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# Lords Reform: The Legislative Role of the House of Lords

A Bill affecting the composition of the House of Lords was announced in the Queen's Speech on 24 November.

This Paper examines the legislative role of the House of Lords, which is central to the Lords reform debate, and has become particularly relevant since May 1997 in the House's treatment of the new Labour Government's legislative programme, especially in the constitutional field. This was demonstrated graphically last session with the *European Parliamentary Elections Bill.*

Because of the re-introduction of that Bill [Bill 4, 1998-99], to be debated in the Commons on Wednesday 2 December, its abortive passage last session is examined in the context of the Lords' legislative role. This section should be read with Research Paper 98/102, The *European Parliamentary Elections Bill*, which provides a full briefing on the re-introduced Bill itself.

This Paper is a companion volume to two forthcoming Research Papers, one updating RP 98/85 on recent developments in the Lords reform debate, and one providing relevant statistical information, on composition and on the pattern of government defeats in the House of Lords over time (RPs 98/105 and 104, respectively).

Barry K Winetrobe

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# Summary of main points

This Paper looks at the nature of the House of Lords functions when dealing, as a House of Parliament, with legislation. It contrasts the House's formal, theoretical powers with its exercise of these powers, and the reasons behind this distinction. While the promised *House of Lords Reform Bill* is expected to deal solely with questions of composition, the powers and functions of the House will certainly form part of the ongoing debate, as the nature of the House's composition is central to its relationship with the House of Commons and the government of the day. In view of the current controversy over the *European Parliamentary Elections Bill*, the legislative process which may apply, in various circumstances, is examined. Full briefing on the Bill itself, and its abortive Parliamentary progress last session is described in Research Paper 98/102.

The nature and effect of the *Parliament Acts* is considered, generally, and in relation to the last example of its use, the *War Crimes Act 1991*. This procedure applies when disagreements between the two Houses reaches its greatest intensity, but this Paper also describes other ways in which disagreements can arise and be resolved under relevant Parliamentary legislative procedures.

The House of Lords has evolved various practices which seek to recognise its ultimately subordinate role to the House of Commons, and, through it, the government of the day, in the context of legislation. One of the most important is the 'Salisbury Doctrine', which can operate when it is considering legislation foreshadowed in a government's election manifesto. Discussion on the extent to which the present Opposition may apply the Doctrine during the rest of this Parliament, especially in the context of the Government' Lords reform legislation, is noted.

This Paper also examines ways in which the House exercises its legislative functions, within these self-imposed constraints (such as the notion of 'wrecking amendments') and external restraints. This is sometimes classified as a 'revising' function, providing the elected House and the Government with the opportunity to 'think again'. In particular the House's practice of not rejecting delegated legislation is described.

Finally, this Paper illustrates some of the Lords' consideration of its legislative role in recent years, especially in the context of the ongoing debate on Lords reform.

Members should note that the procedural passages (especially those relating to the Upper House) in this Paper are substantially descriptive. The Clerks of both Houses will be able to provide Members with substantive advice on procedural aspects of the legislative process in the Commons and Lords, and of the relationship between the two Houses.

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# I. Introduction

## A. Generally

> *"Legislative business looms very large in the working life of the House of Lords … the House spends more than half its time considering public bills, the overwhelming preponderance of its attention being directed at Government bills…..... Interviews with peers .. confirmed that peers themselves regard legislative scrutiny as the most important function of the House of Lords."*[1]

The Queen's Speech on 24 November announced that there would be a Bill this session dealing with the composition of the House of Lords. While the Bill itself is likely to be drawn narrowly, it is certain that the public and parliamentary debate on Lords reform will extend more widely, especially in relation to the Government's plans for 'stage 2' through the proposed royal commission. The powers of the Upper House, both in theory and in practice, are clearly central to this debate, and the legislative functions that the House of Lords exercises tend to excite greatest interest and controversy.

The legislative role of the House of Lords is of current interest for a number of reasons:

- it is a key aspect of the work of the House,
- it has an important direct impact on the implementation of the Government's policies,
- it is of fundamental importance in the relationship between the two Houses of Parliament, and
- it will have a direct impact on the achievement of the Government's plan for Lords reform itself.

This Paper seeks to describe the House of Lords' legislative role, both in theory and practice, by examining the ways in which it exercises, or chooses not to exercise the legislative powers that it possesses as a House of Parliament.[2] With the House of Commons and the Monarch, it forms the 'Parliament' (or 'Queen-in-Parliament') which, in British constitutional theory, exercises legislative supremacy in the UK, a feature often described as 'Parliamentary sovereignty'.[3] In any bicameral system where both Houses

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1 G Drewry & J Brock, "Government legislation: an overview", chap 3 of D Shell & D Beamish (eds.), *The House of Lords at work*, 1993, p61

2 This Paper does not seek to describe the legislative process in the Lords as such, even those procedures (such as amendments at third reading) which differ from procedures in the Commons, nor important innovations such as the Delegated Powers and Deregulation Committee. Members interested in such a description should consult the standard sources such as *Erskine May*, or the Lords' Companion to Standing Orders. An excellent outline is provided by P Silk & R Walters' *How parliament works*, 4th ed., 1997, pp136ff. A comprehensively detailed analysis is contained in D Shell & D Beamish, *The House of Lords at work*, 1993, esp. chaps 3 and 4.

3 On which see section V of Research Paper 96/82, *The constitution: principles and development*, July 1996.

have legislative power, arrangements are required – whether of a formal, standing nature, or *ad hoc*, depending on particular circumstances – to resolve any disagreements between them, so as to ensure that an agreed test of any legislation is passed into law.

It is important, in any discussion of the Lords' legislative role, especially in relation to the House of Commons and/or the Government of the day, to distinguish between the *theory* of the Upper House's legislative power, and the practice and conventions concerning its *exercise.* In this context, it is crucial to an appreciation of the legislative role of the House of Lords to recognise that the Lords' legislative powers are, in theory, and subject to certain important exceptions, the same as that as the House of Commons. These exceptions derive from 'Parliamentary law' and from statute, such as the *Parliament Acts 1911-1949*, and to that extent are binding on the House. In addition the Upper House has generally adopted certain self-denying ordinances, such as the 'Salisbury Doctrine', which in effect accept its subordination to the elected House of Commons.

Thus the way the Lords exercises its legislative functions is a mixture of external constraint and internal restraint. On this basis it is misleading and inaccurate to describe the Upper House's legislative power solely in terms of 'delay' or 'revision'.[4] Despite the fact that this sort of language has become ingrained in the long-running debate over the relationship between the two Houses in the legislative context, it will be used in this Paper where appropriate, such as in the context of the operation of the *Parliament Acts.*

Again, to describe the Lords' legislative role in terms of 'delay' begs the question. By delay is often really meant the Lords exercising more of their theoretical legislative power, in a practical situation, than they would 'normally' do. Can this always be categorised as 'delay', in the sense of obstruction, or simply full or further scrutiny to which it is legally entitled? In other words, can use of available powers in a particular situation, for whatever reason, be regarded as *delay* in a normative sense? Here we are in the realms of Parliamentary and constitutional practice[5] where descriptions may reflect subjective as well as objective factors.

Developments in the nineteenth century confirmed the House of Commons as the dominant House of Parliament. The Commons could point to the ever more democratic nature of elections as the major source of its constitutional and political legitimacy. This was in contrast to the hereditary, aristocratic basis of the composition of the Lords. The consolidation of party and the divergence of the social composition of the two Houses were also important in the development of the Commons' supremacy.

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4 Similarly, the description of the Lords, whether in legislative mode or otherwise, as a kind of 'constitutional guardian' does not, with perhaps one exception, derive from any statutory foundation. The possible exception is the statutory provision in the *Parliament Act* itself that it does not apply to bills seeking to extend the maximum duration of a parliament beyond five years: *s2(1), 1911 Act*. In the Queen's Speech debate on the constitution on 30 November, Andrew Tyrie suggested that this veto could "be extended to cover other constitutional issues": HC Deb vol 321 c 602, 30.11.98

5 akin, in some respects, to the theory and exercise of many of the Monarch's remaining personal prerogative powers, e.g. to refuse royal assent

Nevertheless the perceived permanent majority position of one party in the Lords provided scope for conflict, especially when a different party had a Commons majority. So, in the late nineteenth and the early twentieth century, the legislation of Liberal governments was rejected by a Conservative-dominated House of Lords. In particular, on major constitutional issues such as Irish Home Rule, Conservative peers followed the 'referendal theory' of resisting controversial legislation until the opinion of the nation had been made clear.[6]

This conflict came to a head during the period of Liberal government between 1906 and 1914. See, for example, the three-day debate on 14-26 June 1907 at the end of which the Commons resolved by 432 to 147 that "in order to give effect to the will of the people" legislation passed by the Commons should be enacted within the Parliament notwithstanding resistance by the Upper House.[7] The rejection in 1909 of the *Finance Bill* giving effect to Lloyd George's Budget led, after protracted debate and two general elections, to the *Parliament Act 1911*. This gave statutory effect to the Commons' legislative supremacy by transforming the Lords' veto into one of delay. The *Parliament Acts 1911 and 1949* are considered in greater detail in Section II.

The rest of the twentieth century has seen several periods where reform of the House of Lords was considered seriously.[8] The Bryce Commission in 1918 proposed joint resolution of legislation disputes between the two Houses. The 1945 Labour Government reduced the power of delay from two years to one in the *Parliament Act 1949*. Increased resistance to the legislation of the 1964-1970 Labour Governments was one reason for a protracted but ultimately unsuccessful attempt by the Government to cut down further the period of delay.[9]

## B. A topical case-study: The European Parliamentary Elections Bill 1997-98[10]

In practice, the exercise of the legislative role of the House of Lords, especially in controversial instances, will often exhibit a number of different but potentially inter-connecting features which are considered in this Paper. The treatment and fate of the *European Parliamentary Elections Bill* last session is a recent, neat example.[11] The Bill was foreshadowed in the Labour Party's 1997 general election manifesto, and as such would fall within the scope of the 'Salisbury Doctrine', by which the House of Lords does not seek to overthrow a bill founded on a government's manifesto pledge by rejecting it at

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6 see D Shell, *The House of Lords* 2nd ed, 1992, p. 10

7 HC Deb vol 176 c1523, 26.6.07

8 see section C of Background Paper 297

9 on which see J Morgan *The House of Lords and the Labour Government 1964-70*, 1975, part two

10 This section should be read with sections II and III of this Paper. See also the interesting interview Viscount Cranborne gave to BBC1's *On the record* on 15 November where he discussed the fate, and what he described as the 'Parliament act-ability', of the Bill: www.bbc.co.uk/otr/frames/interviewsf.html

11 As with all Government defeats on legislation in the Lords, there has been much debate about the composition, by party and by peerage type, of both sides of the relevant division lists.

Second or Third Reading. On the other hand, opponents of the Bill argued that, while the Labour manifesto referred to the introduction of a PR-based electoral system for European Parliament elections, it did not make it clear that this would be by way of a 'closed' rather than an 'open' regional list scheme.[12] This shows not only the limitations of the application of crucial constitutional conventions, but also the ways in which both sides of an argument can seek to use these practices to their own advantage.

Again, one can examine the actions of the Lords in the context of the survival of the Bill itself. As the whole Bill centred around the introduction of the regional list method of PR, the disputed provisions as to the nature of the list could not simply be severed from the main body of the Bill, allowing the agreed portions to go forward for royal assent. To that extent, the Lords' persistence with its open list amendment meant that, in the absence of agreement, the Bill would not pass, even though the Upper House did not reject it at Second or Third Reading.[13]

Following the loss of the Bill, attention then centred on the Government's pledge to re-introduce the bill in the present session, bringing into play the possibly of resort to the *Parliament Acts* for the first time since the *War Crimes Act* in the early 1990s. It is interesting that the timetable of the European Parliament elections and the legislative history of the Bill has potentially conflicting impacts on the application of the *Parliament Acts.* As 1997-98 was an unusually long session (following, as it did, a spring general election), the twelve-month statutory period between Commons second reading in the first session and passage in the Commons in the second as demanded by s2(1) of the 1911 Act has already been met.[14] Being a bill which began its legislative passage in the Commons rather than the Lords, it could be enacted by the *Parliament Acts* procedure.[15]

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12 For details of the Bill, see Research Paper 98/102, 1.12.98

13 For discussion as to what may constitute a 'wrecking amendment see section V at pp 47-48

14 The *European Parliamentary Elections Bill* received its Commons second reading on 25 November 1997, HC Deb vol 301 cc 803-877

15 The Government could have followed the precedent set by the Attlee Government to enact what became the *Parliament Act 1949*, through the provisions of the 1911 Act. There was a session, 1948, which was intended solely to consider the Bill, so as to meet the requirements of the 1911 Act. See the King's Speech which stated, in part, "I have summoned you to meet at this time in order that you may give further consideration to the Bill to amend the *Parliament Act 1911* on which there was disagreement between the two Houses last session. It is not proposed to bring any other business before you in the present session": HL Deb vol 158 c 1, 14.9.48. The session lasted from 14 September to 25 October 1948, and the 1948-49 session began the following day. The Lords rejected the second reading of the reintroduced Bill on 23 September 1948

On the other hand the need to have the legislation enacted in good time for it to be implemented in the June 1999 European elections means that the timetable for enactment in this session is relatively tight. If the Bill is not dealt with expeditiously by both Houses in the early part of this session, that deadline will probably not be met.[16] In practice, a government with the substantial Commons majority that the present Labour administration enjoys can generally ensure the speedy passage of a Bill through the Lower House, with or without the cooperation of Opposition, especially as it can argue that the measure had been fully debated in the previous session. However, because of the party arithmetic in the Upper House, it would probably require the cooperation, or at least the acquiescence of other parties in the Lords for the Bill to go for royal assent in time. If the majority of peers supported an agreed text of the Bill on an expedited basis, the desired deadline may well be met without any need to resort to the *Parliament Acts*, and the legislation will pass into law in the normal way.

The *Parliament Acts* would only come into play if the Lords reject the Bill in the second session, either directly at Second or Third Reading, or by not consenting to the Bill as required by the *Parliament Acts* by the end of that session. The date of the prorogation of the present session is therefore crucial in this scenario. The Queen's Speech of 24 November appears to contemplate a 'full' session, lasting until the autumn of 1999. A *European Parliamentary Elections Bill* enacted then would, of course, come into force too late to affect the coming elections next June, although it could be available for the 2004 elections.[17] If the Lords rejected the Bill at Second Reading in the next couple of months then, as with the *War Crimes Bill* in 1991, it could go straight to royal assent under the *Parliament Acts*. While such action would be, strictly speaking, a breach of the Salisbury Convention, it could actually be seen as a 'cooperative' act by peers, as they would be allowing the measure to pass into law in time for the June elections.

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[16] The Government has, at times, suggested that that deadline would be around mid-January 1999. For example the Home Office's Queen's Speech background note on the Bill to be reintroduced stated: "To hold the June 1999 European Elections under proportional representation, the Bill would have to have received Royal Assent by mid-January. This is to enable the training of the 100,000 people, including returning officers, who are employed to run the election. Detailed secondary legislation covering the conduct of the election is also needed - which must be considered by Parliament before it can put into place"

[17] If the Government felt that the necessary cooperation would not be forthcoming, and that no legislation could be enacted in time for the June elections, at least not without potential disruption of the rest of its legislative programme, it could, for example have decided not to re-introduce the Bill until later in the session

These are just some of the possible scenarios which could apply to this legislation this session, and the above brief discussion and speculations demonstrate how many factors (legal and tactical) are involved in the practical legislative process for controversial bills.[18]

# II The Parliament Acts

## A. Generally

The *Parliament Acts 1911* and *1949* have fundamentally transformed the House of Lords' legal power (as opposed to restrictions imposed by convention and the Commons' financial privilege) in relation to legislation. With the exception of Bills to extend the life of Parliament, the House of Lords does not have an enforceable 'veto' over primary public[19] legislation introduced originally in the Commons[20]. The exercise of the House's legislative power, in practice, can be regarded as being generally of a revising and delaying nature.[21]

As the *Parliament Acts* are in effect a statutory confirmation of the Lords' subordinate legislative role compared to that of the Commons, the view could be taken either that the Lords should therefore adopt a non-confrontational policy when acting as a revising Chamber or, on the other hand, that, as the Commons will ultimately prevail if it wishes, peers should not shrink from making clear their views of proposed legislation. See, for an example of the latter approach, Lord Houghton of Sowerby's speech to his dilatory motion at Second Reading of the *War Crimes Bill 1990-91*.[22]

While the power of delay is superficially less strong than a formal power of veto, it should not be regarded solely as a negative action. Delay (whether in the *Parliament Acts* sense or, within the confines of a sessional legislative programme, in normal course of consideration of legislation) is an important and often effective parliamentary weapon. It can require ministers 'to think again', which may produce government concessions on the details of a Bill's policy. The *Parliament Acts* procedure can be seen, for example, to throw the sole responsibility for the enactment of a Bill on to the House of Commons.

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18 In so far as the Bill could be described as a 'constitutional bill', its treatment in this Parliament so far demonstrates the potential hazards involved in such a bill's Parliamentary progress. See Research Paper 97/97, 1.8.97, Time spent on government bills of constitutional significance since 1945, and J Seaton & B Winetrobe, "The passage of constitutional bills in Parliament", (1998) 4 *Journal of Legislative Studies* 33-52. In addition to those issues discussed here, governments have an arsenal of potential weapons to overcome difficulties in the Lords. Two examples, which have been the subject of recent press speculation, are the creation of sufficient numbers of new peers supporting the government (either generally or, at least, over the legislation in dispute) or by seeking to have the Upper House sit for protracted sittings or at times which would normally be regarded as recess or other non-sitting days

19 The House of Lords retains equal powers with the Commons over private legislation

20 The *Parliament Acts* do not affect Bills first introduced in the Lords

21 See the earlier discussion on this descriptive terminology, p 8

When introducing the Second Reading of what became the *Parliament Act 1949*, Herbert Morrison set out the positive aspect of the Lords' legislative role:[23]

> The question whether the Lords should be able to hold up Bills for three Sessions or for two Sessions, and for two years or for one year, is, I submit to the House, not a matter of principle; it is a question of degree, of fair judgment, and of practical efficiency. The Government believe that on the practical the period of the veto should be reduced. Let us look, first, at the position of the House of Lords as a revising Chamber. The Lords are, in our view, entitled to ask that the Commons should be required to give time and consideration to the Amendments which they propose to Commons Bills. That, as I think we should all agree, is reasonable. If the position were that the Lords sent their Amendments to the Commons, but the Commons could indifferently ignore them and pass the Bill into law without further ado, then the Lords would be entitled to say that there was no guarantee that any serious consideration would be given to their Amendments, and that we might as well resort to single-chamber Government.
>
> The present Bill adequately safeguards the reasonable rights of the Lords in this respect. The need to introduce a Bill a second time in a subsequent Session will always offer a strong inducement to the Government and to the House of Commons to go as far as they fairly can to meet the views of the Lords in the modification of Measures sent up to them.

Yet until recent times the Lords' power was commonly regarded almost as a 'doomsday weapon', that if the Lords impeded a controversial government bill or order the result would be its abolition or restriction or removal of its remaining legislative powers. This almost happened in the ultimately abortive attempt at Lords reform in the late 1960s. Recently, the Lords have become more active in their legislative capacity, and have justified this on the grounds, for example, that there was a very small (or even no) overall Government majority in the Commons (as with the Labour government in the mid-1970s) or that a huge Government majority in the Commons meant that there was little scope for revision in that House (as with the Conservative administrations from 1983 to 1992). This activism has led to the initiation of the procedure laid down by the *Parliament Acts* twice in the former situation and once in the latter.

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22 HL Deb vol 528, cc 623-5, 30.4.91

23 HC Deb vol 44 c 38, 10.11.47

## B. Application and procedure

The House of Lords *Companion to the Standing Orders* sets out in detail the application and procedures of the Parliament Acts:[24]

> **Parliament Acts 1911 and 1949**
>
> Under the Parliament Acts 1911 and 1949 certain public bills may be presented for Royal Assent without the consent of the Lords. The Acts do not apply to bills originating in the Lords, bills to extend the life of a Parliament beyond five years, provisional order bills, private bills or delegated legislation. The conditions which must be fulfilled before a bill can be presented for Royal Assent under the Acts vary according to whether or not the bill is certified by the Speaker as a money bill.
>
> **MONEY BILLS**
>
> A money bill is a bill endorsed with the signed certificate of the Speaker that it is a money bill because in the Speaker's opinion it contains only provisions dealing with national, but not local, taxation, public money or loans or their management. The certificate of the Speaker is conclusive for all purposes. If a money bill, which has been passed by the Commons and sent up to the Lords at least one month before the end of a session, is not passed by the Lords without amendment within a month after it is sent to them, the bill shall, unless the Commons direct to the contrary, be presented for Royal Assent without the consent of the Lords. This does not debar the Lords from amending such bills provided they are passed within the month, but the Commons are not obliged to consider the amendments. On a few occasions minor amendments have been made by the Lords to such bills and have been accepted by the Commons.
>
> **OTHER PUBLIC BILLS**
>
> If the Lords reject any other public bill to which the Acts apply which has been sent up from the Commons in two successive sessions, whether of the same Parliament or not, then that bill shall, unless the Commons direct to the contrary, be presented for Royal Assent without the consent of the Lords. The bill must be sent up to the Lords at least one calendar month before the end of each session; and one year must elapse between Second Reading in the Commons in the first session and the passing of the bill by the Commons in the second. The Lords are deemed to have rejected a bill if they do not pass it either without amendment or with such amendments only as are acceptable to the Commons. The effect of the Parliament Acts is that the Lords have power to delay enactment of a public bill until the session after that in which it was first introduced and until not less than

[24] 1994, pp.149-50, available on the Lords website.

13 months have elapsed from the date of Second Reading in the Commons in the first session.

The following hypothetical example (kindly supplied by the Clerks in the House of Lords) describes how the procedures operate.

A public Bill is given a Second Reading in the Commons on 1 December 1984; it is sent up to the Lords at least a month before the end of the session, but does not get Royal Assent; it is sent up to the Lords again, unchanged, in session 1985/86 on or after 2 December 1985. This Bill may then be given Royal Assent whether the Lords pass it or not. The timing depends on the actions of the Lords.

If the Lords reject the Bill outright, Royal Assent may be given under the Parliament Acts thirteen months and one day after Second Reading in the Commons, that is not before 2 January 1986 (or one month after its receipt from the Commons). If the Lords do not reject it outright Royal Assent may not be given until the session ends. The Lords can therefore delay Royal Assent by protracting their consideration and by sending messages back and forth to the Commons. To ensure Royal Assent before October 1986 the session would have to be ended early with the consequent disruption of the legislative programme.

The Bill sent to the Lords in session 2 has to be identical to the Bill sent to the Lords in session 1, with the following exceptions:

(i) The session 2 Bill can include any amendments made by the Lords to the session 1 Bill.

(ii) The Commons can agree to Lords amendments in session 2.

(iii) The Commons can suggest amendments in session 2 and send them to the Lords for their agreement. This is done separately and does not prejudice the Commons' right to insist on the enactment of the session 1 Bill in its original form under the Parliament Acts.

The Commons can choose whether to make use of (i), (ii) or (iii). They can also direct that the Parliament Acts shall not apply at all if they wish.

## C. Use

Three Acts have passed into law under the terms of the original 1911 *Parliament Act* without the agreement of the Lords. These are the *Government of Ireland Act 1914*, the *Welsh Church Act 1914*, and the *Parliament Act 1949*. One Act has been passed since the 1949 Act, namely the *War Crimes Act 1991*.

The procedure prescribed by the *Parliament Act 1911* was used in one other case, that of the *Temperance (Scotland) Bill 1913*. The procedure under the Acts of 1911 and 1949 was used in the cases of the *Trade Union and Labour Relations (Amendment) Bill 1975-76* and the *Aircraft and Shipbuilding Industries Bill 1976-77*. All these Bills were rejected by the House of Lords in the first session, subsequently certified by the Speaker under the

Parliament Act or Acts and sent to the Lords, but then received Royal Assent in the final session with the agreement of the Lords as a result of compromise amendments.

The examples of the *Trade Union and Labour Relations (Amendment) Bill 1975-76* and the *Aircraft and Shipbuilding Industries Bill 1976-77*, two controversial Bills introduced by a Government with a slender or non-existent Commons majority, are well described in the following extract from Shell's *The House of Lords*:[25]

> The Conservatives in Opposition pressed divisions on large numbers of hostile amendments to government bills, defeating the Government over 350 times in the division lobby (or in over 80 per cent of all divisions which took place). Sometimes the Government found itself unable to reverse the Lords' amendments back in the Commons - for example on the Housing Finance Bill of 1975 and the Dock Work Regulation Bill of 1976; the emasculation of these measures was the result of defection by Labour MPs as much as action by the House of Lords. Where the Lords' amendments were cancelled by the Commons, peers generally gave way without more ado. But the Opposition did decide to dig in its heels and quite deliberately use the power of the Lords on three carefully chosen matters.
>
> The first of these involved the 1975 Trade Union and Labour Relations Bill, and concerned the provision of safeguards against possible abuse of the 'closed shop' principle among journalists. The Government's leading opponent in the Upper House was the formidable cross-bench peer Lord Goodman, behind whom, through much of this controversy, the Conservatives took shelter. The bill fell at the end of the 1974-5 session and was reintroduced in the following session, but eventually passed without the Parliament Act procedures running their full course, mainly because the Government changed its position and the Conservative Party got in a muddle…. The second confrontation was over the bill nationalising aerospace and shipbuilding introduced in the 1975-6 session. Again the bill fell at the end of the session because the two Houses were still in dispute over amendments to delete ship-repairing. But here a technical procedural device became available because the bill was found by clerks to be 'hybrid' and therefore liable to an elaborate time-consuming parliamentary procedure (see Chapter 8). In the Commons the Government had the 'hybridity' rule set aside (though by only a single vote: 304-303). In the Lords no such easy way of escape from potentially lengthy select committee hearings was available, so Labour ministers reluctantly compromised and dropped ship-repairing from the bill.
>
> The third exercise of power involved the outright rejection of a bill which would have brought Felixstowe Dock into public ownership, but because this was a private bill promoted by the British Dock and Harbour Board - albeit one with clear government support, and one which had already passed the Commons - the Government could do nothing to overcome the decision of the House.

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[25] 2nd ed, 1992, pp.25-26

## D. War Crimes Act 1991

The most recent example of resort to the Parliament Acts was in the context of the *War Crimes Bills* (enacted as the *War Crimes Act 1991*). The Bill (which was not a measure contained in the Conservative election manifesto of 1987) was introduced by the Government in the Commons in the 1989-90 session on 8 March 1990, and it received its second reading on 19 March.[26] Following three days in standing committee,[27] and remaining stages on 25 April,[28] the Bill was introduced in the Lords on 26 April (HL Bill 64), but was negatived on a division on second reading on 4 June.[29]

The Bill was re-introduced in the Commons in the following session (Bill 105,1990-91) on 7 March 1991, and the House agreed on a division (177-17), after a debate of about 45 minutes to a procedure motion on 12 March how to proceed with the Bill:[30]

> That if the War Crimes Bill is read a Second time, no order shall be made for the committal of the Bill and it shall be ordered to, be read the Third time upon a future day; and upon a motion being made for Third Reading the Question thereon shall be put forthwith and may be decided, though opposed, after the expiration of the time for opposed business.

The Leader of the House, John MacGregor, explained the fate of the Bill in the previous session, and the Government's pledges, re-affirmed in that session's Queen's Speech, to re-introduce it:[31]

> The Government recognise and respect the strongly held views, here and in another place, on the issues raised by the Bill, but the strength of support in this House was such that we believe that an opportunity for further reflection has to be provided…..
>
> In bringing the Bill back before Parliament, we have inevitably kept in mind the provisions of the Parliament Acts 1911 and 1949. My predecessor made plain the Government's hope that the Bill would secure the support of both Houses. That remains our clear objective. The Parliament Acts exist, none the less, as an instrument for the resolution of intractable disagreements between the two Houses of Parliament, and we believe that the possibility of their use should be preserved in this case. The view of this House was unequivocal on the last occasion, and if that remains the position this time, I believe that hon. Members will in the last resort expect their views to prevail.

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26 HC Deb vol 169 cc 887ff, 19.3.90. Bill 95, 1989-90
27 SC 'A', 29 March and 3 April
28 HC Deb vol 171 cc 429ff, 25.4.90
29 HL Deb vol 519 cc 1080ff, by 207-74
30 HC Deb vol 187 cc 901-13, 12.3.91
31 c 901

He explained the provisions of the Parliament Acts, such as the 12-months requirement, and the form of the Bills in the two sessions, and said that the Government had concluded that the Bill should be re-introduced unamended, in its original form. As his motion would dispense with a committee stage there would be no opportunity for the tabling of amendments as such in the Commons proceedings:[32]

> It is against this background that I am moving the procedural motion before the House. It is unnecessary to preserve the formality of Committee and Report stages, nor do we need a further debate on Third Reading, when the issues will already have been fully considered on Second Reading as well as last year. Thus, the motion, which I commend to the House, provides that no order should be made for the Bill's committal, in the event of it receiving a Second Reading, that it should be ordered to be read the Third time upon a future day and that the question should be put forthwith on Third Reading.
>
> I believe that this approach gives due recognition to the gravity of the issues raised by the Bill, while at the same time paying proper regard to the procedures of this House and the pressures of time on hon. Members. The War Crimes Bill has been exhaustively considered by this House already, but we think it is important to provide yet another full day for a Second Reading debate this as well as a further opportunity to debate the money resolution immediately thereafter. If the House remains of the view that the Bill should proceed, then I believe that this should happen as quickly as possible and without the imposition of unnecessary stages here. The important. thing is to return the Bill to the other place as quickly as possible, once the statutory time limit has expired.

After declaring that "it is right to give the House the opportunity to use the Parliament Acts if it wishes to do so, but it is for the House to decide", he concluded:[33]

> It is important to return the Bill to the other place as quickly as possible after the expiry of the statutory time limit. I hope that it will be possible for Third Reading to be taken before Easter, thereby giving members of the other place an opportunity to reflect on the Bill. They may wish to table amendments. If so, this House will have to consider whether they are acceptable within the overall scheme and objectives of the Bill. It is important to initiate that process as quickly as possible within the time scale of the Parliament Act, and the motion seeks to achieve that.

For the Opposition, the shadow Leader, John Cunningham, put the debate in the wider context of the relationship between the two Houses:[34]

> The content of the Bill is of undoubted importance. It raises fundamental questions of justice and of rights. Their Lordships rightly looked at these issues in

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32 cc 902-3
33 c 904
34 c 905

> detail and were helped in that task by two things. First, there is a great deal of legal expertise and experience among their membership. Secondly, they were able to draw upon the personal experiences of many of them during the second world war.
>
> The issues that were so fully debated by their Lordships have been overtaken by a more fundamental question, which we are debating today - the supremacy of this elected Chamber over the other place. The writ of that question runs far wider even than the important issues raised in the Bill itself - issues such as retrospective legislation and the reliability of evidence now 50 years old, especially evidence relating, to identification.

Although the issue was the subject of a free vote on both sides, he made his party's position clear: "I shall be urging my right hon. and hon. Friends to vote, if there is a vote, with the Government because we assert, and have consistently supported, the supremacy of this House…. Opposition Members support today, as we did in 1949, the view that the House of Lords, unrepresentative as it is, should be allotted the subordinate role which must, in a democracy be assigned to an unelected Chamber" (c 906). He warned the Conservatives:[35]

> Few Conservative Members can feel pleased about the predicament in which the Leader of the House and the Government find themselves. They are creating a precedent for Tory Governments by invoking the right of this elected House to enforce the legitimate mandate of an elected Government. I support that principle without hesitation, as the Labour party has always done on such occasions, but it is a pity that that has to, be done in support of a somewhat disreputable measure which, as I have said, I shall not support. I understand the arguments of those hon. Members who support the War Crimes Bill " and I appreciate that their view is as passionately held as mine…..

The Bill received its second reading on 18 March, by 254-88.[36] During his speech, the Home Secretary, Kenneth Baker, examined the relationship between the two Houses, in the context of the Parliament Acts:[37]

> The Government hope that the Bill will be allowed to pass with the agreement of both Houses, whether in the form before the House today or amended in a mutually acceptable way in another place. But the difference of view between the Houses may remain irreconcilable. I read the debate in the House of Lords. It was a distinguished debate. In a way it crystallised the strong feelings that divide people. Some Members of the other place who are Jews and had family connected with the matter urged the House not to pass the Bill. Other Members who are Jews urged the House to pass the Bill. Opinion is deeply divided.

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35 c 907

36 HC Deb vol 188 cc 23-115, 18.3.91. The Money Resolution was agreed to without a division, after a very brief debate: cc 116-8.

37 c 26

> The House will be aware that the provisions of the Parliament Acts exist to ensure that the views of the elected Chamber ultimately prevail over the other House, in cases where no accommodation can be found. I very much hope that resort to those powers will not be necessary. To preserve the possibility of using those powers, it is necessary to send the Bill back to another place in the form that it was in on the previous occasion. That is why the Bill before the House is unamended from last time, and why it cannot. be subject to any amendments during its reconsideration by this House.

The shadow Home Secretary, Roy Hattersley - who emphasised that, in the 'free vote' context of such a Bill, he was speaking in a personal capacity - also considered this key aspect of the debate:[38]

> My decision and my doubts have not been influenced by the eventual rejection of the Bill by the House of Lords. The House of Lords possesses the right under the constitution to reject legislation, and we possess the right to overrule that rejection. The House of Lords, this House and the Government, if I may say so, have acted with absolute constitutional propriety by bringing the matter forward again. Anyone who is dissatisfied with the powers presently exercised by the House of Lords should decide to change them rather than to complain about them. If I have been influenced by the Lords at all, it is not by their decision but by the speeches made during the debate. They were made by lawyers who happened to be peers, and they added to the enormous weight of legal opinion ranged against the Bill. I shall turn to the legal technicalities shortly, but first let me explain why, despite all my doubts, I shall vote for the Bill.

During his speech there was an interesting exchange with the Home Secretary on the exact form of the Bill:[39]

> **Mr. Hattersley:** No, I shall proceed because so many hon. Members want to speak. I know that the hon. Gentleman is anxious to help me, but I am anxious to ask the Home Secretary a second question, which I ask in exactly the same spirit as the first. Is the Bill that he has placed before the House the Bill that he wants to pass into law? His speech contained a Delphic reference to the possibility of mutually agreed amendments. I realise perfectly well that, under the Parliament Acts, the, right hon. Gentleman must send the Bill unamended - to the Upper House. If a measure is to be submitted to the Lords twice, the same Bill must be submitted on each occasion. I think that it would not be an overstatement of the position to say that it would be intolerable if the Government already knew that they would amend or attempt to amend in the Upper House the Bill for which they are asking the House to vote tonight. Let me ask the right hon. Gentleman again whether he has it in mind to propose amendments in the other place if that is possible, because, if he has, he has a duty to tell us now.

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38 c 30
39 c 35

> **Mr. Kenneth Baker:** If the other place rejects the Bill on Second Reading, it will come back to this House and proceed to the statute book under the Parliament Acts. I am sure that, if that happens, it will operate satisfactorily as it is drafted. If the other place gives the Bill its Second Reading, it may wish to amend it, but let me make it clear that the Government will not be tabling amendments at that stage. It will be for the other place to decide, and I know that there are strong views among those on the Back Benches there. If the other place amends the Bill, this House will have to consider the amendments when the Bill comes back. We shall be able to accept or reject them or amend the Bill ourselves.

Robert Maclennan, also speaking in a personal capacity rather than on behalf of the Liberal Democrats, said:[40]

> I was impressed by the weight of argument against the Bill in another place. I do not normally consider that the House of Lords, for all its great expertise, is more in touch with the realities of life than the House of Commons. But on this occasion, the House of Lords predicted with much greater accuracy than this House did during our debates what would happen if the Bill were enacted and the travesty of justice that we ran the risk of initiating by putting the proposals on the statute book.

Winding up from the Opposition front bench, Alistair Darling said, in this respect:[41]

> When the other place declined to give the previous Bill a Second Reading, it was said that that decision was controversial. Indeed, the Home Secretary made the point that the other place had overruled the elected Chamber. I accept that entirely. There is some force in the argument that, in the event of a conflict between the two Chambers, the will of the House of Commons must prevail. Indeed, it would be far better if the second Chamber were elected. In that case, its revising and delaying role would be fully accepted as part of the democratic process. Thus, that element of such a controversy would be removed.
>
> In answer to a point that was made by the right hon. Member for Chesham and Amersham (Sir I. Gilmour), I should make the point that legal arguments were not the only ones to be employed in another place. The Members of the other place who are lawyers are quite capable of raising points that, are entirely political. Indeed, they do just that. As Parliament is currently constituted, they are entitled to express their views. We should be in some danger were we to believe that everything that lawyers say must be right. In saying so, I speak as a lawyer.

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[40] c 52

[41] cc 102-3. He urged his party colleagues to give the Bill a second reading.

The junior Home Office minister, John Patten, concluded his speech as follows:[42]

> As a result of the procedural motion which the House passed on a free vote last week, if the Bill receives a Second Reading-I am confident that it will-it will go straight to a formal Third Reading at a subsequent date. My right hon. Friend the Lord President of the Council explained on Wednesday why we were following that course.. The House has given overwhelming support to both the principle of war crimes legislation and the Bill itself. I have no doubt that that support will be expressed again this evening. As my right hon. Friend explained last week, that was one of the decisive factors in the Government's mind in concluding that the Bill should be reintroduced.
>
> As we have said, the Government hope that accommodation will be achieved between this place and another place without the need for any special measures. Nevertheless, the Government concluded that, the Parliament Act 1949 should remain in reserve as a means of resolving any irreconcilable differences. The Bill is a good Bill. The task may be regarded as a difficult one, but the Bill should be passed. I look forward to its reaching the statute book, with the concurrence of both Houses of Parliament, at an early date.

The Bill was given a third reading on 25 March, without debate, but on a division, 211-57,[43] and was introduced in the Lords the following day (HL Bill 48, 1990-91), and was debated for over nine hours on second reading on 30 April.[44] Having discussed the merits of the Bill, Lord Waddington addressed the House with his Leader of the House hat on, and emphasised that Lord Houghton of Sowerby's proposed amendment to the second reading, that the Bill be read a second time not "now" but "this day six months", would be treated as a rejection of the Bill, under the House's practice, and "your Lordships must assume that the way would be clear for the Speaker to certify that the provisions of Section 2 to the Parliament Act applied so that the Bill could be presented to Her Majesty for Royal Assent to be signified."[45] Not surprisingly, much of the debate was devoted to the constitutional relationship between the two Houses, and the Upper House's proper legislative role.[46] This is considered more generally elsewhere in this Paper.

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42 c 112

43 c 738, 25.3.91

44 HL Deb vol 528 cc 619-744, 30.4.91

45 c 622. He also considered the propriety and effect of another amendment, to be moved if the Bill received its second reading, which sought to give an Instruction to the Committee to consider extending the scope of the Bill. He warned that such a procedure, which had not been used since 1899, nor even tabled since 1906, "would have significant implications for the legislative work of the House" and should not be revived without prior consideration by the Procedure Committee: c 622. The Lords' *Companion* states that "Instructions to extend the scope of bills are undesirable."

46 See for example the winding-up speeches of the present Lords Chancellor, Lord Irvine of Lairg, cc 733-6, and of Lord Waddington, cc 736-40

Following the Lords' support for the 'six months' amendment, by 131-109, the provisions of the *Parliament Acts* could then be invoked. The following day, the Speaker made the following statement:[47]

> **Mr. Speaker:** I have received numerous inquiries about the future of the War Crimes Bill and it might be helpful if I reminded the House of the provisions of the Parliament Acts.
>
> The rejection of the War Crimes Bill for a second time by another place brings into play the provisions of the Act. The House of Lords will be asked to return the Bill to this House where it will be prepared for Royal Assent. No further proceedings are required in this House.

This was supported by the two front benches:[48]

> **The Lord President of the Council and Leader of the House of Commons (Mr. John MacGregor):** Further to your statement, Mr. Speaker, the whole House will be grateful to you for clarifying the position under the Parliament Acts. In particular, your statement has made it clear that the procedures now being followed come into play automatically following the defeat of the Bill last night in another place.
>
> The Parliament Act 1911 makes it clear that only if the House were to direct to the contrary would the Bill not be submitted for Royal Assent. It will be for the convenience of the House if I make clear now on behalf of the Government that we see no need for time to be made available for the House to consider this matter yet again. The House has repeatedly made clear its support for the War Crimes Bill, on free votes, and by very large majorities. The most recent occasion was on the Second Reading of the Bill this Session on Monday 18 March. There is, therefore, no case for putting the matter to the House again.
>
> **Dr. John Cunningham (Copeland):** When we debated the possibilities of following this procedure in the Chamber a few weeks ago I made it clear, on behalf of the Opposition, that we thought that the most important principle at stake was the supremacy of the elected Chamber of the House of Commons. My party has consistently supported that principle since the Parliament Acts were introduced and we have no hesitation in saying today-I do so on behalf of the shadow Cabinet and my hon. Friends-that we think it is proper now for that procedure to be followed without further delay. Although I personally did not support the War Crimes Bill, the reality is that this House, by substantial majorities on two occasions, passed it. It cannot be acceptable for a non-elected, unrepresentative Upper House to frustrate the will of the elected House of Commons. That would be totally unacceptable to us. I make that absolutely clear in supporting the decision that you, Mr. Speaker, have taken. You have the

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47 HC Deb vol 190 c 315, 1.5.91

48 cc 315, 317

> support, as does the view expressed by the Leader of the House, of Her Majesty's Opposition……
>
> **Mr. MacGregor:** You have made it clear, Mr. Speaker that the procedures under the Parliament Acts are automatic. The Government, both through myself and the Home Secretary, made it clear in the procedure debate and on the Second Reading of the War Crimes Bill in March of this year that, if a dispute remained between the two Houses, we would expect, as the Parliament Acts do, to ensure that the views of the elected Chamber ultimately prevailed over those of the other House.
>
> The position is straightforward. That is the stage that we have reached under the Parliament Acts and you, Mr. Speaker, have made clear the action that you must take. As for the Government, it is clear that the House expressed its view on a number of occasions by very large majorities, on a free vote. It would be wrong for the Government to intervene now to frustrate the wishes of this House.

The Bill received Royal Assent, pursuant to the *Parliament Acts*, on 9 May, as the *War Crimes Act 1991* (cap 13).

The unique circumstances and possible implications of the passage of the *War Crimes Bills* are considered in the following lengthy extracts from Shell's book:[49]

> In 1990, however, the House of Lords did reject outright the War Crimes Bill. Before this measure had been brought forward, both Houses had debated the recommendation of a Committee of Inquiry that such legislation should be introduced so that Nazi war criminals, who had found their way into Britain at the close of the Second World War, might be prosecuted. Though no vote was taken in the Lords, speeches made in the debate (held on 12 December 1989) indicated clear and overwhelming hostility to legislation being introduced. However, MPs voted in favour, and the Government duly came forward with a bill. This passed through all its Commons stages, but was then rejected by the House of Lords at second reading on 4 June 1990 by 207 votes to 74. Despite this huge adverse majority the Government quickly indicated its intention of reintroducing the bill in the following session, and if necessary securing its enactment by using Parliament Act procedures. In March 1991, a year after the bill had first been given a second reading in the Commons, MPs again voted for it (by 254 to 88). The bill then went directly to the House of Lords, where peers debated it on 30 April; some who opposed the bill felt that it would be better for the House now to accept it at second reading, and then try to improve it in committee, rather than reject it outright and so lose any chance of securing amendments. However, the House still rejected the bill, though by the much smaller majority of 131 votes to 109. The Parliament Acts provide that a bill approved by the Commons in two successive sessions, but rejected by the Lords, shall go forward for Royal Assent unless the Commons direct otherwise; accordingly, since the Government

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[49] pp 132-3. Reproduced by kind permission of the author

> decided to provide no time for a further debate in the Commons, a few days later the bill was taken forward for Royal Assent. The procedure of the Parliament Acts was thus used for the first time since 1949.

and;[50]

> The power of delay was used when the Lords rejected the War Crimes Bill in 1990. Most of those involved on both sides of the argument about the merits of this particular bill were at pains to point out that no constitutional crisis arose as a result of the action taken by the House of Lords. This view seemed to be borne out by the sequence of events …. But in the longer term the constitutional significance of the whole episode may lie more in what it revealed about the attitude of the contemporary Conservative Party to the unreformed House of Lords. From the very commencement of debate about the possibility of introducing legislation to enable prosecutions to be brought against alleged war criminals, the view of the House of Lords had been made clear -in particular, the debate held on 4 December 1989 contained many powerful speeches arguing against such legislation. But ministers appeared to take no notice of the views of the House. In the same month the Commons held a very unsatisfactory three-hour debate on the subject, at the end of which MPs voted 348 to 123 in favour of the principle of legislation. A bill was duly introduced and passed through the Commons, but when it reached the Lords there was little surprise when peers threw it out, though the majority by which they did so - 207 to 74 - did cause some raised eyebrows. The Government could easily then have decided to let the bill drop, but instead it was reintroduced under Parliament Act procedures in 1991.
>
> When the Lords again debated it in April 1991, some peers who had originally opposed the bill took the view that given the inevitability of its passage into law following its approval for a second time by the Commons, it would now be better to give it a second reading, with a view to trying to amend it in committee to remove its most objectionable features. In particular Lord Bridge of Harwich, a serving Lord of Appeal, argued this 'pragmatic' case in a powerful speech which plainly influenced several other peers; no fewer than twenty-two who had voted against the bill in 1990 voted for its second reading in 1991. But other peers argued that it would be impossible to amend the bill satisfactorily, and that the House would look ridiculous if it simply reversed a view it had so overwhelmingly expressed the previous year: 'We are a House of Peers, not a House of wimps', said Lord Shawcross. The bill was rejected - by 131 votes to 109 - and then, without further debate in the Commons, it went straight for Royal Assent.

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[50] pp 251-3

> On the face of it, no constitutional impropriety attended the passage of this bill. Yet it could well be argued that the readiness with which the Conservative Government and the House of Commons brushed aside the views of the House of Lords was indicative of so changed an attitude to the House that its longer term future had certainly been made much less secure. This was a bill that had not been included in any manifesto. It had been introduced by the Government, but no whip had been applied to secure its passage. There was no widespread public demand for the bill. It involved ethical questions, issues of conscience and public morality to an unusual degree. Present and active in all the debates on this bill were the law lords, some bishops and many former political and some military leaders. The Government and the House of Commons had treated the House with little short of contempt on a subject upon which peers were entitled to expect that their opinions would be given serious weight.
>
> Or were they? For whatever expertise and whatever distinction many peers might be thought to have, one thing they all lacked: not one of them owed their position in the Lords to election. The boldness, if not the arrogance, of elected persons characterised the Lower House. The House of Lords might speak with the authority of experience and expertise, but not with the authority of democratic persons. As a result, the legitimacy of the House has become threadbare and its effectiveness even as a revising chamber called into question ….

# III Disagreements between the two Houses over legislation

## A. Some definitions

The above discussion of the Parliament Acts is but the extreme case of disagreements between the two Houses over items of legislation. As examples in the first session of this Parliament have demonstrated, such disagreements, if maintained on both sides, can disrupt a Government's planned legislative programme. This section briefly examines the nature of such agreements and the relevant Parliamentary procedures. As already noted, any bicameral parliament, where both Houses have some degree of legislative power, will have to evolve ways of dealing with disagreements over the exact text of any legislation. In other words, potential disagreement is a natural function of bicameralism, whatever the composition of, and relationship between, the two Houses.

The terminology used in such discussions can be subjective and even misleading. Disagreements are described usually in terms of 'Lords v Commons' or 'Lords v Government'. In reality, where there is a government with a working majority in the Commons, these amount to the same thing, especially when arguments of elective legitimacy or mandate are invoked.[51] In other words the House of Lords can be described as being in disagreement with the Government through its majority in the House of Commons.[52]

Also, it is important to appreciate that, in formal theory, what is involved in such cases is a disagreement *between* the two Houses: the House of Commons is just as much in disagreement with the House of Lords as the House of Lords is with the House of Commons. It is the accepted situation of the Upper House's practical subordination to the Commons, on grounds of democratic legitimacy and so on, that allows such disagreements to be portrayed in terms of the Lords being in dispute with the will of the House of Commons. As Silk & Walters neatly put it, "the Lords tacitly recognise the right of the government to govern, and of the House of Commons to see its will prevail. They willingly sacrifice their power in the same sort of compromise as that made by MPs when they willingly accept the supremacy of the government in their House."[53]

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[51] Hence the third formulation of 'Lords v People' which is often used in argument.

[52] Where the Commons majority for a bill is perceived to be less than decisive - such as where it is achieved despite significant dissent on the government benches, or only with the assistance of other parties, or passed through significant resort to party discipline or very strict timetabling – the Upper House may feel more able (or entitled) to exercise its formal legislative powers fully and critically.

[53] *How Parliament works*, op cit., p 63

A good example of the tactical aspects of these matters is the Opposition's stated attitude to the forthcoming bill on Lords reform itself. The overlapping nature of the various practices is neatly demonstrated in the following extract from the *Times* of 16 November:[54]

> Tory officials made clear that the party will abide by the so-called Salisbury Convention, under which the Lords agrees not to throw out manifesto commitments of a newly elected Government. They also added that they would not oppose legislation just for the sake of opposition.
>
> But they said that if the Government did not scrap its two-stage approach to Lords reform, their peers would not be as restrained as they are now.
>
> The Government is committed to ending the right of hereditary peers to sit and vote but have not spelt out any further reforms of the Lords. They will publish a White Paper later next month which will set up a royal commission to consider the ultimate shape of a reformed second chamber. The Tories want wholescale public and cross-party consultation before any changes are made.
>
> The new Tory, policy is being characterised as a "zero tolerance" approach to what they see as bad legislation. Instead of letting most legislation go through they will amend and reject far more measures. This would mean that Bills would take far longer to go through the Lords and throw the Government's parliamentary time-table into disarray. Liam Fox the Tory constitutional spokesman said yesterday: "We will not oppose just for not oppose just for the sake of it. But we will oppose what we see as bad legislation and we will not be as willing to constructively amend, or to be restrained, or to turn a blind eye. We will scrutinise with vigour legislation we think is against the country's interests."
>
> He insisted that the Government would "retard their own programme" by being unreasonable and refusing a Tory offer of co-operative reform.

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[54] "Tories to step up rebellion on the Lords", Times, 16.11.98. See also Viscount Cranborne's contribution to the recent two-day Lords debate, HL Deb vol 593 cc 927-8, 14.10.98: "Some say that in our weakness lies our strength--that, were your Lordships through reform possessed of greater authority and therefore felt able to challenge another place more frequently and over weightier matters, legislative gridlock would ensue. I reject that argument. I believe that perhaps the time has now come for a little more legislative gridlock to obstruct the legislative inadequacies of governments of both parties which arise from their domination of the House of Commons. That is the great argument for reform. Our present composition does not allow us to do that job adequately for we lack the authority to do so." See also the report in the *Independent* of 27 November, "Secret Tory plot to derail Labour"

## B. Parliamentary procedures

As has been seen in the last session, especially over the *European Parliamentary Elections Bill*,[55] protracted disputes between the two Houses, while rare, are not unknown. These are often described as a form of Parliamentary 'ping pong',[56] which can become particularly frenetic near the end of a Parliamentary session.[57] In the absence of statute law, with the crucial exception of the *Parliaments Acts* already discussed, disagreements are conducted, and, where possible, resolved, through a mixture of Parliamentary custom and practice, and *ad hoc* solutions to cope with particular instances.

From the perspective of the Lords, the procedures are as described in the House's *Companion to Standing Orders*:[58]

> **COMMONS AMENDMENTS AGREED TO WITH AMENDMENTS**
>
> When the Lords agree to a Commons amendment with an amendment, the bill is returned to the Commons with a Message to that effect. In such a case it is unnecessary to send any reason with the Message. The Clerk writes at the head of the House bill, "A ceste Amendment (or ces Amendemens) avecque une Amendment (or des Amendemens) les Seigneurs sont assentus."
>
> In dealing with the bill thus returned to them with their amendments amended, the Commons can agree, or agree with amendments, or disagree with or without proposing an alternative.
>
> In the case of an amendment in lieu the Commons may agree to the Lords amendment in lieu, or propose an amendment to the amendment in lieu, or disagree to the amendment in lieu with or without proposing an alternative.
>
> **COMMONS AMENDMENTS DISAGREED TO**
>
> Amendments may be disagreed to with amendments proposed in lieu thereof, or without any alternative proposed. In the latter case a Committee, usually of three Lords, is appointed to draw up reasons for such disagreement. The Committee consists of the proposer of the disagreement and one of his supporters, together with the Lord Chancellor or the Lord in charge of the bill. The Committee immediately withdraws to the Prince's Chamber and agrees upon the reasons which are reported to the House by means of an entry in the Minutes.

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55 The arguments used by both sides in both Houses in the latter stages of this Bill neatly encapsulate the various strands of opinion as to the proper role of the Lords when dealing with Government legislation.

56 For a graphic example, see Silk & Walters' *How Parliament works*, op cit., p 142

57 Or the approach of some other relevant deadline

58 Taken from version reproduced on Parliamentary website. This describes the procedure for a Bill originating in the Lords

The reasons are written on the House bill, alongside the amendments disagreed to. The Clerk writes on the bill, "Ceste Bille est remise aux Communes avecque des Raisons (or une Raison)", and it is returned to the Commons with a Message.

When the bill is returned again from the Commons, it is accompanied by a Message, which states that either they insist on their amendments, for which insistence they assign a reason; or they do not insist on their amendments; or they amend their amendments; or they do not insist on their amendments, but propose others in lieu thereof. The reason, or new amendments, are then considered by the Lords.

If the Commons send a Message that they do not insist on the amendments to which the Lords have disagreed, and they propose no further amendments, the bill awaits Royal Assent.

If the Commons insist, it is still open to the Lords not to insist on their disagreement, and thus to accept the Commons amendments, or not to insist on their disagreement but to amend the Commons amendments or propose alternatives. If the Lords simply insist on their disagreement without offering amendments or alternatives, the bill is lost.

If the Commons amend the Lords amendments and send the bill back accordingly, it then becomes the turn of the Lords to agree or disagree to, or amend, such Commons amendments, and the communications proceed in the same way as on the original amendments of the Commons.

## FURTHER COMMUNICATIONS BETWEEN THE TWO HOUSES

Communications between the two Houses may be carried on until the end of the session, subject to these limitations:

(i) what both Houses have agreed on cannot be amended by either House except by a "consequential amendment", that is, an amendment immediately consequent upon the acceptance or rejection of an amendment made by the other House; and

(ii) if one House insists on an amendment to which the other has disagreed, and the other insists on its disagreement, and neither has offered alternatives, the bill is lost; but if there is a desire to save the bill, some variation in the proceedings may be devised in order to achieve this.

If communications are still continuing at the end of a session, the bill is lost.

The above relates to bills originating in the Lords. For a bill originating in the Commons, the processes are substantially the same:

When any Lords amendments have been considered by the Commons, the bill is sent back to the Lords:

> 1. with the Lords amendments agreed to, in which case the bill is ready for Royal Assent; or
> 2. with the Lords amendments amended, or with amendments in lieu; or
> 3. with the Lords amendments disagreed to, with reasons for such disagreement;
>
> and communications, similar to those described for bills originating in the Lords, take place between the two Houses.

For a similar description of the situation from the perspective of the House of Commons, see chapter 22 of *Erskine May*.[59] This notes that, in cases of dispute, "the process of securing agreement between the two Houses could in theory be carried on indefinitely. The successive stages and their complications are reviewed here only up to the point beyond which it would normally be impossible to proceed."[60] However, after describing how a stalemate can be reached which would result in the loss of a bill, *Erskine May* cautions that "it must be remembered, however, that there is no binding rule of order which governs these proceedings in either House, and, if there is a desire to save a bill, some variations in the proceedings may be devised in order to effect this object."[61]

# IV The 'Salisbury Doctrine' and related conventions[62]

## A. Background

As stated in the introduction, the potential for conflict is often at its greatest during periods of non-Conservative government. During this time there is in effect in the House of Lords a potential 'majority Opposition'. Even in times of Conservative administration (as the period from 1979 to 1997 demonstrated) the Lords can defeat government legislation if there is active or even passive dissent on the Conservative benches.

It is important to note at the outset that the legislative power of the Lords is an issue that is covered almost entirely by convention and practice rather than explicit rules by way of legislation or standing orders. The major exception to this is the *Parliament Acts* procedure, removing the concept of a Lords' 'veto' over virtually all legislation.[63]

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59 22nd ed., 1997, pp 545-54

60 p 548

61 p 553. It should be noted, also, that the relevant deadline need not only be the end of a Parliamentary session – subject to any carry-over provisions which may be adopted in future – but can be one imposed by some external factor, or even (as in the *Crime and Disorder Bill* in 1997-98) one imposed by the Government itself.

62 For the history and use of the Salisbury doctrine, see House of Lords Library Note 97/004, *The Salisbury Doctrine*, 19.3.97

63 See Section II of this Paper

As this area is primarily one of practice, description of the Lords' attitude to major Government Bills from the Commons relies to a large extent on what the key players, such as the two Front Benches, have said in past situations. While such 'dicta' are useful, they cannot of course predict what would happen in any future situation. In addition, as such dicta usually relate to a particular occasion, they are rarely stated in identical language. This means that there cannot be said to be a set doctrine or test for the Lords' use of their powers over legislation in any particular case. By way of illustration, methods which are available to peers of 'opposing' the second reading of a bill are set out in the *Lords Companion to Standing Orders*, reproduced in the Appendix to this Paper.

This was demonstrated in the answer to a question in the Lords on 2 July 1984, when the then Leader of the House was asked if the Government would codify the House's practice on voting at Second and Third Reading:[64]

> **The Lord President of the Council (Viscount Whitelaw):** None, my Lords. The powers which this House possesses are considerable, but it has in the past exercised them with restraint, as indeed I hope that it will in the future. This restraint has been self-imposed, and I suspect that any attempt by the Leader of the House for the time being to impose a code of practice to regulate the position would be neither welcome nor effective.
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> **Lord Diamond:** My Lords, while expressing my gratitude to the noble Viscount for that Answer, may I ask him whether he is aware that there is considerable confusion among Ministers as to the extent of what he calls the restraint and what I might call the conventions under which this House works, particularly with regard to Second and Third Readings and in regard to the Motions which have recently been laid before your Lordships' House? Therefore, does he not think it would be helpful if this matter were to be examined by the appropriate committee and reported on, so that the House would have an opportunity to decide the extent of the conventions and whether the House ought to be bound by them? Is it not of considerable importance that when he and his noble friends find themselves sitting on this side of the Chamber they should feel bound by precisely the same self-denying ordinance as do the present Opposition parties?
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> **Viscount Whitelaw:** My Lords, of course it is open to this House and, naturally, to the Procedure Committee to make any changes that they wish. If they did so wish, of course it could be done. As far as the details are concerned, as a newcomer to this House I have learnt that a certain flexibility, together with a certain understanding of convention, has worked much to the benefit of this House. I hope that it will always be thus; and although I do not anticipate my translation from one side of the House to the other (although one never knows), I do not imagine that I would adopt any different position if I were in opposition from that which I seek to adopt now, except that I should be seeking to beat the Government, at which I think other people seem to be very successful, instead of defending them, at which I do not seem always to have been so successful.

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[64] HL Deb vol 454 cc 6-7, 2.7.84

## B. The 'Salisbury Doctrine'[65]

The starting point in the modern (ie post-war) relationship between the Lords and Commons over legislation in the so-called **'Salisbury doctrine'.** This is derived from the following passage by Viscount Cranborne (as the 5th Marquess of Salisbury then was), Leader of the Conservative Peers, in his speech on the Address in reply to the King's Speech on 16 August 1945:[66]

> But, at any rate, with regard to this and other similar proposals, I would say this to your Lordships and especially to noble Lords on my side of the House. Whatever our personal views, we should frankly recognize that these proposals were put before the country at the recent General Election and that the people of this country, with full knowledge of these proposals, returned the Labour Party to power. The Government may, therefore, I think, fairly claim that they have a mandate to introduce these proposals. I believe that it would be constitutionally wrong, when the country has so recently expressed its view, for this House to oppose proposals which have been definitely put before the electorate. Moreover, I believe, from every point of view that it would be an error of the first water. The Labour Party have pledged themselves to these measures. We believe them to be economically and politically unsound, and I suspect that many even of the supporters of the Labour Party itself, in their heart of hearts, are slightly doubtful - that they can implement all these promises.
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> How are we to prove to the British people that our philosophy and not the Socialist philosophy is right? I do not believe that it is to be done by attempting to prevent a fair trial of the Labour proposals. I believe that it is to be done only by allowing a fair trial of them to be made. No one can say that the opportunity does not exist for such a trial. The Labour Party are in power by a very considerable majority-it was said to-day, I think, by a great majority. Let them show what they can do. If they succeed - well and good. If they produce the results which they expect and the prosperity of the country, the happiness of the country and the liberties of the country are increased, I think none of us would not be ready to say they have done what they promised. But if they fail, the British people, who have an unrivalled political instinct, will soon find it out.

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[65] The House of Lords Library Note traces the origin of the doctrine back to the third Marquess of Salisbury and his doctrine of the mandate, in the late 19th century. This present paper examines only the period since 1945, when the fifth Marquess of Salisbury (as the then Viscount Cranborne became in 1947) enunciated his 'doctrine' of Lords' acceptance of the second reading of Manifesto bills. The doctrine is often called the *Salisbury/Addison* doctrine, in recognition of the part played by the then Leader of the House in its development

[66] HL Deb vol 137 cc 47-8, 16.8.45

Viscount Addison, the Leader of the House of Lords, responded as follows:[67]

> Already, quite a number of the more extreme Socialist thinkers and writers, in the newspapers and elsewhere, are beginning to talk hopefully of a "crisis with the House of Lords." Now that the time has come to put their theories into practice, they do not feel quite so confident about them, and they are looking round for a whipping boy. In no long time it may well be that this small far-sighted band of men will have swollen considerably, and considerable sections of the Labour Party will be desperately looking for a fight with the House of Lords to save them from the difficulties. I do hope that we shall not give them that satisfaction. They have persuaded the British people to give them a fair trial. Let them have a fair trial. If there is one thing that has struck me in the short time that I have been in your Lordships' House it is this-whatever it may have been in the past it is now no mere Party assembly but rather a Council of State. This is an occasion, if ever there was one, to show statesmanship. If we show wisdom, if we show patience, if we attempt not to oppose the public will but to educate the public to a true knowledge of the facts and to allow the facts to speak for themselves, I think we need not doubt that in due course-and perhaps sooner than we think truth will prevail.
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> But I do notice - and I welcome it - that with regard to the more controversial items of the gracious Speech from the Throne, he said that there is a Labour Government in power with a mandate from the country to carry those proposals out. I made a note of those words, and I am quite sure he will never seek to go back on them.
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> **Viscount Cranborne:** I referred to the proposals which were before the country at the Election.

and,[68]

> **Viscount Addison:** That is right. And I do not think the noble Viscount suggested they were not those indicated in the gracious Speech. So far as I know -and I have been very closely associated with the policy side of the Labour Party for a good many years there is no item in the gracious Speech which has not been the subject of continued and open discussion in the country for many years, and so I think I can fairly take it that the dictum of the noble Viscount applies them all.
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> I think the noble Viscount rendered a public service in exhorting this House and the country, now that the verdict of the Election has been declared, to give the Government in power a trial, and not to be unduly obstructive. We ourselves in this House are in a specially difficult position, as is obvious from the numbers on the two sides of the House think it is almost unprecedented in British political life that a Party represented by so small a group in this House should be the token of a Party which is a vast ill majority in the other House. However there it is. We have no doubt that our British aptitude for making the best of things and handling things

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67 cc 76-7
68 cc 80-1

somehow or other will enable us to manage with good will and toleration on both sides of the House.

Lord Salisbury reflected on the immediate post-war situation during the Queen's Speech debate in November 1964:[69]

> It was our fashion, as some noble Lords will remember, in that 1945 Parliament which I have already referred, to refer ourselves, rather smugly, as a Council of State; and in the present situation, when the main Parties in another place are almost equally divided, that would seem a very appropriate spirit for us to continue to conduct our affairs. A good deal, of course, must depend both on the measures which the new Government introduce also on the spirit in which they introduce those measures.
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> In 1945 we were faced, in one sense, curiously enough, with an easier problem than now, for the Labour majority in another place, as the noble Earl, Lord Attlee, will remember, was far larger than it is to-day, and it was therefore possible for us who belonged to the opposition to make it our broad guiding rule that what had been on the Labour Party programme at the preceding General Election should be regarded as having, been approved by the British people. Therefore, as your Lordships will remember, we passed all the nationalisation Bills, although we cordially disliked them, on the, Second Reading and did our best to improve them and make them more workable on Committee stage. Where, however, measures were introduced which had not been in the Labour Party Manifesto at the preceding Election, we reserved full liberty of action.
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> I hope that it may be possible for us to adopt in your Lordships' House rather the same practice on the present occasion; although, as the noble Lord Rea, truly said, doubt much more difficult decide what has been approved by the electorate when there is so small a Labour majority in another place and when, in addition to Conservative voters there were, I believe, about 3 million Liberal voters who may or may not have approved individual items in the Labour programme. However, as I see it, we must just do our best, with every desire, to make our bicameral Constitution as it was meant to work.

In his December 1996 *Politieia* speech, the then Leader of the House, Viscount Cranborne, considered the convention of Lords restraint in the face of manifesto legislation, known as, in his phrase, the 'Salisbury/Addison doctrine', first enunciated by his grandfather, in the Queen's speech debate in 1945. Far from renouncing the doctrine, he commended and even 'upgraded' it (pp 10-11):

> It is a doctrine that has become accepted in constitutional circles: so much so that it has come to be known as the Salisbury Convention: that is, it has been raised in the language of politics into a constitutional convention. That means that it is definitely part of our constitution. I certainly regard it as such, and so does our party.
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> In the fifty years since 1945, the House of Lords has never opposed measures proposed by any Government in the manifesto on which it was elected.

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[69] HL Deb vol 261, c 66, 4.11.66

> In my view it follows that it would be - in my grandfather's phrase - 'constitutionally wrong' for any party or individual to suggest that, whatever the outcome of the General election, this convention would not hold. It would be implicitly to accuse the House of Lords collectively of being willing to act unconstitutionally.
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> I can think of no reason for making such an accusation, except to bolster a case for reform of the House of Lords by scare tactics: that is, to make the absurd suggestion that the Lords would seek to oppose the will of the people expressed in a General Election and thereafter, through the House of Commons.
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> A differently constituted House of Lords might do that. After all, by definition a reformed House of Lords would take power and authority from the House of Commons and, as I said a moment ago, being tempted to use it, might succumb to temptation.
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> The Salisbury convention started as a compact between two parties one of which enjoyed a commanding majority in the House of Lords. By extension we now recognise that the convention has become more than that at a time when the House of Lords no longer has a built in majority of any party as a result of the reforms which rejuvenated the House of Lords in 1958 and 1963 by introducing Life Peers and women. It has now become a further limitation on the powers of the House of Lords in its relationship with the House of Common, whatever government is in power.
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> Now I'm very happy to see well established practices accepted as constitutional conventions, as I think I have made clear. I am sure therefore that the Labour Party will welcome what I have said today about the Salisbury/Addison accord. After all, they will think it suits them.

He contrasted his support for established convention with apparent Labour willingness to alter settled convention - which he named the 'Attlee Convention' - on the taking of committee stages of major constitutional bills on the Floor of the House of Commons, for to do so "would be to show contempt for Parliament, for controlling the Executive, and for the freedoms of the British people" (p 12).

Lord Simon of Glaisdale introduced a short debate in 1993 on "The 'Salisbury doctrine' and other practices which qualify the House of Lords' parliamentary role".[70] Calling the doctrine as a "very sensible proposal" in its time and circumstances, he counselled against any abandonment of it now that the House was differently constituted. Other than cases where the House could, he thought, properly vote against a Second Reading - eg. Private Members' bills, bills subject to a free vote in the Commons - he believed that it could also vote against the Second Reading of a Bill which is "quite outrageous constitutionally"[71] or "when your Lordships are given insufficient time to discuss a measure of great importance" (c 1783).

Lord Shackleton, a former Labour Leader of the House, believed that the Salisbury doctrine "made it possible for this House to function and to do its duty as well as it could under

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[70] HL Deb. vol 545 cc 1780-1813, 19.5.93

[71] c 1783. He cited, by way of example, the *Child Support Act 1991*: "not only was it a skeleton Act but it committed practically every constitutional enormity in the book"

difficult circumstances". However, he thought that it "has not been entirely honoured by all parties" and would hesitate to say that it was "a valid doctrine: it certainly is not recorded officially anywhere" (c 1786). Lord Rippon of Hexham (Conservative) warned against simplistic adherence to 'the doctrine of the mandate' because, for example, "the Bills that are subsequently produced in alleged furtherance of a manifesto pledge often bear little or no relation to the one or two lines or paragraphs presented notionally to the electorate..... The doctrine of the mandate should apply only where... a party has made its policy perfectly clear at a general election; or where... there has been a full discussion of the issue in another place" (c 1788).

For the Liberal Democrats, Earl Russell said that "like other rules, it should be construed to contain the word 'normally'" (c.1800). Lord Richard, then Leader of the Opposition, believed that the Salisbury doctrine was right then, and continued (c 1803):

> As a general proposition now, that proposition is probably right; but, although the doctrine has, by and large, worked reasonably well since it was introduced, it may be that the processes of parliamentary life, and the way in which governments feel that they have to legislate, are now perhaps so complicated that I am not sure whether the Salisbury doctrine, pure and simple, can any longer be wholly sufficient to cover the position in this day and age.

and (c 1803):

> The doctrine clearly helped to lead in the past to the identification of a relatively clear role for the Second Chamber; namely, the revision of Commons' Bills; the initiation of non-controversial legislation; and the limited use of delay to permit detailed consideration of Bills and full debate on general issues of policies. There still seems to be a consensus in the House on the desirability of what, I suppose, I can call the general practice of self-restraint when it comes to legislative matters. But it is important to acknowledge that as the House has become busier, questions will increasingly be raised, and have been raised, about the viability of its former role.

For the Government, Lord Hesketh said that the main formal limits on the House were imposed by the *Parliament Acts* and by the Commons' financial privilege, and that the House itself imposed further constraints through its standing orders, and the interpretations contained in the *Companion*: "This class of rules... is of course flexible. The House is the master of its own procedures and when it deems it appropriate it is free to depart from them; for example, it may agree to dispense with standing orders to enable some uncontentious or urgent piece of legislation to be disposed of quickly. That such flexibility should exist - and that your Lordship apply a pragmatic approach to applying your own procedures - is I think a great strength of your Lordships' House" (c 1807).

The final main class of constraints were the conventions, set within the context of the House's constitutional role, such as the examination and revision of Bills (cc 1808-9):

> In exercising those functions of revision and scrutiny the House has, in theory, broad powers only circumscribed by the Parliament Acts. But the manner in which the House chooses to use these powers is the critical issue, as indeed it is to almost all facets of the way the House operates. As I recognise perhaps more frequently than some of your Lordships, this place functions on the basis of agreement. I do not think that the House could operate as effectively as it does without the existence of a consensus about what is or is not an appropriate course of action for your Lordships to pursue-that is, without the general agreement of the House to observe conventions which regulate its activities. That involves in all of us the exercise of self-restraint-from the length of our speeches to the more fundamental recognition of the limits of what is practically or constitutionally appropriate. Of course, it is always open to your Lordships to change your habitual way of proceeding, and noble Lords have suggested today that change is indeed needed in some areas. I believe that we should be very cautious about that. The conventions and practices of the House have evolved over a long period of time and in response to many political and constitutional considerations. There is much accumulated wisdom inherent in them. Tempting though it may be for your Lordships to seek to depart from such practices perhaps in response to specific anxieties which your Lordships may have-I think that your Lordships would want to consider the consequences carefully, both for the House internally and in respect of the wider perception of the House. Perhaps I may take, first, the Salisbury doctrine. That is the convention that the House will not oppose legislation for which a government with a majority in another place have a mandate; that means in practice that the House does not seek to vote down a manifesto Bill at Second or Third Reading. Like the noble Lord, Lord Shackleton, I am an unashamed supporter of the doctrine. It is not merely true that it has served the House well. It has, I think, become essential to our parliamentary system. I remind the House that the doctrine had-and, as this debate has shown, still has -support from all sides of the House. Its first supporter was the grandfather of my noble friend Lord Addison who was then Leader of the House.

He thought it "difficult to distinguish categories of Bills to which the doctrine should not apply", such as a 'constitutionally objectionable' bill. Concluding, he stressed that "our procedures work only because we all agree to abide by conventions and to exercise general restraint" (c.1812).

Since the 1997 general election, and the coming to power of a Labour Government with a huge majority in the House of Commons and a manifesto pledge to reform the House of Lords, the existence and operation of the Salisbury Doctrine has assumed front-line importance in the relationship between the new Government (and the House of Commons) and the Upper House. Conservative leaders have restated their support for, and adherence to

the Salisbury doctrine in the new Parliament, generally and in relation to legislation on the Lords. Viscount Cranborne said on 14 May at the start of the Queen's Speech debate[72]:

> I shall also be interested to see whether the noble Lord approves, when in government, of ignoring non-fatal government defeats in this House, should the House choose to inflict them. For our part we shall treat every Bill on its merits. I hear that there is a school of thought in certain new Labour circles which suggests that the prospect of House of Lords reform should be used as a sword of Damocles to railroad legislation through this House--a sort of guarantee of good behaviour, if I may put it that way. I have to confess that I am not at all impressed by that argument or indeed that threat. Within the confines of convention we shall endeavour to act as a constructive but vigorous Opposition. We shall play our part in helping this House to fulfil its obligations as a second Chamber, to scrutinise and improve legislation and, when--and only when--judgment dictates, to ask another place to think again.

He repeated this the following day:[73]

> The Official Opposition in your Lordships' House will not in any way be deflected from what they see to be their duty: to exercise their judgment, to improve, to amend and to scrutinise legislation. They will attempt to be a constructive and vigourous Opposition. They will treat each Bill on its merits with no thought for their own future or indeed the future of your Lordships' House. I hope that your Lordships will feel that that pledge is honoured in the light of experience.

Nevertheless, the Lord Chancellor, Lord Irvine of Lairg, raised the issue of the Opposition's attitude to the convention when opening the constitutional debate on the Address:[74]

> My noble and learned predecessor was widely reported in the election campaign as offering the opinion that the Salisbury Convention might cease to bind your Lordships' House if the other place did not follow the conventions that are said to apply to constitutional legislation there. In raising this matter I have no hidden agenda. I make no warnings, express or implied. I say only this. With the greatest respect to my noble and learned predecessor, I believe that his customary wisdom did not accompany that opinion. The relationship between this House and the other place is discrete. The Salisbury Convention recognises the status of the other place as the elected Chamber. The procedures and conventions of the other place are for it. Ours are for us. It would, I suggest, be unwise to seek to change ours in response to any change to theirs.

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72 HL Deb vol 580 c 17, 14.5.97
73 c 35, 15.5.97
74 c 147, 19.5.97

Winding up for the Opposition, Lord Kingsland said:[75]

> We recognise that constitutionally, under the Salisbury convention, we are bound to vote for those measures which were in the manifesto both at Second Reading and at Third Reading. But Members on the Benches opposite should not be under any illusion: we shall fight very hard for every amendment in which we believe. I am sure that Members opposite would not wish otherwise.

However the Opposition's attitude came under close scrutiny during the two-day debate on Lords reform in October. Opening the debate, the Leader of the House, Baroness Jay of Paddington said:[76]

> I do not intend to make aggressive remarks this afternoon. The time for that may come! But I cannot resist simply challenging those who lead the Conservative Party with the two words, Salisbury Convention. It was, after all, the noble Viscount's grandfather who first articulated the doctrine. I quote exactly:
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> > "It would be constitutionally wrong, when the country has expressed its view, for this House to oppose proposals which have been definitely put before the electorate".
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> I hope no one doubts that our proposals on the ending of the right of hereditary Peers to sit and vote in your Lordships' House fall into this category. I myself do not see how they could be clearer or more explicit.
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> If that is accepted, how do those who oppose the Government's proposals square the respect for the democratic process, which the Salisbury Convention obviously implies, with demands that the Government should only fulfil their manifesto commitments under conditions of their making? Our proposal could not be more precise: both what it is and its self-contained nature. If our opponents refuse to accept that the convention applies in this case, what manifesto pledges do they think are covered? Do they still subscribe to the convention at all? Do they think they can pick and mix which bits of the winning party's manifesto they thought the electorate understood and voted on, and discard the rest as irrelevant? That seems to me an extremely dangerous course to embark on. And even if those who are opposed to this particular measure can somehow persuade themselves that they are entitled to oppose it, what arguments are they using to justify opposition to other unrelated parts of the Government's programme? Far be it for me to offer advice, but if the Conservative Party hopes to improve its popularity by wrecking the Government's plans about, for example, reform of the health service or law reform so that House of Lords reform is also delayed, I suspect it is once again completely out of touch.

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75 c 240

76 HC Deb vol 593 cc 924-5, 14.10.98

For the Opposition, Viscount Cranborne replied:[77]

> As a hereditary Peer, I assure the Government Front Bench that I will go quietly if a properly independent Chamber takes our place. To be asked to go without that guarantee is to be asked to connive at the final victory of the executive over Parliament. I hope and believe that in the coming Session we shall, as we always have--I say this particularly to the noble Baroness in the light of some of her remarks earlier--observe the conventions of this House. However, I also hope that we shall use our powers, not least our powers of persuasion, to convince the Government that it is still open to them to build by consensus rather than try to advance by attrition. If they begin to do that, I also assure them that they will find us as co-operative and constructive as we have always promised that we should be in those circumstances.

Of particular interest, however, were the following remarks made by Lord Kingsland, opening the second day for the Opposition:[78]

> Before I turn to the basis of the Bill I would like to say something about the Salisbury Convention. That seems to me to be appropriate because we are to face a Bill in the Queen's Speech on the reform of your Lordships' House and it is only right that we consider how the Opposition should react. In talking about the convention I am alert to the fact that my noble friend Lord Cranborne has a certain proprietorial interest in the matter. I shall not be surprised--and perhaps I ought to expect--that at the end of my remarks he might regard me as a trespasser. But despite that, I make the following propositions.
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> The Salisbury Convention states that if a proposed piece of legislation appears in the Government's manifesto, the Opposition are constrained in the way that they oppose it. That seems to me a proposition which does not apply to every situation. Perhaps I may give your Lordships an absurd example. Let us suppose in the Bill introduced by the Government in November, or perhaps even in December, there is a proposal that all hereditary Peers with blue eyes should be excluded from the House but all those with brown eyes should be allowed to remain.
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> **Noble Lords:** Oh!
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> **Lord Kingsland:** Clearly that proposition has at least some support. However, in those circumstances, a member of the electorate would, in my submission, regard that as an irrational Bill and certainly not something that he had in contemplation when he read the Government's party political manifesto. Therefore, I do not believe that the Opposition would be bound by the Salisbury Convention.
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> As I understand it, we shall be faced with a Bill which seeks to replace a House based on a mixture of nominated Peers and hereditary Peers by a purely nominated House. That proposal does not go as far as the preamble of the Parliament Act 1911:

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77 cc 930-1

78 cc 1053-4, 15.10.98

it is a proposal that looks backwards rather than forwards and one which reduces the independence of this House without adding to its legitimacy. It is a solution to a problem that I do not recognise. Therefore, in my submission, the Opposition would be entitled to think most carefully about whether or not the Salisbury Convention applied to the Bill.

Perhaps I may put it in another way. We are talking about a constitutional Bill. It is not a Bill which seeks to change the law; it is a Bill which seeks to change the way in which we change the law. It goes to the composition of the sovereign Parliament, of the Queen in Parliament. The Salisbury Convention applies to a settled set of relationships between Commons and Lords, but this Bill seeks to change the nature of one of the two component parts of that relationship. In those circumstances, does the Salisbury Convention apply?

Perhaps I may give your Lordships a third example. In the manifesto of Her Majesty's Government we see proposals for other legislatures. We see proposals for a Scottish parliament, for a Welsh assembly, for another place, for a new London assembly and, indeed, proposals for your Lordships' House. In four out of five of those sets of proposals there is to be, or has been, a referendum before introduction. However, there is no proposal for a referendum in relation to the changes that are sought in your Lordships' House. I am not at all fazed by that because I happen to be deeply opposed to referenda as a means of democratic government. Nevertheless, your Lordships' House is not being treated in the same way as other legislatures and the electorate might take the view that that was unfair discrimination.

For all those reasons, in my submission the Opposition would be right to think very deeply about the application of the Salisbury Convention before this Bill comes before your Lordships' House. I do not say that it will not apply because that will depend upon what is in the Bill. But it is a factor that the Opposition will have to take into account. I give way to the noble Lord.

**Lord Carter:** My Lords, I thank the noble Lord for giving way. It will perhaps help the noble Lord to know that there was an exchange of correspondence between myself and the noble Lord, Lord Strathclyde, in the summer of 1996 when the noble Lord confirmed that the Conservative Opposition would regard the Salisbury Convention as applying to a Bill to reform the House of Lords introduced by the Labour Government.

**Lord Kingsland:** My Lords, I know that that is historically true, but we have not seen the Bill. However, I accept that that is the situation at the moment.

Following for the Liberal Democrats, Lord Harris of Greenwich queried Lord Kingsland's proposition, which afforded an opportunity for the Shadow Lord Chancellor to clarify his remarks:

**Lord Harris of Greenwich:** My Lords, my first comment on the speech we have just heard is, "Gosh". I have rarely heard such a quite extraordinary speech. First of all, we had a reference to how unacceptable it would have been--this was in relation to the Salisbury Convention--if the Labour Party or any other party had put forward a

> proposition that people with either blue or brown eyes should be excluded from Parliament. Any political party that put forward such an entirely daft idea would never have become a government of this country. I find it hard to understand why a serious minded man like the noble Lord can put forward such a strange argument.
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> But, of course, he was faced with a difficulty of how to justify the serious hints that the Conservative Party is moving away from accepting the Salisbury Convention. He spent a substantial amount of time wriggling around on this issue. He told us how passionately opposed he was to the referendum and then he implied it would have been a great deal better if the Government had suggested there should be a referendum on this issue. However, I understand the embarrassment of the noble Lord all the more so, given the exchange of correspondence to which the noble Lord, Lord Carter, referred. It would, I think, be idle to pretend that after 60 speeches--
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> **Lord Kingsland:** My Lords, as I think the noble Lord's remarks were at least obliquely directed at me, I think I ought to respond by saying that as regards the Opposition there is no doubt that the Salisbury Convention will be observed in relation to this Bill, and of course the remarks that I made about referenda--as I think I made plain in my intervention--were entirely my own.
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> **Lord Harris of Greenwich:** My Lords, in that case I fail to understand the beginning of the noble Lord's speech, which is entirely inconsistent with what he has just said.

Winding up for the Opposition, the Chief Whip, Lord Strathclyde, returned to this issue and speculated on the House's attitude to the proposed legislation:[79]

> If the Government continue with their vague, half-baked and unconvincing plans for reform based on a first single stage, I can only predict that they will find that this House may become increasingly troublesome in the months ahead.
>
> **Noble Lords:** Oh!
>
> **Lord Strathclyde:** My Lords, they will get their Bill eventually, because that is what governments do and the law requires that to happen. But what a waste of time to take two bites of the cherry when one would do. I can assure noble Lords that it will take a lot of time to deal with the Government's stage one Bill. I do not say this as a threat; indeed, noble Lords opposite know me well enough to know that I would not do that. This debate has been characterised not by hereditary Peers against the rest, but by hereditaries and life Peers from all sides taking different views on the argument. That is one reason why it has been so impressive. It is my belief that many Peers from all sides of the House are not willing simply to nod through such a fundamental change. What the Government currently propose is not the third way, but the absurd way.

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[79] cc 1158-9, 15.10.98

The junior Home Office minister, Lord Williams of Mostyn, emphasised that Lords reform was a clear manifesto pledge:[80]

> What are the bleak, implacable facts with which we need to deal. One: there was a clear, unambiguous manifesto commitment. I recite it in part:
>
> "As an initial, self-contained reform, not dependent on further reform in the future, the right of hereditary peers to sit and vote in the House of Lords will be ended by statute".
>
> Some among us say, "Ah, the common sort never read the manifesto. If they did, they would not be able to understand it. We fought the election on a pledge that was so plain and unambiguous that in all conscience and all constitutionality we are entitled to bring it before Parliament and respectfully ask for its passage.

# V Other functions of the conventions

This section considers various formulations of the legislative conventions in the last thirty-odd years, during periods of Conservative and Labour government.[81] As Michael Wheeler-Booth, later Clerk of the Parliaments, stated in Griffith and Ryle's *Parliament: functions, practice and procedures*, "in general this 'doctrine of the mandate' has been given as a reason by both Conservative and Labour Opposition's for refraining from voting against the second reading of mandated government bills" (1989, p.505).

During proceedings on the *London Government Bill* in 1967, Lord Carrington considered the mandate convention:[82]

> We have tried over the past years to lay down certain guidelines as to how the Conservative Party will act in this House when in Opposition. There is, first, the convention of the mandate - that is to say, if a Bill appeared in the programme that the Labour Party presented at the General Election, then it should be assumed that the proposal bad been approved by the electorate. Of course … it is a far from perfect way of judging whether or not an individual item is approved in what might be a very long manifesto, but it would not be possible to carry on Parliamentary Government with these two Chambers unless some sort of convention of this kind were observed.

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80 c 1160-1. In the Queen's Speech debate on 30 November, the Home Secretary contrasted the Opposition's stance on the Salisbury Doctrine on the *European Parliamentary Elections Bill* with that on the forthcoming Lords Reform legislation: HC Deb vol 321 cc 574-5, 30.11.98

81 For a complaint by a Labour Opposition about its treatment by the Conservative majority, see the speech by the Labour Leader, Earl Alexander of Hillsborough during proceedings on the *London Government Bill 1962-63*, HL Deb vol 251 cc 1201-2, 8.7.63

82 HL Deb vol 280 c 421, 16.2.67

The Leaders of the Government and the Opposition accepted the validity of the doctrine when applied to the *Immigration Bill* in 1971: Winding up for the Opposition, Lord Gardiner said that his party would adhere to the conventions: "I should vote against the Second Reading, if it were not the practice of your Lordships' House not to do so when a Bill passed the elected Chamber". The mandate point was emphasised by the Lord Chancellor, Lord Hailsham of Saint Marylebone :[83]

> I should like to add this on the constitutional point which the noble and learned Lord closed his speech: that there is no doubt whatever that the Government have a mandate for this Bill in all its essential particulars -all the particulars which we need to discuss on Second Reading.

> The other side of the coin is that their Lordships may feel freer to attack legislation that as not included in the election manifesto. See for example the speech of Lord Hooson during proceedings on the *Local Government (Interim Provisions) Bill* in 1984. "My third charge is that the Government have no mandate from the electorate to bring in this Bill, as it was not included in the Conservative Party's election manifesto".[84]

The difficulties for the Government over the *War Crimes Bills* a few years ago were increased because such legislation was not in their 1987 manifesto, and because the bills were subject to free votes in both Houses. The Minister, Earl Ferrers, accepted this point during the second reading debate of the first (1989-90) Bill:[85]

> I agree with noble Lords that there is no constitutional issue here. Your Lordships are perfectly entitled -constitutionally - to vote against this Bill. It was not in the manifesto and it does not therefore fall within the ambit of the Salisbury doctrine. The Salisbury doctrine adumbrates that where a Bill was brought to Parliament which had featured in the election manifesto of the Government of the day, it was deemed to have had the approval of the electorate and that your Lordships should not deny such a Bill a Second Reading. That principle has guided your Lordships ever since. It still does. The Bill did not feature in the election manifesto at the last election and therefore is not subject to the Salisbury doctrine. In that way, if noble Lords should decide to vote against the Bill, which I am sure your Lordships will not, they would not be acting unconstitutionally. All I would say to your Lordships on that point is that although something may be constitutionally acceptable, it does not mean that it will therefore necessarily be politically inconsequent.

Acceptance of the basic doctrine has not prevented Oppositions from more indirect challenges to Government legislation. Baroness Birk expressed this approach rather neatly when proposing an amendment to the second reading of the *Rates Bill* in 1984:[86]

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83 HL Deb vol 320 cc 1141-2, 24.6.71
84 HL Deb vol 452 c 901, 11.6.84
85 HL Deb vol 519 cc 203-4, 4.6.90
86 HL Deb vol 450 cc 911-2, 9.4.84 (extracts)

> The Opposition could have opposed the Second Reading. Those outside this Chamber find it hard to accept that we are not rejecting the Bill entirely. It is a constitutional Bill. This House is the guardian of our constitution. Yet it is also a constitutional convention that we do not exercise our full parliamentary powers on the Second Reading of a Government Bill, especially if it appeared in the manifesto. On the other hand, it is unique for a manifesto commitment to be so strongly opposed by the Government's own supporters.
>
> My Lords, the Opposition are going to respect the convention. Our amendment does not deny the Bill a Second Reading, neither does it even delay the Bill. The amendment conserves a careful and strict regard to the conventions of this House. However, the conventions do not require this Chamber to remain silent on issues that are of grave concern in this House, another place, and even beyond.

Interestingly this occasion led to a justification by the then Government Chief Whip, Lord Denham, for the use of 'backwoodsmen' to carry the vote, by reference to the doctrine:[87]

> My Lords, a reasoned amendment to the Second Reading of a Government Bill is in itself a very rare event. When such an amendment is moved to a Bill which is a clear manifesto commitment in the first Session of a new Parliament, it is tantamount to asking for a vote of no confidence in the Government. In these circumstances, I believe that it is right that Government Peers, who can normally only attend rarely, should have made a special effort to do so in this case. In fairness, I should add that much the same criteria apply to the rare attenders on the Benches opposite who came to vote the other way.

During proceedings on the *Industrial Relations Bill* in 1971, Lord Delacourt-Smith justified a motion to adjourn the second reading debate by saying that it appeared to Opposition peers to be "a suitable course on this Bill, because many of them, however strong their feelings of opposition to the Bill, would not consider it consistent with practice to divide against it on Second Reading".[88] Although Lord Shackleton, winding up for the Opposition, reminded Peers "to bear in mind that in voting for the motion they are in no way voting against the Second Reading of the Bill", the Lord Chancellor, Lord Hailsham of Saint Marylebone, warned against this approach:[89]

> I understand the pressures which have been brought on the Front Bench opposite, but let no noble Lord opposite who goes into the Lobby to-night to vote for the Opposition Motion have any doubt in his mind about what he is doing. He is making a complete break with the traditional behaviour of his Party, in this House. He is in fact, if not technically voting against the Second Reading of a Bill brought forward on behalf of a recently elected Government, which no one yet has suggested was not adequately foreshadowed in the Election programme. He is setting a precedent which, if it were followed by a Conservative Opposition in this House, would certainly give rise to what a Labour Government placed similarly to ourselves would

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87 HL Deb vol 451 c 148, 26.4.84
88 HL Deb vol 317 c22, 5.4.71
89 c 207, 6.4.71

> undoubtedly describe as a constitutional crisis. The truth is that the noble Lord has adapted a device to save the unity of his Party which he would never tolerate if the positions were reversed.

Another method of indirect attack is by way of amendments to legislation at Committee, Report or Third Reading stages. During the Committee stage of the *Restrictive Trade Practices (Stock Exchange) Bill* in 1984. Lord Bruce of Donington acknowledged that the conventions apply to 'wrecking amendments':[90]

> The Committee may he aware that, according to the Marshalled List, I gave notice that I was going to oppose the adoption of Clause 1 of the Bill as a whole. I was advised that that was in effect equivalent to a vote against the Bill on Second Reading, which is not, as I am given to understand, the custom of this House. So as an alternative to doing that, I propose to move the deletion of subsection (2) of Clause 1.

During proceedings on the *Education Bill 1992-93* the Minister, Baroness Blatch, gave her definition of a 'wrecking amendment': " … this is something the Government want to do; it is something the Opposition do not want to do. That is a wrecking amendment."[91] Lord Ponsonby of Shulbrede retorted that "by that definition, just about every amendment that we have put forward since I have been here would be a wrecking amendment" (c458). Lord Beloff said that "if that were taken literally, there would be no role at all for your Lordships' House as a revising Chamber". He then referred to a letter which the Minister had subsequently sent clarifying her view:[92]

> Subsequently in a letter to me - I gather that my noble friend will be repeating this in some form when we come to debate that unfortunate Bill - she said that that was not really correct. "I withdraw it". Her definition would be that if the House of Lords has passed a Bill on Second Reading, it must be assumed correctly - to have assented to its principle. Amendments which clearly violate the principle of the Bill then would become wrecking amendments.

Perhaps the most dramatic example since 1979 of a successful amendment which went to the heart of a Bill's policy was amendment no. 100 to the *Local Government (Interim Provisions) Bill 1983-84* at its Committee stage. The amendment sought to delay the cancellation of forthcoming GLC/MCC elections until after the enactment of the main abolition legislation. The Minister, Lord Bellwin, said that "whatever the amendment is or is not, no one .... would deny that its effect is to undermine the paving Bill ..."[93] Lord Hooson, winding up for the proposers, denied this:[94]

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90 HL Deb vol 466 c.938, 17.1.84
91 HL Deb vol 545 c 458, 29.4.93
92 HL Deb vol 545 c 1797, 19.5.93
93 HL Deb vol 453 c 1061, 28.6.84
94 c 1066

> This amendment is not a wrecking amendment at all. It is an amendment that is couched deliberately out of the terms in which the Bill itself is couched. It is not a wrecking amendment. It is a significant amendment, because it restores what I believe is, the proper constitutional position.

Lord Home of the Hirsel warned against amendments at Committee stage "which would conflict with the central purpose of the Bill". During the Committee stage of the *Local Government Bill* in 1985, he said:[95]

> In this Committee, we have for many years accepted that when another place passed with a majority a Bill to which this Chamber of Parliament has given a Second Reading, it is not desirable to use the Committee stage to reopen matters of principle. I believe this amendment in fact is doing just that.

# VI Delegated legislation[96]

Delegated legislation is another area where practice may indicate a distinction between the formal powers of the Lords and their practical exercise of these powers. In formal terms, other than matters relating to finance, the Lords have equal power as a House over the passing and scrutiny of delegated legislation as does the Commons. The *Parliament Acts*, in particular, do *not* apply to delegated legislation.

The practice of the House has been described by Shell:[97]

> Because the House of Lords retains a formal power of veto on orders, peers in general are reluctant to press opposition to an order to a division in which it might be rejected. Never has a prayer against a negative Instrument been carried, and only once has the House rejected an affirmative Instrument, This latter solitary example was the celebrated Southern Rhodesia Sanctions Order of 1968 which, however, was approved when relaid a short while later ….. The inhibition the House feels about using its power in this area means that the Opposition Party in the House traditionally refrains from forcing votes directly against orders. Apart from the 1968 example, the Conservatives did not do so in the 1960s or 1970s. Between 1979 and 1981 Labour did divide the House on nine occasions against affirmative orders, but all these the Government comfortably won. Since 1981 Labour has reverted to the practice of not forcing such divisions. To do so could create precedents very unwelcome to any future Labour Government.

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95 HL Deb vol 463 c 941, 13.5.85

96 For a discussion of the distinctive Lords treatment of 'hybrid instruments see R Borthwick, "Delegated legislation", chap 5 of D Shell & D Beamish, *The House of Lords at work*, 1993, pp 145-9.

97 D. Shell, *The House of Lords*, 2nd ed, 1992, pp 218-9. Examples of these techniques are also described, pp 219-223

> It might have been thought that, given this inhibition on the use of power, the House of Lords would have allowed proceedings on Statutory Instruments to become purely formal, or at least, if that were not the case (which manifestly it is not), the House might have ceased to have any real influence in this area. But this does not appear to be the case either. The House does sometimes force (or perhaps shame) the Government into withdrawing an Instrument (or maybe not laying it in the first place). To this end peers do use procedural means, other than direct votes against an Instrument, to record the view of the House. Motions, in the form of reasoned amendments, are sometimes moved at the same time as a motion to approve an Instrument, or at the same time as a prayer. In such cases the prayer can be withdrawn after debate (or the motion to approve the Instrument not formally opposed), while the motion expressing regret, or calling for the withdrawal of the Instrument on some stated ground, can be voted on, and may even be carried against the Government.

He concluded (p.223):

> Returning in conclusion to secondary legislation generally, it is worth re-emphasising the growing importance of this area and the increasing difficulty evident in securing adequate debate in the Commons. Because the House of Lords contains many peers who have considerable experience of Statutory Instruments - notably as ministers or senior civil servants - it is well equipped to play a part in the parliamentary function of scrutiny. It probably does this most effectively on those Instruments which are not of foremost political importance. The power it retains has required peers to adopt some slightly circuitous procedural routes on those occasions when they want, formally, to register the opinion of the House in opposition to an order. It would seem, too, that during the 1980s Labour accepted a convention precluding the Party from attempting to exercise the formal power the House retains in relation to Instruments. None the less, a hidden but useful aspect of debates in the House on Instruments is the knowledge departmental lawyers have (Statutory Instruments are drafted within departments, not by parliamentary counsel) that their handiwork may be examined in this public and partially expert forum.

The Lords, like the Commons, has to take account of matters such as the need for, and scope of, delegated legislation. A general examination of the Lords' scrutiny procedures is beyond the scope of this Paper, but it should be recalled that the House has developed particular techniques, especially through the Delegated Powers and Deregulation Committee (formerly the Delegated Powers Scrutiny Committee), to improve its scrutiny of such legislation. The conclusion of Borthwick's study of the 1988-89 session, and the dilemmas inherent in the Lords' scrutiny of delegated legislation, is worth reproducing:[98]

> That dilemma is essentially the choice between accepting that a great deal of the detail cannot be put into primary legislation and will therefore have to be put into secondary legislation where providing adequate scrutiny of it will pose great

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[98] R Borthwick "Delegated legislation", chap 5 of D Shell & D Beamish (eds.) *The House of Lords at work*, 1993 pp 164-5

> problems; or demanding that more be put in primary legislation, in which case the burden of that may become intolerable for a House which tries to do a great deal on the floor of the Chamber. In addition, of course, more primary legislation would be needed if fewer details could be changed by statutory instrument. Part of the problem for the Lords is that politically they are circumscribed in matters of delegated legislation. Although they are formally the equal of the Commons in this area, in practice as we have seen convention is sufficiently strong that there is little that the House can do to block such legislation directly. It is of course possible that more may be achieved indirectly, that, as Shell points out, Governments may be persuaded to have second thoughts. Certainly it is useful that the House can debate, albeit usually briefly, a variety of orders. However as we have seen, most of the time that means that a few questions are answered, a few points clarified, though that may have value in that those answers are then part of the public record. It is also possible that attempts to amend primary legislation, although unsuccessful, may have an effect on the content of delegated legislation … It is of course true that in many areas the Lords contains experts and, as Shell notes, those who draft statutory instruments in departments must be aware of the possibility of critical scrutiny in the Lords.
>
> The Joint Committee on Statutory Instruments, as we have seen, beavers diligently at the technicalities of delegated legislation. Such work is undoubtedly worthy, unglamorous, and moderately useful. Perhaps the same could be said for the work of the House of Lords as a whole in this area.

The House's practices were considered by peers in two recent debates, as part of the general debate on 19 May 1993 on the 'Salisbury doctrine'[99] and in a debate on 20 October 1994.[100] In the earlier debate, Lord Hesketh, for the Government, said:[101]

> It is only a short skip from the question of delegated powers in Bills to the issue of scrutiny of delegated legislation by the House…. It is the convention of the House that it does not seek to divide against delegated legislation. No such Division has taken place since 1982; and, as was pointed out earlier in the debate, in recent times the House has only once, in 1968, voted down a piece of delegated legislation. Instead, a number of devices have been developed which enable the House to express its opinion on a piece of delegated legislation without challenging it outright.
>
> That does not in any way mean that the views which your Lordships express on delegated legislation can in any way be ignored. As a Minister with some experience of debate on such issues, I can bear witness to that fact in my previous incarnation. My colleagues and I are fully aware of the strength of feeling in the House about the growth, amount and scope of delegated legislation. It is only right that your Lordships should be vigilant about those matters. Indeed, I believe that the knowledge that your Lordships are rigorous in scrutinising delegated legislation is a significant factor in the Government's considerations …….

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99 HL Deb. vol 545 cc 1780-1813, 19.5.93
100 HL Deb. vol 558 cc 356-383, 20.10.94
101 HL Deb. vol 545 cc 1810-11

> I should also draw your Lordships' attention to the fact that all affirmative instruments are taken on the Floor in this House and that time is invariably found to debate Motions relating to, or prayers against, negative instruments; in each respect, your Lordships have more opportunity to debate delegated legislation than is available, for example, in another place. Nevertheless, some noble Lords have questioned the continuing validity of the convention against voting on Motions to approve or annul delegated legislation. The power to do so certainly exists. It would be open to your Lordships to use that power. However, I think that we should again be very wary of that. It would sit uneasily with the revising aspect of the work of the House. Indeed, it would run directly contrary to it. The House has the right to ask the other place to reconsider its decisions. But delegated legislation, almost all of which has been debated in another place before it comes to your Lordships, cannot be amended. There is no mechanism available whereby the other place can be asked to think again. Were the House to reject a piece of delegated legislation, it would fall. That would be a step which your Lordships would wish to consider most carefully. I think that it could lead us into some considerable difficulty.

For the Opposition, Lord Richard considered the issue of delegated legislation (c 1805):

> I wish to express the anxiety of those on these Benches, as has been expressed elsewhere, at the emergence of what has become almost a culture of delegated legislation. I profoundly agree with the Noble and learned Lord, Lord Simon of Glaisdale, and the noble Earl, Lord Russell, that this flood of delegated legislation undermines the principle of parliamentary scrutiny. I would not want to see our workload reduced at the cost of less scrutiny of controversial measures.
>
> In the light of that argument the House might want to examine the possibility, which was recommended in the first report of the Delegated Powers Scrutiny Committee, that this House should be able to delay secondary legislation by one month so as to permit proper scrutiny which otherwise could not take place. That is particularly important if it is true, as I believe it is, that this House is where the most detailed scrutiny of delegated legislation now takes place.

The Liberal Democrat, Earl Russell, examined how the House could approach the rising tide of delegated legislation, and concluded (cc 1801-2):

> The other option, and the one more relevant to this debate, is to accept the advice given by the noble and learned Lord, Lord Simon of Glaisdale either the advice that he gave on 23rd April 1990 (at col. 352) that this House should depart from what he called the "weak convention" that it does not vote against regulations, or to accept the milder advice that he gave today.
>
> Restraint shown on the other side of the House and the success of the milder procedures may influence what decision we take on which of those procedures is appropriate. The noble and learned Lord is, indeed, right that it is a "weak convention". Since 1968, it has been departed from in 20 Divisions on affirmative instruments, and three on negative instruments…. The power exists, and the only question is about the wisdom of our using it on a particular occasion.

In the October 1994 debate, the Leader of the House, Viscount Cranborne, agreed that "the House undoubtedly has a constitutional right to vote on any subordinate legislation. I do not believe that there is any doubt about that fact".[102] He noted that "we all know that the proceedings of the House depend in large part on a foundation of agreement as to what is and what is not an appropriate course to pursue. The House could not function so effectively without such consensus - that is, without general agreement to observe the various conventions which regulate our activities.... Moreover, it is always open to noble Lords to change their practices" (c.360). He accepted that there would always be exceptions, and believed that "most of our practices and conventions were developed for good reason and, I believe, serve the House well. They represent a great deal of accumulated wisdom which it would be rash for us to ignore" (c 361).

As to the convention on delegated legislation, Viscount Cranborne believed that there was "some clear evidence" that it did exist (c 361):

> If that is so, there would have to be a very powerful reason for discarding it. It does not, as someone suggested, suit the purposes of the government of the day, but is perhaps constructive for your Lordships' House as a whole. After all, this House is in large part a revising Chamber.

While the two Houses had "identical powers" in this matter, that is, "simply to accept or reject", he believed that "this is a crude, inflexible power, at odds with our role as a revising Chamber..... Therefore it is clear that exercise of this crude power could result in stalemate between the two Houses with little scope for resolution" (c 361). He continued (cc 361-2):

> That is why, instead of exercising the power which the House undoubtedly has, your Lordships have chosen rather to develop other means of making known your subordinate legislation submitted for your consideration. The House has chosen to voice its opposition without making an outright challenge to another Place, which in almost every case will have already debated the instruments before us. These other means-there are many of them-have included Motions calling on the Government to make amendments to the legislation, or Motions to adjourn consideration of it. Your Lordships will be well aware, too, that time is always made available to debate a Motion or a Prayer on an instrument. The House therefore has more opportunity to debate instruments than does another place where they are usually taken in a committee and where Prayers are very rarely taken at all.

He then considered the suggestion that there were exceptions' to the convention. He repeated, for example, a promise that the Government should not seek to pursue any deregulation order "to which the House had expressed its opposition on a report of the Delegated Powers Scrutiny Committee" (c 363). He concluded (c 363):[103]

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[102] HL Deb 1558 c. 360, 20.10.94

[103] For other expressions of the last Government's view see, eg., HL Deb. vol 563 cc WA 113-4, 2.5.95, and HL Deb. vol 565 cc 750-1, 28.6.95

> I hope I have made clear the position of Her Majesty's Government. We of course acknowledge your Lordships' power to vote on subordinate legislation, but support the constructive way in which your Lordships have shown restraint in the exercise of that power. However, I believe that there is something else we ought to be aware of, and I hope that the noble and learned Lord can follow me here too. The existence of our unfettered right is not, in my view, otiose, even if we do not use it. The very existence of the power surely gives force to the other means which your Lordships have developed for expressing your views on subordinate legislation and so causes those views to be given full consideration should any unconstitutionally-minded government even think of not doing so.

For the Opposition, Lord McIntosh of Haringey agreed that "it is clear... that the House has an unfettered right to vote on any subordinate legislation submitted for its consideration" (c 364). As far as the power, of rejection was concerned, it had been used recently only in 1968:

> I cannot avoid saying... that we only come close to such rejection because we have a House which is fundamentally non-Labour, and indeed anti-Labour. It is, in fact, Conservative in its composition... We come close to the point of rejection - not merely moving a Motion for rejection but having rejection carried - only when there is a Labour Government. Therefore there is a real party political issue to be considered here.... The next Labour Government simply cannot afford the same degree of insouciance in relation to the powers of this House to deal with delegated legislation as a government which have very nearly, unless they make huge mistakes, a built-in majority in this House. (c.365).

The balance between negative and affirmative resolutions would need to be addressed, but, as to the power of amendments, he stated that "speaking on behalf of Her Majesty's Loyal Opposition, I am bound to say that the House cannot expect a Labour Government to permit amendments to subordinate legislation" (c.366). He concluded (c.367):

> This House must continue to preserve the unfettered right. However, the use of that unfettered right must be a last resort. From the point of view of the House as a revising Chamber, it is far preferable that we use all our influence on the Government to control the amount and type of delegation in legislation, the extent to which Ministers are able to use that right to extend policy rather than to implement relatively minor changes in existing policies which have been approved by Parliament, and to a lesser extent the degree to which this House has the ability to express its views on that subordinate legislation. However, above all the issue is the control of delegation.

For the Liberal Democrats, Lord Rodgers of Quarry Bank was disturbed by the remarks of the two front-benches (cc 367-8):

> The noble Viscount the Lord Privy Seal was very careful indeed in saying what I believe to have been obvious from the beginning: that the Government accepted the Motion. They never had any choice whatsoever. But he then introduced an important "however" which we all know is an indication of a change of direction. He referred

> to accumulated wisdom. He stated that it would be rash to ignore past views. Indeed, he reasserted the use of convention in such a way as to negative the approval of the Motion which he had indicated in advance.
>
> I was also bothered by the remarks of the noble Lord, Lord McIntosh of Haringey. He said that it was trivial to spend time on the Motion. I do not believe that it is. I believe that the content of the Motion is important as the noble and learned Lord, Lord Simon of Glaisdale, indicated is the case. However, the noble Lord, Lord McIntosh, then used what I considered-l hope that he will forgive my using this word-a slightly menacing approach to the issue of subordinate legislation: that this House cannot expect a Labour Government to permit amendments to subordinate legislation. That may be a statement of fact; we must wait and see. But the very tone in which the view was expressed suggests to me that we cannot expect any change of direction from a Labour Government. With regard to the House today, and to the extent to which subordinate legislation will I take the place of primary legislation, that concern will not be diminished by any change on the Front Bench.

His own view was based on the wish "to assert the power of Parliament against the Executive, whoever that Executive may be" (c 371).

## VII The Lords' consideration of their role[104]

In recent years the House of Lords has debated its role as a House of Parliament, especially in the exercise of its legislative function in relation to the House of Commons and to the Government.

For example, in April 1994, Lord Simon of Glaisdale initiated a short debate on 'The constitutional role of the House of Lords.'[105] He considered the place of the two Houses and claimed that "except immediately after an election" the Lords, in its composition and in its Cross-Bench element, "reflects far more truly the general colour of political society at large than any other institution", so that the fact that the Commons is elected, "that is not to be used as a magic formula for invalidating any contrary view that your Lordships' House might put forward" (c.1543). He also emphasised that "the modern House of Commons is very much a House of career politicians", making the Lords "far more independent of the Executive than the other place can be" (c.1543).

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[104] See also the two day debate on 14-15 October 1998, HL Deb vol 593, which, however, concentrated primarily on questions of composition rather than function, and the Queen's Speech debates on 25 November, HL Deb vol 595 cc 24-132. The Commons has, of course, also discussed the Upper House, most recently in the Queen's Speech debate on the constitution and Parliament on 30 November: HC Deb vol 321 cc 559-646, 30.11.98. See generally Research Papers 98/85, 19.8.98 and 98/105, forthcoming

[105] HL Deb. 553 cc 1541-75, 13.4.94

He thought the view that the Lords is only a revising chamber was "grossly misleading", regarding it more positively as "fully an amending chamber", subject only to the Parliament Acts and the 'Salisbury Convention'. He took the latter doctrine as meaning that "your Lordships will acknowledge a principle, but your Lordships are by no means bound to defer under that principle to every detail" (c.1543). He believed that "the inhibition on your Lordships deploying your full powers and full role is the desire of government business managers to treat your Lordships' House almost exclusively as a machine for processing government legislation ... Your Lordships will not be able to play your full role unless there is far more restraint by government business managers" (cc.1543-4).

For the Liberal Democrats, Earl Russell said that while the House could be proud of its legislative efforts, it "does not always have the courage to put its votes where its mouth is. Sometime this House suffers from cold feet. I think that this is the result of underlying doubts about its legitimacy" (c.1563). The Parliament Acts had "created a situation in which we enjoy our power by grant of another place - until, as was stated in 1911, a better system can be devised. We are on probation. We are an example of the potential redeeming power of probation".[106]

Lord Richard, winding up for the Opposition, said that his party were not in favour of unicameralism: "We believe that the legislative process in this country - indeed political life in general - demands that there should be two Chambers of Parliament" (c.1566) and cited Bagehot in support. On the legislative function, he noted that recent Study of Parliament Group research had revealed that just under two-thirds of the time of the House was spent on considering legislation, the great majority of it being government bills.[107] He agreed with the study's conclusion that the Lords was "a kind of legislative longstop" a place where corrections can be made and details put right.

Having examined other perceived wider roles, such as a 'guardian of the constitution', and its operation under governments of different parties, Lord Richard concluded that "the role remains or should remain the same; namely to provide a constitutional mechanism whereby the Commons can be asked to reconsider. In the end, of course, that House must prevail. We all accept that. But provided the expression of views here is a genuinely independent one, then it would be as well for a government to ponder" (c 1568). He continued (cc 1568 - 9):

> Let me say quite clearly that if we have no function other than to be a talking shop or, alternatively, a rubber stamp, then we may as well be abolished, have done with it and move to a unicameral legislature, something which I personally would greatly regret. For this debate I looked up some of the great reform speeches made by noble

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[106] c 1564. He stressed that this did not relate solely to the amending of bills but also to, for example, legislation to prolong the duration of a Parliament, as in the 1940s, a matter expressly excluded from the Parliament Acts (s.

[107] D. Shell & D. Beamish (eds.), *The House of Commons at Work*, 1993

> Lords of the past. I read the great speech made by the Marquess of Salisbury on the Irish Church Bill, when he said,
>
> "If we do merely echo the House of Commons, the sooner we disappear the better. The object of the existence of a second House of Parliament is to supply the omissions and correct the defects of the first. But it is perfectly true that there may be occasions in which the decision of the House of Commons and the decision of the nation must be taken as practically the same".
>
> I do not think our role has changed all that much since the days of the noble Marquess. However, I do have to say in conclusion that if this House is to continue to supply the omission and to correct the defects of the elected Chamber, then in future it will have to do so on a more equitable and fair basis of composition than now exists.

For the Government, the Scottish Office minister, Lord Fraser of Carmyllie, also agreed with the bicameral principle, and "we further consider that this Upper House performs essential functions, as a Chamber of deliberation and revision ... and as a guarantor of constitutional continuity. The Government consider that the powers and composition of your Lordships' House are broadly apt for the effective discharge of these functions. Accordingly we have no present plans for far-reaching reform, although ... that is not to say that the workings of the Lords may not be susceptible to improvement" (c.1569). In particular he agreed with Lord Richard "that prime among our responsibilities must be our role in the examination and revision of Bills" (c.1569) in doing which the Lords "makes a primary and tangible contribution within our existing constitutional arrangements". He considered this role in some detail (cc 1570-1):

> I stress that the Government in no way underestimate the importance of the views of the House on the legislation that is placed before it. I readily accept that revising is not simply a matter of the House being restricted to correcting a few niggling errors made by the parliamentary draftsman. As my noble friend Lord Boyd-Carpenter underlined, there is indeed a right of amendment. It is your Lordships' constitutional right to ask the other place to think again. It is central to the role of a second Chamber in our system that that should be so and it is one that all governments should take very seriously indeed. If, on occasion, Ministers appear to jib at the right when it is exerted, I hope your Lordships will recognise that even the skeeliest of skippers is inclined to resent nudges against the tiller.
>
> The right of this House to scrutinise and amend is not in question. What we might do though, both to our benefit and to that of another place, is to examine how we might avoid unnecessary or repetitive consideration of those legislative matters brought before us. No doubt your Lordships have watched with particular interest the progress of the very complex Trade Marks Bill through this House. Perhaps I may say, to the tribute of my noble friend Lord Strathclyde and all those who participated in the Committee stage off the Floor of the House, that the Bill was not only properly examined in Committee but when it returned to the Floor of the House for Report there was no undue reconsideration of the points. I suggest to your Lordships that we might have greater confidence in resorting to that model in the future.

Furthermore, in our paper *Scotland in the Union,* it was stated that the Government have acknowledged that it would be desirable to find ways of significantly increasing the throughput of law reform Bills proposed by the Law Commissions if this can be done without prejudice to the main programme. I consider that to be a valuable function for your Lordships' House - and I speak not only as a Scottish Minister and a Scottish lawyer but with an eye to law reform on both sides of the Border.

While I was interested in the first thought of the noble Lord, Lord Beloff, in looking to the role of your Lordships' House, it would seem to me that we could take a first thought on a number of matters of importance in law reform for both of our jurisdictions. In so doing we might bring about a further and broader constitutional achievement-a greater cementing of the nations of the United Kingdom by making sure that legislation that properly ought to go through is not left on the stocks without implementation.

# Appendix: Methods of opposing second reading[108]

A bill may be opposed on Second Reading in three ways:

1. By negativing the motion "That this bill be now read a second time". If the motion is disagreed to, the Second Reading is in theory only negatived for that particular day, but in practice the bill is treated as having been rejected and is removed from the list of Bills in Progress printed with the Minutes of Proceedings;

2. By an amendment to leave out ("now") and insert at the end of the motion ("this day six months"). The carrying of such an amendment, which is intended to deny the bill a Second Reading during the current session, is treated as rejection of the bill.

When this amendment is moved, the Lord Chancellor says:

> "The original motion was that this bill be now read a second time.
>
> Since when an amendment has been moved to leave out ("now") and at end to insert ("this day six months").
>
> The Question I now therefore have to put is:
>
> That this amendment be agreed to."

If the amendment is carried, the bill is rejected and no further Question is put. If the amendment is defeated, the question on the original motion is put;

3. By a "reasoned amendment", that is, an amendment setting out reasons why the House declines to give the bill a Second Reading. The Question on this is put in the same manner as in 2 above. If the amendment is agreed to, no further Question is put.

If notice has been given of more than one amendment to the motion for Second Reading, they are dealt with in the order in which they relate to the motion, or, if they relate to the same place in the motion, in the order in which they were tabled. In such cases it is usual for the whole debate to take place on the first amendment, and the Lords who tabled the other amendments speak in this debate to indicate the reason why they prefer their own amendments. When the debate is concluded, the Question is put on each amendment successively, or on so many of them as need to be disposed of before a positive decision is reached. If none is agreed to, the original Question is put.

If there is an equality of votes on the motion for the Second Reading the motion is agreed to; if there is an equality on an amendment to the motion, the amendment is defeated.

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[108] Reproduced from the *Lords Companion to Standing Orders* (on the Lords website)

## OTHER MOTIONS ON SECOND READING

### Second Reading agreed to with amendment

In addition to amendments in opposition to the Second Reading of a bill, amendments have been moved in support of, or without seeking to negative, the Second Reading, where it is desired to invite the House to put on record a particular point of view in agreeing to the Second Reading of the bill. In the case of such an amendment the Question on the amendment is put and decided at the end of the debate on the amendment; the Question on the original motion "That the bill be now read a second time" or on the original motion as amended is then finally put and decided.

### Motion for adjournment of Second Reading debate

It is also possible to move that the Second Reading debate be adjourned with or without notice or reasons. Such a motion, if passed, does not prevent the motion for the Second Reading being put down for a subsequent day.

### Resolution on the same day as Second Reading

A resolution deprecating certain provisions of a bill has been moved on the same day as the Second Reading. Any such motion must be sufficiently different from the bill to avoid breaking the rule against putting before the House the same Question as one on which its decision has already been expressed in the same session.