MIDDLE TEMPLE TREASURER'S LECTURE

10 OCTOBER 2022

THE LORDS AND THE LAW

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Introduction

1. Until I became a member of the House of Lords, I knew embarrassingly little about it.[1] There were the outings as counsel before the Appellate Committee, before it was taken out of the Palace of Westminster and made into the Supreme Court. These were memorable not just for the rarefied legal argument but for the ornate Gothic surroundings and of course the gift shop where House of Lords pencils and superior chocolates could be purchased for relatives.

2. Then, as Independent Reviewer of Terrorism Legislation, I followed a couple of Bills in which the House of Lords debated evidence I had given or reports I had written. My head was a little turned by repeated references to "the *distinguished* lawyer, David Anderson". This was certainly not an adjective that anyone had applied to me before. I now realise that "distinguished" is a stock epithet applied by peers to all lawyers, whether competent or not. More significantly, I was impressed during the gestation of the Bill that became the Investigatory Powers Act 2016 by the thoroughness of the parliamentary procedure: in particular, the convening of a pre-legislative scrutiny committee of MPs and peers which went through the draft Bill with exemplary care, proposing some 200 amendments which were practically all incorporated and which greatly eased the passage of the Bill through both Houses. I did not appreciate at the time how unusual this sort of scrutiny was: sadly, between 2007 and 2021, only 15% of Bills were published in draft.

3. Though impressionistic, these experiences were positive enough to persuade me to apply, after repeated suggestions by another member of the Bar, to join the House of Lords. It is a little-known fact that any citizen of the United Kingdom or a Commonwealth country who is over 21 and resident in the UK for tax purposes can do this at any time, by filling in the online application form, and submitting it with cv

[1] I am grateful to Lord Lisvane, Lord Brown of Eaton-under-Heywood and Tom Mohan for reviewing a draft of this paper, which is a slightly expanded version of my lecture as delivered, and pointing out some errors and infelicities. The usual disclaimer applies to those which remain.

and referees to the House of Lords Appointments Commission, or HOLAC. Those appointed by this route, dubbed "People's Peers" when it was introduced by Tony Blair, have slowed to a trickle: they now number only about one a year. But they comprise some of the most *distinguished* of our legislators, in the true sense of the word: Martin Rees the Astronomer Royal; Tanni Grey-Thompson, Paralympic athlete; John Bird, founder of the Big Issue: cross-benchers who would never have been beneficiaries of political patronage but who give the Lords much of our edge over the Commons in terms of expertise and wisdom.

4. The appointment procedure was intermittent, bursting into life at long intervals over the best part of three years. At interview, I was asked by one peer whether I had a dog – to which I said yes – and then what breed it was. My answer (border terrier) evoked a derisive snort, and no further questions came from that quarter. I read shortly afterwards of the unfortunate death of my noble questioner. Was there time for his views of my family's canine preferences to be factored into HOLAC's decision? I can only assume not – for in 2018 came the surprising news that I had been appointed.

5. That is a useful reminder that whatever route is taken to the Lords, and however meritorious we might be vain enough to think ourselves, a huge dollop of luck – whether of birth or other circumstance – is always required for appointment.

6. It was time to put to the test the essayist Walter Bagehot's well-known comment that the cure for admiring the House of Lords is to go and look at it. My first day saw the House of Lords in characteristic form: eccentric yet strangely impressive. The Bill to ban the trade in ivory that was to become the Ivory Act 2018 had sailed through the Commons on a gust of patriotic pride; and at Lords second reading, peers soon brought to bear their remarkable collective range of expertise.[2] Interests were punctiliously declared, from trusteeships of conservation charities to the presidency of the Northumbrian pipers' society and the ownership of Benjamin Disraeli's ivory paper knife. The former Conservative leader William Hague gave a fine speech and was praised for his "majestic trumpetings" on behalf of the African elephant. Two peers described their experiences on safari, and another the temple elephants she had grown up with in India. The opposition benches expressed concern that rhinos, hippos and narwhals were not being given equivalent protection, and elaborated on the "cybercrime aspect" of the ivory trade. The Earl of Kinnoull spoke expertly of insurance difficulties, and Baroness Rawlings, a former president of the British

[2] HL Hansard, 17 July 2018, col 1143: https://hansard.parliament.uk/lords/2018-07-17/debates/32EEC7EF-60FC-498A-B442-13F179F601CE/IvoryBill.

Antique Dealers' Association, of the Asian markets for ivory. The composer Michael Berkeley, in a speech that it is difficult to imagine being made in any of the world's other legislatures, explained that for thirty years the bows of stringed orchestral instruments had been faced with the ivory from excavated mammoth tusks, and noted sadly that metal alternatives had proved acoustically inferior.

7. Then a little later in the progress of the Bill came the turn of Lord Judge, Master Judge, Igor Judge, former judge and Lord Chief Justice. He had been reading the *dull* bits of the Bill – the parts which provided for enforcement. And he had got to the bottom of something that no one else had noticed – it did take a bit of puzzling out – the proposal to create "accredited civilian officers". These turned out to be civil servants, entrusted with *police powers* – including the powers to search dwellings, and to seize, detain and remove things using reasonable force – but without any provision made for their *training, discipline, control or oversight*. The next speaker, the former Conservative MP Lord Cormack, got the point immediately.

> *"I do not want to over-dramatise [he said], but this is Orwellian. We should not have anything to do with this in either House of Parliament. I am astonished that this should have come from the other place. It illustrates, if anything is needed to illustrate it, how important it is that we have a more dispassionate assembly to scrutinise our legislation. It also illustrates how exceptionally fortunate we are to have in your Lordships' House those who have no party political affiliation, who cannot by any stretch of the imagination or vocabulary be accused of making a political point. We have in this House Cross-Benchers, among whom are some of the finest lawyers in the land."*

By this he meant of course the former judges of our highest courts, some of whom go on to work with such astonishing dedication and effectiveness in their capacity as legislators. I only wish we had more of them to share the burden.

8. Because the world is in some respects still a reasonable place, the government listened to Lord Judge, and it put things right. Without the House of Lords, this affront to our liberties would have become part of our law. And without a lawyer diligent enough to read the small print, perceptive enough to see its significance and bold enough to voice his concerns with force and eloquence, the House of Lords would have missed it too.

9. That was not the end of my mentoring from Lord Judge, who as Convenor of the cross-bench peers likes to keep a fatherly eye on the new ones. Seeing that I was down to speak, for the first time after my maiden speech, he sat down next to me in

the Chamber and asked how long I thought I would be. "We'll see", I said, beginning to feel that I was getting the measure of the place. "I have material for eight or ten minutes if I need it." Igor recoiled in shock – whether forensic or not, I cannot be sure. "Eight minutes? I don't think I've ever spoken for eight minutes. Keep it to five!" Then he was gone, and I was left to cut introductory verbiage, remove the more obvious points and sharpen those that were left. My speech turned out to be the shortest in the debate – a badge of honour often claimed by Lord Judge himself, and the surest way, as I now know, to the approval of the House.

Functions of the House of Lords

10. So much for first impressions. Looking back four years later, what – to coin a phrase – has the House of Lords ever done for us?

    a. Well we hold the government to account by ***written and oral questions***. Oral questions (including topical questions) are either answered briefly, during the 40-minute question time which opens each day's proceedings, or in more formal short debates.

    b. We can put down ***private members' bills*** on any topic we wish, for debate in the House of Lords. It fell to me last month to introduce the Public Service (Integrity and Ethics) Bill, a title which at least earned a hollow laugh at first reading.[3] Private Members' Bills are a good way of drawing attention to an issue and can be thoroughly debated in the Lords, though they will succeed in the Commons only with government support, which is rare.

    c. Our ***select committees*** carry out inquiries into things that need scrutiny. They are not primarily organised on a departmental basis as in the Commons, but are devoted to important cross-cutting issues such as constitutional affairs, delegated legislation, international agreements and the "common frameworks" that are intended to regulate relations between the nations of the UK in policy areas returned to us after Brexit.

    d. There are two important ***committees with members from both Houses*** – the Joint Committee on Human Rights and the Intelligence and Security Committee (which is a statutory Committee rather than a conventional Parliamentary Committee, although all its members are Parliamentarians).

[3] Public Service (Integrity and Ethics) Bill 2022: https://bills.parliament.uk/bills/3332.

e. And members of both Houses are sometimes appointed to ***committees looking at particularly important Bills*** in draft, before their final introduction. A recent example was the committee on the draft Online Safety Bill, to which the cross-benches contributed the People's Peer Beeban Kidron, a film director influential internationally for her work on the protection of children online.

11. All these things matter. But the case for the House of Lords really stands or falls by our performance as a ***revising chamber***. Andrew Adonis noted in one of his books that between 1884 and 1914, apart from its efforts to undermine the legislation proposed by Liberal governments of which it disapproved, the House of Lords "*was a revising chamber notable for undertaking almost no revision*".[4] Eighty years later, that had barely changed: a Conservative-leaning House defeated a Conservative government only very occasionally between 1979 and 1997. But it has certainly changed now.

    a. The government was defeated 114 times in the session which ran from 2019 to 2021, and 128 times in the 2021-2022 session: the two highest numbers of defeats on record.

    b. The 243 defeats suffered by Boris Johnson's government compared with 100 for Theresa May, 158 for David Cameron and 68 for Gordon Brown.

    c. Particularly notable, in the latest session, were the 34 defeats for the Nationality and Borders Bill, the 25 defeats for the Police, Crime, Sentencing and Courts Bill – 14 of them in a single evening – and the 17 defeats each on the Environment Bill and Health and Care Bill.

    As Sam Anderson of the UCL Constitution Unit notes in his recent analysis of these defeats, civil liberties and constitutional propriety rank particularly highly as reasons for them.[5]

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[4] Andrew Adonis, Making Aristocracy Work: The Peerage and the Political System in Britain 1884-1914 (1993), pp. 68-69. I am indebted to Lord Pannick KC for this reference.

[5] Sam Anderson, "Examining last session's record-breaking number of government defeats in the House of Lords", Constitution Unit blog 2 October 2022: https://constitution-unit.com/2022/10/02/examining-last-sessions-record-breaking-number-of-government-defeats-in-the-house-of-lords/.

Legitimacy of the House of Lords

12. That greater activism, matched by an increased reluctance in government to accept Lords amendments, provokes the question of the *legitimacy* of the House of Lords to stand up to the will of an elected government. Most people would accept that governments should be under some constraints as regards their power to legislate. Governments are rarely elected on even a bare majority of the votes. Many policies and Bills which they bring forward have not figured in manifestos. It is right that they should be tested by outsiders, and unsatisfactory if a strongly whipped House of Commons with a large government majority means that they can be driven into law, whatever the outcome of that testing process. Second chambers constituted on a different basis from first chambers are common, particularly in larger countries: Professor Meg Russell has counted 84 second chambers in the world, only half of them wholly elected. As she put it in a lecture earlier this year: "*Second chambers mean second thoughts, and if you are interested in evidence-based policy-making, you like them.*"[6]

13. However, the status of the House of Lords as a wholly unelected Chamber means that despite being known as the Upper House and boasting majestic accommodation to match, it cannot and should not prevail in a head-to-head fight with the Commons. So:

    a. Some matters are completely off limits: the Lords has a very limited role on financial Bills, and under the Addison-Salisbury Convention we say we will not throw out – though we can still amend – a Bill that is introduced following a manifesto commitment.[7]

    b. And the Parliament Acts 1911 and 1949 have the effect that even in respect of other Bills, we can never permanently thwart the will of the Commons. Our power is limited to *delay* – by opposing a Bill to the point where it has to be re-introduced in a future session of Parliament – and even that residual power is very rarely exercised.

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[6] Prof Meg Russell FBA, "How should the House of Lords be reformed?", Keele World Affairs Lecture, 20 January 2022 http://www.kwaku.org.uk/Video.html.

[7] The Addison-Salisbury Convention is often thought to be stronger and more precise than is in reality the case. It has been said on good authority that far greater significance attaches to "*the broad acceptance that government bills will normally be given a second reading and dealt with in reasonable time*": Robert Rogers and Rhodri Walters, *How Parliament Works* (Routledge, 7th edn. 2015).

14. When the Commons rejects our amendments we can persist by re-submitting similar amendments, and by doing so again and again in a process known as ping pong. But the game is usually over after two or three rallies at most.[8] However wise or important we think our amendment is, a rock-solid Commons majority against it will nearly always cause us to give way eventually. We can and do urge the Commons to think again, but we cannot force them to do so. Thus, we may surrender even on amendments of constitutional significance for which there are sizeable majorities in the House of Lords. At the end of the last session, in the spring of this year, these included:

    a. an amendment to the ***Dissolution and Calling of Parliament Bill*** which, while accepting the repeal of the Fixed Term Parliaments Act 2011, would have allowed a Prime Minister to call a General Election only if it was approved by a simple majority of the House of Commons;[9]

    b. various amendments to the ***Nationality and Borders Bill***, intended to ensure that changes to the treatment and legal status of asylum-seekers could proceed only if they were consistent with the Refugee Convention;[10] and

    c. an attempt, led by Lord Judge, to remove or tone down a clause in the ***Elections Bill*** which stood to diminish the independence of the Electoral Commission by requiring it to have regard to a strategy statement written by the Secretary of State.[11]

15. Important though we thought those issues were, a majority felt in the end that we had to defer to the will of the elected House. It remains to be seen whether other such stand-offs will arise in the current session, and if so how they will be resolved. Politics is a fluid business, and it would be rash to identify the flashpoints in advance. But possibles include the proposal to repudiate international commitments provided for in the Northern Ireland Protocol Bill, which we debate for the first time tomorrow, and the astonishing delegated powers that Ministers seek to assume under the Retained EU Law (Revocation and Renewal) Bill, previously trailed as the Brexit Freedoms Bill.

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[8] One exception was the Corporate Manslaughter and Corporate Homicide Bill 2006-07, which was subject to seven exchanges.

[9] HL Hansard, 22 March 2022, col 855: https://hansard.parliament.uk/lords/2022-03-22/debates/6CDD29B5-9E77-4AF5-9340-5CB015BA1C70/DissolutionAndCallingOfParliamentBill.

[10] HL Hansard, 27 April 2022, col 294: https://hansard.parliament.uk/lords/2022-04-27/debates/A55E216C-E66A-4D6E-9B46-1FD44C4C1AFC/NationalityAndBordersBill.

[11] HL Hansard, 27 April 2022, col 324: https://hansard.parliament.uk/lords/2022-04-27/debates/DBF27915-E57B-4C50-8827-6BBAE5C99121/ElectionsBill.

Means of exerting influence

16. If the House of Lords ducks out of the tough fights, what is its value as a revising chamber? The answer lies not in power – because we can always be overpowered in the end by a determined government with a secure Commons majority – but in influence. That is a subtler concept, not easy to explain – particularly to primary school children as I had to do recently. My wife came up with an elegant solution, which goes something like this. The House of Commons is your parents. They are in charge, and they set the rules – whom you can go and play with, when you must go to bed. But sometimes they need advice – whether they know it or not – from someone else. That is where, if you are lucky enough to have them, grandparents come in. They don't make the decisions but they give advice. They are listened to – sometimes – because they are older (and with an average age of 71, the Lords are certainly that); they know about some things that parents don't; and above all they have more time. The last point is crucial – in the Lords the government cannot easily bring debates on legislation to a close, which allows time for concerns to be explored in detail.

17. In recognition of what are sometimes described as the thoroughness of our scrutiny, our expertise and our ability to make a bit of a nuisance of ourselves if we are ignored, we are listened to surprisingly often. Let me try to explain how and why that is, with the help of some examples from the past few months.

18. The three principal stages of Lords proceedings are ***second reading***, when we give our first impressions of the Bill that has been delivered to us, before or more usually after it has completed its Commons stages; ***committee***, which all peers may attend and in which numerous amendments are debated in order to probe what the Bill is trying to achieve and gauge support for change; and ***report stage*** – the sharp end, when the most promising amendments are put to the vote.[12] Intervals between these stages, typically a couple of weeks or more, allow time for support to be canvassed and for meetings and negotiations to be held. This sequence works well. However radically the revising chamber in the future be reformed – and like many peers I am certainly open to radical reform – I hope it will be maintained.

[12] ***First reading*** is a purely formal introductory stage. ***Third reading*** debates are a final opportunity for government to deliver on promises of concessions, but are more usually "*quietly valedictory affairs in which those most closely involved … look back rather sentimentally on the bill's progress through the House"*: Robert Rogers and Rhodri Walters, *How Parliament Works* (Routledge, 7th edn. 2015, p. 198).

19. An amendment put down at *committee* stage will not normally be voted on at that stage. But if it is well-supported and sensible, it may elicit a commitment from the Minister to meet, to talk, and to think again. If there is a meeting of minds, then at *report* stage a revised amendment, or a compromise drafted by government, may go through unopposed. If there is no such accommodation, the promoters of an amendment may decide at report stage to test the opinion of the House – not a decision taken lightly, for since the regrettable abandonment of the Covid-inspired system for voting from the PeerHub app on our phones, 15 or 20 minutes are required to troop through the lobbies and have our votes recorded. If the amendment is passed, it will go into the Bill. Ministers then have to decide whether they can live with it, or whether to ask the Commons to take it out – at which point we are into *ping pong*.

20. The willingness of government to listen may depend on all sorts of circumstances, not all of them predictable in advance.

    a. Perhaps the Lords Minister *secretly agrees* with us, and is able to use us as a reason to advance their case within the department. Or the *media* gets behind what we are trying to do, and makes it politic to offer a deal.

    b. *Influential figures* in the governing party may support an amendment – for the whip is less rigorously enforced in the Lords – opening up the unwelcome possibility, if it is resisted, of a rebellion in the Commons.

    c. Towards the end of a parliamentary session, *time may be short*, and concessions needed to ensure that parliamentary time is devoted to the government's most urgent priorities. It is then that our influence can sometimes be at its greatest.

    d. And there may sometimes be a cynical suspicion that a compromise was pencilled in from the start by the government as part of a *concession strategy*. Even if that is so, the challenge needs to be made or the concession will never be granted.

21. Sometimes, as in the examples I gave a moment ago from the end of the last session, no changes are offered even in the face of a widely-supported Lords amendment. But even in such cases, all may not be lost: the Minister who cannot agree a compromise text may yet consent to speak from the despatch box about how the disputed clause is to be *interpreted*. These statements can be referred to

subsequently in Parliament or in pre-litigation correspondence, and one can always hope, even expect, that they may be heeded by Ministers and the Civil Service.

22. Such a statement accompanied the passage of section 38 of the Environment Act 2021. The Act creates a new Office for Environmental Protection or OEP, which as the government were keen to stress, can take public authorities to court if they are in breach of their environmental obligations. Less prominent in their narrative were the severe limitations on what the court in this environmental review procedure could actually do. The Bill permitted judges to quash unlawful decisions of a public authority only if they were satisfied that the grant of a remedy would *not* be likely to cause substantial hardship or prejudice to developers, landowners or others. The court would thus have been powerless to remedy breaches of the law in some of the cases where the consequences of the unlawful decision were most serious. This contrasted with the strong remedies available to the European Commission in the European Court, under the system that environmental review was designed to replace, and risked turning the OEP itself, as I said in debate, into a Potemkin watchdog.

23. A limited amendment was secured to the text, after prolonged efforts, which allowed the court additionally to grant a remedy where there was an exceptional public interest reason for doing so. This was underwhelming but welcome as far as it went. After two rounds of ping pong, when it became clear that no better amendment was on offer, those of us who had pressed the point bowed to the inevitable. The deal was sweetened by the Minister agreeing to make a statement indicating just how helpfully, to us, the government intended section 38 to be interpreted. [13] Having provoked that statement and indeed been consulted on its drafting, I hope that it may prove of some incidental use. But as a consolation prize it is far from satisfactory. The brutal reality is that if the *courts* do not consider the section to be ambiguous on its face, they will decline to have regard to the Minister's statement as an aid to interpretation under the rule in Pepper v Hart.

24. ***How easy is it to win a vote?*** Since the reform of the House of Lords in 1999, no government has commanded a majority. Indeed in September 2022 of 755 peers eligible to attend proceedings, 33% are Conservatives and 33% are Labour or Liberal Democrat. 24% are cross-benchers, with 3% bishops and 7% others.[14] Those numbers can always change, but they tell you two things of significance.

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13 HL Hansard, 9 November 2021, col 1607: https://hansard.parliament.uk/lords/2021-11-09/debates/56E7640D-B7DC-49DC-8FB5-C5ED9F500633/EnvironmentBill#.

14 House of Lords Library, 29 September 2022: "House of Lords membership update, September 2022": https://lordslibrary.parliament.uk/house-of-lords-membership-update-september-2022/.

a. First, where Labour and Liberal Democrats join in opposition to government, which is frequently the case, the ***balance of power is with the cross benches.*** The fact that cross-benchers turn up and vote less often, on average, than political peers does not much diminish their collective influence. Provided that opposition parties are effectively whipped – a process which seems to get more difficult as the evening advances – a good majority of cross-benchers will very often be enough to secure the amendment of a Bill.

b. But secondly, *no* cross-bench amendment, however high-minded or deserving, will get anywhere *without* the ***support of the main opposition parties***. That applies not only at report stage, when the first vote takes place, but at ping pong where the political will to fight on tends to decrease with every round. The Opposition front bench plays an important part in deciding which issues will be given priority at each successive stage. Principled and well-supported cross-bench amendments are often favoured in this process – perhaps because they are less easily dismissed as motivated by base political calculation. Their cross-bench pedigree may make them easier for peers on the government side to support, or at least abstain on. And crucially, the government itself may be more inclined to accept a cross-bench amendment than one promoted by its political opponents.

25. Conservative peers occasionally try to imply that a majority of cross-benchers are crypto-Labour supporters or Liberal Democrats. That is absolutely not the case. It is simply that effective challenge to the weaker elements of any Bill may require a degree of dialogue and even coordination between the challengers. That will continue to be so, irrespective of the political colour of the government promoting the Bill. I would add that for cross-benchers to have real influence, it is at least as important for them to be able to communicate effectively with *government* as with the *opposition*.

26. This can be explained by five examples, taken from recent Bills. Otto von Bismarck is famously supposed to have said that laws are like sausages: it is better not to see them being made. But perhaps a few glimpses from the gory innards of the legislative sausage-machine will be informative. It is the best way I can think of to show you how the House of Lords goes about its revising work and adds value to the Bills that are sent to us. These examples are taken from Bills in which I had close involvement – a small minority of the 30 or so that are passed in a typical year – and so could easily be multiplied.

Examples of influence

27. I start with what is now the ***Nationality and Borders Act 2022***, which left the Commons containing a provision, clause 9, entitled "Notice of a decision to deprive a person of citizenship". This would have allowed the Home Secretary, when exercising her already controversial power to deprive someone of their citizenship on the grounds that this would be conducive to the public good, to do so *without informing them* if she thought it was in the public interest to do so. Home Office officials had previously believed themselves to have this power under a regulation which had recently been declared *ultra vires* by the courts[15], and had experienced no pushback from opposition parties in the House of Commons. So they may have seen this clause as no more than the regularisation of an established and increasingly-used practice. If so, they had reckoned without the likely reaction of the public once it became aware not only of the relatively low bar for the removal of citizenship, but of the fact that it could be removed without notice. As a former independent reviewer of a citizenship deprivation power I asked six written questions to establish the recent background,[16] and drew attention to the issue on social and broadcast media. It became obvious that clause 9 was of great concern not only to peers but to naturalised citizens across the UK. Their case was enthusiastically taken up by the opposition parties. 300,000 signed a petition, and some strong speeches were made in the Lords, including by Conservative peers such as Sayeeda Warsi.[17] Was their citizenship second-class? And since it could be removed without notice, how could a dual citizen be sure that their citizenship had not already been removed?

28. A possibly bewildered Home Office invited me to a private meeting and explained the thinking behind dispensing with the requirement of notice. A courier could be exposed to danger, they said, if it were necessary for them to go into a Syrian camp to deliver the news that a former Islamic State fighter had forfeited his British citizenship. This was perhaps a fair point – but it did not explain the far wider power that was sought in the Bill, or the absence of safeguards on its use. After an inaccurate and perhaps counter-productive social media campaign of their own, the Home Office saw that they had been wrong-footed by the negative publicity. It became clear that they wanted a way out.

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15 *The Queen (on the application of D4) (Notice of Deprivation of Citizenship) v Secretary of State for the Home Department* [2021] EWHC 2179; [2022] EWCA 33.

16 HL Deb, 19 January 2022, cW: https://www.theyworkforyou.com/wrans/?id=2022-01-05.HL5077.h&s=speaker%3A25736#gHL5077.q0.

17 HL Hansard, 27 January 2022, col 521: https://www.theyworkforyou.com/lords/?id=2022-01-27b.521.0 .

29. A solution was found, influenced by the laws of Australia and New Zealand. Like most peers, I function without staff and cannot claim credit for finding these provisions myself. They had been helpfully explained in a blog post by Jeremy Ogilvie-Harris, a paralegal at the Hackney Community Law Centre,[18] which I picked up via Twitter. The outcome was a more limited power, attended by a number of safeguards including a requirement for judicial permission if there is ever thought to be a sufficiently strong case for withholding notice. These changes were drafted in proper form by parliamentary counsel, and moved at report stage as a series of amendments in my name which the government agreed to accept.[19] You will find them in section 10 of the 2022 Act, which inserted a new schedule into the British Nationality Act 1981. Their likely effect is that non-notification of citizenship deprivation, while still technically possible in tightly-defined circumstances, will become vanishingly rare. That is a victory for citizens but also I think for the government, who by participating constructively in the amendment process ended up with an appropriately limited power that was no longer an albatross round their necks.

30. A not dissimilar result was reached on the ***Covert Human Intelligence Sources (Criminal Conduct) Act 2021***, my second example, which sets out the circumstances in which undercover agents may be authorised by police forces, intelligence agencies and others to commit criminal offences. I shan't labour the details. But once again it was left to the House of Lords to insert protections, to which Government eventually agreed, into a Bill that had been passed by the Commons despite safeguards on this extraordinary power being conspicuous by their absence. These were not as extensive as some would have liked, but included the real-time involvement of the Investigatory Powers Commissioner's Office, enhanced safeguards for the authorisation of children and vulnerable adults, and changes to the relevant code of practice.[20]

31. My third example is a provision that was debated largely by lawyers but had wider implications for the rule of law: clause 1 of the ***Judicial Review and Courts Act 2022***.

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[18] Jeremy Ogilvie Harris, "A comparative perspective on the constitutionality of clause 9 of the Nationality and Borders Bill", UKCLA blog, 12 January 2022: https://ukconstitutionallaw.org/2022/01/12/jeremy-ogilvie-harris-a-comparative-perspective-on-the-constitutionality-of-clause-9-of-the-nationality-and-borders-bill/

[19] HL Hansard, 28 February 2022, col 580: https://www.theyworkforyou.com/lords/?id=2022-02-28c.578.0#g580.0.

[20] HL Hansard, 9 February 2021, col 180: https://hansard.parliament.uk/lords/2021-02-09/debates/98D38795-5C22-40C0-B6D5-19942008C6C8/CovertHumanIntelligenceSources(CriminalConduct)Bill.

The government wished to ensure that judges sitting in judicial review could grant two rather esoteric remedies: *suspended quashing orders*, which would take effect only from a future date, and *prospective-only quashing orders*, which would only ever apply to decisions subsequent to the order. The cross-bench lawyers were divided on the question of whether the latter in particular were *ever* a good idea: having seen them in action over many years in the European Court of Justice, I had no objection. We were all however united in opposition to sub-clauses 1(9) and (10), which imposed a rebuttable presumption that these weaker remedies would be used in preference to the traditional, more muscular quashing order. There is something rather magnificent about a cohort of ex-Supreme Court judges in full cry, miscellaneous silks yapping at their heels, and Ministers seem to have decided on this occasion that discretion was the better part of valour. The presumption in the sub-clauses was duly removed from the Bill, leaving the judicial discretion over remedy undisturbed.[21] To an audience of lawyers that may seem so obviously right as to be unremarkable: but changes are not made unless you press for them, and let us not forget that on this occasion as well, the Commons had voted through an unamended version which could have materially weakened the effectiveness of judicial review.

32. There was an equally consequential parallel in my fourth example, the ***Overseas Operations Act 2021***, which as passed by the Commons would have introduced a presumption against the prosecution of soldiers on overseas operations for a vast range of crimes, including war crimes, after only five years. Cross-bench lawyers did not like this either: but the key voices on this occasion belonged to noble and gallant Lords as we refer to them: former Chiefs of the Defence Staff and other senior officers sitting in the Lords. They well understood the effect that an exemption from liability for serious crimes would have on discipline and on NATO solidarity. It seemed to them especially intolerable that where the presumption applied, British service personnel would by operation of our own law be made liable for prosecution before the International Criminal Court in The Hague. The then Prosecutor of the ICC made it clear in a letter that this was no hypothetical possibility. Confronted by this barrage of disapproval from the top, and by a successful amendment tabled by George Robertson, the former NATO Secretary-General, MoD Ministers staged a tactical retreat.[22] Though the presumption in the Act survives, crimes subject to International Criminal Court jurisdiction are excluded from it.

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[21] HL Hansard 27 April 2022, col 279: https://hansard.parliament.uk/lords/2022-04-27/debates/6F3C9E0D-5D9B-4464-9F72-39B18B2D9ACC/JudicialReviewAndCourtsBill .

[22] HL Hansard 28 April 2021, col 2345: https://hansard.parliament.uk/lords/2021-04-28/debates/399CE59F-D821-4459-A07E-658F0E7DB7FA/OverseasOperations(ServicePersonnelAndVeterans)Bill.

33. Some amendments aim not so much at correcting defects in Bills as adding useful new provisions to them – sometimes described as decorations on a Christmas tree. My fifth and final example of influence is the new offence of strangulation or suffocation created by ***section 70 of the Domestic Abuse Act 2021***. My own interest in this subject was sparked when I was contacted by a doctor who had researched the long-term effects on the brain of periodic strangulation, often used by the stronger party in a relationship not as an attempt to kill but as a reminder of their superior force – in other words, as an instrument of coercive control. It is not necessary for that purpose to leave a mark, a fact which can make it difficult to prosecute these acts as assaults occasioning actual bodily harm. Yet the offence of common assault is obviously not serious enough to meet the case. And experience in other common law jurisdictions which have introduced such an offence is that it is helpful in focussing the attention of police on an under-reported and under-prosecuted crime.

34. Work had already been done on this, including by the Domestic Abuse Commissioner and the Liberal Democrats. The cause began to attract wider support, not least among female members of the House of Lords (though I am afraid they still comprise only 30% of the total), the House of Commons and women's groups out in the country. What needed to be overcome was the government's natural and understandable reluctance to create new and specific offences against the person. Particularly influential here was the former Criminal Law Commissioner, Professor David Ormerod. He had a track record, helpful to his credibility on this issue, of scepticism about creating *specific* offences against the person where adequate offences of a *general* nature exist.[23] It is certainly right that "signalling the importance" of something is not a good enough reason to legislate. But Ormerod was persuaded that there were other, compelling reasons here. After an introduction to the Lords Minister, the silk David Wolfson, Ormerod discussed with his team how the Bill might deal with tricky legal issues such as *mens rea* and consent. Perhaps it helped that one member of the ministerial team was a devoted former student of the Professor. In the end, no contested vote was necessary. Wolfson put his heart and his back into it. The government tabled amendments in the name of Baroness Newlove, and took well-deserved credit for putting the new offence into law.[24]

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[23] Law Commission, "Reform of Offences against the Person", Law Com 361,HC 555, 2 November 2015: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/473403/51950_LC_HC555_Print.pdf.

[24] HL Hansard, 10 March 2021, col 1652: https://hansard.parliament.uk/lords/2021-03-10/debates/5A6B3EBE-EE46-453F-AAC8-5391793E3923/DomesticAbuseBill#.

Reforming the House of Lords

35. With those five recent examples, which are very far from exhaustive and I hope have not been too exhausting, I have tried to persuade you that the House of Lords adds significant value to our legislation. And, perhaps, that the worst of its faults is not its great size: for a wide range of unsalaried expertise, even if it is brought to bear only occasionally, can be very useful given the limitless range of subjects on which legislation is passed. Nonetheless, I turn briefly to the subject of House of Lords reform, which few would deny is necessary – and overdue.

36. There were three important reforms during the 20th century – the Parliament Act 1911, which reduced our ultimate power to one of delay; the Life Peerages Act of 1958; and the House of Lords Act of 1999, by which the size of the House was halved, having reached the extraordinary level of 1330, by removing the great majority of the hereditary peers. Since then, further attempts at major change have failed: Labour never went through with the removal of the remaining hereditaries, as it had intended, and the coalition government's plan to introduce a predominantly elected House numbering 450 was scuppered by a Conservative rebellion in 2012. More successful have been the smaller, more incremental reforms made since then: notably the House of Lords Reform Act of 2014 that allows peers to retire, to resign or to be expelled for non-attendance. Over the past eight years, an average of 20 a year have taken retirement. [25]

37. When it comes to further incremental reform, no one is keener than the House of Lords itself.

    a. First, we regularly debate, and approve, private members' bills in the name of the Labour peer Lord Grocott which would end the system whereby the remaining hereditary peers are replaced, on death or retirement, by other hereditary peers of the same political persuasion.[26] I do not fear for the hereditary peers: the best of them are so strikingly knowledgeable, hard-working and trustworthy that they would excel in any open selection procedure. But the reserving in the *efficient* part of our constitution of places for members of a hereditary aristocracy seems impossible to defend on

[25] House of Lords Library, 29 September 2022: "House of Lords membership update, September 2022": https://lordslibrary.parliament.uk/house-of-lords-membership-update-september-2022/.

[26] House of Lords Library, "House of Lords (Hereditary Peers) (Abolition of By-Elections) Bill [HL]", 24 November 2021: https://lordslibrary.parliament.uk/house-of-lords-hereditary-peers-abolition-of-by-elections-bill-hl/.

rational grounds, particularly when every single one of the current 92 hereditaries is male. Yet the government has declined to support Lord Grocott's bills in the Commons, so they have gone nowhere.

b. Secondly, in 2016, the former civil servant Lord Burns came up with a plan for new peers to commit to single 15 year terms, and for the political parties to apply a "two out, one in" policy until the total number of peers was reduced to 600. Supreme Court Justices, whose retirement age was at that time only 70, would have each been appointed for a single term of seven years. The Burns proposals did not require an Act of Parliament and were overwhelmingly approved by the House – it may have helped that they featured neither a retirement age nor a 15-year limit for *existing* peers. But once again, they were not taken forward by government.[27]

c. Thirdly, there is a good deal of support for putting HOLAC on a statutory basis – the body which not only recommends new Peoples' Peers, but advises the Prime Minister on whether prospective *political appointees* are fit and proper persons.[28] The limitations of the current setup were made embarrassingly clear when HOLAC advised Boris Johnson in 2020 that it could not support the nomination of Peter Cruddas, a former Conservative Party treasurer who had given more than £3 million to the party, but Mr Johnson simply overruled it and appointed him anyway.[29]

38. The initiatives I have described show that there are solutions, widely supported within the House of Lords itself, to some of the most obvious problems in the way the second chamber is composed. The system by which 26 Church of England bishops, uniquely among faith leaders, have the automatic right to sit in the House tends to attract less criticism. This is despite the fact that the UK is said to be joined only by Iran in reserving places in our legislature for religious leaders. Perhaps this is because the Bishops operate a rota system, generally appearing only two at a time;

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[27] For an account of the proposed reforms and their progress or otherwise, see Fourth Report of the Lord Speaker's committee on the size of the House, 9 May 2021: https://committees.parliament.uk/publications/5753/documents/65642/default/.

[28] PoliticsHome, "Peers Call For Lords Appointments Watchdog To Be Given Statutory Status", 7 September 2021: https://www.politicshome.com/news/article/peers-call-for-lords-appointments-watchdog-to-be-given-statutory-status.

[29] The results of a survey, published in the week this lecture was delivered, suggest strong public support for a more independent appointment process and for a reduction in the size of the House of Lords. There was roughly equal support for electing and appointing peers: UCL Constitution Unit, "Majority of Public Support House of Lords appointment reform", 14 October 2022 https://www.ucl.ac.uk/constitution-unit/news/2022/oct/majority-public-support-house-lords-appointments-reform.

added to which they are becoming more gender-balanced and, unlike the rest of us, have to retire at 70.

39. Why are governments so reluctant to debate ideas for incremental reform? Here are two slightly cynical guesses. *First*, because the power of patronage is useful to any Prime Minister, and appointment to the House of Lords provides it in spades. And *secondly*, because the more absurd, unrepresentative and corrupt the Lords can be portrayed to be, the easier it is to attack or ridicule it for doing its job of standing up to government and requiring them to think again. A House of Lords that was wholly or mainly elected, and shorn of its more obvious and embarrassing absurdities, would rival the House of Commons for legitimacy. Whatever their protestations, who in the Commons, or in government, would really want that?

40. A further reform *I* would like to see – though I freely accept that I am not in the majority here – would be significantly greater use of the remote participation to which we became accustomed during the pandemic. Well over 40% of peers live in London or the South-East, and it is likely that such peers are represented more disproportionately still in contributions to the business of the House.[30] But moving the physical House to York or Stoke-on-Trent, as has been suggested perhaps mischievously by Ministers, would make it harder to hold a London-based government to account and to cooperate with a London-based House of Commons. Nor would it help those based in other areas of the country such as Northern Ireland, Wales and the South-West.

41. In contrast, a greater capacity to speak and vote remotely would be a good way of *levelling up*. It would also make it easier for peers to combine participation with caring responsibilities, or with the business, professional, public service or charitable activities that provide them with a livelihood and contribute to their expertise. [31] We put this to the test when we chose to operate in a largely virtual fashion during the pandemic, and benefited from a wider range of speakers in our debates. Much of the formal work and – at least as importantly – the informal, behind-the-scenes work on the Bills I have mentioned was done remotely. I sat on one committee which never met in real life – but enjoyed getting to know its members and working with them to

[30] "Regional representation in the House of Lords", House of Lords library briefing, 8 January 2020: https://researchbriefings.files.parliament.uk/documents/LLN-2020-0007/LLN-2020-0007.pdf. Of those who elected to have the broad location of their registered address as at June 2019 published on Parliament's website, 23.7% lived in London and 19.9% in the South East.

[31] Lord Anderson, "Let's build on the virtues of virtual proceedings", The House Magazine (PoliticsHome), 18 May 2021: https://www.politicshome.com/thehouse/article/lets-build-on-the-virtues-of-virtual-proceedings.

hold the government to account. And as the metaverse beckons, the technology – as Richard Susskind never fails to remind us – can only get better.

42. There may be an argument also for building on the expertise and reputation of cross-benchers. This route has been pioneered by the Canadian Senate, an appointed second chamber and perhaps the closest international equivalent to the House of Lords. Like the House of Lords, the Senate had acquired something of a reputation for political cronyism. In 2015, Justin Trudeau initiated reforms aimed at giving it what we would call a much stronger cross-bench flavour. Every time there is a vacancy in the Senate, the Prime Minister appoints a person to fill it. But that person must be one of five Canadians who have applied for a place and been identified as appointable by an independent advisory board. By 2020, more than half of Senate seats had been filled by this method and, according to the researches of the House of Lords library, the Canadian public appeared to approve.[32] It would be interesting to know how the consistent and thorough scrutiny of legislation is ensured without the discipline that is provided in the House of Lords by the party system. But whatever reforms may be adopted, a significant cross-bench element in the House of Lords is something I hope we will never lose.

43. If reform is to come, particularly of our numbers, we would do well to decide *soon* on the form it will take. We are going to have to move out of the Palace of Westminster for an extended period, so that urgent restoration and renewal can be performed on its creaking and dangerous infrastructure. Whether we move back, and how the space is configured, can only sensibly be decided once we have a clear long-term picture of how big our revising chamber will be, and of the function that we will be asking it to perform.

Statutory interpretation

44. The publicity for this lecture promised a word about statutory interpretation. But it is almost time for me to sit down, so I shall make just one point – about the so-called "intention of Parliament".

45. Lord Burrows, Justice of the Supreme Court, gave a lecture in March of this year. He called it "Statutory Interpretation in the Courts Today", and I commend it to any student of the law.[33] Towards the end of the lecture, Lord Burrows expressed

[32] House of Lords Library, "Canadian Senate reform: what has been happening?", 17 March 2020: https://lordslibrary.parliament.uk/canadian-senate-reform-what-has-been-happening/.

[33] Lord Burrows JSC: "Statutory Interpretation in the Courts Today", University of Hertfordshire, 24 March 2022: https://www.supremecourt.uk/docs/sir-christopher-staughton-memorial-lecture-2022.pdf.

scepticism about the way lawyers and judges speak of statutory interpretation as "*giving effect to the intention of Parliament*". He had three difficulties with this formulation.

a. First, the impossibility either of identifying the *particular individuals* whose intention should count, or of defining the intention of the *group* at anything other than an excessively high level of generality.

b. Secondly, the fact that recourse to "the intention of Parliament" *obscures the true nature of the exercise*. To say that Parliament cannot have intended a particular result may convey a comforting sense of judicial respect for Parliament's processes: but if what we really mean is that the result would be unreasonable or absurd, which we generally do, it is better if we say so.

c. Thirdly, the difficulty in reconciling reliance on parliamentary intention, which was of course expressed at a particular time in the past, with the doctrine that the statute is "*always speaking*" – in other words, to be interpreted in the light of developments since it became law.

46. I cannot pretend to the learning or authority of a Supreme Court judge; but viewed from the perspective of the noisier and less respectable side of Parliament Square, all this makes perfect sense. Parliament tries to do its best with the Bills we are given; but to seek a common intention from the variously motivated ramblings of two Houses would be a fool's errand. I respectfully agree with Lord Burrows that it is better for lawyers and judges to be honest about what they are doing: determining the meaning of statutory provisions from dispassionate analysis of their words, context and purpose.

47. The German legal scholar and Minister of Justice, Gustav Radbruch, once said:

> "The interpreter must understand the law better than did the person who created it; the law can be wiser than its author—it really must be wiser than its author."

48. Thank you for listening to this part-time author of laws: I wish you wisdom in understanding them.