Aspects of Nolan - Parliamentary Self-regulation

Research Paper 95/65

23 May 1995

Self-regulation in Parliament is an important constitutional principle which has become topical in the light of the recent Nolan Report (Cm 2850, May 1995). This short Paper considers the constitutional aspects, in the context of the Nolan proposals affecting Members, such as the establishment of a Parliamentary Commissioner for Standards, and Members' initial reaction in the 18 May debate.

Members wishing briefing on the Nolan debate as such, including the substance of the report's proposals, should consult other Research Papers in the *Aspects of Nolan* series, ie Research Paper 95/60 on lobbying, and Research Paper 95/62 on Members' financial interests, as well as other relevant Research Papers.

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Summary

Parliamentary self-regulation has traditional constitutional foundations. The courts recognise not only the legislative supremacy of Parliament but also, through Parliamentary privilege, the exclusive right of Parliament to internal autonomy. The practice of self-regulation must also take account of a government's generally dominant role in internal Parliamentary matters as well as in the legislative process, and Members in the 18 May debate cited the very appointment of the Nolan committee, with a remit which included Parliamentary standards, as an example of this point.

The report of the Nolan committee is examined on the self-regulation point. The committee recognised the constitutional importance of Parliamentary self-regulation but wished to inject an independent element, through the proposed Parliamentary Commissioner for Standards for example, which would make self-regulation more effective and bolster public confidence.

The debate of 18 May is examined, again on the self-regulation point. Members argued both for and against the maintenance, wholly or substantially, of the present self-regulatory arrangements. Some argued for or against statutory regulation. Others suggested that the Speaker, or someone based in her office, would be the appropriate standards commissioner.

CONTENTS

I Some constitutional aspects of self-regulation

The issue of Parliamentary self-regulation is of central constitutional importance. A theory of the separation of powers, certainly in the eyes of the judiciary, is said to be a precondition of a liberal parliamentary democracy subject to the rule of law. The UK does not have a pure 'separation of powers' system which separates Parliament, Government and the courts; Ministers sit in Parliament, the Lord Chancellor is a senior member of all three branches, and so on. Parliament is, to a large degree, autonomous in law, and this is preserved through the assertion of its privileges, and the recognition of these privileges in most cases by the courts.

Much of the initial debate on the Nolan proposals for Members of Parliament has been in terms of Parliamentary sovereignty. In this respect, sovereignty does not mean, or simply mean, legal supremacy in the legislative sense so much discussed in the context of European Union membership. Rather it appears to be being used in the sense of autonomy or independence as noted above. Autonomy in the eyes of the courts is as crucial to Parliamentary self-regulation as it is to legislative supremacy. As the Nolan report itself recognises, autonomy through Parliamentary privilege is central to the functioning of Parliament in the constitution.[1] The traditional justification for privilege is particularly relevant to the current Nolan debate on Members' ethical standards. A classic expression of this approach is that of a former Clerk, Sir Barnett Cocks, to the 1966-67 select committee on parliamentary privilege: "The sole justification for the present privileges of the House of Commons is that they are essential for the conduct of its business and the maintenance of its authority."[2]

The second aspect of constitutional independence and autonomy in a separation of powers context is more problematic. The Westminster system of parliamentary government involves a significant mixing of the Executive and the Legislature, rather than a separation of these two branches of government. A government's position within Parliament means,
in practice, that it has the leading role in the operation of Parliament, mainly, but not only, in the legislative process. The usual situation of a government with a working majority means that it will take the initiative in the operation of, or changes to much of the organisation and administration of Parliament. Thus, whether changes to House of Commons practices along Nolan lines come about by legislation or by resolution of the House as a 'House of Commons' matter, a government would be bound to have a major input not only in the changes themselves but in their initiation.

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1 See the next section of this Paper

2 HC 34, 1967-68, p12. See *Erskine May*, 21st ed., 1989, chap 5, and, for an explanation of the concept of 'the law of Parliament' see the Introduction which, *inter alia*, quotes John Ley a Clerk in the 19th century, on Parliamentary self-regulation: "What does it signify about precedents? The House can do what it likes. Who can stop it?" (p1)

An interesting aspect of this governmental role within Parliament arose during the 18 May debate on the Nolan report. Two Members noted that the Committee, which was charged with the investigation, *inter alia*, of Members of Parliament was set up by the Prime Minister without any specific Parliamentary debate or approval. Tony Benn described the Nolan Committee as a "permanent royal commission"[3] set up by the Prime Minister's use of the royal prerogative "clean contrary to article 9 of the Bill of Rights, which stipulates that no one from outside may presume to regulate what we do."[4] This view was supported from the Conservative benches by Iain Duncan Smith who added that "my views on the position of Parliament mean that I should like to have had some say in deciding what would be set up."[5]

Constitutionally, Parliament will have the final word on the implementation or otherwise of the Nolan proposals, either in its legislative capacity or as a matter of internal administration. Indeed, in this sense, consideration of the Nolan proposals by a House of Commons committee, following the 18 May debate, can be said to be an assertion, in constitutional terms, and as was noted by several Members during the 18 May debate, of Parliament's right to regulate itself. In practical terms, all this will be within the context of a government's usually dominant position within Parliament, as considered above.

It is rare for the House to give up its autonomy to an external or quasi-external body. Perhaps the most obvious precedent is the surrender of Parliament's right to adjudicate on contested elections, partly in 1770 (the '*Grenville Act*') and almost entirely in 1868 (*Parliamentary Elections Act)*, because of the unsatistisfactory and partisan way in which election petitions were dealt with by Parliament. Early editions of *Erskine May* described the operation of the pre-legislative system of determination by the whole House of Commons as "so notorious a perversion of justice."[6]

Some aspects of Parliament are regulated by statute, such as the *House of Commons Disqualification Act 1975, House of Commons (Administration) Act 1978* and *Parliamentary Corporate Bodies Act 1992.* It can be seen that the statutory route can maintain as well as dilute self-regulation, depending on the subject-matter and the statutory provisions.

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3 The Nolan committee would not be regarded as a royal commision in the standard use of that term as a body established by Royal Warrant

4 HC Deb vol 260 c532, 18.5.95

5 c552

6 Erskine May 8th ed., 1879, p663. See also pp 668-679. For current practice see 21st ed., 1989, pp35-7

The Nolan committee's proposed Parliamentary Commissioner for Standards appears to be modelled, to some degree, on the Comptroller and Auditor General and the Parliamentary Commissioner for Administration, as an office that is both independent of, and linked to, Parliament.[7] Both the C&AG and the PCA are officers of the House, and both work with select committees of the House. The chairman of the Public Accounts Committee has to agree the appointment of a C&AG before the Prime Minister can move for an address.[8]

The following section sets out some of various approaches adopted by Members to self-regulation during the 18 May debate. It will be seen that some attempted to accommodate the spirit of Nolan while maintaining the current level of self-regulation.

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[7] See Exchequer and Audit Act 1866 and National Audit Act 1983, and the Parliamentary Commissioner Act 1967 for details of their appointment and status

[8] S1(1), 1983 Act

II The Nolan debate on self-regulation

The first report of the Nolan Committee[9] considered the ethical issues of Members of Parliament at some length. The substance of this issue is comprehensively considered in the other *Aspects of Nolan* Research Papers cited earlier. This section concerns itself *solely* with the discussion of Parliamentary self-regulation in the context of the Nolan report and its immediate aftermath, especially the debate in the House on 18 May.

A. The Nolan report

The summary and introduction chapters at the outset of the report emphasise the twin pillars of the Nolan approach throughout the public service: "Internal systems for maintaining standards should be supported by independent scrutiny."[10] This would apply "wherever there is scope for behaviour falling below the highest standards."[11]

The report, stating that the House of Commons "is at the heart of our democracy" and that Members' standards "are crucially important to the political well-being of the nation," asserted that those standards have always been self-imposed and self-regulated because Parliament is our supreme institution."[12] Members must not only maintain the highest standards but also "it is essential for public confidence that they should be seen to do so."[13]

The report rehearsed what is in effect the case against self-regulation. It noted the history of the introduction, and enforcement of the Register of Members' Interests: "the 1969 Strauss report was shelved without debate; the introduction of a Register of Interests was resisted until the Poulson scandal forced the hand of a new government in 1974: it has taken Members 20 years to accept the Register fully....." After listing other such examples the report concluded that "the overall picture is not one of an institution whose Members have been quick to recognise or respond to public concern."[14]

"On the other hand", the report continued, "we do not believe that the position is so grave that it has to be addressed outside the framework of the House's own rules." Having set out what it required in principle to deal with these problems, it continued: "We believe that the House can do this itself, and that the package which we set out below will help it to do so. It is a powerful and flexible mixture of disclosure and enforcement which will serve the public interest better than the inflexibility of statutory procedures."[15]

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9 Cm 2850, May 1995
10 Summary, para 7
11 Para 1.16
12 Para 2.1
13 Para 2.2
14 Para 2.58
15 Para 2.59

In the section in chapter 2 entitled 'enforcement of obligations' the report tackled the issue of self-regulation directly. The committee accepted that 'Parliamentary privilege' "is designed to ensure the proper working of Parliament, and is an essential constitutional safeguard."[16] One of its consequences is "that the House of Commons regulates the activities of its Members itself," and the report declared that "because Parliamentary privilege is important for reasons entirely unconnected with the standards of conduct of individual Members of Parliament, we believe that it would be highly desirable for self-regulation to continue."[17] But for self-regulation to continue successfully "it is essential that Resolutions of the House - in effect the legal framework which the House imposes on its own operations -should be regarded as binding on all Members, and should be firmly, promptly and fairly enforced."[18]

The committee then considered examples of past difficulties in enforcing House Resolutions on the Register of Interests,[19] and believed that there was a perception within the House that standards Resolutions do not have the same impact as laws or regulations "even though they are the law of Parliament." This was due in part to the reluctance of the House (and its relevant staff) to sit in judgment on fellow Members unless the matter was very serious.[20] The committee regarded this attitude as entirely understandable but wrong, and emphasised the need for the development in the House of a culture of adherence to standards Resolutions.

This analysis led the committee to its central proposal in this respect, that "*this can best be taken forward by combining a significant independent element with a system which remains essentially self-regulating.*"[21] This element was the proposed Parliamentary Commissioner of Standards which would, *inter alia*, play an independent role on the enforcement of the House's standards rules. The committee believed "that our proposals to appoint an independent Commissioner and to overhaul the entire disciplinary procedure for Members should be sufficient to achieve the necessary detachment without recourse to the courts or indeed any surrender of privilege. The recommendations ... should enable Members to secure a fair, thorough and expeditious hearing without removing the jurisdiction of the House of Commons."[22] The report noted the suggestion by some witnesses that such procedures should be put on a statutory basis.

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16 Para 2.91

17 Para 2.92

18 Para 2.93

19 Paras 2.93-7; see also Research Paper 95/62, and Enoch Powell's article in the *Times* on 19 May, "There's no legislating for honour"

20 Para 2.96

21 Para 2.99, emphasis added

22 Para 2.102

B. The debate of 18 May

The House debated the first Nolan report, one week after its publication, on a motion for the adjournment.[23] This section explores the treatment by Members participating in the debate of various aspects of the self-regulation issue, and the Nolan proposal for a Parliamentary Commissioner for Standards in particular.

Perhaps the most detailed argument in favour of the Nolan proposals for an independent element in the current system of Parliamentary self-regulation came in Jeff Rooker's speech winding up for the Opposition. He claimed that "by and large we have proved ourselves incapable of putting our own house in order. That is the ultimate proof that self-regulation can be self-delusion .... I would argue that we are the highest court in the land, but we should not be a law unto ourselves because we are the law makers. That is the distinction I draw. I do not understand why some hon Members find the House under threat if we look for something other than complete self-regulation."[24] He placed his argument in the context of a reformed constitution where Parliament would not be sovereign over all matters, and reforms such as those proposed by Nolan would not be subject to attack by broad parliamentary sovereignty arguments. While accepting that the Nolan proposals were "the first outside interference in hundreds of years in the conduct of the House" they were "in a very narrow area [and] do not interfere with our prime functions."[25]

A clear exposition of the opposite approach came in the speech of Sir Dudley Smith, who said that "Parliament's sovereignty is being undermined." The standards commissioner "will be a veritable gauleiter" and the Parliamentary committee to which the commissioner will report "will be his poodle." He believed that "for good or ill, Parliament must police itself. The public decide whether they like us and, if they do not, they throw us out .... Parliament is the highest court in the land and cannot be ruled by a High Court judge, however eminent, or by a registrar, however qualified or respectable ... Parliament must safeguard its sovereignty and deal with the situation circumspectly."[26] Sir Edward Heath, Father of the House, made a speech against the dilution of self-regulation: "The great danger is that the Nolan report will damage the House."[27]

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[23] HC Deb vol 260 cc481-570, 18.5.95

[24] c560-1

[25] c563

[26] c545

[27] c509. See also his *Independent* article on 20 May, "Parliament must not be run by an outsider", where he asked, "If we cannot run our own affairs, how can we run other people's affairs? How can we legislate for the country, if it is judged that we need an outsider to legislate for us?"

The idea of control of Parliamentary standards by a *statutory scheme* was considered by a number of Members. Nicholas Budgen emphasised that, as Nolan was proposing material changes and restrictions in Members' terms of employment, they would have to be set out in statute.[28] Tony Benn wanted a statutory regime which would set out what conduct would be unlawful and would thereby disqualify a person from Membership of the House: "we should lay down what is lawful for a Member to do and a Member who does not stay within the law will not be eligible to be a Member."[29] Edward Leigh, from the opposite Benches, supported the statutory approach, not only for certainty, but also because of the principle of a separation of the Executive and the Legislature: "If the House is to be regulated in this tight way - which may or may not be the right thing to do - it should be by statute. Hon. Members should know exactly where they stand, and should not be bound by a commissioner effectively appointed by the Executive to oversee independent Members of Parliament."[30] Tristan Garel-Jones pointed out that "if we were to have a statute, would we not be handing over the scrutiny of this House to the judges and to legal interpretation?"[31] David Hunt, opening the debate for the Government, said that a statutory route "would be a fundamental constitutional change because the conduct of the House is not a matter of statute, and if the terms upon which hon. Members serve were to be encompassed in statute, it would be a fundamental constitutional change."[32] Winding up for the Government, Tony Newton rejected Tony Benn's analogy between the House of Commons Disqualification Act 1975 and some proposed Parliamentary standards legislation: "there is a clear distinction between putting into law ... a list of offices held that disqualify, and what would come much closer to a list of criteria needing to be interpreted and considered by the courts before it could be decided what was and was not in order."[33] Ann Taylor, responding to an intervention by Mr Budgen on the need for statute for major changes in Members' terms and conditions, thought that, with the implementation of the proposals she supported, any candidate for Parliament would be clear about the terms and conditions of membership of the House, and therefore Mr Budgen's thesis was "a bogus point that should not delay us."[34]

Some members suggested that, if there were to be some form of ethics commissioner, it should be in the person of the *Speaker*, or at least be appointed by her and based in the Speaker's Office. Sir Archie Hamilton said that "that would remove many of our fears about an independent commissioner over whom, once we had appointed him or her, we would have no control at all."[35] Iain Duncan Smith said that if there had to be a commissioner "such an appointee must come solely from [Madam Speaker's] office. There is no way that I will vote for somebody from outside this place, who does not know of the pressures and the work of

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[28] cc482, 486, 488
[29] c532
[30] c487
[31] c487
[32] c482
[33] c566
[34] c499
[35] c532

the House, to sit in judgment on Members."[36] John Garrett said that he had long argued for a "new and independent role for the Speaker", and if the supervision of Parliamentary standards were to be in the hands of the Speaker "that would mean that we would have constant access to the guardian of our standards."[37]

Mr Newton, in the closing speech, recognised "some understandable suspicion ... about an attempted diktat by members of the Government Front Bench or of proposals based on a deal between members of the two Front Benches." He therefore proposed "that the appropriate course is to operate according to the House's normal procedure in such circumstances, which is to ask a group of senior and respected Members of Parliament to make recommendations on how we should proceed in the light of the report and to make specific proposals for resolutions that might be put to the House having considered some, many or all of the points raised in today's debate."[38] He said that that would be consistent not only with House practice but also the Nolan report: "That implies that we now need a proper House mechanism for considering how to proceed."[39]

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[36] c554
[37] c546
[38] c568
[39] c569

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