (Wellingborough) (Con):** On a point of order, Mr Speaker. The media have announced that there will not be a programme motion. According to Standing Order No 63, by rights the Bill should not be committed to the whole House, but should go to a Public Bill Committee upstairs. Will that procedure apply in this case?
>
> **Mr Speaker:** I do not think that Standing Order No 63 applies in this case, given that the programme motion has been tabled. I am happy to take further advice on the matter, and to consider whether the hon Gentleman's point is valid.[26]

That might be taken to be the Speaker's preliminary view. Full judgment followed shortly:

> **Mr Speaker:** Order. Before I call the first Back-Bench speaker, may I, for the benefit of the House, now respond substantively to the point of order raised with me earlier by the hon Member for Wellingborough (Mr Bone)? Standing Order No 83A provides that, where notice is given of a programme motion, Standing Order No 63 shall not apply. That means that, if the Bill is read a Second time this evening, it will not be possible for Ministers or others to move to commit the Bill, whether to Committee of the whole House or elsewhere. The Bill will remain uncommitted for the time being. I hope that that information is helpful to the House.[27]

[26] HC Debates Official Report, 10 July 2012, c 187.

[27] HC Debates Official Report, 10 July 2012, cc 204–05.

In other words, the Bill was to be left in limbo—Members could not move its referral to a committee of the whole House, but it was not automatically referred to a Public Bill Committee either. Standing Order No 83A was taken to disapply Standing Order No 63 in its entirety.

Mr Speaker Bercow's ruling appears to turn on a literal interpretation of Standing Order No 83A(1), which, as he intimated, says that, if before the second reading of a bill, a minister gives notice of a programme motion, 'the motion may be made immediately after second reading, and Standing Order No 63 (Committal of bills not subject to a programme order) shall not apply to the bill'. The crucial word is 'notice'. The decision is that Standing Order No 83A disapplies Standing Order No 63 as soon as the minister declares an intention to move the programme motion, an event evidenced by the motion's appearance on the Order Paper. It is not necessary actually to move the programme motion for the disapplication to take effect.

Speaker Bercow's interpretation of Standing Order No 83A(1) has the remarkable effect that a minister can limit the rights of all other Members to move a motion not by persuading them to pass a different motion, or even by moving a different motion, but merely by announcing that a different motion will be moved. That matters not just because it shifts the balance of power between the government and the House in favour of the former on government bills, but also because it provides yet another weapon by which the government can destroy private Members' bills. Standing Order No 83A(1) is not limited to the government's bills. It applies to any bill. The effect is that a minister could stop any private Member's bill in its tracks by the simple method of giving notice of a programme motion about it and then failing to move that motion. The bill would then enter permanent limbo unless the government moved the programme motion and released it.

That result, however, is not inevitable. Another way of reading Standing Order No 83A(1) is that the interposition of the words 'the motion may be made immediately after second reading' before the disapplication clause implies that if, in the event, the motion is not made, the disapplication ceases. The reasoning behind Standing Order No 83A(1), as far as it can be rationally reconstructed, is that it would be very inconvenient if any Member could jump up before the programme motion has been moved and propose a committal without a programme. That is also why the programme motion may be made 'immediately'. But if it is not made, the reason to exclude Standing Order No 63 disappears and so the disapplication should also cease. That interpretation is reinforced by the way Standing Order No 83A(1) refers to Standing Order No 63 as the standing order about 'Committal of bills not subject to a programme order'. If a programme motion is not moved, the bill is at that point 'not subject to a programme order' and so Standing Order No 63 should once more apply.

One might also ask what precisely Standing Order No 83A(1)'s disapplication of Standing Order No 63 achieves. The original version of Standing Order No 63 was passed in 1907, by a government anxious to provide more time for its legislative programme on the floor of the House and irritated by long debates about committal. Before then, any Member could, immediately after second reading, move without notice any form of committal and a debate would then ensue. Standing Order No 63 did not create the right to move committals. It rather removed the ability of the House to debate such motions and provides for an automatic default option if no committal motion is moved. Disapplying it therefore might produce its own paradoxical effect of reviving the previous position under which committal

motions were debatable. The problem for Members wanting to move a committal would then not be Standing Order No 83A but Standing Order No 9(6), which provides that no further unexempted opposed business can be taken after the moment of interruption. A committal could indeed have been moved but could have been blocked by any Member voicing an objection. Sadly neither Mr Bone nor any other Member attempted to move a committal after the moment of interruption and so this theory remains untested.

CONSEQUENCES

What difference would it make if we began (or began again) to treat Parliament, and in particular the House of Commons, as operating a legal system? Two consequences come to mind. First, it would improve academic understanding of Parliament. Some historians have understood the importance of parliamentary procedure, as have some political scientists.[28] But many, including lawyers, have not. To treat everything that happens in Parliament as a black box marked 'political' is to miss much of what happens there. Parliamentary politics takes place within rules, is influenced by rules and sometimes consists of arguments about what the rules should be. The system for deciding what the rules are and what they mean matters. The rules are not, of course, the only thing that matters. It is possible that they matter only a little, that they provide a bare framework that helps to structure daily routines but nothing else. But it is also possible that they are fundamental to the acceptance by Members of Parliament of the legitimacy of Parliament itself. Further research might reveal the answer to the question of which of those views is correct, but the question can only be asked at all if we take the system of rules seriously to begin with.

The second consequence is that it would help to focus more attention and effort on reforming Parliament. Thinking of Parliament's procedures as misty traditions that somehow float up without any conscious design from the dank atmosphere of the ground floor of the Palace of Westminster tends to discourage putting effort into reform. If current practice is ultimately ungraspable and tied up in intricacies we can only guess at, how can we be sure that change will be for the better? And thinking of procedure as 'political' also discourages reform by giving the impression that political convenience will always outrank the rules and so changing the rules is futile. If, however, we think of the system as a type of legal system we should be able to see it as designed for certain purposes and capable, as are all modern legal systems, of having its purposes changed.

No doubt some will raise as an objection to treating parliamentary procedure as a legal system a third possible consequence, that it will encourage and embolden that least popular group of Members of Parliament, namely lawyers. The stereotype that lawyers are pointlessly argumentative and pernickety persists as much in Parliament as in the outside world, perhaps even more.[29] The prospect of more wrangling over small points is not attractive.

[28] See, eg, Steven Watson, 'Parliamentary Procedure as a Key to Understanding Eighteenth Century Politics' (1962) 2 *Burke Newsletter* 108 and Herbert Döring, 'Parliamentary Agenda Control and Legislative Outcomes in Western Europe' (2001) 26 *Legislative Studies Quarterly* 145.

[29] I should record that shortly after my own election I was offered the (genuinely friendly) advice that it would not be a good idea to be identified as a lawyer and that I should try always to let others know that I was an academic.

But even if that were to happen—and one might counter that Members of Parliament, whether lawyers or not, are already so argumentative that very little room exists for more wrangling—its inconveniences would be outweighed by setting lawyers both inside and outside Parliament to work on what they really do best, using or designing formal structures of rules to achieve specific purposes.[30] Perhaps it might even attract different, and possibly better, kinds of lawyer into Parliament, those who see their role not as causing problems but as solving them.

[30] See generally David Howarth, *Law as Engineering: Thinking about What Lawyers Do* (Cheltenham, Edward Elgar, 2013).

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