# The Table

BEING
THE JOURNAL OF
THE SOCIETY OF CLERKS-AT-THE-TABLE
IN COMMONWEALTH PARLIAMENTS

EDITED BY
J. M. DAVIES AND J. SHARPE

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# USUAL PARLIAMENTARY SESSION MONTHS

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# The Table

BEING
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## 1. EDITORIAL

This is the Fiftieth Volume of The Table, a journal which was launched in 1933 and has been published annually since then, except for two volumes which were published as one during the Second World War.

Volume I was the almost single-handed work of one man, Owen Clough, the founder of the Society. Not only was he the inspiration behind the journal but he personally wrote most of the first volume, as he did many subsequent ones. The present editors are very grateful for the fact that they get so much cooperation from colleagues at Westminster and abroad that they are hardly ever obliged to write lengthy articles to fill up each volume! In 1933, however, it must have been a daunting task to produce an entirely new journal dealing with esoteric parliamentary matters; but doubt never seems to have crossed Owen Clough's mind. Indeed his first editorial bursts with confidence for the future and with gratitude for the help he had received in the preparation of Volume I.

The membership of the Society as listed in Volume I did not include any clerks from Westminster, a fact to which the article by Sir Charles Gordon and Mr. Robert Perceval refers. The original members of the Society were the Dominion of Canada and the provincial assemblies of Quebec, New Brunswick, Saskatchewan and Alberta; the Commonwealth of Australia and the state assemblies of New South Wales, Queensland, Victoria, Tasmania and Western Australia; New Zealand; South Africa; South West Africa; the Irish Free State; Southern Rhodesia; Malta; India and the legislative councils of Assam, Bombay, Burma, Madras and the Punjab; and Northern Rhodesia. Since then the membership of the Society has grown enormously; it is never static, but Owen Clough's optimism has been amply rewarded by the present support the Society receives from both large and small legislatures.

That is not to say that the Society's fortunes have always prospered. Fifteen years ago, a proposal was made to close down the Society, but this was rejected by the membership, who instead gave new financial support and so enabled the Society to survive. Inflation has been one of the Society's major problems over the years, particularly recently. In 1933,

the Journal cost £70.00 to print. In 1951, Volume 19 ran to 420 pages but cost only £760.00, compared with £2,500 for 1981's Volume which ran to less than 200 pages. Postage costs are another major problem for a Society which spans the world and whose members rarely meet. Increased financial support has, however, always been forthcoming to meet these extra costs. The Journal enjoys world-wide sales, including many university libraries and legal practitioners; the editors are very conscious that this requires them to maintain a high standard in each volume, since the outside sales are an important source of finance to the Society.

Since this is the Fiftieth Volume of The Table, it has prompted the editors to make a special effort to try to include material from as wide an area of the Commonwealth as possible. The major article deals with the background to the patriation of the Canadian constitution from Westminster to Ottawa. Articles from some of the smaller legislative assemblies, such as Barbados and the Cayman Islands have also been included. One further feature of the volume is that the editors have persuaded all those who have previously edited the journal at Westminster to contribute either an article or a book review. We are very grateful to them all, particularly Sir Charles Gordon and Mr. Robert Perceval who took over from Owen Clough and who have described the transfer in 1952 of editorial responsibility from Cape Town to Westminster. Volume 50 could never have been achieved without the labours of all these editors in earlier years.

**Roy Leslie Dunlop, C.M.G.** – Mr. R. L. Dunlop died on 8th December 1981. He gave fifty years of parliamentary service to Queensland commencing his career in 1918 and becoming Second Clerk-Assistant in the Legislative Assembly in 1920. He was appointed as The Clerk of the Parliament in 1954 and served in this position until his retirement on 31st December 1968.

**S. S. Bhalerao.** – Shri S. S. Bhalerao retired as Secretary General of the Rajya Sabha on 30th April 1981.

**Robert Fortier, Q.C.** – On 30th December 1981, Robert Fortier retired as Clerk of the Canadian Senate and Clerk of the Parliaments.

Mr Fortier is a graduate of the University of Ottawa and, in law, of the University of Montreal. He was admitted to the Bar of Québec in 1937. His career in the Public Service began in 1942 when he was appointed Principal Secretary to the Minister of Public Works. In 1953 he became Departmental Secretary of the Department of Public Works and in 1960 was appointed Director of Administrative Services of the Department. He was appointed Clerk of the Senate and Clerk of the Parliaments on 1st February 1968. That same year he was a founding member of the Association of Clerks-at-the-Table in Canada and served as the Association's first Vice-President.

The following Motion, moved by the Honourable Senator Raymond Perrault, P.C., Leader of the Government in the Senate, was adopted, with a supporting speech from the Honourable Senator Jacques Flynn, P.C., Leader of the Opposition in the Senate:

"That the Senate desires to record its deep appreciation of the long and distinguished service rendered by Robert Fortier, Esquire, as Clerk of the Senate and Clerk of the Parliaments; and

"That in acknowledgment of the dignity, dedication and profound learning with which he has graced the office, he be designated an Honourary Officer of this House with an entree to the Senate and a seat at the Table on occasions of ceremony."

In moving the Motion, Senator Perrault, P.C., said, in part:

"I would now like to say a few words about Mr. Robert Fortier who resigned as Clerk of the Senate at the end of December.

Mr. Fortier was the distinguished and able Clerk of the Senate for 13 years. He served Speakers, leaders and senators, regardless of party, with integrity, judgment and consummate skill. His hard work, thoroughness and dedication earned him the confidence and respect of all members of this chamber. We are saddened by his resignation. We shall miss him greatly, and we wish him well in his future endeavours.

Mr. Fortier has had a distinguished career in the service of his country. To him and to Mrs. Fortier we extend our wishes for a long and happy period of retirement which we hope they enjoy with their family.

Honourable Senators, Mr. Fortier, in his years of service to the Senate has earned our gratitude and appreciation."

In seconding the Motion, Senator Flynn, P.C., added, in part:

"Mr. Speaker, honourable senators, I wholeheartedly second the motion of the Leader of the Government with respect to our Clerk who has just retired, namely Mr. Robert Fortier. I had been in the Senate for six years when Mr. Fortier was appointed to take on his very important duties, and during the thirteen years he has been with the Senate, our relations have been most satisfactory. He came here with almost thirty years experience, including twenty-seven spent in the public service...I believe we have every reason to appreciate the competence he has shown in exercising his duties. He has been a very effective administrator as the Clerk of the Senate. We have appreciated his discretion, which is absolutely essential since the Clerk's duties involve relations with both sides of the Senate and occasionally with a more or less independent group...I think we all have reason to appreciate the excellent relationship we have had with Mr. Fortier. The Leader of the Government has described his admirable career. Mr. Fortier started in the public service in 1942 which is some forty years ago. He has had a truly enviable career and once more, I feel that he was very wise to decide to retire at this time.

Mr. Fortier has acted in accordance with the best traditions of the Clerks of the Senate.

On behalf of the Official Opposition, I wish to express our agreement with the words spoken by the Leader of Government, offer our best wishes to Mr. Fortier and send our cordial greetings to his wife."

**Clerks become Members, and vice versa.** – In Volumes XLV, XLVI and XLVIII we published the names of clerks who either have been, or have become, Members. We list below one further name which has been drawn to our attention:-

Waldegrave, Hon. George, A Clerk in the House of Commons 1845-47; Member of the House of Commons, 1864-68.

## II THE SOCIETY'S TRANSFER TO WESTMINSTER, 1952

BY SIR CHARLES GORDON, KCB

*Clerk of the House of Commons*

AND

R. W. PERCEVAL,

*Formerly Clerk Assistant of the Parliaments*

There can be few who have left such a lasting mark upon the profession which they have adorned as did Owen Clough; and the fact that he contrived to do so mainly during the years after his retirement can be little short of unique. As readers of the Editorial in Volume I of this Journal will recall, the idea of founding the Society came to him soon after he became Clerk of the Senate in South Africa, and his travels under the aegis of the Empire Parliamentary Association, as it was then called, allowed him to discuss the possibility of its formation with fellow-Clerks in other dominion Parliaments. It was not until 1927, however, two years before his retirement, that the Society took shape; but at this stage it was only a corresponding body, with insufficient funds to enable the production of a published organ. That became possible only through persistent appeals for finance by the Clerks of a handful of Parliaments in the Commonwealth and Empire to their respective Speakers and governments, as a result of which the first Volume appeared at the end of 1932.

At that time Clough was living in London, and although the United Kingdom Clerks were not then members of the Society (to which fact later reference will be made), he was allowed by the then Clerk of the Parliaments to use a room in the House of Lords Committee Office as the depository of his papers and the seat of his editorial operations. These were of the least complicated kind conceivable; the whole burden of the work was discharged by the Editor in person, relieved solely by the secretarial duties performed first by one of his daughters and thereafter for seventeen years, after Clough had moved back to Cape Town in 1935, by Miss Vera Chapman. Those who have access to the Society's earlier papers can have little doubt that Miss Chapman gave full value for "such remuneration as the Society was able to afford and well below the current rates of pay for this work", to use Clough's words. His own assiduity, right up to the end of his life, is also marked by a formidable surviving mass of correspondence in manuscript. A very large proportion of the earlier volumes was written by himself, and nothing short of total devotion to the aims and membership of the Society could have sustained him in the strenuousness of the work involved.

But inevitably this strenuousness took its toll. By the end of 1950, although his interest in his work was in no way flagging, Clough had

reached the age of seventy-seven, had suffered a serious illness, and was beginning to give active consideration to the choice of a possible successor. Not surprisingly, his first ideas on this pointed him in the direction of some retired Clerk at the Table such as himself. It appears from his correspondence with Westminster at the time that he had several possible names in mind and, given his persistence when the interests of the Society were involved, it would be surprising if he had not personally approached one or more of their owners; but it seems clear that by the time of a visit by him to London in the summer of 1951 no such approach had borne fruit. In his annual Report to the Society, dated 28th January 1952, Clough informed his colleagues that the two United Kingdom Clerks had strongly urged that a successor to him should be considered, and a break in the continuity of the Journal thus avoided; he announced his firm decision that Volume XX would be the last that he would edit, and asked for suggestions regarding his succession. No such suggestions appear to have been made from overseas, and it was therefore at this stage that serious thought came to be given to the transfer of the Society's headquarters to Westminster.

It is pertinent at this point to make mention of the support – or lack of it – which the Society had received in earlier years from the Westminster Clerks. The use of a House of Lords room, which has already been mentioned, and the writing of a number of articles in the Journal, appears to have been the total extent of the commitment of our pre-war colleagues, of whom the Commons Clerks seem to have been even less forthcoming than those of the Lords. In one of his characteristic letters the re-perusal of which has given the authors of this Article such delight, Clough refers to what he describes as a "sticky" interview between the wars with a former highly-respected Clerk of the House of Commons, who expressed the view that no overseas Clerk at the Table could produce a Journal. The opinion also seems to have been held by a least one Westminster Clerk that the fact that he enjoyed an office by Letters Patent under the Crown was a bar to his official enrolment in the Society. Be this as it may, the question of membership was happily resolved during the course of 1946, and coals of fire were heaped upon the heads of the two United Kingdom Clerks at the time by the publication of their names as Joint Presidents of the Society in the first Volume in which their membership and that of their other Table colleagues was recorded.

From that time onwards, the communications between Cape Town and Westminster were constant and cordial. By the time that Clough had taken his decision to relinquish control after the publication of Volume XX, a number of suggestions concerning a successor had been canvassed with Westminster, discussed and discarded. In a letter to the Westminster Clerks in July 1952 Clough expressed great alarm at a rumour that a 'take-over bid", to which he was strongly opposed for personal reasons, might be made by the Commonwealth Parliamentary Association. Later in the same month, he himself suggested that the Hansard Society be asked to assume control not only of the Journal but also of the affairs of

the Society of Clerks-at-the-Table itself but neither of the two Westminster Clerks was ready to support such a transfer. It was in a letter of 1st August 1952, in reply to this suggestion, that Sir Robert Overbury, the then Clerk of the Parliaments, first revealed that he and his colleague in the House of Commons, Sir Frederic Metcalfe, were actively discussing the possiblity of providing a Clerk (though not a Clerk at the Table) from each of the two Houses to act as joint editors. Clough's approval of this proposal was immediate and unhesitating, and it was with his blessing that we were appointed in December 1952 as Secretary and Treasurer respectively of the Society and Joint Editors of its Journal.

It will not be imagined that the transfer proceeded as smoothly as the succession of one newspaper editor by another. London and Cape Town are six thousand miles apart, and the bulk of the papers which required to be transported was not inconsiderable. The publication of Volume XX, for which Clough still retained responsibility, had been subject to unconscionable delays by the then printers; and the fact that the subscriptions of individual members and their Parliaments to the Society were at that time levied in respect of each forthcoming volume rather than each calendar year had the result that we found that we had no funds with which to embark on the expenses of preparing Volume XXI, to which urgent attention was needed. This problem was resolved by the diversion (with the full approval, let it be understood, of the Clerks of the two Houses as Trustees and, of course, Clough himself) of the Westminster subscriptions for Volume XX to the new editors. In spite of this, Clough's careful husbandry (of which more anon) allowed the full costs of Volume XX to be paid for out of existing resources, and the Society was therefore able to proceed with the production of Volume XXI in a state of solvency.

So much for the dry facts of the matter. But, on a more personal note, what did it all feel like at the time? Owen Clough was in appearance rather a Dickensian character. He was small, and round, and rubicund; he talked very fast, and a little indistinctly. He seemed very old, but perhaps that was because we were young ourselves then.

Being young, we thought we had to make changes, and for these there was one incontrovertible excuse – the reduction of expense. It seemed that Clough's ultimate answer to such deficits as had from time to time occurred had been to pay for them out of his own pocket. The new Treasurer was in no position to do the same, and so the new co-Editors decreed that subsequent volumes were to be only half as thick as the old had become. There could, alas, be no further editions of the articles entitled "Busman's Holiday", the appearance of which in Volumes XVIII and XIX had given much pleasure to the Journal's readers. These were accounts of Clough's very considerable travels, consisting of a straightforward travelogue mixed half-and-half with random procedural notes engendered by his meetings with colleagues round the world. Regretfully, we could not ask him to keep them up.

Everything else we pruned, vigorously at first: but in some mysterious

way supply seemed soon to adjust itself to demand, and "The Table" – a new title suggested in 1953 by Sir Francis Lascelles, at that time Clerk of the Parliaments – got fairly rapidly onto an even keel. Apart from that, we changed the printer (cheapness again) and put on a shiny new cover. We found that the annual job of revising the cumulative index – the last editorial task at the beginning of the summer recess – was something of a grind, though to do it well was satisfying; we therefore decided that four out of five volumes would have purely internal indices, so that only every fifth index would be cumulative. We note that our successors have carried this process still further.

The rest of Owen Clough's creation we left as it was in substance, albeit with some formal rearrangements. On reflection, what he made was remarkable enough. "Expressions in Parliament" is an unfailing – and almost always unacknowledged – source book for journalists, and the rest of the Journal is an indispensible working tool for Clerks, regularly used by compilers of Erskine May and its equivalents. But perhaps above all, The Table is a means of keeping in touch with colleagues whose joint activities, though for the most part hidden, may have some slight influence on human affairs as a whole.

## III. THE SOCIETY OF CLERKS-AT-THE-TABLE IN COMMONWEALTH PARLIAMENTS: THE FIRST FIFTY YEARS

The Questionnaire for this volume of The Table asked for material about parliamentary developments over the past half-century, principally in those countries which were early members of the Society; for instance, personal recollections from retired clerks, changes in the size and role of legislatures, staffing, influence on the executive, etc.

The Editors also asked for any comments about the Society and its journal during the last 50 years. For instance, their value, or otherwise, to members and whether they have played any part in parliamentary developments over the same period.

The response to this approach has not been as wide as the Editors had hoped, but they feel that this attempt to "look backwards" has not been altogether a failure because a number of interesting replies were received.

*Bermuda.*

The Clerk of the Bermudan Legislature, Mr. J. T. Gilbert, writes as follows:-

"When Volume I of the Journal of the Society of Clerks-at-the-Table in Empire Parliaments was printed in 1932, the House of Assembly of Bermuda was 312 years old and had 36 Members called Members of Colonial Parliament who had been able to stand for election provided they owned land valued at not less than £250! These Members called themselves "Independents" but the great majority of them represented local business interests and could by no stretch of the imagination be considered representatives of all the people of Bermuda. They were, however, by and large shrewd men with "horse sense" who built up the prosperity of Bermuda and made it one of the world's most famous tourist resorts.

It was not until 1963 that the first political party was formed in Bermuda. A second political party was formed in 1964 and the two party system of Government has been in existence since that year. After the formation of political parties, parliamentary developments were very rapid. Following a Constitutional Conference held in London in November, 1966, a new written Constitution was introduced on June 8th, 1968, providing a responsible form of Government.

The House of Assembly adopted the report of a Boundaries Commission that the General Election held on May 22nd, 1968, should result in 20 constituencies each sending two members to the House of Assembly under full adult suffrage.

In 1973, further constitutional changes created a 40 seat House of Assembly and a constituency system of eight parishes divided into two seat constituencies and one parish, the largest one, into four two seat constituencies. Various other amendments were made to the Constitution in 1973, the most important being the establishment of the Governor's Council, to deal with the Governor's reserve powers of external affairs, defence, internal security and the police. The Premier and two of his Cabinet Ministers under the Chairmanship of the Governor form this Council. From 1973, Members of Parliament became M.P.'s, the C. (Colonial) having been removed, the Leader of Government Business became the Premier, who presided over a Cabinet replacing the Governor who had presided over an Executive Council

Looking through the 49 Volumes of the Journal that have been published to date is a most rewarding experience as the articles and other information in them are of the utmost value

to all members of the Society. They provide an invaluable insight into the development of parliamentary practice and procedure within the Commonwealth and therefore enable the Members of the Society to be better equipped to deal with their day-to-day parliamentary duties.

The majority of Members of the Society meet only once a year at the Society's Annual Meeting and although this Meeting is of great value as it provides a forum for the exchange of ideas and for the Members to get to know each other, it is a pity that Members cannot meet more regularly and thereby establish a rewarding working relationship throughout the Commonwealth. I am certain that the Society and its Journal have played an important role in parliamentary developments in the Commonwealth during the past fifty years. Much information contained in the Journals must have been passed on by Members of the Society in their capacity as Clerks or other Officers of the House to the Members of their Parliaments who must have been influenced by this information. In this connection, I always see that a copy of the latest Journal is prominently displayed in the House of Assembly's Library, and main lounge and what's more, I see many of the Members reading them!"

*Malta*

Mr. C. Mifsud, Clerk of the Maltese House of Representatives, has drawn attention to wartime correspondence between Owen Clough, the Secretary/Treasurer of the Society, and the Lieutenant Governor of Malta, Lord Gort. Owen Clough wrote in part:-

"Your Excellency,

I have the honour to acknowledge your letter of July 1st 1944 which you will be interested to know arrived here today from your gallant little island, Malta, G.C.

The members of our Society will be indeed glad to know that they can again welcome your "Clerk-at-the-Table", the Clerk of the Councils in their midst and he has been duly enrolled, pending the necessary payment of his qualifying subscription."

*New South Wales.*

Both the Clerk of the Legislative Council and the Clerk of the Legislative Assembly have drawn attention to the dismissal by the Governor on 13th May 1932 of the then Government led by Mr. J. T. Lang. This dramatic event coincided with the formation of the Society of Clerks-at-the-Table and the first volume of The Table. The significance of the event was different for each House because, of course, the Premier enjoyed his position by right of a majority in the elected House, while the non-elected Upper House had been under threat of abolition before the dismissal of the Government. For these reasons the two accounts are published in full. The Clerk of the Legislative Council writes as follows:

"At the time the Honorary Secretary of the Society of Clerks-at-the-Table was dating his introductory remarks to Volume 1 of "The Table", the State of New South Wales was passing through a period of depression and financial and political difficulties. Talk was rife that the Labor Party in Government was going to abolish the Legislative Council. The Labor Government, under the leadership of the Premier, the Hon. J. T. Lang, M.L.A., was replaced on 13th May, 1932, by a coalition Government (United Australia Party and Country Party), known as the Stevens-Bruxner Ministry, when the Governor, Sir Philip Game, dismissed Mr. Lang on his refusal to withdraw *ultra vires* regulations.

While the Labor Party were talking of abolishing the Legislative Council, the coalition parties were talking of reforming that House.

Following the General Election on 11th June, 1932, at which the Stevens-Bruxner

Ministry was returned to power, moves were put in train to reform the Legislative Council by the introduction and passing through both Houses of the Constitution Amendment (Legislative Council) Bill and for its presentation to the people of the State by way of referendum. The electorate as a whole approved of the reforms contained in the Bill by approximately 41,000 majority and the Bill finally became law on Assent on 22nd June, 1933, as Act No. 2 of 1933.

The Legislative Council, prior to the referendum, had been a House of Life Members, nominated by the Governor, usually on the advice of the Premier of the day. In 1932, with "swamping" by Premier Lang as a precursor to his moves to abolish the Chamber, the membership had risen to 126.

The Constitution Amendment (Legislative Council) Act, 1932, (No. 2 of 1933) provided for a Legislative Council of 60 members who were to be elected by the electoral college system of voting, i.e., both Houses of Parliament voting in their respective Houses at the same time. The system of voting was proportional representation and the term of service of the newly elected Members was to be eventually for 12 years.

Elections for the new Members took place in November and December, 1933, and were for 15 members for terms of 12, 9, 6 and 3 years respectively. The President of the newly reformed Council was to be elected by its Members and no longer nominated by the Governor.

The newly elected 60 Members of the Council, whose varying terms of service commenced on 23rd April, 1934, met in the Council Chamber on 24th April, 1934, and, after being sworn and subscribing the Roll, set about electing one of their number to be their President. A new chapter in the life, constitution and role of the Legislative Council had begun.

Members of the Legislative Council had received no remuneration for their services, either by way of salary or allowances, until by Act of Parliament passed in November 1948 and made retrospective to 1st September, 1948, Members were provided with an allowance of £300 per annum. In 1952, this allowance was increased to £500 per annum and its name changed to salary which, with other allowances, provided for differing sums for the President, Chairman of Committees, Ministers, Leader of the Opposition and the Members. As the years progressed, other Officers of the House became recognised, likewise political parties and members' affiliations therewith and new nomenclatures emerged with salaries and additional allowances for specified classifications and categories.

From 1st January, 1982, the salary of the private Member of the Legislative Council with his allowance is $29,540 – a sharp contrast to his 1948 allowance equivalent to $600.

Further changes affecting the constitution of the Legislative Council and its Members were forecast in 1976 which became a reality with the passage of the Constitution and Parliamentary Electorates and Elections (Amendment) Act, 1978 (No. 75 of 1978). Through this measure, and until further constitutional changes are effected, the Legislative Council is to be elected by all persons eligible to vote at a General Election for Members of the Legislative Assembly. Provision was made for the gradual replacement of pre-1978 Members with Members elected by the people over a period of three Periodic Council Elections which are held concurrently with the State General Election for Members of the Lower House.

At the first Periodic Council Election, held on 7th October, 1978, 15 Members were elected by the people of the State and, with the remaining 28 Members of the old electoral college system of voting, the House, when it met on 7th November, 1978, consisted of 43 Members. Following the second Periodic Council Election, on 19th September, 1981, the total membership of the Council rose to 44 Members, of which number 30 are now elected by the populace. By the year 1984, the transition from the electoral college system Member to the "democratically" elected Member and a House of 45 Members will have been accomplished.

Over the 50 years of the life of "The Table" the Legislative Council of the State of New South Wales has changed from a membership of 126 to 44 (45 by 1984), and from a "nominee" House to a "democratically" elected body.

The resultant changes from such reforms will become evident when "The Table" indices for the years to 2032 are scanned by those Officers of the Legislative Council who will

doubtless record in that Journal other matters of change in Standing Orders, ceremonial and – who knows what else?"

The Clerk of the Legislative Assembly writes:–

"The most dramatic event in the development of the New South Wales Parliament over the past half-century was the dismissal of the Lang Ministry on 13th May, 1932, by the then Governor, Sir Philip Game.

The crisis arose when the Federal Government enacted legislation to direct New South Wales revenue to the Federal Treasury in settlement of default by New South Wales in certain interest payments. The Lang Ministry riposted by issuing instructions (contrary to the Federal legislation) to State Civil servants on 13th April, 1932, respecting the procedure to be followed in connection with the receipt and expenditure of public moneys.

A further circular was issued on 10th May, 1932, confirming the earlier instructions, and authorising the continuation of the method of collection as might be directed by Treasury circular, under Government instructions, from time to time.

Following the issue of these directions the Governor, on 12th May, requested the Premier to inform him whether instructions contravening the Federal legislation had been issued to State public servants. The Premier informed the Governor that certain instructions had been given to servants of the State, and forwarded a copy of these instructions to the Governor. The Governor then requested the Premier to withdraw the circulars or, alternatively, prove satisfactorily that the instructions were not illegal.

Upon receiving an intimation from the Premier that Cabinet would not, under any circumstances, withdraw the instructions given, the Governor, at 5.40 p.m. on 13 May, 1932, informed Mr Lang that his commission as Premier of the State had been withdrawn.

One hour later the leader of the Opposition, the Honourable B. S. B. Stevens, was sworn in as premier, and as an Executive Councillor. (Mr Stevens, as Leader of the Opposition in the Legislative Assembly, had had a following of 35 members, including himself, while the former Premier, Mr Lang, had had 55 supporters including himself.)

A Government Gazette, notifying the withdrawal of Mr Lang's commission and the swearing in of Mr Stevens, was published on 16 May, the notification being dated 13 May.

At the date of the dismissal of the Lang Ministry, the Estimates for 1931-32 had not been passed, although Supply had been previously obtained until 31 May. At the date of dismissal, all payments necessary after 31 May were to depend upon the Governor's Warrant.

On 11 May Parliament was prorogued until 5 July, and later dissolved on 18 May. The General Election was held on 11 June, 1932, with the Stevens Ministry being returned with 66 seats. The former Lang Ministry remained in Opposition with 24 seats.

Mr Lang, although re-elected to Parliament, never regained office as

Premier. He was subsequently expelled from the Labour Party in 1943 and was re-elected that year at a by-election as an independent member. This raised a procedural problem. Standing Order 19 of the Standing Rules and Orders of the Legislative Assembly requires that a member returned at other than a general election be introduced to the House by another member. No member, however, was prepared to introduce Mr Lang. The situation was overcome by having Mr Lang introduce himself, with the Speaker stating that as the newly elected member was well known to honourable members and the Speaker, he would allow Mr Lang to be sworn without having first been formally introduced...

* * * * * *

The Staff at Parliament House has grown enormously over the last half century. This reflects not only the growing complexity of society in New South Wales but the increasing involvement of government at all levels in the day-to-day life of the people of the State.

The following table illustrates the change in the size of the Legislature over the last fifty years.

| *Year* | *L.A. Staff* | *Whole Legislature* |
|---|---|---|
| 1932-33 | 27 | 91 |
| 1947-48 | 39 | 120 |
| 1962-63 | 42 | 140 |
| 1975-76 | 128 | 272 |
| 1981-82 | 157 | 369 |

The influence of the legislature during this period of the executive has waned, with a corresponding waxing of the influence of the executive of the legislature.

The paradox of the increase in the size of Parliament and its role in society, as the "Government" and its concomitant decline in prestige as an institution' and its supplantation by the executive, is a source of concern to all who support the doctrine of the separation of powers and the rule of law.

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The Journal, which has always been read with great interest by our Clerks during its half-century existence, has also proven to be a valuable work of reference.

It is always enlightening, when unusual situations having no local precedence arise, to be able to consult "The Table" and to see if, and how, one's fellow Clerks have dealt with the situation. A case in point is the article "Tie in Opposition," in Volume XLVI of "The Table", by the Clerk of the Legislative Assembly of Saskatchewan, Mr. Gordon Barnhart. This article proved of great interest when the former Opposition coalition parties in the Legislative Assembly of New South Wales were each returned with 14 members at the 1981 General Election. Questions immediately arose. Who is the official Leader of the Opposition? Who would be entitled to the salary and office grants of the

Leader of the Opposition which were larger than those given to the Leader of the Third Party? Which party would sit closer to Mr Speaker in the Assembly? Which leader should be recognised in the Legislative Assembly as the official spokesman for the Opposition? It was with some relief that one learnt that these questions had been broached...

The Journal and the Society also give members the feeling of belonging to a wider community. It is almost always pleasing to meet one's fellow Clerks and is it always comforting, when travelling away from the domain of Legislature, to know that a welcome awaits from one's brother Clerk."

*India*

The Secretary General of the Lok Sabha, Shri Reddy, writes:-

"It is a privilege for me to be invited to write to you on the occasion of the completion of fifty years of publication of 'The Table'. These years have been momentous in the history of the world – more so for many of the Commonwealth countries which passed through a period of struggle for self government culminating in their independence and securing for themselves a place of honour in the comity of nations. Though I assumed the office of Secretary, Lok Sabha (House of People) in the year 1977, it has been my good fortune to have been intimately associated with this House for over twenty five years. During all these years I have been a keen reader of 'The Table' which ever since its inception has been an authentic medium for dissemination of latest information on parliamentary practice and procedure. The Society of Clerks-at-the-Table of which India was also a founder member can legitimately take pride in the wise decision they had taken to bring out this useful Journal. 'The Table' has, undoubtedly, lived up to the expectations of its founders.

In recounting the political and parliamentary developments in my country, the year 1919 is an important landmark because in that year, in response to the growing popular demand for self government, the Government of India Act, 1919 was enacted which for the first time established a bicameral legislature for the country at the Centre. The Act envisaged a maximum of 60 members for the Council of State, of which not less than half were to be elected and not more than one-third could be official members. The Legislative Assembly, comparatively more representative, was to have a strength of 145 – at least five-sevenths of these were to be elected and, of the remaining, at least one-third were to be non-official. The first Legislative Assembly, constituted under the Act came into being at the Centre in 1921. The Act while establishing partially responsible governments in the Provinces, under a system of what was known as 'dyarchy', did not introduce any element of responsibility at the Centre. The Central Legislature, though more representative now and endowed, for the first time, with power to vote supplies, had no power to replace the Government, and even its limited powers in the field of legislation and financial control were subject to the overriding powers of the Governor-General-in-Council. In brief, in theory as well as in

practice, the Governor-General-in-Council continued to remain responsible only to the British Parliament through the Secretary of State for India.

The constitutional reforms introduced under the Act of 1919 fell far short of the expectations of the people and their demand for a fully sovereign Parliament and government responsible to the elected representatives of the people became more insistent. After a series of Round Table Conferences in London during 1930-32 with Indian leaders representing various interests and parties, the British Government formulated certain proposals for further constitutional reforms. These, with some modifications, eventually became law in the form of the Government of India Act, 1935. The two important features of this enactment were the provision for the establishment of "The Federation of India" uniting the Provinces, then known as "British India" and such of the Princely States (then known as "Indian States") as joined the Federation and the introduction of "Provincial Autonomy".

In this scheme, the Princely States could not be persuaded to accede to the Federation. And so, the federal part of the Act never came into operation. As a result, the Constitution of the Central Government in India remained as contemplated under the Act of 1919 with such modifications as were necessitated by the introduction of autonomy in the Provinces. Thus, no Council of Ministers responsible to the Legislature was appointed at the Centre and the powers and functions of the Central Legislature, as envisaged under the 1919 Act, remained unchanged until the Indian Independence Act, 1947.

The Central Legislature of pre-independence days had many fetters upon its functioning and was far from being a free and sovereign Parliament; yet it did serve, as our revered leader Pandit Jawaharlal Nehru put it, as a training ground for Parliamentary democracy in India and familiarised Indian legislators with important elements of modern parliamentary procedure.

The outbreak of war in 1939 quickened political development in the country. Already the Indian public opinion was sorely disappointed over the denial of popular government. Added to this, one event which was deeply resented was the declaration by the Governor-General, exercising his discretionary powers, that India had joined the war on the side of "Allies". This highlighted the fact that on such vital matters there was no need to consult the Assembly. In protest, the Congress Ministries which were in power in most of the provinces resigned, emphasising in unmistakable terms that although the Governor-General had declared India's participation on behalf of the Allies, this was done without their consent. To mollify Indian public opinion, Sir Stafford Cripps, an important member of the British cabinet was sent out to India in October 1939 to find a solution to the Indian constitutional and communal problem. On his return to England, he stated before the House of Commons that "India's salvation remains in a Constituent Assembly". Sir Stafford came to India again in 1942 with the draft of a resolution

which envisaged an elected Constituent Assembly for the country in which the princely States could participate, and whose agreed constitution the British Government would accept. For the interim period, the Viceroy's Executive Council at the Centre would be composed of Indians only. The question whether the Viceroy could overrule the Executive Council was evaded on the ground that any such provision requiring him to accept its advice would need an amendment of the Act of 1935.

Indian leaders were now convinced that a solution to the Indian constitutional and political problem would be automatically found if the foreign domination ended. Events moved fast and in August 1942, the Congress adopted the "Quit India" resolution asking the British Government to leave the country. Pursuant to its resolution, Congress started a countrywide movement against the British Government and soon most of its leaders were put behind bars or went underground.

After the war ended, the British Government gave the Indian problem the highest priority. It recognised India's right to decide her own destiny. With a view to resolving the constitutional tangle, they sent a Cabinet Mission consisting of Sir Pethick Lawrence, Sir Stafford Cripps and Mr. A. V. Alexander to have wide-ranging talks with the Indian leaders. On 16 May, 1946, the Cabinet Mission's Plan was announced under which a Constituent Assembly of India was formed for framing the constitution of the country. Although constituted on the basis of indirect elections, the Assembly was indeed truly representative and a most impressive body consisting of many of the foremost leaders of the country's freedom struggle, eminent jurists and constitutionalists and distinguished men and women in the country's public life. The Assembly met for the first time on 9th December, 1946.

So far as the status of the Assembly was concerned, the prevailing view in the Assembly was that although the statement of 16th May, 1946, did impose certain limitations on the Assembly, how far, if at all, it would abide by those limitations depended on the Assembly itself and not on any external authority. In any case, the Assembly proceeded on this assumption and adopted its own Rules. One of these significantly provided that "the Assembly shall not be dissolved except by a resolution assented to by at least two-thirds of the total number of members of the Assembly."

On 3rd June 1947, the Viceroy made the announcement about the division of the country into two independent dominions – India and Pakistan. The Indian Independence Act, 1947 enacted by the British Parliament in record time declared the Constituent Assembly of India a sovereign body, and on the midnight of August 14–15, 1947, the Assembly assumed full powers for the governance of the country.

Under the Indian Independence Act, 1947, the existing Central Legislature ceased to function and its place was taken by the Constituent Assembly which though formed for framing a constitution for independent India was also to function as the Dominion Legislature. The two

functions of the Assembly, however, were clearly demarcated and the Constituent Assembly (Legislative) started functioning from 17th November, 1947.

The Constituent Assembly adopted the draft Constitution on 26th November, 1949 and the new Constitution came into force on 26th January 1950. Before this day India was still a British Dominion with a Governor-General appointed by the British Crown. Till then India had continued to be governed by an Act of the British Parliament – the Government of India Act, 1935 – as suitably modified and adapted in the context of the Indian Independence Act, 1947.

With the coming into force of the Constitution, from January 1950, the Constituent Assembly became the Provisional Parliament of India and functioned as such until the first General Elections based on adult franchise were held in 1952 (Polling took place from October 1951 to January 1952) and Parliament was constituted under the provisions of the new Constitution.

The Constitution of free India provides for a Parliament, consisting of the President and two Houses, known, respectively, as the Council of States (Rajya Sabha) and the House of the People (Lok Sabha). Rajya Sabha consists of not more than 250 members. Of these, 12 are nominated by the President for their special knowledge or practical experience in such matters as literature, science, art and social service. The remaining seats are allocated to the various States and Union Territories, roughly in proportion to their population. The representatives of each State are elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote. The minimum age for membership of the House is 30 years.

Rajya Sabha was constituted for the first time on 3 April, 1952. It is a permanent body not subject to dissolution, but with one-third of its membership renewed every second year. When constituted in 1952, it consisted of 216 members, including 12 members nominated by the President and 204 chosen by indirect election to represent the States. With the formation of new States and Union Territories the number of elective seats has also gone up. The present strength of the House is 244, of whom 232 are the elected representatives of the States and the Union Territories and 12 are nominated by the President.

The Lok Sabha is composed of representatives of the people chosen by direct election on the basis of adult suffrage. The maximum strength of the House envisaged by the Constitution is now 547 – up to 525 members to represent the States, up to 20 members to represent the Union Territories and not more than two members of the Anglo-Indian Community to be nominated by President if in his opinion that community is not adequately represented in the House. The total elective membership is distributed among the States in such a way that the ratio between the number of seats allotted to each State and the population of the State is, so far as practicable, the same for all States. The qualifying

age for membership of Lok Sabha is 25 years.

Following the first General Elections held in the country in 1952, the first Lok Sabha met in May 1952. The present House – the Seventh Lok Sabha – was constituted in January 1980. The strength of the House is 544.

As in other parliamentary democracies, Parliament in India has the responsibility for legislation, for overseeing the functioning of Administration and ventilation of public grievances.

The powers between the Centre and the States have been so distributed as to ensure a pre-eminent position for Union Parliament in the legislative field. Apart from the sphere of legislation demarcated for it under the Constitution, in normal times also, under certain circumstances, Parliament can assume legislative power over a subject falling within the sphere exclusively reserved for the States.

The Constitution vests in the Union Parliament the constituent power or the power to amend the Constitution.

One of the methods by which Parliament exercises check over the Executive is through its control over finances. This power in the hands of Parliament helps in securing accountability of the Executive. Besides, there are procedural devices laid down in the Rules of the Parliament which afford ample opportunities for the enforcement of ministerial responsibility, for appraising and influencing governmental policies and offering opportunities for ventilating public grievances.

Between the two Houses, the Lok Sabha has supremacy in financial matters. The Council of Ministers is also collectively responsible to this House. On the other hand, the Rajya Sabha has a special role in enabling Parliament to legislate on a subject falling in the sphere of States if it is necessary in the national interest. It has a similar power in regard to the creation of an All India service common to the Union and the States. The Constitution, otherwise, proceeds on a theory of equality of status of the two Houses.

Since the present Constitution came into force seven General Elections have been held on the basis of adult franchise which goes to show that Parliamentary institutions have taken firm roots in the Indian soil. The peaceful and orderly manner in which elections were conducted evoked unqualified appreciation of both Indian and foreign observers. The elections were generally acknowledged to have been free and fair. Never before in world history had such large numbers of men and women gone to the polls in any country.

An important matter which I would like to mention here is the evolution of the Secretariat, which serves the House, into an independent department directly under the Speaker free from the day to day influence of the Executive. In pre-independence days, on 10 January 1929, a separate self-contained department known as the 'Legislative Assembly Department' was created in the portfolio of the Governor-General with the President (Speaker) of the Legislative Assembly as its *de facto* Head. The recruitment and conditions of service of the employees of the

Legislative Assembly Department were governed by separate Rules, called the 'Legislative Assembly Department (Conditions of Service) Rules, 1929'. The officers and staff of the Legislative Assembly Department thereafter began to be appointed in accordance with these Rules and the position and authority of the Speaker in the matter of their recruitment and conditions of service came to be recognised. The name of the Department continued to remain the same until 26 January, 1950, when with the coming into force of the Constitution of India and the creation of a Provisional Parliament, it was changed to 'Parliament Secretariat'. With the creation of two separate Houses, the House of the people and the Council of States in 1952 under the new Constitution, the Secretariat of the House of the People continued to be called the Parliament Secretariat, while a new Secretariat, called the 'Council of States Secretariat' was set up for the Council of States. Their names were changed respectively to 'Lok Sabha Secretariat' and 'Rajya Sabha Secretariat' in 1954. The present Constitution provides for separate staff for each House of Parliament and authorises Parliament to make laws regulating the recruitment and conditions of service of the secretarial staff of the two Houses. Until such laws are made, the President may, after consultation with the respective Presiding Officers, make rules regulating their recruitment and conditions of service. No legislation in this respect has been passed by Parliament so far. However, in October, 1955, the Lok Sabha Secretariat (Recruitment and Conditions of Service) Rules, 1955, were framed and promulgated by the President in consultation with the Speaker. These Rules, framed as they are under the constitutional provisions, have the force of law, and have been found by experience to be flexible enough and adequate to meet the needs of varying circumstances from time to time. The Secretariat of the House thus functions as an independent entity under the overall guidance and control of the Speaker.

In order to facilitate the members in the performance of their onerous duties, as representatives of people, Parliament has enacted laws which entitle them to a monthly salary, daily allowances and pension when they cease to be members. These are regulated under the provisions of the Salary, Allowances and Pension of Members of Parliament Act, 1954, as amended, and the rules made thereunder. According to the Act, a Member is entitled to a salary at the rate of five hundred rupees* per mensem during the whole term of his office and an allowance at the rate of fifty-one rupees* for each day during the period of residence on duty i.e. during the period a member resides at a place where a session of a House of Parliament or a sitting of a Committee is held. A member is also entitled to receive, in lieu of additional facilities such as housing, postal, water, electricity, constituency and secretarial, allowances at a rate of Rs. 1,000* per mensem. Members are also entitled to travelling allowance for attending a session of the House or a sitting of a Committee. Some other amenities like facility to travel first class by any railway service in India accompanied by one person to travel second class, medical facilities,

telephone facilities etc. are also given to them.

Ex-members of Parliament are entitled to pensions ranging between Rs. 300* to Rs. 500* per month depending upon the duration they have served as members.

I hope this short resumé, based on well known sources, of the political and constitutional development in my country during the last fifty years which covers both the pre-independence and post-independence era, will be found useful by readers. I look forward to reading similar contributions in respect of other member countries in the pages of 'The Table'.

On the fiftieth year of its publication I offer my good wishes to the journal."

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* Rs. 16.35 = 1 Pound sterling (buying) – (23 April, 1982).

# IV. THE ACHIEVEMENT OF CANADIAN SOVEREIGNTY

BY D. E. STOLTZ

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On April 17, 1982, Queen Elizabeth, at a ceremony on Ottawa's Parliament Hill, signed a proclamation to bring into force the Constitution Act, 1982, thereby completing the final stage in the evolution of Canada towards political and legal sovereignty. In this, the last amendment to the Canadian constitution enacted by Westminster, provision was made for the enactment of all future amendments in Canada. Thus culminated a historical process spanning some two hundred years in which British North America evolved gradually, and constitutionally, from dependent to independent status.

The formal surrender of legal responsibility by Westminster merely confirmed in law what had long been accepted in practice – namely, Canadian sovereignty over Canadian laws. The public controversy that surrounded the "patriation" proposals of the Government of Canada centred upon the specific amending procedure proposed, the accompanying *Charter of Rights and Freedoms,* and the absence of consensus among the ten provinces with respect to these items. Events in the Parliaments and courts of two countries following their introduction in October 1980 raised some important issues of constitutional law and convention. However, in order to put them in perspective and grasp the real significance the Constitution Act, it will be useful, as well as timely, to retrace some of the earlier milestones in Canada's accession to legislative sovereignty, with particular reference to methods of constitutional change.

How did Canada, one of the senior members of the Commonwealth with a long tradition of self-government, become the last to achieve complete formal sovereignty over its affairs? The explanation lies in Canada's position as a federal state and the prolonged absence of agreement among the constituent governments on a formalised method of constitutional amendment. The central document of the Canadian constitution, the British North America Act, 1867, made no general provision in this regard. Any changes to that Act affecting more than one level of government, and certain changes affecting even a single government, have until now been capable of enactment only by the United Kingdom. But let us start the story at the beginning.

*Development of Colonial Self-Government*

The first stage in the evolution of self-government in any colony was the granting to the inhabitants of the right to make their own laws in a legislature at least partly elected. Apart from the colonial constitution, which was regarded as a matter of Imperial concern, the King in Council

had no power to legislate for the domestic affairs of a colony and the Imperial Parliament generally abstained from doing so, particularly after an Assembly had been established. Representative government first appeared in what is now Canada with the calling of an Assembly in Nova Scotia in 1758 pursuant to a Commission to the Governor.[1] By the *Constitutional Act* of 1791, the Imperial Parliament extended representative institutions to what had been New France, divided into Upper and Lower Canada.[2]

In principle, as soon as a British colony was granted its own legislature it had the power to legislate across the entire range of domestic colonial affairs.[3] This was frequently expressed in colonial charters as the power to make laws for the "peace, welfare and good government" of the colony. It included authority to legislate with respect to the composition, powers and modes of operation of local governmental institutions – in other words, to modify the colonial constitution. The extent of this power depended on the terms of the Imperial Acts or prerogative instruments establishing the colony. In 1865, the Colonial Laws Validity Act established a degree of uniformity in such matters throughout the Empire. It provided that every colonial legislature had power to establish and reconstitute courts of justice, and that every representative colonial legislature (a legislature half of whose members were elected) had power to change the "constitution, powers and procedure" of that legislature. At the same time, the Act codified the common-law principle that colonial legislation must not conflict with Imperial legislation extending to the colony. (The Imperial legislation which was paramount was that which applied to the colony *ex proprio vigore*, "of its own force," either by express words or necessary intendment. As to the general statute law of England, deemed to be imported into a colony by British settlers, the Act removed such doubts as existed previously regarding the colony's power of amendment.) So much of the colonial constitution as was contained within Imperial statutes therefore remained beyond the colony's capacity to change, except to the extent that such power of amendment was expressly conferred.

The ascendancy of British statute law was only one of the constraints on colonial sovereignty. A colonial statute that was within the defined jurisdiction of the legislature might yet be denied legal effect by the exercise of the royal prerogative. Though the King's assent had not been withheld from a United Kingdom statute since 1707, this prerogative lived on in the rest of the Empire. The King in Council could disallow a colonial act after the Governor had already assented to it in his name. More commonly, the Crown's discretion was exercised by the Governor reserving bills, before assent, for signification of His Majesty's pleasure (though the Governor could also refuse assent outright). Among classes of bills reserved as a matter of course were those affecting colonial constitutions.

The evolution of sovereignty in matters of administration generally is a separate subject, but it is necessary to mention in this connection one

development of surpassing importance in constitutional history. Until the 1840s, colonial administration was carried on by an Executive Council appointed by the Governor and responsible to him alone. Laws passed by the colonial legislature were administered by persons who were accountable, not to that legislature but, through the Governor and Colonial Secretary, to the Parliament of the United Kingdom. In his famous report of 1839, the Earl of Durham recommended that Executive Councillors be chosen from among persons possessing the confidence of the popular branch of the Legislature, and that in matters affecting the internal government of the colony, the Governor act only upon the advice of the Council so chosen. By 1848, this policy had been fully implemented in the colonial provinces of Canada, Nova Scotia and New Brunswick.[4] Thereafter, following Lord Durham's suggestion, the number of colonial Bills reserved also diminished considerably, being limited to those affecting Imperial interests (including constitutional matters), as enumerated in Governors' instructions.[5] The introduction of responsible government into Canada was effected by means of a series of instructions from the Colonial Secretary to successive Governors. While this took place without the need for any legislation by the Imperial Parliament, it was arguably more significant an advance, in terms of the drive toward self-government, than any of the Imperial Acts which preceded or followed it.

*The B.N.A. Act and Constitutional Change*

From a modern-day perspective, the omission of an amending procedure in the British North America Act, 1867 seems remarkable. Comparisons are inevitably made with the Australian Constitution of 1900, section 128 of which provides for the amendment in Australia of any provision of that Constitution. Were the Fathers of Canadian Confederation so naive as to imagine that they had achieved perfection? Did they lack the vision to foresee the inevitable changes that time would dictate? Or, like their modern-day successors, were they merely unable to agree on a method of amendment? None of these explanations finds any support in contemporary accounts. It was simply taken for granted by those who framed the Act that the mode of amendment would be identical to the mode of enactment – that is, by statute of the United Kingdom Parliament.

It was not the purpose of the B.N.A. Act to create an "independent" country out of dependent ones – although it did set the stage for subsequent developments toward autonomy.[6] The Act had the somewhat more prosaic objective of providing a common government for the surviving British colonies in North America, while at the same time continuing their individual identities within a federal system. The novel polity thereby created, while styled a "Dominion" (in preference to "Kingdom", the original choice of Sir John A. Macdonald), remained as fully subordinate to the sovereignty of Great Britain as the colonial entities out of which it was formed. The "general" government of the

Dominion acquired a share of the powers of self-government previously exercised by the constituent colonies, whose powers were correspondingly diminished. In a certain limited sense the provinces assumed a status subordinate to that of the federal government.[7] However, the Canada that emerged in 1867 was in every sense a colony of the United Kingdom. There was therefore nothing incongruous in leaving any future amendments to be enacted by the Imperial Parliament. The B.N.A. Act was one more in a series of Imperial prerogative instruments and statutes dating back for a century and more, and there seemed to be no particular preoccupation with making it the last.

It is true that the trend was to increasingly broad powers of constitutional amendment for the colonies. Indeed, in 1857, by 20–21 Vict., c. 53 the General Assembly of New Zealand had been empowered "to alter, suspend or repeal *all or any* of the provisions", with several specific exceptions, of the earlier Imperial Act which formed its constitution; but New Zealand had a unitary government. The constituent colonies who together could claim paternity in the birth of the Canadian federation had no wish to see their progeny reconstitute itself beyond recognition at some future date, much less have it encroach on their own spheres of jurisdiction. Where flexibility was clearly necessary in the constitution of the *central government* (as distinct from the constitution of the *federal union*), the Act expressly conferred jurisdiction: for instance, with respect to electoral districts and the franchise. There seemed to be no obvious need for a broad power to amend "the constitution" as a whole. With regard to any alteration of the federal-provincial balance of powers, this was conceived in 1867 and for some time after as having an Imperial dimension, making it an appropriate subject for Imperial legislation.

An amending formula on the familiar model of the neighbouring republic to the south was seen by at least some of the Fathers of Confederation as a potential straitjacket. In an early overture to the Colonial Secretary on the subject of union, the government of the Province of Canada put forward an outline of the main features of a proposed federative pact, and described how and why it ought to differ from the Constitution of the United States:

> "It does not profess to be derived from the people, but would be the Constitution derived from the Imperial Parliament: thus affording the means of remedying any defect, which is now practically impossible under the American Constitution."[8]

In the United States, amendments to the Constitution required a two-thirds majority in each House of Congress and ratification by three-quarters of the states. Between 1791, when the ten amendments known as the Bill of Rights were ratified, and 1865, when slavery was rendered unconstitutional, only two amendments had surmounted this obstacle course, the last in 1804.

The situation of the provinces under the B.N.A Act was quite different from that of Canada. As separate colonies, they had already enjoyed

broad powers of constitutional change. The first item in the enumeration of provincial legislative powers (section 92.1) is "The Amendment from Time to Time . . . of the Constitution of the Province . . .". The provinces entering the new federation thus shed whatever restrictions still existed on their ability to modify their own executive, legislative and judicial institutions. The provincial legislatures were limited only by the principle that colonial legislation should not be repugnant to Imperial legislation touching the same subject – including, of course the B.N.A. Act itself. This internal constitution-making power of the province has remained substantially unchanged since 1867. It was broadened slightly by the repeal of the repugnancy rule with the enactment of the Statute of Westminster, 1931, and has now been narrowed somewhat by the new *Charter of Rights*, prohibiting certain classes of laws from enactment by either level of government.[9]

No comparable provision to s. 92.1 is found in the original enumeration of federal powers in section 91. However, a number of specific provisions, scattered about other parts of the Act, confer an express or implied power upon the federal Parliament to legislate upon matters that would fall within most definitions of "constitution" – for example, the privileges of Parliament, elections to the House of Commons, and the constitution of federal courts. As regards the constitution of the executive government. it was typical of British practice, both at home and in the colonies, to leave such matters to be regulated by convention, usage and the royal prerogative,[10] as we have already seen in the case of the introduction of responsible government. With respect to the B.N.A. Act, this meant there were few specific provisions that presented potential obstacles to Dominion legislation upon the federal executive, which it otherwise is competent to enact under its residual "peace, order and good government" power. On the other hand, section 12 transferred the existing *statutory* powers of the several colonial governors and executive councils to the Governor General of Canada and the federal Privy Council, so far as the same were exercisable "in relation to the Government of Canada." All in all, despite the absence of a general amending power, the new Dominion was clothed with extensive authority to regulate the structure and functioning of its own institutions.

The Statute of Westminster, 1931, empowered the Parliaments of self-governing Dominions, including the provincial legislatures in Canada, to enact laws that amended, repealed or were otherwise "repugnant" to Imperial legislation, and provided that no future British legislation would apply to a Dominion except at its request and with its consent.[11] In the case of Canada, the British North America Act was expressly expected from the operation of the Statute, at the specific request of Canadian provinces. Within the constitutional framework of the B.N.A. Act, Canada and its provinces each now possessed sovereign powers of legislation within their respective spheres, but the power to alter the framework itself – in particular, to enlarge the existing powers of the federal or provincial legislatures – remained under the control of the

United Kingdom. The provinces did not trust Ottawa to wield this power unilaterally, and no agreement was reached in early attempts at an amending formula. Another 50 years would be required to achieve that. During most of that period, neither the symbolism associated with Canada's legally dependent status, nor the unwieldiness of the *de facto* amendment procedure (described below) seemed sufficient to generate the momentum needed to achieve a final solution.

Since the Statute of Westminster still permitted no change to the B.N.A. Act by Canada, the provisions of that Act relating to federal government institutions remained unalterable by Parliament, even though provincial legislatures had since Confederation enjoyed almost complete freedom to legislate with respect to provincial institutions. This limitation made it necessary to resort to Westminster on six occasions between 1875 and 1946 for amendments in relation to the federal legislative branch: the privileges of the two Houses, the duration of a Parliament and representation of the provinces. In 1949, an amendment to the B.N.A. Act (new class 1 of section 91) was obtained to permit the Parliament of Canada to amend the "Constitution of Canada", with the exception of certain matters including the rights and privileges of provincial legislatures and governments. Under this new power, Parliament subsequently amended the B.N.A. Act on five occasions, always in relation to the Senate or House of Commons.[12]

With the passage of the B.N.A. Act, 1949, Canada achieved legislative sovereignty in the sense that virtually all possible subjects of legislation had been distributed between the two orders of government. Generally speaking, only fundamental structural changes affecting both levels still required formal implementation by Westminster. Sovereignty in the judicial and executive branches of government was also made effective the same year. The Statute of Westminster had removed the last obstacles in the way of making the Supreme Court of Canada the final appellate court.[13] In 1949, the Parliament of Canada, by an amendment to the Supreme Court Act, abolished the appellate jurisdiction of the Judicial Committee of the Privy Council in Canada.

With respect to the executive branch, no enactment has ever terminated the responsibility of the United Kingdom Government for the government of Canada.[14] However, its exercise was drastically restricted by convention and usage (complemented by prerogative instruments) with the advent of responsible government prior to Confederation. The Imperial Conference of 1926 formally recognised the convention that the Government of a Dominion was no longer in any way subordinate to that of the United Kingdom. In particular, the powers of reservation and disallowance of Canadian Bills, which had been given a statutory basis in the B.N.A. Act, were no longer to be exercised on behalf of the British Government. These powers had, in any case, already fallen into disuse after 1878, when new Letters Patent constituting the Office of Governor General omitted the customary enumeration of classes of Bills subject to reservation. In 1947, the provision in the

Publication of Statutes Act for transmittal of a copy of Canadian statutes to the Colonial Secretary was repealed, the practice having been discontinued in 1942.[15]

The B.N.A. Act, 1949 gave the Parliament of Canada the power to enact any provision whatsoever in relation to the executive government of Canada, a power expressly continued by section 44 of the Constitution Act, 1982. However, there has never been the type of enactment found in the Independence Acts of most other Commonwealth countries to the effect that, as from an appointed day, Her Majesty's Government in the United Kingdom shall have no responsibility in respect of the government of that country.[16] Consistent with this continued reliance on convention, the Canada Act 1982, while effectively terminating British legislative power in Canada, remains silent on the question of executive power.

*Origin of the Procedure by Way of Address*

The B.N.A. Act, though formally enacted into law by the Parliament of the United Kingdom, was in reality the product of a consensus among representatives from Nova Scotia, New Brunswick and the United Province of Canada, who adopted 69 Resolutions in London in December 1866 and stayed on to take part in the framing of the Bill itself through seven drafts.[17] It would have been surprising, then, if subsequent amendments had been passed otherwise than at Canada's request and, in fact, none were. In the years after 1867 it remained only to establish what form such a request might take. Who was entitled to speak for Canada in seeking a constitutional amendment; and by what mechanism would such requests be transmitted to the United Kingdom? Oddly enough, the first question has never been resolved in a way that satisfied everyone (and has now been rendered academic by recent amendments), yet the second was settled quite early on, owing to a convenient series of precedents.

Addresses or petitions to the Crown had long been an accepted means for either branch of the legislature to seek redress of grievances or to express its views for or against a particular course of action.[18] In particular, when a modification was desired to the constitution beyond what a colonial legislature was itself empowered to enact, an Address to the Crown became the mode of communication between the Legislative Assembly (or Council) and the Imperial authorities. Where the colony had a prerogative constitution, that is, one founded upon Governors' Commissions and Instructions, specific action might be requested of the sovereign directly. Thus, in April 1867, the Legislative Assembly and Council of Nova Scotia passed Addresses requesting that the Queen "establish the number of the Legislative Council of this Province at eighteen members."[19]

In the province of Canada, whose constitution was based on Imperial statutes, it was necessary to request of the Queen that an amending Act be put through the United Kingdom Parliament. This was done

successfully in two cases before Confederation. The 1840 Act of Union, re-uniting Upper and Lower Canada, had provided that English was to be the only legal language of parliamentary records. In 1845, the two Houses of the Legislature presented to the Governor a joint Address requesting Her Majesty "to recommend to the Imperial Parliament the repeal of that portion" of the Union Act.[20] In 1853, the Legislative Assembly presented an Address to make the Legislative Council elective, setting out in some detail the proposed constitution of that body. It concluded with the request to the Queen "to recommend to the two Branches of the Parliament of the United Kingdom, and finally to sanction, a measure calculated to give effect to the Representations thus humbly submitted..."[21]

When the federal Union of the British North America provinces became a subject of serious discussion, the Imperial Government took the position that such a proposal should emanate from the colonies and be concurred in by all those affected. In a despatch of 1862 to the Lieutenant-Governor of Nova Scotia, the Colonial Secretary suggested that "the most satisfactory mode of testing the opinion of the people of British North America would probably be by means of Resolution or Address, proposed in the Legislature of each Province by its own Government."[22] In October 1864, delegates from Canada, New Brunswick, Prince Edward Island, Nova Scotia and Newfoundland met at Quebec and adopted 72 resolutions to form the basis of a proposed confederation. Resolution No. 70 provided that the "Sanction of the Imperial and Local Parliaments shall be sought for the Union." (The question of a popular referendum had been raised but had been ruled out.)

In February and March of 1865, the Legislative Council and Assembly of the Province of Canada delivered to the Governor General Addresses incorporating the full text of the Quebec Resolutions.[23] Here for the first time appeared the form of address which was destined to serve the purposes of constitutional amendment for the next hundred years without substantial alteration:[24]

TO THE QUEEN'S MOST EXCELLENT MAJESTY.

Most Gracious Sovereign,

We, Your Majesty's most dutiful and loyal subjects, the Commons of Canada, in Parliament assembled, humbly approach Your Majesty for the purpose of praying that Your Majesty may be graciously pleased to cause a measure to be submitted to the Imperial Parliament...[25]

In the four Atlantic colonies, the tide of public opinion turned against the union before similar Addresses could be passed by their legislatures – with one exception. In April 1866 the appointed Legislative Council of New Brunswick presented an Address to the Lieutenant Governor which was to the same effect as the Canadian one.[26] When, not long

afterwards, the tide began to swing back in favour of confederation in Nova Scotia and New Brunswick, the outcome was instead a request by their Legislatures for a new conference, this time with representatives of the Imperial Government present. The resulting London Resolutions of December 1866 called for sanction by the Imperial Parliament only, and became the basis of the British North America Act without further direct participation by the colonial Legislatures.

The use of Addresses to the Crown in constitutional amendment now received a measure of formal recognition. Section 146 of the B.N.A. Act empowered the Queen in Council to admit Newfoundland, Prince Edward Island and British Columbia into the Union upon Addresses from the Canadian Houses of Parliament and the Legislature of those colonies. The admission of the Hudson's Bay Company's territories, known as Rupert's Land, and the British possessions beyond them, described loosely as the "North-Western Territory", required Addresses from Parliament alone. Thus, among the first items of business of the new Parliament, disposed of by both Houses in December 1867, was a joint Address to the Queen requesting the addition to Canada of the latter territories, as well as the authority to legislate for them.[27] In 1871, separate Addresses of the Senate and House of Commons, each setting forth proposed Terms of Union with British Columbia, requested the union of that colony with Canada. The same procedure was again followed in 1873 for Prince Edward Island.[28] All remaining British possessions in North America apart from Newfoundland, specifically the Arctic archipelago, were added to Canada by Order in Council pursuant to the royal prerogative in 1880, following a joint Address of Parliament in 1878. (When Newfoundland joined Canada in 1949, s. 146 of the B.N.A. Act was no longer applicable as Newfoundland had given up its Legislature during the Great Depression).

Among matters on which the 1867 Act was silent was the formation of provinces where no self-governing colony had existed previously, namely, in the Northwest Territories (which term included Rupert's Land after its cession to Canada). In 1870, in anticipation of their imminent acquisition, the Parliament of Canada assumed to create the province of Manitoba centred on an existing established settlement. The Canadian Government subsequently passed an Order in Council requesting the passage of an Imperial Act to confirm the Manitoba Act. A draft Bill was accordingly prepared to this effect, which also conferred the power to create other new provinces and provide for their constitutions. The draft was sent back to Ottawa where it was brought up in the House of Commons. The Government argued, plausibly enough, that Parliament, in having passed the Manitoba Act in the first place, had necessarily consented by implication to any Imperial Legislation merely confirming the same Act. However, the Imperial draft Bill now went beyond that, so the Government proposed a resolution approving the Bill. A proviso was moved in amendment that "no changes in the provisions of the British North America Act should be sought by the

Executive Government without the *previous* assent of the Parliament of this Dominion."[29] A joint Address was then adopted, setting forth the draft Bill and requesting Her Majesty to submit it to the Imperial Parliament.[30]

An analogous situation arose several years later, but this time over specific wording in the 1867 Act. Section 18 had conferred legislative jurisdiction upon the Parliament of Canada to define the "privileges, immunities and powers" of the Senate and House of Commons so long as these did not exceed those held *in 1867* by the *Commons* of the United Kingdom. In 1867, the House of Lords had the power to examine witnesses under oath, but the British House of Commons did not, except in committees on private bills. This restriction was, however, removed by The Parliamentary Witnesses Oaths Act, 1871 which put the Commons on the same footing as the Lords.

In 1868, the Parliament of Canada passed an Act to provide for the administration of oaths in select committees on private bills of either House, but in addition at the bar of the Senate. The Act was neither reserved nor disallowed. In 1873, a new Act provided for examination on oath in *any* committee upon resolution of the House to that effect. This Act was disallowed by the Imperial Government, and at the same it was brought to the attention of Canadian authorities that the 1868 Act, previously overlooked, was in part *ultra vires*. In 1875, while Parliament was in session, the Government of Canada passed an Order in Council recommending the passage of an Imperial Act to remove all doubts to the Canadian Parliament's legislative power in the matter of oaths. Again, the Imperial Parliament provided a general remedy. In addition to confirming the Canadian Act of 1868, the Parliament of Canada Act, 1875, 38–39 Vict., c. 38, broadened s. 18 of the B.N.A. Act so that in any future Act of Canada extending parliamentary privileges, immunities or powers, those of the British Commons as of the *date of enactment* of the Canadian Act were to be the only limiting criteria.[31] When, the following year, objection was taken in the House of Commons to the Government's acting by Order in Council, the Prime Minister defended this course on the ground that the Act only added to the powers of Parliament and, moreover, did not affect the provinces. This was one of only two United Kingdom statutes amending the Canadian constitution which were not preceded by an Address from the Canadian Houses of Parliament. The other, in 1895, was an Act limited to confirmation of a Canadian Act, in this case extending the powers of the Senate.

The procedure for constitutional amendment by way of Address to the Crown was employed on seventeen further occasions between 1886 and 1981. The consent of the provinces was obtained in some cases, beginning in 1907, but in others it was not sought, despite the protests of some of them. The question whether provincial agreement was necessary at all and, if so, in what circumstances and to what extent, came to be hotly debated and was the major issue in the recent constitutional references to the courts of Canada. Beginning in 1915, Canadian Addresses set out the

text of the proposed amendment. In all instances from then on, the Bill enacted by the British Parliament was exactly in the form adopted by the Senate and House of Commons of Canada.

Between 1871 and 1931, joint Addresses to the Crown were adopted by the two Houses of Parliament acting in concert, initiated in the House of Commons and united in by the Senate. A second joint Address to the Governor General, as the Canadian representative of the Imperial Government, requested him to transmit it to the sovereign "in such a way as to your Excellency may seem fit." As with other communications from the Canadian government during most of this period, it was channelled through the British Colonial Secretary, who in the normal course would advise the Cabinet and the Crown on the disposition of the matter. In July 1927, the Governor General ceased to be the channel of communication between the Governments of the two countries, in accordance with the understanding reached at the Imperial Conference of 1926 where the Dominions achieved equality of status with the United Kingdom. He became instead the personal representative of the King, and the channel of communication between the Government of Canada and the King in the latter's capacity as King of Canada, who now followed the advice of his Canadian Ministers. In transmitting Addresses from Parliament, he was no longer acting as agent of British Ministers advising the Crown Imperial, but as local representative of the Crown Canadian advised by Canadian Ministers. It became the practice of the Cabinet to pass a Minute of Council declaring the "request and consent of Canada" to the enactment of amendments that were requested in Addresses.[32] This wording followed that of the Statute of Westminster, 1931 with respect to United Kingdom statutes intended to apply to self-governing Dominions. It has been suggested that such request and consent by the Government alone, without reference to Parliament, would have been sufficient for the purpose.[33] Nevertheless, Addresses continued to be used for constitutional amendments, whether owing to tradition or to ambiguity in the Statute.

Between 1940 and 1960 there was a minor modification in the procedure. Each House passed separate though identical Addresses to the Crown instead of uniting a single joint Address. More interestingly, while the Governor General continued to forward the Addresses to Britain, there was no longer any separate Address to him specifically requesting that action. Presumably it was reasoned that such a formality, while appropriate when it had been directed to the representative of the Imperial Government, was no longer so when that person represented instead the very Sovereign being addressed. Moreover, the King as Sovereign of Canada was now required to act on the advice of the Canadian Government, and it was for the Cabinet to recommend any action by the Governor General with respect to Addresses from Parliament, at least where they involved matters of state. It must be observed, however, that Addresses for constitutional amendment required action that could not be taken by the King alone (as contrasted

with executive acts such as, for example, the appointment of Canadian ambassadors abroad). A Bill had to be presented in the British (Imperial) Parliament, and for this the King was not only bound to follow the advice of his British (Imperial) Ministers, but depended also on their physical presence in the Houses of Parliament. In practice, of course, both the British Government and Parliament continued to respect the constitutional convention, established long before 1931, that requests from Canada were to be carried into effect without alteration (during the recent constitutional impasse a debate raged over whether or not the convention is an absolute one). However, from the strict legal point of view, the role of the British Government in the passing of legislation for Canada or any other Dominion that requests it, was not affected by the changed role of the Sovereign or of the Governor General. It is interesting to note in this connection that in 1964, when the next-to-last constitutional amendment was sought from the United Kingdom, the old procedure of a joint Address to the Queen and a second joint Address to the Governor General was reverted to.

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1. Governor Cornwallis' Commission of 1749 provided, in the customary fashion, for both a Legislative Council and an Assembly, but until 1758 laws were enacted, illegally, without an Assembly. Prince Edward Island and new Brunswick, both originally part of Nova Scotia, were subsequently given Governors of their own by new Commissions under which Legislatures were called in 1773 and 1786, respectively. Houston, *Documents Illustrative of the Canadian Constitution* (1891), pp. 7–26.
2. 31 Geo. 3, c. 31. Revised Statutes of Canada, 1970, App. II, No. 3. The Act replaced the *Quebec Act* of 1774 in which the Imperial Parliament (as distinct from the King in Council) intervened for the first time in a comprehensive way in colonial government. The *Quebec Act* had in turn revoked Governor Murray's Commission of 1763 which had authorised him to call an Assembly as soon as circumstances might permit. See Ollivier, *British North America Acts and Selected Statutes*, pp. 14–20.
3. Todd, *Parliamentary Government in the British Colonies* (1st ed., 1880), p. 129.
4. Under another of Lord Durham's principal recommendations, Upper and Lower Canada were re-united by the *Act of Union* of 1840.
5. Todd, *op. cit.*, p. 140.
6. See, generally, Maurice Ollivier, *Problems of Canadian Sovereignty* (1945).
7. Disallowance of provincial Bills, and assent to Bills reserved by provincial Lieutenant-Governors, were thereafter to be exercised by the Governor General of Canada rather than the Queen. Any communications between the provinces and London now had to be channelled through the Governor General.
8. Cartier et al. to Lytton, 25 October 1858, quoted in G.P. Browne, ed., *Documents on the Confederation of British North America* (1969).
9. Another less obvious and perhaps unintended diminution of provincial powers results from another part of the *Constitution Act, 1982*. Section 43 requires that an amendment to the "Constitution of Canada" affecting a single province receive the approval of the Senate and House of Commons of Canada as well as the legislature of the province. The definition of "Constitution of Canada" includes federal Acts and Imperial Orders in Council admitting new provinces into Confederation after 1867. Thus, for example, the *Manitoba Act*, which previously was alterable by the Manitoba Legislature alone under section 92(1) of the B.N.A. Act, now cannot be amended without the concurrence of the two Houses of Parliament in Ottawa.
10. Sir Henry Jenkyns, *British Rule and Jurisdiction beyond the Seas* (1902), p. 76.
11. The Statute took effect immediately in Canada, South Africa and Ireland, but by its own terms did not apply to the remaining three Dominions until "adopted" by the Parliaments thereof. Australia exercised this right of adoption only in 1942 (retroactively to 1939) and New Zealand in 1947. Newfoundland, which lost its Legislature in 1933, never did, but the 1949 Terms of Union with Canada put it on the same footing as other Canadian provinces.

12. S.C. 1952, c. 15; 1965, c. 4; 1974–75–76, cc. 13, 28, 53. Four of these amendments affected provincial or territorial representation in Parliament. The provinces have asserted that such changes affected their constitutional rights, and that on this basis their views should have been considered in the framing of the 1949 Act. Under the *Constitution Act, 1982*, however, such changes have been specifically included among those subject to the general amending formula and therefore requiring substantial provincial agreement.
13. *Attorney-General for Ontario* v *Attorney-General of Canada*, 1947 A.C. 127.
14. *6 Halsbury's Laws of England* (4th ed.), p. 346. Australia and New Zealand are in the same position.
15. Dawson, *The Government of Canada* (1st ed.), p. 175. The similar requirement of the *B.N.A. Act*, section 56, remains theoretically in effect.
16. See, for example, the *Indian Independence Act, 1947*, 10–11 Geo. 6, c. 30, s. 7(1)(a).
17. "The *B.N.A. Act* is a remarkably well-drawn statute every word of which was studied by Lord Thring, one of the great draftsmen of the United Kingdom Parliament." Arthur Beauchesne, "The Provincial Legislatures Are Not Parliaments", 22 Cdn. Bar Rev. 137 (1944)
18. Several addresses from Upper and Lower Canada are reproduced in Kennedy. *Documents of the Canadian Constitution 1759-1915*, the earliest, from the Legislative Council of Lower Canada, dating from 1823; p. 331.
19. Nova Scotia, Legislative Council, *Journal*, 1867, pp. 17, 24. Ironically, the *B.N.A. Act*, to which the Queen had assented just days before, would empower the Nova Scotia Legislature to enact this amendment directly.
20. Province of Canada, Legislative Assembly, *Journals*, 1844–45, pp. 289, 300. The provision in question was repealed three years later: 11–12 Vict., c. 56 Houston, *op. cit.*, p. 175.
21. *Ibid*, 1852–53, p. 945. The response was an Imperial Act giving the Legislature broad power itself to amend the constitution of the Council. 17–18 Vict., c. 118. Houston, *op. cit.*, p. 177.
22. Newcastle to Mulgrave, 6 July 1862, in Browne, *op. cit.*, p. 31.
23. Province of Canada, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces* (1865, reprinted 1951), pp. 421, 1032.
24. Cf. *Canada Commons Journals*, 1964–65, p. 454 (19 June 1964), the last request for an amendment prior to 1981.
25. The terms "Parliament" and "House of Commons" were used interchangeably with "Legislature" and "Legislative Assembly" in the pre-Confederation Province of Canada.
26. New Brunswick, Legislative Council, *Journal*, 1866 (1st Sess.), p. 78. The New Brunswick Assembly had previously passed a resolution against Confederation. In Nova Scotia, the Quebec Resolutions were never submitted for the approval of either House. In Prince Edward Island, both Houses rejected them twice, while Newfoundland's response was equivocal at first and negative later. See Senate of Canada, *Report to the Honourable the Speaker by the Parliamentary Counsel relating to the British North America Act* (1939, reprinted 1961), Annex 4, pp. 22–28.
27. This vast land mass included what are now the Yukon and Northwest Territories, the three prairie provinces and northern Ontario and Quebec. The Order in Council adding it to Canada was not passed until 1870. In the meantime the *Rupert's Land Act, 1868* was passed by Westminster authorising the Hudson's Bay Company to surrender its charter to the Crown, followed by negotiations between the Company, Canada and the Imperial Government. A second joint Address was adopted by Parliament in May 1869 embodying the terms agreed upon.
28. In both cases the Legislatures concerned passed corresponding Addresses, and Imperial Orders in Council followed quickly. All these Orders in Council, which set out the texts of the Addresses, are reproduced in R.S.C. 1970, App. II, as Nos. 9, 10, 12 and 14.
29. *Commons Journals*, 1871, p. 149.
30. *Senate Journals*, 1871, p. 154. The Bill became the *British North America Act, 1871*, 34–35 Vict., c. 28.
31. Thus, in 1876 the Parliament of Canada was able to re-enact the disallowed Act of 1873: See now the *Senate and House of Commons Act*, R.S.C. 1970, c. S–8, ss. 25–32.
32. See, for example, P.C. 1981–3465.
33. Personal communication from E. A. Driedger, formerly Deputy Attorney-General of Canada.

# V. REFORM OF SUPPLY PROCEDURE AT WESTMINSTER

BY C. B. WINNIFRITH

*A Deputy Principal Clerk in the House of Commons*

*Introduction*

The present Parliament has seen a substantial number of major procedural changes, most notably the creation of the departmentally-related Select Committees. One important area of the House's activities remains as yet unreformed. Historically the most important function of Parliament and the basis of the power of the House of Commons over the Executive is the granting of supply to the Crown. Yet in practice the time spent by the House on discussing the details of expenditure is minimal, although the sums involved are vast. Now far-reaching changes are beginning to be introduced which will enable the House to reassert and even perhaps to extend its traditional duty of scrutinising and controlling public expenditure.

This article describes the background against which on 19th December 1980 a Select Committee on Procedure (Supply) was appointed; summarises the main conclusions of their Report published in September 1981 and of the subsequent debate in the House in February 1982; and looks forward to the possible changes which may occur.

*Existing Supply procedure and its disadvantages*

Present Supply procedures are governed by Standing Order No. 18 which lays down the number of allotted days on which the business of Supply is taken, sets out what constitutes the business of Supply, and describes the way in which the outstanding estimates have to be voted. Twenty nine days are allotted for the business of Supply, and under the Standing Order certain estimates have to be voted by both a certain time of year and by a certain allotted day; there are three such Supply "guillotines" each session. Under the basic financial rules of the House the mere voting of money by the House by means of Supply Resolutions is not sufficient authority for expenditure of the money out of the Consolidated Fund, that is the Exchequer account of the Bank of England. Consolidated Fund Bills are therefore brought in upon the relevant Supply Resolutions.

It might be assumed that the House devotes these twenty nine days, together with the three days devoted to Consolidated Fund Bills to detailed discussion of the estimates, voting after due consideration money at regular intervals. In practice nothing of the sort happens. The reason for this lies in the definition of "the business of Supply" which, in addition to the main and supplementary estimates, includes substantive motions and motions for the adjournment. Over the last eighty years or so control of business of Supply days has gradually passed into the hands

of the official Opposition, which naturally tends to use such days to discuss matters of general policy on topics of their choice.

There is thus virtually no opportunity to discuss any details of the estimates, unless the official Opposition choose to do so. There is equally little or no opportunity for any meaningful vote when the Supply guillotines fall, since under Standing Order No. 18 it is only possible to vote against a particular class of the estimates and not against a single Vote, still less against a particular item. Nor do the Consolidated Fund Bill debates provide any real opportunity for scrutinising expenditure, since they are in practice used as a means by which backbench Members can raise topics of their choice for which there is Ministerial responsibility. Even if a Member were to pick a particular item of expenditure for detailed scrutiny, he would not be able to vote on it, since the money has already been voted in the relevant Supply Resolution. Members not unnaturally, therefore, raise matters of general administration and policy rather than of specific expenditure.

While there are advantages both for the Government and the official Opposition under the present system, there is little benefit for backbench Members, and the real loser is the House as a whole which cannot, with existing procedures, even pretend to control expenditure. It was growing criticism expressed from all parts of the House which led Mr St John-Stevas, then Leader of the House, in December 1980 to propose the appointment of a Select Committee "to examine the House's present procedures for considering and voting on the Government's requests for Supply and to make recommendations". Every witness who appeared before the Select Committee voiced similar criticisms. Senior backbenchers with long standing concern for financial matters, such as Mr Edward du Cann and Mr Joel Barnett, described present procedures as, respectively, "a disgrace in a modern Parliament" and "quite intolerable in a democratically elected Parliament". Both the Chief Secretary to the Treasury and the new Leader of the House, Mr Pym, expressed similar views in rather more cautious terms. The way was clear for the Select Committee to propose considerable changes, and this they did.

*The Report of the Select Committee*

The Select Committee had two basic objectives in their Report; to retain the existing opportunities given to the official Opposition and backbench Members to raise matters of their choice on a regular guaranteed basis, and at the same time to provide for adequate scrutiny, debate and votes on the detailed estimates.

To meet the first objective the Committee made two recommendations. So far as the official Opposition was concerned, they proposed that there should continue to be a number of specific days each session on which they retained the right to debate topics of their choice. These days would be known as "Opposition Days" to make their purpose quite clear and to distinguish them from any days devoted to

consideration of the estimates. There would be 19 such days each session. The considerable difference between that number and the 29 days presently devoted to Supply would be accounted for partly by the need for the Opposition to give up a certain amount of their time to consideration of the estimates, and to a greater extent by the transfer to Government time of a number of days on which by convention certain topics such as debates on the armed services, EEC matters and so on were discussed in Supply time. So far as backbench Members were concerned the Committee recommended that proceedings on Consolidated Fund Bills should be formal, but that an equivalent amount of time should be allocated to discussion of topics chosen by ballot. They proposed that this time should be taken on three full days, one open-ended and the other two ending at midnight, plus one Friday. No one topic could last for more than one and a half hours. Such a change would allow more topics to be debated than at present, and at a more reasonable hour, and would do away with the transparent fiction of linking a topic to some particular estimate.

With these two recommendations the Committee sought to clear away most of the difficulty of the present procedures and to prepare the way for changes designed to ensure that the House could both scrutinise and control expenditure. In their view there were three essential needs for any reforms to be successful; preparatory scrutiny of all estimates before debates in the House; a mechanism for ensuring priorities for debate, and the provision of a certain number of days specifically for debating the estimates to which priority had been given together with opportunities to amend and vote on specific items separately.

Preparatory scrutiny could only be carried out effectively by Select Committees. The Procedure (Supply) Committee heard a good deal of evidence on the role and structure of such Select Committees. Their conclusion, which they emphasised was preliminary, was that no major changes in either the structure or the powers of the existing Select Committees were desirable at present, although the present organisation had potentially serious defects so far as study of the estimates was concerned. The existing Select Committees should continue to have an advisory rather than a functional role, but it was recommended that they should allot some time each session for examination of the departmental estimates, the exact arrangements being for each Committee to determine.

So far as time in the House was concerned, the Committee received differing views as to what the right number of days might be, ranging from three or four suggested by the then Leader of the House to as many as fourteen put forward by his predecessor. The Committee recognised that any suggestion was bound to be subjective and should therefore be subject to review; their own recommendation was for eight "Estimates Days" to be devoted specifically for consideration of and voting on the estimates.

On the question of allocation of time on the eight days and

determination of priorities, the Committee sought to strike a balance between the natural claims of the Select Committees whose Reports would highlight certain topics and the rights of other Members of the House to express their views. Their proposed solution was the creation of an Estimates Business Committee to be nominated by the Committee of Selection, with similar powers to those given to the Business Committee on Bills under Standing Order No. 43, that is to say powers to determine the order in which estimates should be taken, and how long each debate should take. Such a Committee would be representative of all major interests in the House, such as Select Committees, other backbenchers and the two front benches. Selection of amendments would naturally remain with the Chair. The Committee did not favour any change in the present rule which disallows any amendments other than a simple decrease in an estimate, although they were not unanimous on this point.

*The House's response to the Report*

Perhaps because it was largely concerned with technical issues, the Select Committee's Report did not attract a great deal of public comment when it was published, either in the House or outside. Behind the scenes, however, the general response was favourable, as became clearer when the House held its first debate on the Report on 15th February 1982. The debate took place on a motion for the adjournment, so no decisions were reached; the purpose of the debate was in the words of the Leader of the House, to "take the views of the House fully into account before coming to a final decision on the terms of the motions that I shall bring forward in due course".

Mr Pym began by stating that the Government supported the broad aim of the proposals put forward by the Committee, and this was the general reaction of all the speakers in the debate, many of whom were of course members of the Committee. There was complete agreement that the present procedures were unsatisfactory, and that there should be adequate time for discussing the estimates. There was, not unnaturally, some difference of opinion as to what constituted adequate time. The Leader of the House maintained the view he had expressed in evidence that three days might be sufficient, at any rate to start with; on this he received little support except from the spokesmen for the official Opposition. Backbenchers in general supported the Committee's recommendation, although there was some support for reducing the number of days to six.

Apart from this issue, there was some dispute over how the new "Opposition" days should be allocated; the minor parties claimed that they should have a certain amount of the time on a mathematical basis in proportion to the number of seats they held, while the official Opposition wished to retain complete control as now with perhaps the occasional day by agreement being given to minor parties. Mr Pym undertook to reconsider this. There was also a certain amount of disagreement over the proposed Estimates Business Committee. Mr Pym suggested, contrary to

the evidence he had given to the Select Committee, that the creation of a new Committee was unnecessary and that the allocation of priorities could be left to the Liaison Committee. He was strongly criticised on all sides for this suggestion and agreed to think again. He concluded his reply to the debate by promising "in due course" to bring forward motions that would enable the House to come to conclusions.

*Prospects for change*

On 19th July 1982, the effective motions were debated and agreed in the early hours of the following morning. Although most speakers supported the Select Committee's views over the number of Estimates days and the establishment of an Estimates Business Committee, in the actual voting the Government's proposals won the day. As a result, with effect from the beginning of next session, there will be three Estimates days with the allocation of time on those days determined by the Liaison Committee. Apart from these changes the proposals of the Select Committee were very largely adopted. How effective the procedures will be must depend in the last resort upon Members themselves.

This will not be the end of the story. At an early stage in their inquiry the Select Committee on Procedure (Supply) decided that their terms of reference were too restrictive, and the time available too short, to enable them to carry out a full inquiry into the whole of the House's financial procedures, of which Supply was only a part. Their first recommendation was that there should be a further Select Committee with wider terms of reference to complete the task. The Government accepted this and on 22nd January 1982 the Select Committee on Procedure (Finance) was appointed with largely similar membership to the previous Committee. A number of major issues will clearly have to be considered by this Committee. It is not the purpose of this article to go into these matters. Suffice it to say that they may well prove more contentious than reform of Supply procedures, but that if agreement can be reached first by the Committee and then by the House, the whole relationship between Parliament and the Executive could be transformed.

# VI. RECENT DEVELOPMENTS IN THE FIELD OF PARLIAMENTARY STUDIES AND TRAINING IN INDIA

BY AVTAR SINGH RIKHY

*Secretary General of the Lok Sabha*

In a parliamentary democracy, it is important that all those engaged in the democratic process, including policy makers, legislators, administrators, parliamentary and legislature officials and other functionaries at various levels, are suitably apprised of the tenets, tools and operational mechanics of parliamentary institutions. Also, their attitudes have to be oriented to the needs and responsibilities and the tenor and temper of parliamentary democracy. The task of carrying on the necessary studies and imparting the required orientation and training primarily falls on the Parliament itself.

In India, the Bureau of Parliamentary Studies and Training, set up in 1976 as an integral Division of the Lok Sabha Secretariat, is designed to meet the long-felt need to provide the legislators and officials with institutionalised opportunities for problem-oriented studies and systematic training in the various disciplines of parliamentary institutions, processes and procedures.

The Bureau's main activities include holding of Seminars and Orientation Programmes for Members of Parliament and of State Legislatures, Training and Refresher Courses for officers of the Secretariats of Parliament and of the State Legislatures, Appreciation Courses for senior and middle level officials of the Government of India and probationers of All-India and Central Services. Organising short Study Visits by the members of State Legislatures and Government officials, scholars, students and others, and arranging attachments of foreign parliamentary officials to Indian Parliament and of parliamentary and legislature officials from India to foreign Parliaments also form part of the Bureau's activities.

## I. Programmes For Legislatures

### *Orientation Programmes for New Legislators*

Every newly elected House of Legislature contains an element of new membership with little or no previous legislative background. The new legislators need some kind of orientation, to make them familiar with the operational intricacies of the parliamentary processes. This is a useful and necessary first step for any Member seeking a fruitful parliamentary or legislative career. Unless a Member is thoroughly conversant with the working procedures and practices, their purposes and uses, and the modes of their employment, he may not be able to effectively avail of them to bring up various pressing matters of interest to him, his constituents and the country. It is not merely a question of knowledge of the Rules Book,

so much as a vivid appreciation of the range and scope of the various procedures, and possibilities of their actual application in day-to-day parliamentary or legislative business. In order to be a successful legislator, one has not only to be familiar with the legislative procedures but also acquire thorough knowledge of the precedents and developing conventions that constitute the corpus of parliamentary law governing the conduct of business in the House.

The Bureau of Parliamentary Studies and Training has now been organising for the last four years, programmes of orientation for new Members of Parliament. Under this programme, which is a continuing one, one or two Discussion Sessions are held during every parliamentary session, each such Discussion Session being devoted to one particular aspect of the working of Parliament, e.g. "The Question Hour", "Adjournment Motions, Calling Attention Notices etc.", "Private Members Bills and Resolutions", "Work in Committees", "Legislative Process" and so on. The Discussion Sessions are so designed that the participants derive the intended practical benefit. Well in advance of a Discussion Session, background material on the subject is circulated to the participants. The Discussion Session opens with a key-address on the topic of the day, by a parliamentarian of standing, and is followed by discussion thereon in the course of which the Members attending the session bring up points requiring clarification.

Some senior officers concerned with the subject from the Secretariats of the two Houses of Parliament are also in attendance to answer any questions of procedure that may be raised by the participating members.

The benefit of Orientation Programmes is not confined to Members of Parliament alone. At the requests of State Legislatures, the Bureau also organises separately such Programmes for Members of the State Legislatures. As a part of this Programme, the participating Members of State Legislatures have an opportunity of exchanging ideas regarding parliamentary practices and procedures with Speaker, Lok Sabha, Union Ministers, Members of Parliament and senior parliamentary officials.

*Seminars for M.P.s/State Legislators*

Besides the Orientation Programme for new Members, the Bureau of Parliamentary Studies and Training has been organising Seminars for Members on different aspects of Parliament at work, e.g. on subjects like "The Financial Committees", "The Question Hour", "Privileges of the Legislature", "Amendments to the Constitution", "The Budgetary Process", "Legislature and Planning", "Social Legislation and Problems of Its Implementation" etc. Since in these Seminars, besides Members of Parliament, Presiding Officers and legislators from the State Legislatures in India have also been increasingly participating, the subjects chosen for discussion are broader in scope and of interest to the legislators from the Centre as well as the States. These Seminars also provide a forum for informal exchange of views amongst legislators and Members drawn from all parts of the country.

These Discussion sessions and Seminars have also come to reveal a new dimension of utility by serving as a feed-back mechanism providing valuable information on how the rules and procedures operate in practice, the difficulties that Members encounter and the lines on which they need improvement. Although the Orientation Programmes are primarily intended for participation by new Members, our experience has been that senior Members also choose to participate in the discussions and have commended their value to all Members – whether new or of standing. The fact that in the course of discussions the participants ask of their senior colleagues searching questions is indicative of their seriousness and earnest desire to benefit from such discussions and profit from the wise counsel of the seasoned and eminent parliamentarians.

Recognition of the need for orientation for new Members in particular and development of appropriate arrangements for sharing of experience help in improving the effectiveness of Members and thereby strengthen the parliamentary institutions in the country.

### II. Training Programmes For Officials Of Foreign Parliaments

Training programmes for foreign parliamentary officials are intended to meet the special needs of the officers who may be sponsored to study the working of parliamentary institutions and procedures in India. The aim of such programmes is to provide to the foreign parliamentary officials an opportunity to exchange ideas in the context of their own experience in their legislatures and to make them aware of the environment, culture and traditions of the working of Parliamentary institutions in India.

In recent years, the Bureau has received officials from the Parliaments of Kenya, Zambia, Lesotho, Uganda and Nepal.

### III. Courses For Parliamentary And State Legislature Officials

Training Courses – Intensive, Specialised and Refresher – meant for officers of different levels working in the Secretariats of Parliament and of the State Legislatures aim at providing a thorough grounding to participants in the different disciplines of parliamentary work so as to improve their functional skills, widen their horizons and enable them to sharpen their perspective through discussion and exchange of ideas. The Foundational Courses arranged for new entrants to parliamentary service at the Centre are directed largely towards inculcating the parliamentary perspective and developing the right attitudes and qualities essential in a parliamentary official, e.g. a sense of dedication to service, precision and promptness, objectivity of approach and highest respect for the representatives of the people, extension of unfailing courtesy, etc.

### IV. Courses For Government Officials And Probationers Of All India/Central Services

Appreciation Courses in Parliamentary Processes and Procedures are

organised not only for senior and middle-level officers and supporting staff of the Government of India but also for the Probationers of several All India and Central Services, such as, Indian Administrative Service (IAS), Indian Foreign Service (IFS), Indian Customs and Central Excise Service (IC & CES), Indian Audit and Accounts Service (IA & AS), etc. In these Courses, the aim is to provide the participants the much needed direct exposure to parliamentary traditions, so as to enable them to appreciate better the nature of their role and place in the overall context of the parliamentary system. This ultimately leads to a more informed response on the part of the participants in their work in relation to Parliament.

The layout of various Courses arranged for the benefit of officials – be they of Parliament or the Government – broadly consists of (a) a series of planned lectures, talks, discussions and Question-Answer Sessions with participation by Members of Parliament, eminent parliamentarians, senior parliamentary and Government officials, experts and others; and (b) watching the proceedings of the two Houses of Parliament and possibly some Committees of Parliament, if these be in session.

To the extent possible, briefs or synopses of the lectures are made available to the Course participants in advance, so that all the sessions actually become, by and large, problem-resolution and practice-oriented discussion sessions.

Each Course is concluded by a Question-Answer Session which traverses the entire gamut of parliamentary processes and procedures and allied matters. It has been found that the officers attending the course evince keen interest in finding out more details about certain aspects of functioning of Parliament and Parliamentary Committees which are not clear to them. This is a lively session where views are freely and frankly exchanged.

In order to learn from the experience of our participants in the various courses we have devised a proforma wherein the participants are encouraged to record frankly their impressions of the course as well as suggestions for effecting improvement. These are systematically gone into and such of the points as merit action are conclusively followed up. This has been found very useful as an authentic feedback on the course.

## V. Study Visits

Apart from the regular training Courses, the Bureau affords facilities not only to the members of State Legislatures and officers of State Legislature Secretariats but also to Central and State Government employees, scholars and students, for short Study Visits to Parliament, during which the visitors are provided with the requisite orientation, so that they get familiar with the notable aspects of the practices and procedures of parliamentary institutions.

The study visits are becoming increasingly popular with students as these enable them to get first hand basic idea of the framework of Parliament and the manner in which it is functioning.

# VII. AUSTRALIA AND THE "WESTMINSTER SYSTEM"

BY HARRY EVANS

*Principal Parliamentary Officer (Procedure)*
*in the Australian Senate*

The fifty years during which this Journal has been published have no doubt seen great progress in many branches of human affairs, remembering that "progress" (like "reform") is only change of which somebody approves. There have certainly been great changes in technology, of which most people approve. Most societies are more prosperous, and the combination of technology and prosperity, and the relative peace of most of the last forty years, have enabled parliaments to develop their institutional and procedural means of performing their tasks. There is one area of human activity, however, where progress does not seem to be inevitable, nor does it seem necessarily to have actually taken place, and that is in clarity of thought, especially in thinking about parliaments and their work. It often appears that our immediate ancestors thought more clearly about matters in general, and about parliaments and their workings, than we sometimes do today.

One area where clarity of thought appears to have suffered, at least from the Australian viewpoint, is represented by the term "Westminster System" or "Westminster Model".

It seems that the use of "Westminster" to refer to the British Parliament is of relatively recent origin; the Oxford English Dictionary, published in 1933, does not record it, but it appears in later editions of the Shorter Oxford. An etymologist could well go to work on it. The use of "Westminster System" to refer to the British system of government may be not much more than a generation old.

It would be presumptuous to comment on affairs in other countries, and especially upon usage in language, but in Australia, the term "Westminster System" has become a veritable incubus to discussion of parliamentary and constitutional matters, a barnacle on the parliamentary ship and even on the ship of State. The term is used either without any definite meaning, or with a large number of different and even mutually contradictory meanings, which are often peculiar to the particular user. The words have become a magic incantation to ward off, or to conjure up, evil or good spirits, depending upon the purpose of the user.

To take one of the most common contexts in which the incantation is used, it is frequently stated as a self-evident truth that the "Westminster System" demands that Ministers behave in all sorts of ways, some of them quite bizarre. Ministers are frequently called upon to resign when there is some minor bureaucratic tangle in their departments, lest their failure to do so means the abandonment or dishonouring of the sacred system. This

is a great favourite with the press, and is frequently employed by opposition members whose interpretation of the matter undergoes a radical change when they achieve office.

To refer to another common example, the system is held to demand that a government which is defeated on even the most trivial matter in the lower house immediately resign or call an election. This is no joke, this one, for governments and members of parliament in Australia have long acted as if it were true, regardless of whether it is supported even by British practice, let alone the wisdom of the alleged rule. This curious belief helps to ensure that party discipline in Australia is so much more intense and rigid than it is in almost any other democratic country, including, of course, Britain. Members of parliament are imbued with a notion that governments must by definition be supported by every vote in the lower house, or a collective resignation or an immediate dissolution will ensue, and they very seldom deny their party their votes, as members of the British House of Commons do, if not with regularity, at least with sufficient frequency apparently to involve complete departure from the "Westminster System" in the land of its origin. Every vote, in effect, is not only whipped, but whipped with an unwritten triple-line whip, with a consequent debilitating effect on the operations of our lower houses. If any justification is requested for this parlous state of affairs, the magic words spring effortlessly to the lips of commentators learned or unlearned, most of whom do not think to inquire whether the British have strictly adhered to this great system which they are alleged to have invented.

Other examples could be enlarged upon for the diversion of readers. There is another particular area, however, in which the "Westminster System" has a particularly debilitating and confusing effect, and that is in discussion of the Australian Constitution.

In his 1976 BBC address on the British constitution, entitled "Elective Dictatorship", Lord Hailsham said:

> "We are sometimes unaware that our constitution is unique. There is nothing quite like it, even among nations to whom we have given independence. They believe of course that they have inherited the so-called Westminster model. In fact, the Westminster model is something which we have seldom or never exported, and, if we had tried to do so, I doubt whether any nation would have been prepared to accept it."

He was referring to the fact that the British parliament has no constitutional limitations upon its legislative powers, whereas the powers of most legislatures are constitutionally restrained. This is a situation which he would like to remedy, by the adoption of a written constitution in Britain, preferably with a division of powers between the central and regional legislatures. The powers of the legislature and any restrictions thereon are certainly at the heart of any constitutional system. One might add that it is an essential feature of the British system of government that there is only one elected chamber; opponents of the replacement of the House of Lords by an elected house are quite right in claiming that such

replacement would fundamentally alter the system of government, though that does not settle the question whether the system *ought* to be altered.

The men who drew up the Australian Constitution at the end of the last century were well aware that they were creating an unWestminsterish system of government, although their discussions were not blighted by such terms. Indeed, it was not possible for them to do anything else; they had to unite six already existing self-governing States, without removing the separate identities and governments of those States, and this entailed a federation and a written constitution. They could not have adopted the British system of government even if they had wanted to. They were also well aware that the constitution which they drew up contained a conspicuous and very un-British feature: an elected second chamber, constituted on a different basis, but directly elected by the people of the federation, with powers virtually equal to those of the first chamber. They knew that the existence of two representative and powerful chambers, differently constituted, carried with it the possibility of disagreement between those chambers and the need to resolve such disagreements. Unlike the American constitution-makers, they provided the means for decisively settling disputes between the two houses. They adopted the radical democratic mechanism of the simultaneous dissolution and re-election of both houses, to allow the electorate as a whole to settle any disagreement when called upon to do so by the government of the day. The very nature of the Constitution requires that at times a government which is supported by a majority of the House of Representatives will not be able to secure the support of the Senate, even for important legislation, and since the federal Constitution came into effect in 1901, governments have frequently been in this position.

Notwithstanding all this, the "Westminster System" incantation is frequently uttered to support some statement about how the Constitution ought to operate; in particular, it is thought to provide conclusive proof that the Senate should not interfere with legislation coming from the House of Representatives, or at least with financial legislation.

Since the constitutional crisis of 1975, in which the Senate used its powers to force a government to a dissolution of both Houses against its will, there has been a great deal of discussion on the Australian Constitution, and in particular on the powers of the Senate. It is painful to have to admit it, but a good deal of this discussion, even on the part of the most eminent authorities, has amounted to a faulty syllogism with a false middle, revolving for the most part around those two dreadful words or the notions for which they are made to stand. The syllogism, put briefly, goes something like this: "Under the Westminster System (or "responsible government" or "parliamentary government") the upper house does not have the power to tamper with (financial) legislation. We have a Westminster System (or "responsible government", etc.). Therefore the Senate should not have the power to interfere with (financial) legislation.". Very often, the middle term is not stated. A very

large number of articles about the Australian Constitution and related matters, some of great length and apparent erudition, boil down to this chain of reasoning. There has been very little attempt to analyse what the Constitution is and whether it has worked properly as a blueprint for an indigenous set of federal institutions. There has also been very little critical analysis of the British system of government, assuming that we have a version of it. The critique of that system exemplified by Lord Hailsham and many others of his countrymen goes largely unobserved in Australia.

Indeed, one of the great ironies of the recent constitutional debate in Australia is that the "left", the radicals in the debate, have tended to become devotees of the unadulterated British system of government, while they are not remarkable for their attachment to everything else inherited from the Mother of Parliaments. This is because the actions of the Senate in 1975 put supporters of the then Labor Government in the position of defending the sanctity of a cabinet backed by a House of Representatives majority. That position also explains another set of words which has become ritualistic in Australia, "frustrating a democratically elected government". This magic formula indicates a belief that once a government is properly elected it should be unchecked, which is precisely the situation Lord Hailsham wishes to avoid, and which it has been the aim of Western constitutional development to overcome. After all, the American constitution-makers were well aware, two hundred years ago, that a democratically elected government with absolute powers would not be much of an improvement on a king with such powers. They were aware that what they had to prevent was arbitrary government as such, regardless of the person or body to whom the powers of government were entrusted. The authors of a great many of the constitutions of the Commonwealth and of Europe have followed that noble tradition.

In the first issue of *The Table* in 1932, the editorial observed that the Dominions (as they were then known) were developing their own procedures, often because of constitutional provisions which did not prevail in Britain, and the Journal was intended to provide "Overseas Clerks" with a means of exchanging information. Since then, many worthwhile articles on constitutional and political matters in the various jurisdictions of the Commonwealth have served to clarify those matters. In the interest of clarity, may an Australian contributor, in paying tribute to the Journal, broadcast a plea that "Westminster System" (the term but not the institutions to which it originally referred) be now expunged from the record?

# VIII. ONTARIO'S SELECT COMMITTEE ON THE OMBUDSMAN

BY GRAHAM WHITE

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Many jurisdictions with British-style parliamentary democracy have Ombudsmen or Parliamentary Commissioners, but few have parliamentary committees overseeing the Ombudsman. Nine of Canada's ten provinces, for example, have Ombudsmen, but only one has a committee specifically empowered to review exclusively matters relating to the Ombudsman. This article is an account of the Ontario Legislature's Select Committee on the Ombudsman.

*Ontario's Ombudsman*

In order to set the context for the committee's work, a brief description of Ontario's Ombudsman is necessary. In June of 1975, Ontario passed an act establishing the Office of the Ombudsman[1] and shortly thereafter the first Ombudsman was appointed: Mr. Arthur Maloney, Q.C., one of Canada's most respected criminal lawyers. In 1978, Mr. Maloney resigned; the present Ombudsman is the Honourable Donald R. Morand, a former justice of the Supreme Court of Ontario.

The Ombudsman is appointed for 10 years (or until age 65) by the Cabinet on address of the Assembly and is removable only for cause on address of the Assembly. A servant of the Legislature, the Ombudsman reports to the Legislature through the Speaker. The jurisdiction of the Ombudsman extends to all agencies of the Government of Ontario, but does not include matters of local government, schools, hospitals or to judicial functions or Cabinet decisions (or of course to actions of the Government of Canada). Persons may direct complaints directly to the Ombudsman; they need not, as in the United Kingdom channel complaints through the elected Members. In 1980–81, the Ombudsman received 8,709 complaints and information requests, which resulted in the opening of 4,022 files[2] (many complaints are not within the Ombudsman's jurisdiction). The Ombudsman's staff of roughly 125 work from a central office in Toronto, the provincial capital, and from two small regional offices in the province's north. The budget in 1981–82 was approximately 4.9 million dollars.

*Background*

In October 1975, the House appointed a Select Committee "to consider and set out general rules and guidelines for the guidance of the Ombudsman". That committee completed its work quickly, and issued a report in December of that year. One of its principal recommendations was that a permanent Committee of the Legislature be struck to review:

a) the Reports of the Ombudsman as they became available from time to time
b) the estimates of the Ombudsman
c) the actions, or lack of action, taken by those persons referred to in the Ombudsman's Reports

Whether a permanent committee would have been established in the normal course of events is a moot point. On July 15, 1976, the predecessor of the current Select Committee on the Ombudsman was established, "to review from time to time the reports of the Ombudsman as they became available". The striking of the Committee was precipitated by the Ombudsman's presentation of a report to the Assembly highly critical of the methods and amount of compensation paid by the Ministry of Housing to expropriated landowners at a large land assembly project just east of Toronto. The seriousness of the matter clearly demanded evaluation and response by the Assembly, yet no vehicle existed for the consideration of the Ombudsman's report and of the Ministry's response. A small committee was the obvious forum for the House to deal with the issue and to serve generally as the Assembly's mechanism for maintaining communication with the Office of the Ombudsman.

The specifics of this case are not germane to this account, although the "North Pickering Affair" was important for the committee in that it established the committee's basic approach to all subsequent work and its posture with respect to the Ombudsman.

*The Ombudsman Committee Process*

The current Select Committee on the Ombudsman is composed of twelve Members, with the three political parties represented roughly in proportion to their numbers in the House. Thus the Progressive Conservative Party, which forms the Government, has seven seats, while the Official Opposition, the Liberal Party, has three seats and the New Democratic Party, two. The present Chairman is a Member of the Government party and the Vice-Chairman is a Member of the Official Opposition; all three previous Chairmen have been drawn from the ranks of the opposition.

Following the general election held in the Spring of 1981, the Committee was re-appointed in July, 1981. For all intents and purposes, the Committee is a permanent one, despite the fact that in Ontario a "select" committee usually is considered to be a special, temporary committee.[3] It is highly significant that the current Select Committee on the Ombudsman has not chosen to vary the practices developed by its predecessors in earlier parliaments.

The Committee's order of reference directs it "to review and consider from time to time the Reports of the Ombudsman as they become available and as the Committee deems necessary, pursuant to section 16(1) of the *Ombudsman Act, 1975*, formulate from time to time general rules for the guidance of the Ombudsman." The Committee is

empowered to employ staff and to travel, subject to the budgetary approval of the Legislature's Board of Internal Economy, and to "call for persons, papers and things." The Committee staff consists of a clerk and a part-time counsel from a private law firm, with secretarial assistance.

In 1978, the Committee travelled to the United Kingdom, Sweden, Denmark and Israel to study Ombudsmen in those countries; since then it has not met outside Toronto. In recent years the Committee has typically met approximately 15 days a year; most meetings take place when the House is not in session and last for the entire day.

The Committee's terms of reference have varied somewhat over the years, but one of its principal tasks has always been to "review" the reports of the Ombudsman. A description of the process by which the Committee reviews the Ombudsman's reports touches upon most important aspects of the Committee's work.

The Ombudsman normally makes his report to the Legislature annually, in late Spring or early Summer. The Ombudsman determines the content of his report, but three types of matters are normally included: 1) analysis of performance and changes at the Office of the Ombudsman; 2) summary of cases deemed noteworthy or significant; 3) summary of all "recommendation denied" cases – i.e. instances in which the governmental organisation refuses to accept the recommendation of the Ombudsman. The Committee concentrates its work on these three areas with particular emphasis on the very few " recommendation denied" cases.

Once the Ombudsman's report is received, the Committee counsel reviews the individual cases with officials from the Office of the Ombudsman and from the Ministries involved and obtains the relevant documentation. An agenda is then set, covering a sample of the specific cases summarised in the Ombudsman's report.

The actual Committee meetings are among the more formal of any held by Ontario Legislative Committees; in large measure this reflects the Committee's non-partisan approach and its desire to maintain a neutral stance between the Ombudsman and the Government. Still, witnesses are not usually sworn in, and the preference has been for common-sense flexibility rather than for restrictive, court-like rules of evidence. Most committee meetings are open to the public; exceptions are all meetings at which reports are being drafted or considered and occasional instances when the Committee feels it best to take evidence *in camera*.

Members are supplied with copies of all relevant documents, mostly correspondence between the Ombudsman and the Ministry or agency. In keeping wth the secrecy provisions required upon the Ombudsman by the Act, all documents have names of complainants and Ministry staff and other identifying references removed. No one associated with the Committee knows the complainants identity, unless the complainant makes himself known.

Since the cases reviewed by the Committee are usually quite complex with many technical and legal points, the Committee counsel normally

"leads" the questioning with a view to bringing all the pertinent facts out clearly for the Committee Members. Of course, Members regularly ask their own questions to clarify matters raised by the counsel, or pursue their own lines of enquiry. Questioning of Ombudsman staff and Government officials is rigorous and pointed, so that both "sides" must be prepared to convince the Committee that their assessment, and the actions they have taken are well documented and are fair and reasonable. The Committee is no more accepting of the opinions or interpretations of the Ombudsman than it is of the views and conclusions of the Government. This is symbolised by the seating arrangements: Ombudsman personnel are seated beside the officials representing the ministry, at a witness table facing the Committee, rather than beside the Chairman.

In a sense, the process is somewhat akin to a semi-judicial tribunal or a royal commission in which evidence is brought out by the staff counsel and the Members reach a decision favouring the views put forward by the Ombudsman or by the Government. This analogy should not be over-extended, but it does help explain how the Ombudsman Committee differs fundamentally from other Legislative committees.

Although it is true that most of the Committee's recommendations support the findings of the Ombudsman, it is not unknown for the Committee to decide that it cannot support particular recommendations of the Ombudsman. On occasion, the very fact that the Committee chooses to review a particular case encourages the Ombudsman or the Ministry to reconsider its position on a particular case, thereby enabling an agreement to be reached. In such instances, the Committee will not usually see a need to review the case formally.

Over the years the Committee has developed its own self-imposed rules and procedures. Most notable of these is the basic process outlined in the preceeding paragraphs, but two others are also important.

First, the Committee has consistently refused to act as a "court of appeal" on decisions of the Ombudsman. That is, the Committee will not entertain requests from complainants that it review a decision of the Ombudsman simply because, in the complainant's view, the decision was inappropriate, ill-considered, wrong, etc. Only in the extremely rare instances in which it appears that complaints from the public about the actions of the Ombudsman or his staff may indicate a general problem requiring the passing of a "rule", will the Committee consider complaints about the Ombudsman. Few allegations of this nature have been raised before the Committee and fewer still have received the Committee's attention. The Committee does not see itself as the 'Ombudsman on the Ombudsman'.

Secondly, the Committee will not normally permit either the complainant or other members of the public to address it. Among the reasons for this are the view that the Ombudsman is there to represent the complainant and to press his interest vis a vis the government and the belief that it is not the Committee's function to require or permit

members of the public to voice their grievances against government. On occasion, the Committee will suspend this self-imposed rule, and hear from the complainant or from other members of the public, but only for very good reasons, and always at the Committee's discretion. In short, the Committee recognises no right for the public to appear before it. Of course, the Committee is always prepared to accept written submissions.

For the past few years, the Committee has been instructing the Chairman to move, upon presentation of its report to the Legislature, that the report (or its recommendations) be adopted. The debate takes place some weeks later. At the conclusion of the debate, a vote is taken and the recommendations are either endorsed, rejected, or endorsed in amended form.

Disagreement exists as to the legal force of Committee recommendations adopted by the House. Some Members have taken the view that such recommendations are binding upon the government or its agencies. The Attorney General appeared before the Committee to argue the contrary: that committee recommendations, even when endorsed by the House, are in no way legally binding. In its Seventh Report, the Committee went on record as disagreeing with the position of the Attorney General and argued that "the issue of the legal effect of legislative action in this context is by no means clear and unequivocal". However, the Report also contains the following observation, which is rather more important:

> The weight in law that an Order of the Legislature adopting a Select Committee's report and recommendations is, in the Committee's opinion, not the critical issue in this discussion. That critical issue is best expressed by the Attorney General in a letter to the Chairman of this Committee dated July 4th, 1979 as to what is "the best way to implement recommendations of the Ombudsman and the Select Committee.". Certainly the discussion should not be centred upon the possible consequences of a failure or refusal to implement such recommendations, but upon the "best way" that the governmental organisations affected thereby are to implement those recommendations.
>
> The Committee hopes that any governmental organisation affected by such a recommendation adopted by the Legislature, would be loathe not to implement that recommendation as quickly as possible. If that were not the case it would have a serious undermining affect on the integrity of the Legislature and the respect which all governmental organisations must have therefore. Certainly any governmental organisation who embarks upon a technical "word game" with respect to the legal affect of the legislative action is demonstrating a profound disrespect for both the concept of the Ombudsman in the Province of Ontario and the Legislative Assembly.[4]

In short, Committee recommendations, particularly those debated and formally adopted by the Legislature, have an important moral force, in the sense that they represent the express views of the Assembly.

Indeed, it is significant that, as a result of the debate in the Committee as to the legal force of its recommendations, the Minister of Labour agreed to establish a formal procedure for resolving certain cases in which the Workmen's Compensation Board disagreed with the Committee, as supported by the Assembly – even though there was no legal requirement for doing so. Moreover, the Government has generally been receptive to

the recent recommendations of the Committee; of the six recommendations in the most recent report of the Committee, five were accepted by the Government.

Relations between the Committee and the Executive have not always been so accommodating in terms of response to the Committee's recommendations. In early 1979, the Committee felt it necessary to issue a special report, complete with a black-edged "death notice" on the front cover, in order to ensure "meaningful comment and responses" from Government. This was largely a reaction to the debate in the House in November, 1978, on the Committee's Fifth Report, during which none of the Ministers responsible for ministries or agencies to which the Committee had addressed recommendations were present or were represented by other spokesmen. As a result, the Chairman of the Committee, Mr Michael Davison, M.P.P., had resigned from the Committee to protest what he regarded as a serious affront to the Committee.

In its Eighth Report, the Committee noted with approval that "in general terms, governmental organisations which have been affected by recommendations of this Committee, adopted by Order of the Legislative Assembly have complied with those recommendations without debate on the nature and extent of their legal obligation so to do."[5]

The impression should not be left that the Committee is the site of bitter and protracted conflict. By and large, the adverserial nature of the Committee's early days during the North Pickering affair – Ombudsman versus Government – has given way to an atmosphere of reasonableness in collaborating towards the resolution of difficult problems. Indeed, with few exceptions, co-operation from all participants is excellent; honest differences of opinion are aired forcefully but civilly; and the Committee has acquired a reputation for fairness and reasonableness.

In turn, this reflects the non-partisan approach taken by Members of the Committee. Clearly, given the Committee's mandate, the opportunities for direct political confrontation are not so numerous as in other Committees or in the House, yet many issues have surfaced in the Committee which, in a different setting, might well have resulted in bitter, protracted partisan conflict. The Select Committee on the Ombudsman, however, has generally been the least partisan committee in the Ontario Legislature; in most instances, observers would be hard-pressed to identify Members' party affiliations from their remarks in the Committee. This apolitical approach has been a key element in the Committee's effectiveness.

*The Committee's Relations with the Ombudsman*

From the very outset, the Committee has taken great pains to be – and to be seen to be – entirely fair and unbiased in its dealings with the Ombudsman and with the Ministries. One former Chairman described the Committee's stance as one of "weighted neutrality" – that is, the

Committee carefully and objectively weighs the evidence presented to it, but, without automatically taking the Ombudsman's part in a dispute, tends to lean towards the Ombudsman's point of view. This principle was enunciated in the Committee's Fifth Report:

> When it appears to the Committee that the Ombudsman has complied with the provisions of the legislation and where the governmental organisation's response is not adequate, appropriate or reasonable to the Committee, it will prima facie support the Ombudsman's recommendation. When the Ombudsman was created in Ontario, the Legislature intended that a vehicle for the scrutiny of decision of the public service would ultimately press the Legislature to redress the consequences of certain decisions considered by him to be warranted, within the context of The Ombudsman Act. If the committee chose not to support a recommendation of the Ombudsman after it had satisfied itself as set out above, it would seriously undermine the effectiveness and credibility of the Ombudsman in the eyes of the people of the Province of Ontario and the members of the public service.[6]

As mentioned earlier, the Committee is rigorous in satisfying itself that the actions and recommendations of the Ombudsman are just and proper. The Committee specifically addressed this point in its Seventh Report:

> The Committee wishes to assure the Legislature that it will continue to investigate exhaustively and review all aspects of Ombudsman reports before reporting thereon to the Legislature, particularly on matters of Ombudsman recommendations. This process will ensure that the Legislature, through this Committee, before effectively approving and adopting a recommendation of the Ombudsman will have fully investigated, examined and thoroughly reported upon all relevant and appropriate issues.[7]

In its Second Report, the Committee described its role in the following terms:

> The relationship that exists between the Ombudsman and the Legislature requires a Select Committee of this nature with authority and flexibility to deal, on a continuing basis, with matters affecting the Ombudsman such as reports, rules for his guidance in the performance of his functions under the Act and any other matter arising which is within its order of reference, the Committee should have and continue to have an identity of its own to deal with the unique matters that arise from the consequence of the operation of the Ombudsman's office.[8]

The Committee went on to emphasise:

> The essence of the relationship between the Assembly and the Ombudsman does not lie in any legislative definition of jurisdiction, but in good faith, mutual respect, and co-operation, with open and free discussion between this Committee and the Ombudsman.[9]

The relationship of the Committee to the Ombudsman is significantly different from the Public Accounts Committee's relation with the Provincial Auditor. The Auditor works closely with the Public Accounts Committee, in an advisory and support capacity, in the Committee's scrutiny of public expenditure and in its attempts to foster economy and efficiency.[10] The Committee and the Auditor are very much partners in this enterprise; the Public Accounts Committee takes for granted the

accuracy of the Auditor's work and would never attempt to impose methods of operation upon him. Although the Select Committee has been traditionally very supportive of the Ombudsman concept, due to the necessarily far more subjective nature of the Ombudsman's work, the Committee has found it necessary to take a more detached, inquisitive approach to the conclusions reached by the Ombudsman. It seems fair to say that the Ombudsman generally welcomes the rigorous scrutiny of the Committee since he and his staff are confident that this process will only confirm the thoroughness and objectivity of the Ombudsman's investigations.

Nonetheless, a substantial potential exists for conflict between the Ombudsman and the Committee which is scarcely imaginable between the Provincial Auditor and the Public Accounts Committee. That potential has been realised on several occasions, most notably perhaps in early 1977. At that time the Committee was hearing complaints from several MPP's regarding the Ombudsman and his Office. The Ombudsman refused to acknowledge that the Committee had any authority to deal with one particular concern raised by a Member, and walked out of the meeting. The Committee noted, in its Second Report, that it does have the authority "to deal with concerns of this nature."

Thus, the Committee's relationship with the Ombudsman has, at times, been uneven and ambiguous. The Committee is at one with the Ombudsman in the pursuit of justice for any person unfairly dealt with by government. Further, not only is the Committee strongly supportive of the Ombudsman concept, it has every faith in the integrity and ability of the Ombudsman and his staff. For his part, the Ombudsman has stated his firm belief in the Committee's value, and has referred to it as "the final arrow in the Ombudsman's quiver." Nevertheless a certain tension, if not antagonism, has from time to time coloured the relation of the Ombudsman and the Committee.

Shorn of different approaches to what might be termed "Ombudsmanship" and friction attributable to strong personalities, much of the tension is attributable to the elemental fact that the Ombudsman is doing a job that, rightly or wrongly, many Members believe to be theirs. Given the limited resources with which they must tackle all manner of problem, many Members are frankly jealous of the Ombudsman's formidable resources. If pressed, very few Members would want to dismantle the Ombudsman's operation, but the sentiment persists, spurred on by (perhaps specious) comparisons with the successes achieved by Members' own constituency offices, that with the staff at his command, the Ombudsman should be able to resolve more cases more quickly than he does.

The impression should not be taken that the Committee is continually at odds with the Ombudsman, for such is not the case. The relationship of the Committee to the Ombudsman has been amicable and co-operative in recent years, the occasional differences in opinion notwithstanding. Although the Committee would have been prepared to hear them,

Members have not for several years felt it necessary to approach the Committee with criticisms of the Office of the Ombudsman. (A possible confrontation over a proposed visit by the Ombudsman to South Africa was averted before the Select Committee had a chance to consider the matter.) The potential for conflict is ever present, but with few exceptions, this has not prevented the Committee from working harmoniously and effectively with the Ombudsman.

The Committee does, as set out in its Fifth Report, perceive its function "on a continuous basis, to assist the Ombudsman and its staff to attain and maintain ... (a) high level of performance by discussion with them of areas wherein improvement may be in order".[11] The most significant aspect of this process has been the setting of "rules" for the Ombudsman, as set out in the Committee's terms of reference. In practice, the Legislature's rules for the Ombudsman are Committee recommendations about the functioning of the Office of the Ombudsman which have been adopted by vote in the Assembly. Those rules are deemed to be regulations under the Regulations Act. To date, the Committee has only proposed one set of rules to the Legislature, which adopted them without amendment. It is noteworthy that the Committee only felt confident in proposing these rules after a lengthy process of discussing them with Ombudsman, canvassing the Members' opinions, and setting out the areas of concern and possible recommendations in earlier reports. In a word, the Committee does not take lightly its power to propose "rules" to the Assembly.

It has been a matter of continuing frustration to the Committee that despite repeated entreaties and the comment in one report that the matter was one of "utmost priority", the House has never seen fit to have the estimates of the Ombudsman reviewed by the Select Committee.

In conclusion, the following passage from the Committee's Sixth Report summarises the roles the Select Committee on the Ombudsman has attempted to perform:

> The Committee has historically functioned as more than an information source to the Legislative Assembly respecting the organisation and operation of the "Ombudsman concept" in Ontario. It has served as a liaison and catalyst in the establishment, maintenance and improvement of the relationships between the Ombudsman and the many governmental organisations within his jurisdiction. It has also served as a means of implementing matters outstanding between the office of the Ombudsman and governmental organisations. It has been acknowledged by most who have come into contact with it as an effective instrument in the overall concept of an Ombudsman in the Province of Ontario.[12]

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1. "An Act to provide for an Ombudsman to investigate Administrative Decisions and Acts of Officials of the Government of Ontario and its Agencies", *Revised Statutes of Ontario, 1980*, c 325.
2. The Ombudsman, Ontario, *Eighth Annual Report* (May, 1981), p 4.
3. For an overview of the committee system, see this author's "Committees in the Ontario Legislature", *The Parliamentarian* LXI (January, 1980), p 7–21.
4. Select Committee on the Ombudsman (hereafter, Committee) *Seventh Report* (September 1979), p iv.
5. Committee, *Eighth Report* (December 1980), p ii.
6. Committee, *Fifth Report* (November 1978), p 98–9.

7. Committee, *Seventh Report* (September 1979), p iii.
8. Committee, *Second Report* (March 1977), p 48.
9. *Ibid.*, p 53.
10. On the Ontario Public Accounts Committee, see Patrick Reid, M.P.P., "Public Accounts Committee: Ontario Legislature", *The Parliamentarian* LXI (October 1980), p 247–53.
11. Committee, *Fifth Report* (November 1978), p 96.
12. Committee, *Sixth Report* (May 1979), p iii.

# IX. THE EUROPEAN COMMUNITIES COMMITTEE OF THE HOUSE OF LORDS: THE WORK OF THE LEGAL ADVISER

BY SIR CHARLES SOPWITH

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The European Economic Community[1] is an institution based on law, which not only binds the Member States to the Community and to each other, but also has direct effect in the territories of the Member States and according to Community legal theory takes precedence over the national law if there is any conflict between them. Some of this directly effective law is to be found in the Treaty[2] which creates the Community; Treaty Articles which are precise, unconditional, and leave no discretion about their application, have the force of law in Member States, and can be relied upon by the State against its citizens; by the citizens against the State; and by the citizens against each other. But the Treaty also confers on the Council of the Community the power (which may within limits be delegated to the Commission) of adopting legislation which, in the form of Regulations, and to a lesser extent in the form of Directives, has the force of law in Member States. This power of legislation has been and is being very extensively used. A useful description of the legal structure of the Community will be found in Annex C to the Committee's 2nd Special Report, Session 1974–75, (H.L. 251).

When, in 1972, the European Communities Bill was introduced in the House of Commons to enable the United Kingdom to enter the Community, the House was confronted with the prospect that the Council of the Community, sitting in Brussels, would be able to adopt legislation having effect in law in this country; and our Parliament would have no part in adopting this legislation, though the United Kingdom, along with other Member States, would of course be represented in the Council. In the House of Commons, the opponents of accession to the Community objected strongly to the proposed transfer of sovereignty to the Community; and on the Second Reading of the Bill Mr. Rippon, then Chancellor of the Duchy of Lancaster and our principal negotiator during the negotiations for accession, was careful to offer reassurances[3]. He devoted an early and important part of his speech to proposals for attending to Parliament's interests. The Government, he said, were "deeply concerned" that Parliament "should play its full part when future Community policies are being formulated, and in particular that Parliament should be informed about and have an opportunity to consider at the formative stage those Community instruments which, when made by the Council, will be binding in this country." The Government believed that the House needed "special arrangements under which it would be apprised of draft regulations and directives before they go to the Council of Ministers for decision."

At the end of 1972, each House set up a Committee – for the Commons the Foster Committee[4], and for the House of Lords the Maybray-King Committee[5] – to consider procedures for scrutiny of proposals for European Community legislation. The Lords Committee recommended the setting up of a Select Committee on the European Communities, with terms of reference substantially as follows: "to consider Community proposals, whether in draft or otherwise, to obtain all necessary information about them, and to make reports on those which, in the opinion of the Committee, raise important questions of policy or principle, and on other questions to which the Committee consider that the special attention of the House should be drawn." Accordingly, in May 1974 the House of Lords set up a Select Committee with these terms of reference. The Maybray-King Committee also advised (at paragraph 125(b) of their Report) that the Select Committee would need "a legal adviser conversant with both Community and domestic law." The writer of this Article was forthwith appointed to meet these formidable requirements, and held the post until the end of May 1982 when he retired.

Proposals for legislation by the Council are usually prepared by the Commission in the form of draft Regulations or draft Directives which are published in the Official Journal of the Community. A period then elapses which may extend over years and during which the draft may be considered and revised by a Working Party of officials from the Member States and later by the Committee of Permanent Representatives of the Member States ("Coreper")[6]. It is during this "formative stage" that the Select Committee is able, where a proposal is of sufficient importance, to examine the merits and legality of the proposal, to take evidence about it, and to report it to the House for information or debate. But the Committee by no means confines itself to considering specific proposals for Community legislation. It also, from time to time, takes some sector of Community policy or practice, or one of its Institutions, and reports on the merits of the policy, the fairness or efficiency of the practice, or the performance or future of the Institution.

The Committee works through seven sub-committees: A, on Finance, Economics and Regional Policy; B, on External Relations, Trade and Treaties; C, on Education, Employment and Social Affairs; D, on Agriculture, Food and Consumer Affairs; E, on Law; F, on Energy, Transport, Technology and Research; and G, on Environment. The Legal Adviser is the principal adviser to the Select Committee on all matters of law. In addition, he assists in the work of Sub-Committee E, but he also advises any of the other sub-committees which requires legal advice. A matter will be referred to Sub-Committee E only if it presents special legal difficulty or importance.

Within two days of a draft Regulation or Directive having been forwarded by the Commission to the Council, a copy of it is laid before Parliament by the Government. Shortly afterwards – usually within a fortnight – the Department furnishes an Explanatory Memorandum

explaining the purposes of the draft, commenting on its policy, and briefly indicating the legal consequences of the proposal, its possible effect on United Kingdom law, and any United Kingdom legislation which may be needed to implement it or give effect to it. The Legal Adviser receives copies of all the proposals and Explanatory Memoranda and gives them a preliminary examination, noting those which are likely to have legal significance, and observing the general trend taken by the Commission proposals. At fortnightly intervals the proposals are classified or "sifted" by the Chairman of the Committee and its Clerk; the majority are dismissed as not of great importance, some are sent to the appropriate Sub-Committees for information, and some for enquiry and report to the House. The Legal Adviser is from time to time consulted on the allocation of proposals to the Sub-Committees. With the help of another officer, (the Legal Assistant), the Clerk to the Committee is responsible for a fortnightly report on the "Progress of Scrutiny", in which the Chairman's sift is recorded and where the proposals received during the fortnight are analysed into Class (1), those which do not affect United Kingdom law, and Class (2), those which would involve changes in that law. The Legal Adviser draws the attention of the relevant Sub-Committee to any legal points which he has noted; they refer to him for advice on any legal points which arise during the Sub-Committee's enquiries, whether into specific proposals for Community legislation or into some general subject which the Sub-Committee has taken up. When necessary, the Legal Adviser attends Sub-Committee meetings or suggests questions to be put to witnesses who give evidence at the meetings.

A Sub-Committee meeting is not always the best forum for pursuing questions of law, particularly if they are of complex nature. The Legal Adviser therefore holds informal meetings with the legal advisers or other representatives of Government Departments, with representatives of professional associations, and with other persons having an interest in or practical experience of the relevant questions of Community or United Kingdom law. At these meetings questions about law and practice, both of the Community and of the United Kingdom, can be thoroughly discussed; improvements in Community proposals can be formulated; and the results may be incorporated in the draft Reports prepared by Sub-Committees for consideration by the Select Committee. The Legal Adviser sometimes submits draft sections concerning the law for inclusion in the Sub-Committee's draft Report; in any event, he reads all these draft Reports before they are submitted to the Select Committee, so as to ensure that in matters of law they are unexceptionable.

The Legal Adviser keeps in touch with the Council's Legal Service (at present headed by Dr. H. J. Glaesner) and with the Commission's Legal Service (at present headed by Dr. Claus-Dieter Ehlermann). From time to time he obtains information from them and occasionally invites them to comment on one of his opinions.

The nature of the advice from time to time required by Sub-

Committees may be illustrated by two recent examples.

Sub-Committee D (Agriculture) has been preparing a Report on State Aids[7], or subsidies, granted by the governments of Member States for the purposes of agriculture. Article 92 of the Treaty as a general rule forbids the granting of aids in any form "which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods." The Article is notable for the large number of exceptions which it permits, some automatic, some at the discretion of the Commission or the Council. But for the great majority of agricultural products the Community has established a common organisation of the markets, under which prices are fixed, support may be provided by intervention authorities which buy in produce if the price falls to a particular level, and in some cases provision is made for financial aid to be given to producers. The question for the lawyer is whether Article 92 can be applied so as to permit subsidies to be provided for the production of an agricultural product which is already the subject of a common and apparently comprehensive system or organisation.

The other example, which arises from an inquiry by Sub-Committee B into the Internal Market, concerns the free movement of goods throughout the Community, which is one of the cardinal principles of the Treaty (paragraph (a) of Article 3). Article 30 accordingly provides in effect that all restrictions on the import of goods from one Member State into another shall be prohibited. But Article 36 derogates from Article 30 by providing that it shall not preclude the prohibition or restriction of imports on grounds of the protection of health and life. This raises an important legal question. Who is to decide whether a prohibition or restriction on these grounds is to be effective? Is it sufficient that the government of the Member State thinks the prohibition or restriction is necessary? Or may that government be required to satisfy the European Court that its rules provide no more than is necessary for the purpose?

In conjunction with Sir Hilary Scott[8], the Committee's Specialist Adviser in Company law, the Legal Adviser has assisted Sub-Committees A and E in the production of some ten Committee Reports on the co-ordination of the Company laws of the Member States, as required by Article 54 of the Treaty. Interesting examples are the 4th Report, Session 1975/76 (HL 24) on Company Accounts, and the 69th Report, Session 1979/80, (HL 360) on Interim Reports. In the 69th Report an important question of general law had to be considered. The proposal in question was a draft Directive requiring companies which have been admitted to official Stock Exchange listing to publish half-yearly reports on their activities. It was intended that the British Stock Exchange should be appointed "competent authority" in the United Kingdom and should be expected to see that each listed company promptly published its interim reports. The question with which the Report had to deal was whether the Stock Exchange, if it failed in these duties, could be liable in damages to a shareholder or creditor from whom, through the company's default, crucial information had been withheld.

The most important legal subjects are considered and dealt with by Sub-Committee E. Enquiries of this kind may arise on a proposal or other document which is "sifted" by the Chairman to the Sub-Committee; or the Sub-Committee may take up the subject on its own initiative. Of these reports, one of the most significant is the Report on the Approximation of Laws under Article 100 of the EEC Treaty[9]. This Report raises some fundamental questions about the Community's constitution. Article 100 provides that:

> "The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.
>
> The Assembly and the Economic and Social Committee shall be consulted in the case of directives whose implementation would, in one or more Member States, involve the amendment of legislation."

The question is, how wide are the powers which this Article confers on the Council? The obvious case to which it applies is that of technical requirements with which goods must comply before they can be put in circulation throughout the Community; for example, a requirement about the lead content of petrol. But how much wider does the power go? On this question Article 2 of the Treaty is relevant:

> "The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it."

The ultimate purposes to which the Community is to dedicate itself are plainly very wide, reaching a climax at "an accelerated raising of the standard of living." But, then, it appears that these utopian results are to be reached "by establishing a common market and progressively approximating the economic policies of Member States." Sub-Committee E put forward the view that the purposes of the Treaty are confined to the economic sphere, with only such excursions into other spheres, such as social affairs, as are ancillary to economic policy. The Committee's Report was the subject of a discussion between the Commission's legal advisers and representatives of Sub-Committee E and the Legal Adviser, and it was clear that the Commission's advisers placed a very much wider and more dynamic construction on the language of Article 100. The Committee's Report was debated in the House of Lords on 4th July 1978[10]. During the debate, Lord Diplock observed that "the Commission, adopting a dynamic interpretation of the Treaty, claims that ... any measure which claims to have as its objective improving the quality of life is within Article 100, however remote it is from the economic field." The debate showed a marked divergence of opinion among those who took part, and the fundamental questions

raised in it cannot, pending some decision by the European Court, be considered to be finally resolved.

Another important subject with which Sub-Committee E has been concerned is the Commission's practice in cases concerning competition.[11] The EEC Treaty puts free competition high amongst its objectives and contains in Articles 85 and 86 strict rules forbidding agreements between undertakings, and concerted practices, which may affect trade between Member States and which have as their object or effect the prevention or restriction of competition within the common market. The enforcement of these rules is entrusted to the Commission, which acts as both prosecutor and judge, subject to certain limited rights of appeal to the European Court. It was in response to growing comment and concern over the procedures used to enforce the competition rules that the Sub-Committee embarked on an enquiry into the fairness and efficiency with which they were being carried out. This enquiry involved much preparatory work for the Legal Adviser, including valuable discussions with lawyers practising on a large scale in competition matters.

Sub-Committee E includes two of the present Lords of Appeal, two retired Law Lords, and some other distinguished lawyers, together with some laymen who help to maintain the practical nature of the Sub-Committee's deliberations. It seems to have become a convention that the Chairman should be a Law Lord. The Legal Adviser prepares preliminary papers summarising the national law and drawing attention to the sources and authorities of the Community law, and after an enquiry he often prepares the first draft of a report for settlement by the Sub-Committee and submission to the Committee. The composition and activities of the Sub-Committee have, it is probably fair to say, put it in a very special position in the consideration of points of Community law.

The attempted ascertainment of the Community law raises some interesting problems. Article 164 of the EEC Treaty provides tersely and enigmatically that "the Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed." What is meant by the law? The Treaty and the legislation adopted under it constitute a large and detailed body of law. But the Court of Justice does not consider that the Community law is to be found only in these written sources. On the contrary, the Court is developing, in addition, an unwritten Community law to be derived from its judgments and founded on what the Court considers to be the best relevant elements in the national laws of its Member States. The Court does not proceed in this field by trying to ascertain the common minimum or the arithmetical mean of the national laws. Its method is to choose from the national laws those principles which it thinks appropriate for and likely to produce the fairest results in Community affairs. Some of these principles may be briefly stated:

(1) Proportionality[12]. The individual should not have his freedom of action limited beyond the degree necessary for the public interest; citizens may only have imposed on them,

for the purposes of the public interest, obligations which are strictly necessary for these purposes to be attained. This principle not only places a constraint on legislation by the Community Institutions, but also appears to apply to Member State action under provisions of the Treaty, such for example as limitations permitted by the Treaty on the free movement of workers throughout the Community.

(2) Fundamental Rights[13]. The Treaty makes no express provision for applying the European Convention on Human Rights to the Community's activities. The Court has made it clear that there are fundamental rights enshrined in Community law and they can limit the Community's legislative powers.

(3) Legitimate Expectation[14]. This principle requires that reasonable persons acting on the basis of the law as it is must not be frustrated in their expectations. The Court has decided that a Community Institution may be liable for harm caused by an act infringing this principle, e.g. by failing to allow a transitional period before abolishing a system of compensatory amounts; even though the legality of the act itself is not in question.

These and other general principles are in course of development and application in Community law. For the lawyer who has to advise on that law they arouse interest, while at the same time requiring vigilance to track and foresee their course. They also arouse in his mind speculation whether other systems of law and particularly of legislation might benefit from the application of such principles.

It will be clear that the Legal Adviser, as well as knowing his national law and the Community law, must also obtain at any rate some knowledge of the national laws of the other Member States. He may need this if he has to consider a piece of draft Community legislation designed to approximate or harmonise the national laws on particular topics, for example on the proposal for a principle of strict liability on manufacturers for the safety of their products[15], or he may need it to trace to its source one of the general principles of Community law. For this, among other reasons, the Legal Adviser keeps in touch with the work done by the Legal Affairs Committee of the European Parliament; from that Committee's Reports useful information can often be obtained about foreign laws. The Commission sometimes arranges for an academic lawyer to prepare a comparative study of the law on some subject, and here again the Legal Adviser obtains valuable help. Failing one of these sources, the Legal Adviser may have to do his best to grapple with the text, or a translation of the text, of a foreign code. This is always a hazardous operation.

The House of Commons has also appointed a Select Committee to scrutinise proposals for Community legislation. The Committee's Legal Adviser is Sir Charles Davis, C.B., Second Counsel to the Speaker. Unfortunately, the timing of the respective Committees' work makes collaboration between the two Legal Advisers difficult, but so far as possible each communicates with the other on important points of principle.

The two Legal Advisers jointly advise the Statutory Instruments Committee on the European aspects of instruments laid before it; much the greater part of this work is done by Sir Charles Davis. In this field an important point came before the Lords Select Committee. British Ministers made a Regulation under Section 2(2) of the European

Communities Act 1972 which purported to give effect not only to an existing Community Directive on a certain subject but also to any directive "replacing, supplementing, or amending" the existing Directive, in other words, purported to give effect to future directives as well as to an existing directive. The Lords Select Committee reported in its 33rd Report, Session 1974–75 (HL 326) that the British Regulation was *ultra vires* since the powers of subordinate legislation conferred on Ministers by Section 2(2) did not admit of giving effect to future directives. The point was also taken in the 24th Report of the Joint Committee on Statutory Instruments, Session 1974–75 (HL 262). The British Regulation was amended by the Ministers so as to delete the reference to future directives[16].

*Conclusion*

The reader will no doubt have noticed the range and variety of the legal subjects with which the Legal Adviser has to deal. It is a far cry from the law on the consolidated accounts of groups of companies to the question whether the Community should accede to the European Convention on Human Rights, and almost as far from the subject of worker participation on boards of companies to the draft Community Convention on Bankruptcy. The first Adviser has enjoyed grappling with these varied subjects, particularly in the distinguished company in which he has been allowed to work on them. He hopes there will be a long line of successors to his post, and he wishes them well.

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1. Two other European Communities also exist – the European Coal and Steel Community and the European Atomic Energy Community.
2. Cmnd. 7460.
3. Hansard. Vol 831, Cols. 274–5.
4. HC (1972–3) 463 I.
5. HL (1972–3) 194.
6. A committee responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council, see the "Merger Treaty", Article 4, Cmnd. 7460, at p. 176.
7. See Select Committee's Report on "State Aids to Agriculture", 7th Report, HL (1981–82) 90.
8. Formerly President of the Law Society.
9. 22nd Report, HL (1977–78) 131.
10. Hansard, Vol. 393, Col. 848.
11. 8th Report, HL (1981–82) 91.
12. Case 11/70 *Internationale Handelsgesellschaft v. E V St.* (1970) ECR 1125 at page 1147.
13. Case 4/73 *Nold v. Commission* (1974) ECR 491, at p. 507.
14. Case 74/74 *CNTA v. Commission* (1975) ECR 533.
15. 50th Report, HL (1980–81) 236.
16. Lords Hansard, Vol. 368, 17 February 1976, Col. 408, S.I. 1975 No. 655, S.I. 1976, No. 406.

# X. FIFTIETH ANNIVERSARY OF THE AUSTRALIAN SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

BY ANNE LYNCH

*Secretary to the Regulations and Ordinances Committee*

It is a happy coincidence that the Australian Senate Regulations and Ordinances Committee should be celebrating the fiftieth anniversary of its establishment at the same time as the Society of Clerks-at-the-Table is recognising its golden anniversary.

As with the Society, the gestation period of the Committee was lengthy: in fact, three years were to elapse from the time when the Senate established a Select Committee to examine the desirability of extending scrutiny of delegated legislation to the adoption of its report and the appointment, on 11th March 1932, of the Committee recommended by the Select Committee to examine the substantial number of instruments made by the Executive. The Committee was established at the height of a conflict between the Senate and the then government over the use of the power to make subordinate legislation.

It is to be noted that the standing committee was called the Standing Committee on Regulations and Ordinances. This title reflected the fact that delegated legislation subject to disallowance consisted of regulations made under Acts of Parliament or ordinances of federal territories: other types of executive law-making were relatively rare. With the growth of governmental activity, however, the variety of instruments which are subject to disallowance has increased. The Committee considered it necessary to examine these instruments and, following negotiations between the Committee and Ministers, modifications to various instruments were made to accord with the Committee's suggestions. In 1979, the Committee's practice of examining instruments other than regulations and ordinances was formally recognised by amendment to the Standing Order under which it is established. The Standing Order now reads:

> 36A. – (1) A Standing Committee, to be called the Standing Committee on Regulations and Ordinances, shall be appointed at the commencement of each Parliament.
>
> (2) The Committee shall consist of seven Senators chosen in the following manner:
>
> (a) The Leader of the Government in the Senate shall, within four sitting days after the commencement of each Parliament, nominate, in writing, addressed to the President, four Senators to be members of the Committee.
>
> (b) The Leader of the Opposition in the Senate shall, within four sitting days after the commencement of each Parliament, nominate, in writing, addressed to the President, three Senators to be members of the Committee.
>
> (c) Any vacancy arising in the Committee shall be filled after the Leader of the Government or the Leader of the Opposition, as the case may be, has nominated, in writing, addressed to the President, some Senator to fill the vacancy.

(3) The Committee shall have power to send for persons, papers and records, and to sit during Recess; and the Quorum of such Committee shall be four unless otherwise stated by the Senate.
(4) All regulations, ordinances and other instruments, made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to such Committee for consideration and, if necessary, report thereon. Any action necessary, arising from a report of the Committee, shall be taken in the Senate on Motion after Notice.

It is noteworthy that the Standing Order does not set down guidelines governing the Committee's operation. However, the Committee adopted four principles which were suggested by the Select Committee which recommended its establishment, and which, while slightly modified in 1979 to take account of legislative provision for review of the merits of administrative decisions, have remained unchanged in substance to the present day. These principles are as follows:

The Committee scrutinizes delegated legislation to ensure:
(a) that it is in accordance with the statute;
(b) that it does not trespass unduly on personal rights and liberties;
(c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
(d) that it does not contain matter more appropriate for Parliamentary enactment.

As the principles indicate, the Committee has always been concerned to ensure that the policy aspects of delegated legislation do not intrude upon the primary task of protecting the rights and liberties of the individual. To that end, the Committee's evaluation of delegated legislation never touches upon the merits of the parent legislation passed by the Parliament. The Committee's continuing concern, rather, is to achieve a balance between necessary executive functions on the one hand, and the rights and liberties of citizens on the other. Throughout its history, therefore, the Committee has concentrated on those provisions which have given administrators discretionary, unacceptable control over the day-to-day concerns of people or which have attempted to remove personal liberties, such as the freedom from unreasonable searches of premises and seizures of property, the right to refuse to give evidence on the grounds of self-incrimination, the right to require that the onus of proof be upon the prosecution rather than the defence, and the right to privacy.

The Committee has worked quietly but effectively for so long because of the sanction it has over executive law-making. The ultimate power of the Senate over delegated legislation lies in its capacity, provided for in the Acts Interpretation Act and other Acts, to disallow most instruments. The Committee, and the Senate itself, have an admirable record of judicious use of this power, in that any motion for disallowance which has

been moved on the Committee's behalf has been accepted by the Senate despite the wishes of the Government of the day. As a result, Ministers are wary of showing any intransigence in the private negotiations undertaken by the Committee. The Committee therefore has an outstanding record of considerable influence upon executive actions.

After fifty years, it seems strange to look back on the turbulent days of the Committee's foundations, because it is so much a part of the "parliamentary establishment" that the days of battle and partisanship seem remote indeed. It must be added that the path of the Committee at the present time is not strewn with roses. It would be easy to be complacent about the work and the authority of the Committee; to continue the metaphor, the Committee could rest on its laurels. Its power and influence are indisputable. Its very existence has ensured that the legislation it now considers is drafted by the Executive with the Committee's principles and possible courses of action in mind. In this last year, however, particularly as a result of the Commonwealth Conference of Delegated Legislation Committees held in Australia in 1980, the Committee has had good reason to examine its existing procedures and practices.

For example, the Committee is now examining the possibility of the more extensive use of the affirmative resolution procedure in relation to delegated legislation. This procedure is already available in the federal sphere to give Parliamentary approval to certain executive acts before they come into operation. Examples include proposals to proceed with various stages of the new Parliament House. The affirmative resolution procedure is rarely used in relation to "normal" delegated legislation, and the Committee is now examining the desirability of extending its use to some of these instruments.

A second matter taken up by the Committee is the examination of delegated legislation in draft form before it is made. Already the Committee has achieved some measure of success in persuading Ministers – who, after all, do not like the embarrassment of parliamentary disapproval of their executive acts – to give the Committee the opportunity of considering their proposed legislation in draft before it comes into effect. This development in the Committee's procedures is at an experimental stage, and no firm views as to its efficacy have yet been determined. The most spectacular demonstration of the Committee's involvement in consideration of legislation in draft has occurred during the past twelve months. Following an undertaking by the responsible Minister, the Committee was given access to a proposed Ordinance of the Australian Capital Territory relating to the law of public assembly. The Committee's participation in the drafting of this legislation occurred at a much earlier stage than was anticipated at the time the undertaking was given. Thus the Committee's first encounter with the drafting process came with its consideration of a working paper provided by the Minister's department. The Committee then considered five successive drafts of the Ordinance before it finally became law on 26 March 1982, and is now in

the process of considering the final law in accordance with its normal practice. The Committee's primary consideration, in accordance with its principles, has been to ensure that competing personal rights and liberties are accommodated within the legislative framework provided by the Ordinance. At the time of writing, the matter remains unresolved in the Senate, and it would be presumptuous to suggest that the Committee's excursion into the area of legislative drafting has been an unqualified success. What is clear, however, is that the legislation now formally before the Committee for its final examination is rather better than would have been implemented without the Committee's influence.

Another problem, which up to the present time the Committee has found virtually impossible to resolve, is the difficulty involved, for both the Committee itself and the executive, in giving effect to the Committee's suggestions without the requirement to make a new instrument. At present, for convenience, the Committee generally accepts a Minister's undertaking to make the required amendment at a later time, without proceeding to disallowance. However, substantial delays in giving effect to the Committee's recommendations have caused the Committee concern. The Committee is therefore examining the advantages of formally recommending amendments to delegated legislation, to be made immediately by the Parliament. This would obviate the necessity of recommending disallowance of the entire instrument, for want of agreement on a small but significant section, and should prevent the delays involved in the government's making new instruments, at a much later time, to accord with the Committee's proposals. There are, however, significant disadvantages to this procedure, revolving around the extension of Parliament's legislative authority to amend executive rules made under powers delegated to government by Parliament.

The last proposal, emanating from the Conference discussions, to which the Committee is giving its attention, is the most important power, provided under statute in Tasmania, whereby when the Parliament of that State is not sitting, the Subordinate Legislation Committee's recommendations concerning delegated legislation must be accepted or the operation of the instrument suspended. This proposal would have advantages for both government and the Parliament. Clearly, it would be of great advantage to government to know that delegated legislation would be scrutinised immediately by the Committee. For the Committee's part, such a procedure would ensure that objectionable legislation would be the subject of immediate action, and parliamentary control over the operation of such legislation would be maximised.

Given the significance of the issues involved, the Committee has not yet reached conclusions on the merits of all these proposals. Recently, it has received the considered views of the Attorney-General in relation to all the matters raised at the Conference, and will continue its evaluation of the applicability of the procedures to its operations, taking the Attorney-General's comments into account.

Another matter, which has concerned the Committee over a substantial period, is the blunt weapon it has available to it to disallow regulations in order to censure departments for delay in conferring a benefit upon individuals. Further, it is difficult for the Committee to recommend disallowance of an instrument which, while conferring benefits upon certain individuals, also has the effect of penalising others under the same provision. The Attorney-General, in his letter to the Committee, has suggested the possibility of extending the power of either House of the Parliament to disallow a part of a Regulation (as he puts it, "necessarily a self-contained part"). The Committee has commended this forward-thinking approach to the problem, and will consider the Attorney-General's proposal as part of its review of the Committee's existing procedures.

Apart from these somewhat revolutionary concepts – in the Australian federal context – certain advances in the Senate's scrutiny of delegated legislation have been achieved since the 1980 Conference was held. On 26 May 1981, the Attorney-General announced that the Government had agreed to amend the Acts Interpretation Act, the statutory authority for the Parliament's control of delegated legislation, to accord with the Committee's recommendations, and legislation to give effect to the undertaking is now before the Senate. The measures agreed to, though of a machinery nature, will nonetheless have the effect of further establishing the Parliament's right to scrutinise and control executive actions under parent Acts.

The Committee's contribution to the work of the Senate was recognised on 11 March 1982, following the tabling of a special Fiftieth Anniversary Report by the Chairman, Senator Austin Lewis. The following resolution was agreed to unanimously:

> That, on the occasion of the fiftieth anniversary of the establishment of the Standing Committee on Regulations and Ordinances, the Senate expresses its appreciation of the contribution of the Committee, on behalf of the Senate, to the effective scrutiny of delegated legislation since 11 March 1932.

To mark the occasion, the Committee held a dinner at Parliament House, which was attended by the President of the Senate, Senate Ministers, and a significant number of Senators. The dinner was also graced by the presence of three former Chairmen and one former Deputy-Chairman, whose service on the Committee covered thirty years of its operations.

# XI. THE STANDING ORDERS OF MALTA'S LEGISLATURES THROUGH A CENTURY AND HALF OF CONSTITUTIONAL VICISSITUDES

BY C. MIFSUD

*Clerk to the House of Representatives*

In 1800 the Maltese had sought, of their own free will, the protection of Britain, after driving out the French invaders of the Napoleonic times, with their help as well as with the help of other nations, chiefly Sicily and Portugal. This was in fact the beginning of the British connection in Malta, which in effect lasted for over a century and a half of colonial rule.

But even before 1800, the Maltese had already been accustomed to some sort of measure (according to those days) of administering their purely local affairs, under the Order of the Knights of St John, which had been established on the island from 1530 to 1798. Thus besides maintaining their own courts with their own judges and their own departments (where Britain put Englishmen as the Heads of the more important ones), the Maltese were soon demanding from Britain some measure in the administration of their islands.

The first "Nominated Council" was in fact granted in 1813, but it was left in the discretion of Sir Thomas Maitland (the first Governor of Malta) whether or not to form this purely advisory council (the Members not voting, but merely delivering their opinion and advice); and this Council remained a dead letter as Maitland held that "Colonial Assemblies are injurious to the People and disadvantageous to Government".

It was only in 1835 that a Council of Government was granted to Malta,[1] as a result of two petitions presented to the House of Commons three years earlier. This Council held its first sitting on 29th December 1835; and it is in the Minutes of this Council, right up to 1849, that one finds scattered the first attempts to evolve rules for procedure, after "reference had been made to the Office of the Secretary of State for the Colonies with the view of obtaining information respecting the mode of proceeding observed in the Councils of other Colonies"[2]. As some time had necessarily to elapse before an answer was received, the Council adopted at the same sitting the following mode of procedure:

> "*1st* That Members shall debate according to precedence and shall not interrupt.
> *2nd* That in voting, the junior Member be called on to vote first, and so on up to the Senior Members.
> *3rd* That after each Member shall have spoken and replied the debate be considered closed".

These rules of procedure however were never collected in one paper, nor were they ever printed by the Council; but they were certainly the first forerunner of the current Standing Orders, largely shaped on the Westminster model.

In fact the first printed 'Standing Rules' "for the maintenance of Order and Method in the despatch of business in the Council of Government of Malta" are found in the Minutes of Sitting No. 1 (8th January 1850) of the Next Council Government[3]. They were proposed for adoption (13th January 1850) by the Governor, Sir Richard More O'Ferrall, and ran into 31 rules, under 6 headings: Course of Proceedings, Rules of Order, Committees, Laws or Ordinances, Annual Estimates and Strangers. The "proposal", however, was opposed, as the elected members wanted to discuss the rules one by one, and in fact these members carried the day on a division[4]. There were many amendments moved in this and subsequent sittings, but only a few minor ones got through, chief among which was the addition of one rule (under "Course of Proceedings") which stated: "As soon as possible after each Sitting, a copy of the Order of the Day for the subsequent sitting shall be forwarded to each Member". Finally, however, when the Governor put the proposal for the adoption of the Standing Orders "as amended", "the proposal was agreed to unanimously"[5].

Since those early days of the 1830s and 1850s, many constitutions were granted to Malta, until Independence in 1964; but Self-Government was only introduced under the 1921 Constitution where section 37 states that "the Senate and the Legislative Assembly ... shall each adopt Standing Rules and Orders, joint as well as otherwise ... which shall be laid before the Governor-in-Council, and being by him approved shall become binding and of force", and that in the meantime, the Standing Rules and Orders of the previous council[6] were to continue to apply. Thus at its first sitting (15th November 1921) the Legislative Assembly appointed a "Special Committee" from among its Members for this purpose, and the Standing Orders were eventually adopted by the Assembly on 6th March 1922 and approved by the Governor-in-Council on 13th March 1922. They ran to 257 orders spread over 26 chapters. The Senate had acted likewise too, and its Standing Orders, running to 232 orders under 26 chapters, were adopted on 7th July 1922. In addition, there were the "Joint Standing Orders of Both Houses of Parliament" running to 10 orders, under 2 chapters, and adopted by the Legislative Assembly and by the Senate on 2nd June and 20th July 1922 respectively.

The two possibilities, that a Government might have a majority in one House[7] but not in the other, and that a Government might not have a two-thirds majority in both Houses as stipulated in the Constitution for the passage of a law rejected by the Senate, both materialised in 1927[8]; and after bitter recriminations, especially when the Senate rejected the general estimates for that year, the Constitution was amended on 1st August 1929 (upon an address by the Assembly to the Crown) so that in joint sessions, laws could be passed by a simple majority, and so that all authority over money bills was removed from the Senate, which could no longer reject them[9]. All three sets of Standing Orders had to go through a drastic revision – which was however short-lived as the Constitution was eventually withdrawn in 1933.

This was followed by two retrograde Constitutions[10], but at long last as promised in the House of Commons by Churchill during the war, self-Government was restored to Malta under the 1947 Constitution, which eliminated the Senate[11]. The Legislative Assembly of 1947 lost no time in appointing a Select Committee (12th February 1948) under the Chairmanship of the Speaker[12] and with the Clerk as Secretary[13], to draft its Standing Orders which were in fact laid on the Table of the House on 3rd November 1948, and which were soon after adopted and printed in the Government Gazette (31st May 1948). They ran to 205 orders under 24 headings; and a notable fact in these Standing Orders was the elimination of the whole Chapter (as appearing in previous Standing Orders) dealing with "Financial Business – Ways and Means"[14].

Unfortunately, the 1947 Constitution was again withdrawn in 1958 and substituted by the retrograde Constitution of 1959, setting up once more a Council of Government. This was however soon followed by the 1961 Constitution[15] which created once again the Legislative Assembly; and which was in turn soon followed by the Independence Constitution (1964). But the amendments in the Standing Orders following this vast political change, were small and few, apart from consequential ones, like changing "The Assembly" into "The House of Representatives". The Quorum went down from 20 to 15 members[16] and a provision was made that the House cannot proceed on "any petition" if in the opinion of the person presiding in the House it entails the imposing or increasing of "any charge on the revenue"[17]. The Standing Orders were in fact again reprinted in 1966, with 197 orders under 22 chapters, and since then they have been left practically untouched[18] despite the other vast political change in its Constitution which followed in 1974 when Malta became a Republic[19].

In 1971 the Labour Party came to power with a majority of one member in a House of 55[20]. In one of its first sittings, the House passed a motion suspending Standing Order 25 (same motion cannot be proposed again in same session) and Standing Order 107 (same bill not to be twice offered in same session) for the duration of the Legislature; while another motion, which was agreed to, suspended likewise Standing Order 171 – that the Minutes of Proceeding should be in both Maltese and English and stipulated that the Agenda and the Minutes be in Maltese only. Likewise too Standing Order 173 was suspended by motion agreed to; but this suspension had already been granted also in the previous Parliament. It made possible the taking of debates by tape recording, instead of by shorthand. The suspension of these same four Standing Orders for the whole legislature, was again agreed to or carried in the House, in one of the first sittings of the two following Parliaments[21]. It may be added however that despite the suspensions of Standing Order 25 and Standing Order 107 for a decade, the opportunity to make use of these suspensions never actually arose.

This brings the story to the present when there is a strong feeling that it is time the Standing Orders were amended to suit current needs. In fact in

the last electoral manifesto of the Malta Labour Party (November 1981), it is laid down that "Parliament still has obsolete procedures, which had been imposed on us by the British or which we modelled too much on the British pattern because we had a colonial mentality. Thus, measures will be taken so that Parliamentary business becomes more effective and closer to the life of the people, and so that this institution can carry out better its functions"[22]. Then too, in the Address to the House by the Acting President of the Republic on the opening of the Fifth Parliament[23] it is stated that:

"As promised in the electoral manifesto, the Government intends to carry out reforms so that Parliament will serve the country more effectively. The country has the right to be fully informed about the work of Parliament. Consequently, debates in Parliament will be given full coverage on television[24]. In order to discard traditional procedures and render the work of Parliament more effective, standing orders will be changed. Select committees will shortly be set up for the purpose under a new system. This system will be based on practical methods in order to attain good results. In this respect it would appear that the best way will be to appoint select committees with members from the two sides of the House who will discuss specific matters in depth during the committee stage in Parliament and then report to the full House without delay[25]. ..... Members of Parliament from Gozo, Cabinet Ministers and public officials will hold open discussions in Parliament to discuss matters concerning the island during Parliamentary time allocated specifically for Gozo affairs".

Indeed there seems to be quite a challenge round the corner for the Office of the Clerk!

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*Notes*

1. This Council was "to advise and assist in the administration of the Government thereof" and consisted of the Governor, 4 official members and 3 nominated ones. It was however a legislative one, and indeed the very first ordinance passed by it (after quite a number of sittings) was an "Ordinance to oblige all persons under penalty of fine or imprisonment to attend the Council when so summoned and to give evidence on oath, if required, such oath to be administered by the Council". This Ordinance is in fact the first ancestor of the current "House of Representatives (Privileges and Powers) Ordinance" which is today Chapter 179 of the Laws of Malta.
2. Extract from the Minutes of Sitting 3 (21st January 1836) of the Council of Government of 1835.
3. The 1849 Constitution provided for a Council of Government with the power of making laws "for the peace, order and good government of the island" provided such laws were not repugnant to the law of England. The Council consisted of the Governor as its president (with an original and a casting vote) 8 *elected* members (all Maltese) and 9 official members (4 of whom were English and the rest Maltese).
4. There was a parity of votes in this division, but the Governor gave his casting vote with the elected members.
5. Sitting No. 4 of 16th January 1850.
6. This refers to the Council of Government set up under the 1903 Constitution – a very retrograde one, and practically a revision to the 1849 situation and the official majority principle; after that the 1887 Constitution had established a representative legislature with 10 official members and 10 elected members, besides the Governor as President with neither an original nor a casting vote. Under this Constitution of 1887, we come across the first Maltese Clerk to the Council – Mr Emilio de Petris. Since then in fact the Clerk has always been a Maltese.
7. The Legislative Assembly had 32 elected members, while the Senate had 17 members (10 "special" members representative of the clergy, the nobility, the university graduates, the Chamber of Commerce, and the Trade Union Council – 2 members for each class or body; and 7 "elected" members).
8. When the Constitutional Party was in office for the first time.
9. Thus the conflict between the two Houses was removed, as had been done in UK following the Parliament Act of 1911.

10. The 1936 Constitution and the 1939 Constitution. Incidentally under this latter Constitution, the "Council of Government (Privileges and Powers) Ordinance" was passed in 1942. The privileges of the legislature were no longer made to be co-extensive with those of the House of Commons generally but were specifically laid down.
11. The 1947 Constitution, however, made provision so that a bill from the Legislative Assembly could set up the Senate, but only after 10 years from the date of the operation of the Constitution (22nd September 1947) – so as to allow for a clear and full ascertainment of the will of the people on a subject which had proved highly controversial. In fact since then, no party has ever resuscitated the idea of a second chamber. The Standing Orders of the Senate were thus never revived.
12. The Speaker was the Hon. Dr J. Cassar (today Senior Deputy Prime Minister) who resigned the post as he was made Minister, and who was succeeded by Speaker Prof. P. Debono, who continued to chair this Select Committee.
13. In fact in all the mentioned cases of Committees of Members drafting Standing Orders, the Chairman was naturally always the Speaker and the Secretary was always the Clerk.
14. Thus the Committee of Ways and Means was eliminated, and has never since been revived.
15. The Royal Commissioners of 1931 who reported on the then Constitutional Crisis in Malta wrote that "It would be almost possible to plot a graph of the constitutional history of Malta during the last hundred years showing the rise and fall of constitutions modelled alternatively on the principle of benevolent autocracy and that of representative government". Indeed this remark of the Royal Commissioners was to apply to the next 30 years as well – right up to the grant of Independence in 1964.
16. The Quorum today is still 15 despite the fact that the House has increased from 50 to 55 members and then to 65 members, as it is today.
17. This is now Standing Order 69 (c) – while (a) and (b) of the same Standing Order refer to Bills and Motions, in the same light.
18. References to the Governor-General were naturally made to refer to the President, in addition to some other minor amendments.
19. The 1974 Constitution of the Republic of Malta was passed with the votes of 49 Members in favour and 6 against – in a House of 55 members, made up of 28 members on the Government side and 27 members on the Opposition side.
20. The Labour Party had been in Opposition since 1962.
21. This was in 1976, when the Labour Party was returned to Office with 34 Members against 31 opposition ones; and in 1981 when the Labour Party again retained its position in the House, where party strength had remained static.
22. Free translation from Maltese (page 48) in which language the Electoral Manifesto is printed.
23. On 15th February 1982 – official English Translation, page 27.
24. In fact a motion has already been passed in the House (17th February 1982) to the effect that during the whole legislature (normally five years) any sitting of the House or of its Committees, or any part thereof, may be given direct on Television and other broadcasting media, as may be ordered by Mr Speaker.
25. In our Standing Orders there is no report stage in the passage of bills.

# XII. "EFFICIENCY, NOT SPEED": PARLIAMENTARY REFORM IN THE SASKATCHEWAN LEGISLATURE 1969–1981

BY GORDON BARNHART

*Clerk of the Legislative Assembly*

As the fiftieth volume of *The Table* is written and published, it is with good reason that the Society of Commonwealth Clerks can mark the occasion with a special edition. The fiftieth anniversary of a society or an institution or even of a marriage, causes one to look back and reminisce about "the beginnings." Although I was not a member of the Society in 1932, nor in fact was I yet born, it is with great interest that I look at the early volumes of *The Table*. To begin to publish an annual professional journal in the midst of worldwide economic depression was a brave and ambitious goal.

The first editor, Owen Clough, was the founder of the Society of Clerks-at-the-Table in Commonwealth Parliaments and former Clerk in the Legislative Council of the Transvaal and later Clerk of the Senate of South Africa. In the editorial of Volume 1, he wrote that the beginnings of the Society and of the journal were rough. The originators were faced with problems such as a shortage of money and the vast distances between the members of the Society spread throughout the world. The Society and the journal were intended to appeal to Table officers of varied backgrounds and from vastly different forms of parliamentary government. Yet the goal was there – to create a means of drawing professional Clerks together from all over the Empire (now the Commonwealth) by means of questionnaires and articles in order to promote a pooling of knowledge and a greater interest in the parliamentary system. The journal, according to Owen Clough, would not prescribe one hard line on the "correct procedures" but instead would seek contributions from Clerks who had found different but useful and effective ways of solving procedural problems within their Houses.

The editor, in the first volume, fifty years ago, launched a venture that has not missed a year since and one that has continued to serve a growing number of Clerks throughout the Commonwealth. He compared the beginnings of *The Table* to the launching of a new ship when he wrote in the first editorial:

> The little ship, therefore, after having been long on the stocks, now slides calmly down the slipway for her maiden voyage, and with the assistance of those who constitute her crew, it is hoped will successfully accomplish many voyages. When once she has been under full sail for a time, we shall learn how to handle her and to know how best she can be rigged, in order, well and truly, to hold her course from voyage to voyage.

It is with pleasure and with no small amount of humility that I

contribute to the fiftieth voyage of such a successful ship. I note with pride that a predecessor of mine, G. A. Mantle, Clerk of the Legislative Assembly of Saskatchewan, was a member of the Society in 1932. Unfortunately, Saskatchewan had to discontinue its membership until 1939 due to economic bankruptcy of the province because of an economic depression and a ten-year drought which turned the "bread basket of the world" into a "dust bowl." Fortunately, by 1939, the economic times of Saskatchewan had improved and the province was able to renew its membership in the Society.

A recurring theme at many recent parliamentary seminars is "parliamentary reform" – Parliament must reform itself in order to keep in touch with a rapidly changing society. The Legislative Assembly of Saskatchewan has been a part of this reform era. In the first sixty-five years of this province, 1905–1970, the Legislative Assembly adopted three major revisions to its rules. Within the last twelve years, the Assembly has had three more major revisions of its Rules. Each revision has been as a result of thorough reviews by special committees of the Legislative Assembly, whose recommendations were approved by the Legislative Assembly. The reviews and resulting reforms can be grouped into three categories: procedure, communication, and administration. Through this paper, I will briefly outline the reforms that resulted from the latest three revisions to the Rules of the Saskatchewan Legislature.

The 1969–70 Rules committee was chaired by the Speaker, as were the subsequent two Rules committees, and was composed of members from both sides of the Assembly. The theme and emphasis of this revision was a streamlining of business in the Legislative Assembly in order to shorten the time that was necessary for the consideration of the ever-growing volume of government-initiated programs, legislation and estimates. Efficiency, not speed, was the emphasis when the Non-Controversial Bills Committee was established. This standing committee receives Bills from the House after first reading if both the Government and Opposition believe the Bills are non-controversial. The committee is chaired by an Opposition Member and has an Opposition majority but the committee's powers are limited to review and do not extend to amending the Bills. Bills that pass through the Non-Controversial Bills Committee are exempted from the second reading and Committee of the Whole stages and receive third reading immediately upon receipt of the standing committee's report. This is one example of the 1970 revision which encouraged streamlining the procedures. The Committee of Supply and the Committee of Ways and Means were amalgamated but the method of reviewing estimates department by department in a Committee of the Whole House was maintained. Members on both sides of the Assembly agreed that the principle of "grievance before supply" was an important one and one that could be best maintained if the government was forced to defend its spending before the full glare of the media in the House rather than in smaller committees. As long as the annual business of the province could be completed within the year, the

Legislative Assembly seemed to be content with giving the estimates a full public review in the House. This is still the case today despite further reviews of this procedure in subsequent rules committees.

Another theme of the 1969–70 committee report was the need to simplify parliamentary procedure in order that the public could understand it and hopefully become involved. This was a recurring theme of the subsequent reports.

In retrospect, the 1970 revision succeeded in streamlining without limiting the Opposition's right to hold the Government accountable. Even though the parliamentary roots in Saskatchewan are still very new, parliamentary tradition based on the Westminster model is one that is cherished by most members. It has been said by some, not critically, that the procedures in the Legislative Assembly of Saskatchewan still resemble those at Westminster at the turn of the century. This is probably fairly accurate because the small size of our Legislative Assembly (currently 61 Members) and the fact that the business can be reviewed well within the time frame of a year, has meant that there has been less pressure to adopt some of the reforms that have been implemented in other jurisdictions such as time limits on speeches or debates and the referral of estimates to standing committees.

Even though cautious traditionalism was present in Saskatchewan, the Legislative Assembly launched another review of the Rules in 1975. Many Members were pushing for a daily Hansard, a recognised daily oral question period and the televising of the legislative proceedings.

Since the formation of the province, many of the major debates were recorded by a shorthand reporter and printed as part of *The Journal* after prorogation of the Session. A more complete verbatim record was begun in 1947 and Saskatchewan was the first within the Commonwealth to record the debates electronically. (See article by George Stephen in *The Table,* Vol. XV, 1946). The debates were recorded daily but were not published in final form until after prorogation. The 1975 committee recommended that the debates be recorded and published on a daily basis. With the implementation of computerised optical character readers and phototypesetters, the daily verbatims are now printed and distributed by 9.00 a.m. on the following morning.

By 1975, the oral question period was recognised in practice but had not been formally included in the Rules. The 1975 committee report recommended that a twenty-five minute period of time each day should be provided in order to permit Private Members to question the Ministers on matters for which they are responsible. The questions did not need notice and were to be brief and of a nature so as to not provoke debate. The answers, in like manner, were to be brief, factual and to the point. The Rules clearly stated that points of order were not to be raised during the question period but on "Orders of the Day" immediately after question period. The new procedures heightened the drama of the question period but also lead to a series of points of order on Orders of the Day dealing with the type of questioning or replying that had been

witnessed earlier. The Chair was frequently drawn into the fray in defence of how the question period had been handled. This daily point of order period became fondly known as "Disorders of the Day." Fortunately, the Members on both sides of the House after a time, adjusted to the oral question period and began to relax and accept the new procedure as part of their day's proceedings. The oral question period has some merit in that it is exciting, has public appeal and is an opportunity for Private Members to raise immediate concerns with the responsible Minister. The disadvantages also must be noted. The procedure of written questions with notice (a useful mechanism for searching for factual information) has nearly been abandoned. The desire to find and publicise particular facts on the operation of government or to obtain information for research purposes has, for now at least, been abandoned with attention now devoted to the oral question period where the scoring of debating points or political points is the order of the day. The oral question period is popular with the press since these capsulised pellets of news are prepackaged and ready for the evening newscast. I argue that an old but useful procedure of seeking actual information has been lost. The decorum of the Chamber and in fact the public image of the Legislature has sometimes suffered during the oral question period and often the mistaken impression is left in the public mind that the oral question period is the only important event in the day of a Legislature. This has downgraded the importance of the debates which follow later in the day. The oral question period is common across Canada and has many advantages but has been achieved at some cost.

The third major theme of the 1975 Rules committee report was the feasibility of televising the legislative debates. The committee studied the question in depth and visited several jurisdictions which had already permitted the televising of the debates. The committee's conclusion was that the televising of the debates was advantageous on the condition that the equipment would be owned by the Legislative Assembly and operated by Legislative Assembly staff under certain guidelines. The committee reported that the current cost of such a system was too high but that the proposal should be reviewed again at a later time. Most Members shared the view that the debates should be made more accessible to the public through television but the cost in 1975 compared with the relative affluence of the province at that time did not justify proceeding with the project. The Legislative Assembly contented itself with the plan to continue to broadcast the major debates over radio which was a program that had been in place since 1945.

The issue of television in the Legislative Assembly did not die out and instead lead to a further study by another special committee of the Legislature which reported to the House in 1981. By this time, the technical art of television had been improved and the relative cost had decreased. By 1981, fibre optics had been developed to the point that within three years, all major communities in the province will have a live television link-up. This will enable cable companies throughout the

province to carry live or delayed coverage of the debates in the Legislative Assembly. Technological developments have reduced the minimum light requirements for the television cameras thus eliminating the need for costly additional lighting and the discomfort from the extra light and heat. Cameras controlled by a highly developed micro-processor now eliminates the need for any cameramen inside the chamber. Based on all of these technological advances, the Legislative Assembly agreed to purchase and install a computerised remote control television system with broadcasting to begin in the fall of 1982. The five remote control cameras will be recessed into the walls and will be part of the customary decor of the Legislative Chamber. The system will be operated by personnel from the Office of the Clerk under guidelines as set by the Legislative Assembly. The effect of television on the Members and the debate in the Legislative Assembly will be the subject of future studies.

The 1981 Rules committee did not devote its entire report to television or the broad field of communication. It also recommended procedural reforms which will give greater emphasis to Private Members' day (every Tuesday afternoon and evening), and which will promote greater activity in the committee structure. One highlight of the reformed committee structure was the adoption and establishment of a small select committee which has the power to appoint special committees, and to set their membership and terms of reference. Each special committee will be given a topic for research and enquiry but each will report its findings directly to the Legislative Assembly. The principle behind this special nominating committee is that special legislative enquiries can be established which will involve Members who are interested in a particular topic and will lead to the production of some factual and useful committee reports. These special committees can be established without government necessarily initiating them and without a resolution through the House. It is hoped that this new procedure will increase the Private Members role in the Legislative Assembly and will permit them to initiate studies which are of interest and importance to the Private Members.

The third theme of the 1981 report and one that lead to some important reforms for the Saskatchewan Legislative Assembly was the field of administration for parliament. Based on the committee's report, the Legislative Assembly amended *The Legislative Assembly and Executive Council Act* in order to create the Board of Internal Economy. The board is chaired by Mr. Speaker and is composed of two Cabinet Ministers, two Government Private Members and two Opposition Private Members. The board has jurisdiction over general policy for the administration and services to Members, staffing size and the overall budget for the Legislative Assembly Office and Legislative Library. The Clerk and Legislative Librarian report to the Speaker and to the board as permanent heads and are responsible for the administration in their respective areas. The board also has advisory powers in the matter of space allocation for the legislative arm in the Legislative Building.

security in the Legislative Building and can review and make recommendations regarding Members' pay and expenses which are set by statute.

The major change as a result of the creation of the board and the change which has evoked the most resistance from the public service, is that once the estimates have been prepared by the permanent heads and approved by the board, they are not reviewed by Cabinet or by Treasury Board. Instead the estimates are sent directly to the Minister of Finance for inclusion in the estimates book to be presented to the Assembly. The control of the purse strings for the operation of the Legislature has been placed in the hands of Members representing the Legislative Assembly as a whole rather than in the hands of the Executive only, as was the case previously. All employees of the Legislative Assembly and Legislative Library have been removed from the public service and are now legislative servants. Public Service fringe benefits, pension and disability plans still apply to the legislative service.

The establishment of the Board of Internal Economy was a result of great pressure from the Private Members who argued that Private Members on both sides of the House, rather than the executive, should be given certain responsibilities in the budget setting and policy establishment for the administration of parliament. It was a combination of a philosophical struggle for the rights of parliament and a practical move to give private Members more responsibility within the Legislative Assembly. The Board was established on July 14, 1981 and thus is still in the developmental stage. The board's first budget has been approved and transmitted to the Legislative Assembly. The board has established regular meetings and seems to be making each decision based on the arguments of the case and not dividing on straight party lines. Several years from now, a more accurate assessment can be made but it would appear that the Members are determined to make it work.

The three Rules revisions in the last twelve years had three general areas of reform: procedure, communication, and administration. Throughout these reforms, one major trend has been developing. The role, rights, and responsibilities of the Private Member have been slowly improving and increasing – not because they were given but because the Private Members began to work as a group to improve their lot. If in appearance and actuality the Private Member is merely a needed vote in the Assembly when called upon, the level of frustration for Private Members will mount. Many Saskatchewan Private Members have taken the view that if Private Members are useful, are given responsibility and can contribute in a meaningful way, parliament will be improved which will lead to good government. Whether this trend will continue is hard to predict. The role of the Private Member will only be meaningful as long as those Members are willing to press for change and continue to defend what they have already achieved.

The last twelve years have been years of moderate reform and change in the Legislative Assembly of Saskatchewan. They have been years of

change in the role of the Private Member, in the administration for parliament, and in greater communication between the Legislative Assembly and the public. Yet these changes have not limited the rights of government to steer its legislative and financial package through the Legislative Assembly. In fact, as I have shown, many of the procedural reforms have streamlined the procedures based on the motto "efficiency – not speed." The reforms and the frequent rewriting of the Rules have been done with great respect for tradition but also with a spirit of adventure and experimentation. Throughout the last seven hundred years, the institution of parliament has reformed itself constantly without losing a sense of tradition. Reform and tradition need not be opposites but in fact can be compatible. In this age of space travel, computer chips, laser beams, television, fibre optics, and a general quickening of the pace of life, parliament too must change if it is to remain relevant to the public it represents and serves. With the growth of government and the increased expertise of the bureaucracy, the Members of Parliament and officers of Parliament must also use new methods in order for Parliament to keep government responsible. In the future, the pace of change will surely quicken; the challenge is for Parliament to keep up.

# XIII. MINUTES AND JOURNALS: A CHANGE IN THE RELATIONSHIP BETWEEN THE PUBLISHED RECORDS OF THE PROCEEDINGS OF THE HOUSE OF LORDS

BY J. C. SAINTY

*Reading Clerk and Clerk of the Journals*

The year 1981 witnessed a small but significant change in the relationship between the three principal published records of the proceedings of the House of Lords: the Journals, the Minutes of Proceedings and the Official Report (Hansard). In order to set this change in its context the content and history of these three records will first be briefly considered.

The Journals have always been the most authoritative record. Until last year they contained a daily Attendance Register, provided an account of all the proceedings in the House and set out in full the texts of commissions for opening and proroguing Parliament, of patents of newly created peers on their introduction and of amendments moved to bills. Until very recently the texts of all select committee reports were also included.

Although earlier fragments are known, the sequence of Journals in the custody of the House dates from 1510. Originally the Journals were kept in manuscript. In 1767 the House ordered them to be printed. The backlog of printing had been made up in 1830. Since 1820 the volumes have been published sessionally. From the same date they have been provided with indexes. General indexes cover the whole sequence and are now published every ten years.

The Minutes of Proceedings are divided into two halves. The first provides a summarised account of the day's proceedings; the second contains notices of future business, No Day Named motions, Questions for Written Answer, details of forthcoming committee meetings and tables showing the progress of bills and other legislative instruments. The sequence of minutes of proceedings dates from the 17th century. Originally they were kept in manuscript and recorded only each day's proceedings. From 1825 they have been printed and circulated and have included an increasing amount of information about future business.

The Official Report (Hansard) is primarily concerned to provide a verbatim account of what is said in the House although it also contains a considerable amount of procedural matter. Parliamentary reporting was originally undertaken on an entirely private and unofficial basis. During the course of the 19th century Hansard's Parliamentary Debates were granted a subvention from public funds. Since 1909 the reports of debates have been prepared under the authority of the two Houses by editors and reporters in their direct employment.

Since 1909, therefore, the House had maintained three distinct official

records of its proceedings. Each had a different purpose although their contents overlapped to a considerable extent. A significant amount of cost to the public was involved in their production in terms both of printing charges and of the expenditure of staff time. In the circumstances it was considered appropriate for the officers of the House to examine the relationship between the three records in order to see whether economies could be made without impairing their several essential purposes.

A number of conclusions emerged from this consideration. In the first place it was agreed that, since the Official Report had been prepared by staff in the direct employment of the House for over 70 years, its status as a fully fledged record of the House should be recognised. The practical consequence of this recommendation would be that the procedural matter contained in the Official Report would not need to be duplicated in other records simply on the ground that the Report was insufficiently authoritative. No change in the content of the Report was considered necessary.

Where an opportunity for rationalisation was seen to exist was in the relationship between the Minutes of Proceedings and the Journals. For many years the Journals had been, for all practical purposes, an expanded version of the Minutes supplied with an Index. Apart from the Attendance Register there was no item which was recorded in the Journals that had not already been recorded in the Minutes, although in many cases the entry in the Journals was of greater length and contained some additional information.

In view of the duplication involved the question was posed whether it was necessary to continue the Journals at all. This question was considered in the light of a number of factors. One was the historical continuity represented by a sequence of records extending for more than 450 years. Another was the statutory recognition given to the Journals of both Houses by section 3 of the Evidence Act 1845. On a practical level there was the fact that there were inevitably occasions when the Minutes, which were compiled in haste with little opportunity for reflection, contained errors which could only be corrected in another record prepared at leisure. In the event, these factors were considered sufficiently cogent to justify the retention of the Journals.

Nevertheless it was recognised that the preparation of the Journals could be simplified and their bulk greatly reduced if two proposals were accepted. The first was that documents in common form should no longer be set out at length but summarised giving details of all variable particulars – for example, the names of commissioners at prorogation. Those who wished to see the full texts would be able to examine the original documents at the House of Lords Record Office or at the Public Record Office. The second proposal was that amendments to bills and the proceedings upon them should no longer be set out in full but be briefly summarised as they were in the Minutes. The account of such proceedings given in the Official Report, which would be checked for accuracy by the Journal Office before the publication of the bound

volumes, could be regarded as authoritative for most purposes. In cases of dispute or uncertainty appeal could be made to the manuscript record kept by the Clerks at the Table.

If these proposals were accepted the process of compiling the Journals could be assimilated to that of compiling the Minutes. The entries in the Minutes could be so framed as to be suitable for inclusion in the Journals as they stood. Very little increase in the length of the existing entries would be required. Any errors or infelicities could be corrected at leisure before the text was finalised for the Journals. In short the Journals would become revised Minutes of Proceedings furnished with an Attendance Register and Index. The relationship between the two records would thus be very similar to that which obtained between the Commons Journals and the Votes and Proceedings. There would be considerable savings in printing costs since the only items that would have to be set up separately in type for the Journal would be the Attendance Register, the Division Lists and the Index. There would be considerable savings in staff time since, subject to checking, the text prepared for the Minutes would be the same as that required for the Journals.

After having been considered and approved by the Procedure Committee these proposals were agreed to by the House on 5th May 1981. The changes were implemented from the beginning of the present session on 4th November 1981.

# XIV. CASTING VOTES OF THE VICTORIAN SPEAKER, 1979–1981

BY JOHN CAMPBELL

*Clerk of the Legislative Assembly*

The general election of 5th May, 1979 resulted in the Victorian Government no longer having a clear majority in the Legislative Assembly. For the first time since 1955 the Government had to rely upon support from Members of another Party on the floor of the House.

Holding 41 seats in a House of 81, after one of its Members had been elected as Speaker, the Government had 40 Members on the floor of the House, as against 32 members of the Opposition Labour Party and 8 members of the National Party. Therefore, if the two non-Government Parties combined their voting strengths against the Government on an issue and assuming there were no "unpaired" absentees, voting would be equal. Standing Order No. 186 provides that in such a case the Speaker has a casting voice and any reason stated by him in the exercise thereof shall be entered in the Votes and Proceedings.

The numbers described prevailed until August, 1980 when a Member of the National Party resigned from his Party in order to join the Government Party thereby giving the Government a small but clear majority; despite this, on three further occasions the need for a casting vote arose.

The period from 1979 to 1981 is therefore a particularly interesting one procedurally for during this time more casting votes were given by the Speaker than in the previous 60 years in the history of the House. In all, 29 casting votes were given in the House during the life of the Parliament.

Unlike Westminster, in Victoria there is no convention whereby the Speaker will not be opposed at a general election by the major political parties and, in fact, a Speaker may have to work very hard on behalf of his constituents to ensure political survival. In a numerically small House where numbers may be critical, there are a number of precedents for the Presiding Officer voting as an ordinary Member when in Committee, perhaps leading to the Chairman of Committees being obliged to give a casting vote. In the Chair the Speaker is nevertheless expected to be objective, to put aside his Party allegiance and to serve the Chair with dedication and detachment. In the event, the Speaker succeeded in fulfilling these high expectations of impartiality.

Under Standing Order No. 3 the House has recourse to Commons' practice in cases not covered by its own Standing Orders and so attempts to follow the principles enunciated in "May" concerning the giving of the casting vote. "May" (p. 403 et seq) describes the principles applied to casting votes in the Commons. In summary, the Speaker is "at liberty to vote like any other Member according to his conscience, without

assigning a reason; but, in order to avoid the least imputation upon his impartiality, it is usual for him, when practicable, to vote in such a manner as not to make the decision of the House final, and to explain his reasons, which are entered in the Journal". Some difficulty seems to arise in respect of the situation where further consideration of a matter is not possible and the vote will decide the issue. On the one hand Speaker Denison's ruling of 1867 indicates that where no further discussion is possible, decisions should not be taken except by a majority, (p. 403) but the earlier ruling by Speaker Addington (1796) was in effect that "he should then vote for or against it, according to his best judgment of its merits, assigning the reasons on which such judgment would be founded".

In fact, on each occasion when giving his casting vote Speaker Plowman provided the Legislative Assembly with his reasons, which are now a matter of record.

An analysis of the various casting votes according to the procedural aspects is as follows:–

(a) motions calling for an opinion of the House (substantive motions)
Affirmative Nil Negative 14

(b) amendments to motions (including one amendment to an amendment to a motion)
Affirmative Nil Negative 6

(c) reasoned amendment to motion for second reading of a bill
Affirmative Nil Negative 3

(d) motion to continue sitting beyond time set for adjournment pursuant to Sessional Orders
Affirmative 1 Negative Nil

(e) urgency motion in connection with invoking guillotine procedure on a bill
Affirmative Nil Negative 1

(f) motion for an instruction to committee on a bill
Affirmative 1 Negative Nil

(g) second reading of a bill
Affirmative 1 Negative Nil

(h) third reading of a bill
Affirmative 1 Negative 1

The reasoning for most of the casting votes is self-evident in the light of "May's" principles. Category (a) was decided on the basis that such matters should be determined by a majority and not a casting vote; (b) and (c) were on the basis of allowing the House the opportunity of deciding the original question; (f) was to give the committee the opportunity of considering the issue; whilst (g) similarly was to allow the bill to receive further consideration.

The casting votes where the reasons were not so self-evident are worth further explanation.

In voting against a motion preliminary to the undertaking of a guillotine procedure on a bill (e), the Speaker did so to "allow the House

to give further consideration to the bill". The vote in favour of continuing the sitting beyond 10.30 p.m. (d), was "so that matters under consideration can be further considered".

One of the votes cast against an amendment to a motion is of interest but only in relation to its subject matter. A motion was before the House to amend Standing Orders to extend the time allowed for questions without notice. An amendment being proposed to that question, the effect of which would be to give discretion to the Speaker to extend further the time allowed for question time, Mr. Speaker in giving his casting vote against that further amendment referred to the matter as one of considerable importance to the running of the House and not appropriate to be decided by the Presiding Officer alone, but rather it should be decided by a majority. In doing so he undertook to have the matter considered by the Standing Orders Committee.

It is perhaps in respect of casting votes upon the Third Reading stage of bills (h), that the Chair was faced with its most difficult decisions, this being the last effective opportunity for the House to consider a bill in the light of the Standing Orders.

Both the bills in question were Government measures. In one case the Speaker voted for the third reading and in the other he voted against it. In each case he was seeking to follow the principle of Speaker Addington's decision.

In the first instance (the Railways (Amendment) Bill) several aspects of the measure were highly controversial and three amendments had been negatived in Committee on the casting vote of the Chairman, the Speaker having voted in committee as an ordinary Member. The Minister in the course of debate had undertaken to further examine aspects of the bill after its passage through the Legislative Assembly and before it was finally dealt with by the Legislative Council. These circumstances provide the background to the Speaker's remarks in explaining his reasons for voting against the third reading as follows:–

> And the numbers being equal, Mr. Speaker said "The vote being evenly divided, the Speaker is left with a casting vote. A vote on the third reading of a Bill is one that no Speaker relishes, firstly, because it is the final stage of a Bill and the decision has to be made and, secondly, because in May, which is the Parliamentary procedure and practice followed in this Parliament, there is no clear rule as to the way in which a Speaker should vote at the final stage. There are two options. The Speaker may vote for the Bill on the facts as presented to him at the time, using his judgment of the facts as presented, or he may vote against the Bill on the basis that the House itself should make the decision and that the decision should not be made merely by the vote of its Presiding Officer. In this instance, the Minister has shown himself to have some reservations, in that he is prepared to consider amendments while the Bill is between this and another place. As there is some reservation within the Chamber and the vote is not clearly one of the whole House, I cast my vote with the 'Noes'."

The second bill was also quite controversial. In this case numerous amendments had been made to the bill in committee, but unlike the earlier bill, no casting votes had been required in committee. There were therefore some points of difference in the procedural background to the two measures.

In the second case (the Education Service Bill) Mr. Speaker in giving his vote with the "Ayes" in favor of the third reading said "On the facts presented during the debate and having regard to the large number of amendments made during the Committee stage to accommodate the earlier objections to the Bill, I declare myself with the 'Ayes'."

These two bills illustrate the heavy responsibility borne by the Chair in the giving of a casting vote in the final stage of a bill. Undoubtedly the situation that existed in the House over this period involved great strain on the occupants of the Chair. Many prospective casting votes were researched and prepared for which, in the event, thankfully, proved unnecessary. Some of these cases would have presented many difficulties if they had arisen, not only because of the complex issues to be judged, but also because of the conflict they may have caused in a particular case as between the approach of the Addington decision and that of the Denison decision, i.e., should the Chair tend always to vote against third reading if that be the final stage or should the Chair vote according to his judgment of the merits?

In fact, despite best endeavours there were occasions when a casting vote was required when least expected; in one case because of a senior member of the Government falling asleep in a remote part of the building and failing to hear the Division Bells. In such circumstances there was little if any time to prepare, but is not this the essence of the work of Presiding Officers and Clerks wherever they may be? With little time for reflection the Speaker must be ready at all times to uphold the best traditions of the Chair if the need for a casting vote should arise. The challenge is a very real one and during the period when we had a "tied" House I had the feeling that the Sword of Damocles hung over the office of Speaker whenever he took the Chair.

# XV. 1982 – 150th ANNIVERSARY OF REPRESENTATIVE GOVERNMENT IN THE CAYMAN ISLANDS

BY SYBIL McLAUGHLIN

*Clerk of the Legislative Assembly*

Recorded history shows that representative Government took place in the Cayman Islands in the year 1832, so that 1982 will be 150 years and is worthy of celebration by Caymanians as is done in other territories.

While no actual date is known of the first meeting (Hirst's history stated that recorded minutes were found from April, 1883, but before that time the minutes were recorded in the Court Book as sittings of the Assembly of Justices and Vestry took place on the same day as the Courts), many records show that meetings were held once a year, in the month of September, primarily to consider the Islands' Budget, for the financial year beginning 1st October.

Hirst also states that though the system of Government was primitive it certainly was a system (1774). They had a chief or Governor of their own choosing and regulations of their own framing; they had some Justices of the Peace among them, appointed by commission from the Governor of Jamaica and lived very happily without any form of civil government.

In 1832 the principle of representative government was adopted by the inauguration of the Assembly of Justices and Vestry. This consisted of the Governor, Justices of the Peace and others locally elected as Vestrymen. At the same time the title "Custos" was substituted for that of Governor. The name "Custos" is believed to be one which was in use in Jamaica and connected in some way with either districts or parishes.

In 1863 an Act of Parliament was passed recognising all prior acts of the Assembly and validating any others subsequently assented to by the Governor of Jamaica. In 1898 the powers of the Custos were vested in a Commissioner who combined administration with that of Judge of the Grand Court until the appointment for the first time of a Stipendiary Magistrate in 1957.

The Commissioner was selected by the Secretary of State for the Colonies and appointed by the Governor of Jamaica. A Pocket Guide for the West Indies, published in 1907 stated that "The Commissioner is a veritable 'Pooh Bah' carrying out as he does, besides the duties of Chief Executive Officer, those of Collector-General of Customs, Registrar-General, Treasurer and Judge of the Grand Court".

On 20th February, 1958 an Act of the United Kingdom Parliament empowered the Queen to make provision for the Government of the islands by an Order-in-Council. The Islands' first written constitution was proclaimed on 4th July, 1959 whereby the Islands ceased to be a Dependency of Jamaica and became a separate territory within the then Federation of the West Indies. It provided for the Governor of Jamaica to be

Governor of the Cayman Islands and for the Commissioner to be re-styled "Administrator." The Legislative Assembly then consisted of the Administrator, 2 or 3 official members, 2 or 3 nominated Members and 12 elected members and for an Executive Council consisting of the Administrator, 2 official members, 1 nominated member and 2 members drawn from the elected members in the Legislature. The laws of the Legislature of Jamaica could be applied to the islands under a special procedure provided for by the constitution but federal laws did not apply to the Islands unless they were expressly stated to do so.

In 1962 another constitution was brought into effect when the Federation of the West Indies folded up and Jamaica became an independent territory. The Cayman Islands elected to become a British Crown Colony with a direct link with the United Kingdom.

1972 saw the bringing into operation of another constitution which this time provided for a significant advance towards internal self government as provision was made for the elected members of Executive Council to have responsibility for subjects assigned to them by the Governor. There are now no nominated members in either the Legislative Assembly or the Executive Council.

The Legislative Assembly now consists of twelve elected Members and three official Members (the Chief Secretary, the Attorney-General and the Financial Secretary) with the Governor as President. The Executive Council has four elected members and three official members (the Chief Secretary, Attorney-General and Financial Secretary), plus the Governor as Chairman.

Whereas in the past women would appear to have been included in the electorate it had long been the practice for male tax-payers only to vote, the latter being defined in Law 5 of 1927 as: "male persons between the ages of 18 and 60 years". But in 1959 women were given the vote and have since played a vital and important part in the public life of the Islands.

In 1932 the Cayman Islands, wishing to celebrate the centenary of the Assembly of Justices and Vestry sought permission to make a new issue of postage stamps to mark this period of their independent administration.

In the Crown Agents' Stamp Bulletin published in October, 1932 the following official description was given –

"The design consists of vignettes of H.M. the King and King William IV and a border includes palm trees and turtles. The name of the colony is at the top with the words 'POSTAGE AND REVENUE' immediately beneath. In the top left and right hand corners are the commemorative dates 1832 and 1932 and the duty tablets are placed centrally at the base. Oblong shape stamps approximate size 41 mm by 27 mm".

The design struck a new note both for the stamps of the Empire and also for those of the colony. The head of King William IV had never before appeared on a postage stamp and the inclusion of the palm trees and turtles was a reference to two of the principal industries of the islands at that time. This series was placed on sale at Georgetown and Cayman Brac on 5th and 20th, December 1932 respectively. The issue was

withdrawn from sale at Cayman Brac on 20th March, 1934 after only fifteen months life and the surplus stock returned to Georgetown for destruction. At Georgetown, however, the series remained on sale until 5th May, 1934 when it was withdrawn and replaced by the previous recess-printed issue. The stamps were engraved and printed in recess by Waterlow & Sons, Ltd, whose imprint appears in the lower margin in small uncoloured letters. The sheets consisted of sixty stamps (10 rows of 6) and were on the usual white Script CA paper.".

The Cayman Islands have come a long way since the year 1832 but have a history of which they can be proud. It is therefore fitting that in this the one hundred and fiftieth year of representative government that the Islanders take time out to reflect on the past. with gratitude to Almighty God, to plan to commemorate and celebrate this long period of parliamentary democracy and to look to the future with anticipation and courage, maintaining the high ideals and principles of which they can be justly proud.

# XVI. AUSTRALIAN SENATE SELECT COMMITTEE ON PARLIAMENT'S APPROPRIATIONS AND STAFFING

BY P. N. MURDOCH

*Usher of the Black Rod and Secretary of the Select Committee*

On 26th November 1981, the Senate endorsed the conclusions and recommendations of the Senate Select Committee on Parliament's appropriations and staffing and specifically resolved that:

(a) the Senate should establish a Standing Committee to consider the Senate's appropriations and staffing;
(b) the estimates for the Senate, as finally agreed to by such Standing Committee, be submitted to the Minister for Finance for inclusion in a separate Parliamentary Appropriation Bill;
(c) the Government agree that the appropriations for the Parliament be removed from the Bill for the ordinary annual services of the Government and included in the separate Parliamentary Appropriation Bill;
(d) the expenditure administered by the Executive departments on behalf of the Parliament be brought together in a Parliamentary Appropriation Bill and that provision be made for an Advance to the President of the Senate on the same basis as the advance to the Minister for Finance;
(e) the President arrange for discussions to be held with the appropriate Executive Departments to review those functions which are currently administered by them, and subsequently to plan the transfer of functions suitable for administration by the Senate; and
(f) section 9 of the *Public Service Act* 1922 be amended to vest in the Presiding Officers, separately or jointly as the case may be, the power of appointment, promotion, creation, abolition and classification of officers, and the determination of rates of pay and conditions of service.

This Resolution was the virtual culmination of years of effort on the part of a number of Senators and Clerks.

In 1965, the Committee appointed by Government Senators on *Appropriation Bills and the Ordinary Annual Services of the Government* recommended that the appropriations for the Parliament should not be included in the Appropriation Bill for the ordinary annual services of the Government. The Committee pointed out that it was inconsistent with the concept of the separation of powers and the supremacy of the Parliament for the Parliament to be treated as an ordinary annual Service of the Government. These views were reiterated by other Senators and subsequently were supported by the Senate House Committee in 1972 and by Senate Estimates Committee A in 1974.

The funding of Parliament was again commented on in the 1976 report of the Joint Committee on the Parliamentary Committee System. It was suggested that the Parliament should not be dependent upon the Government or upon Treasury decisions for the funding of its operations. The Joint Committee pointed to the greater level of financial independence of the committees of the British and Canadian Parliaments and to the inappropriateness of arrangements whereby parliamentary activity, including Parliamentary committee activity, can be curtailed by Government financial restriction.

Again, in 1978, Senate Estimates Committee A reported that it firmly held the view that the appropriation for Parliament was not an ordinary annual service of the Government. The Committee stated that Parliament was a separate arm of Government to which the Executive was accountable, and it must be master of its own affairs. The Committee suggested to the Senate that the time was long overdue for the appropriation for Parliament to be excluded from the non-amendable Appropriation Bill for the ordinary annual services of the Government, and included in a Special Appropriation Bill which would be subject to Senate amendment.

The point was restated in the Estimates Committee A report of November 1978 and referred to yet again in its October 1979 report as follows:

> "Any Parliament which claims, or aspires to, accountability of an executive Government to the Parliament, must make such arrangements for its own resources and facilities as are necessary to achieve this constitutional relationship, in practice as well as in theory.
>
> The Committee has previously stated . . . that the Senate must assist its President in his (and the Speaker's) efforts to achieve greater control over the expenditure and staffing of the Parliament . . .".

In relation to the staffing of Parliament, the Senate made amendments to the Public Service Bill 1902 to put beyond doubt the principle that all staff servicing the Parliament should be under the control of the Parliament, and not the Public Service Board. Consultation with the Public Service Board was considered appropriate only to protect the rights of the officers of the Parliament with respect to conditions of service. In no way could, or should, that examination by the Public Service Board of staffing conditions prevailing in the parliamentary departments be construed as either a detraction of the Presiding Officers statutory authority to act in all senses as the equivalent of the Public Service Board for the parliamentary staff, or an abrogation of the rights of the Parliament to determine its own affairs.

However, despite these statutory provisions, over the years the Executive imposed upon the Parliament arrangements which have meant that the advice of the Public Service Board had to be sought on matters relating to Parliamentary staff, be they classifications or additional staff requirements. If the Public Service Board concurred with a proposal, it could then be submitted to the Executive Council for approval.

More recently staff numbers in the Australian Public Service became

subject to a policy of Executive-determined levels, commonly referred to as staff ceilings, and the Executive extended these to include the Parliamentary Departments.

It was against this background that, on 23 May 1980, the Senate resolved that a Select Committee be appointed to inquire into and report on Parliament's control of its own appropriations and staffing, and related matters.

Due to the rather specialised nature of the Inquiry, the Committee did not advertise in the national press for submissions. Instead, it made direct approaches to organisations and individuals having a particular interest in, or involvement with, Parliament's appropriations and staffing. The Committee also obtained from the Presiding Officers and staffs of the United Kingdom House of Commons, the Canadian Senate and House of Commons and the United States' Senate and House of Representatives, information concerning their practice in funding and staffing their legislatures.

The Committee's investigation showed that the common source of concern to all parliaments is the growing imbalance in the relationship between Parliament and the Executive, the rapidly increasing power and influence of the Executive, the need for Parliament to strengthen its oversight and check of Executive activity, and the concurrent need for the Parliament to regain or assert greater independence and autonomy in regard to its own internal arrangements.

The Committee found that for the majority of members of the Inter Parliamentary Union, Parliamentary budgets are not subject to Executive modification; the financial autonomy of these legislatures is thus guaranteed. The general pattern is that the estimates are drawn up by the Directing Authority of Parliament, or by a Special Committee, on the basis of figures prepared by the Administrative Authorities, and then approved by the Chamber as a whole. As to the involvement of the Executive, typically the Minister for Finance enters the sums required by the Parliament into the national estimates without questioning them or consulting the Government about them. In relation to the United Kingdom, Canada and the United States, specifically, the concept of each legislative chamber independently maintaining control of its own staffing and funding is readily accepted in all three countries. The United Kingdom House of Commons has had such an arrangement operating for the last four years; the United States for the last sixty years; and Canada for the last one hundred and fifteen years!

Governments of course are quick to point out the responsibilities they have to the Electorate for overall budgetary policy and the level of public expenditure, and that they have the responsibility for raising the revenue to fund that expenditure. But, in the light of overseas experience, it is nonsense to suggest that Government needs to maintain control over the total amount of funds available for expenditure by the Parliament. It should certainly be in a position to influence but not to exercise total control.

Despite the fact that most other Parliaments and Executives have made arrangements which provide for real autonomy in relation to Parliamentary appropriations and staffing, the Select Committee understood the reluctance on the part of the Australian Government to agree to an immediate total reform package. In addition, the Select Committee was aware that the House of Representatives may find other arrangements more suitable.

The Select Committee was therefore mindful of the need for an experimental approach to be adopted in making any new arrangements for appropriations and staffing. This is especially true in a bi-cameral Parliament and in one in which there is a sharing of certain services such as the Library, the Reporting Staff, and those areas administered by the Joint House Department.

For this reason, the Select Committee did not choose to follow the example of the United Kingdom House of Commons as the creation of a Commission would involve legislation which would, of necessity, produce a rigid, structured approach rather than the flexible approach which is required at the moment. Accordingly, the Committee recommended that the Senate, and, where appropriate, the Government, should agree to a trial of the proposed arrangements.

The Australian Senate, therefore, is about to embark upon an experiment which we hope will achieve the appropriate constitutional relationship with the Executive, in practice as well as in theory.

# XVII. GIFTS FROM THE BRITISH HOUSE OF COMMONS TO FIJI AND VANUATU

BY MICHAEL RYLE

*Clerk of the Overseas Office, House of Commons*

It is a happy tradition that gifts are from time to time sent from one parliament within the Commonwealth to the parliament of another Commonwealth country to mark important events in that country's history. In particular it has long been the practice for the House of Commons at Westminster to send gifts to the parliaments (or to the lower Houses of bi-cameral legislatures) of countries achieving independence within the Commonwealth. Previous issues of *The Table* have described numerous such presentations, and, as the lucky person involved (it is not the least happy feature of this tradition that the Clerk of the House of Commons always nominates one of his more senior colleagues to form part of the delegation appointed by the House to make these presentations), I have been asked to write for this issue on the presentation of gifts to Fiji and to Vanuatu in October 1981. These were, respectively, the 44th and 45th such presentations made since 1950, which was the year in which we, at the House of Commons, received so many fine and beautiful gifts for our new Chamber from many Commonwealth parliaments.

The Fiji presentation was, in one respect, unusual. It is normal for such gifts to be presented as soon as practicable after independence (which was achieved by Fiji in 1970), although the time needed to agree the nature of the gift, approve its design, to manufacture and to transport it over thousands of miles of sea has often imposed considerable delay. But in Fiji's case the House of Representatives decided to postpone the offered gift at the time of independence as they then hoped to be moving into a new parliamentary building. Alas, as we know only too well at Westminster, such hopes are liable to be disappointed, and the plans for a new building in Suva were postponed and then again postponed. But by 1980 it was agreed that the gift should be no longer delayed, and so, some ten years later than usual, it was duly presented.

The gifts themselves have varied widely. The House of Representatives of Fiji chose a new Clerk's Table (which may yet be incorporated in a new chamber). As is customary this gift was authorised by the House of Commons in an Address to Her Majesty and duly approved by the Queen. A delegation, consisting of Mr John Stradling Thomas, M.P., the Government's Deputy Chief Whip, Mr Austin Mitchell, M.P., an Opposition Whip, and myself was appointed to make both this presentation and that to Vanuatu.

It was convenient for all concerned for the Fiji presentation ceremony to be held soon after (but quite separately from) the C.P.A. Conference

in Suva. Mr Stradling Thomas was one of the U.K. delegates to that Conference and I myself also attended, particularly for the meeting of the Society of Clerks-at-the-Table. Mr Mitchell joined us at the end of the Conference. We were able, therefore, to see something of the beauty of Fiji and to encounter the kindness and charm of the people of those islands before the formal occasions. In particular we had come to know well our principal hosts, the Hon. Mosese Qionibaravi, Speaker of the House of Representatives, and their Clerk, Mrs Lavinia Ah Koy, and we had seen the tremendous efforts they had made to ensure the great success of the C.P.A. Conference. We therefore appreciated all the more their arrangements and hospitality for our additional ceremony. Everyone made us most welcome, including all at the U.K. High Commission, as well as the Members and staff of the Parliament.

The presentation ceremony was held at a formal sitting of the House of Representatives on 26 October 1981 attended by many Members, and at which the President and Members of the Senate were also present (the House and the Senate share the same chamber and therefore our gift to the House will also be used by the Clerk of the Senate when they are sitting). Mr Speaker Qionibaravi read a letter from Mr Speaker Thomas of the U.K. House of Commons and then, the assent of the House having been given, invited the U.K. delegation to take their seats inside the bar of the House.

The Speaker, in welcoming the delegation, said that the gift from the House of Commons cemented further their friendship with the Mother of Parliaments and strengthened the links which bound them together in their respect for parliamentary democracy and rights and freedom for all citizens. Mr Stradling Thomas expressed the honour and privilege of the delegation in having travelled half way round the world to present a gift which carried with it the warm affection of the House of Commons. He then symbolically handed the key of the drawers of the Table to the Clerk (the gift itself, being made of solid English oak, was a little too heavy to be carried by any of the participants in the ceremony!), and said that it came "from Britain with love". Certainly the new Table, which is a fine example of contemporary British furniture craftsmanship, made a lovely setting for Lavinia Ah Koy – surely one of the most beautiful Clerks in the Commonwealth – and her colleague, David Mahabir, the Clerk of the Senate.

The Leader of the House then moved a formal motion expressing the thanks of the House which was seconded by the Opposition Whip. The Deputy Prime Minister also spoke, emphasising the close ties between Britain and Fiji and their common enjoyment of many traditions and ways of life – including a love of rugby football. Finally Mr Austin Mitchell replied on behalf of the British delegation. He too had been greatly touched by the kindness and hospitality of their hosts; although the Opposition in the U.K. opposed much that the Government proposed, they were unanimous in defence of the parliamentary system symbolised by their gift and in conveying their best wishes to Fiji.

Before we left Fiji we were able to meet many of the Ministers and Members of Parliament – the Speaker hosted a most enjoyable dinner – and to see something of the beauty of the islands. We especially enjoyed a day away from the beaches, the sea and civilisation when we ventured into the interior and bathed in a cool, clear mountain stream over which towered great cliffs and massive boulders thrown up by the volcanoes long ago. Out of chaos and conflict has come forth peace and beauty. Fiji is a happy place and its people happy people.

A short air flight took us the 400 miles to the very different group of islands of the Republic of Vanuatu (before Independence they were called the New Hebrides). Here struggle and conflict is a recent experience, and their Independence was only achieved, after some strife, in 1980. However nothing but peace and friendship was experienced by our delegation, and once again we were given a warm welcome and excellent hospitality. From the moment we were greeted at the airport by the Speaker of Parliament, the Hon. Maxime Carlot M.P., John Simpson, the Clerk, and Bill Ashford, the British High Commissioner, we knew we were in good hands.

The presentation itself was a simple but effective ceremony, attended by a number of Members of Parliament, although it was not a formal sitting. (At a later sitting of the House a formal resolution was passed which was sent to the House of Commons and recorded in the Journals.) This time the gift was a gavel and desk set for the Speaker's desk. Mr Speaker Carlot, welcoming the delegation, spoke in both English and French. He emphasised the desire of the people of Vanuatu to continue the parliamentary system, drawing on British experience, but incorporating as well Vanuatu traditions. Mr Stradling Thomas confirmed the desire of the House of Commons to offer any help they could, which was symbolised by the gift they brought, though he trusted that the Speaker would not need to have too frequent resort to the gavel in calling Members to order! Mr Mitchell expressed the thanks of the delegation for the kind hospitality we had received. And representatives of the Government and Opposition also spoke.

For those who enjoy French cuisine, one advantage which Vanuatu has derived from the earlier period of Government by an Anglo-French condominium (though that period is now more commonly known as "pandamonium") is the availability of excellent restaurants. The dinner given by the Speaker was a truly international affair: the guests were English, the cooking French, the languages French, English and Bislama, and the hospitality truly Vanuatan (complete with beautiful garlands of flowers). The dinner was given on a small island, and we ate outside while the sun went down. As we returned to our hotel across the water in the moonlight we felt fully aware of the peace that has at last happily come to these islands.

While in Vila (the capital of Vanuatu) we had the honour of being received by President Sokomann, the President of the Republic. We were able to meet the Prime Minister, Father Walter Lini, Ministers, the

Leader of the Opposition, Members and other prominent citizens at a reception at the U.K. High Commission. We toured the island – some of the white sand beaches are incredibly beautiful, not least because they are unmarked by human visitors – and saw something of recent agricultural developments. Before he departed, Mr Mitchell also went off on his own to one of the smaller islands, Tanna, where he witnessed traditional dancing and other rites on the edge of a live volcano. By all accounts it was a memorable experience!

We also took the chance to have extended discussions with Speaker Carlot and John Simpson about the procedures and practices of parliaments, including the rights and functions of Opposition and backbench Members. The Vanuatu Parliament is very new, with little experience to draw on from their own past. In discussing the draft Standing Orders with John, I was much impressed by the way they are incorporating the practices of local village democratic discussion into their procedures and then codifying them, rather than slavishly following more alien rules, while still basing themselves on the Westminster model in its essentials. We hope, with confidence, that their new rules will work well.

And so our missions were completed and we flew home. A few weeks later, in the middle of a snow storm, the Members of the delegation made a short report to the House. Although Fiji and Vanuatu felt a long, long way away, the memory of their kindness and the warmth of their welcome will always be with us. We were proud to have played a small part, with our gifts from the House of Commons, in establishing still closer relations between the U.K. and these countries.

Finally, as a Clerk, I would like to add particular thanks to Lavinia and John, both members of the Society, not only for their personal hospitality but also for all the hard work they must have undertaken to ensure the success of our visits. I send them my best wishes.

# XVIII. THE PASSAGE OF THE CANADA ACT 1982: SOME PROCEDURAL ASPECTS

BY D. R. BEAMISH

*A Senior Clerk in the House of Lords*

The Canada Bill was introduced in the House of Commons on 22 December 1981. Its long title was "a Bill to give effect to a request by the Senate and House of Commons of Canada". It included the following Preamble, which reflected the terms of an Address from the Canadian Parliament to the Queen, delivered on 9 December 1981[1]:

"Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose:".

The Bill comprised four Clauses and two Schedules, the latter (unusually) being described as Schedules A and B rather than 1 and 2. Schedule B, which accounted for 34 of the Bill's 36 pages, consisted of parallel English and French texts of the Constitution Act, 1982, which under Clause 1 of the Bill was to have the force of law in Canada and to come into force as provided in that Act. Clause 2 provided that after the Constitution Act, 1982 had come into force no Act of the Parliament of the United Kingdom was to extend to Canada as part of its law. Clause 3 provided that Schedule A – a French version of the long title, Preamble and Clauses of the Bill – was to have the same authority in Canada as the English version. Finally, Clause 4 gave the short title. Initially it stated: "This Act may be cited as the Canada Act". Subsequently a correction slip was issued to bring the short title into conformity with the normal style: "Canada Act 1982". Consequential alterations were made to Schedules A and B.

Before the Bill's introduction there had been considerable debate on the role of the United Kingdom Parliament in respect of such a measure. The House of Commons Foreign Affairs Committee reported on this question in January 1981[2]. They reached several detailed conclusions, but for the purposes of this note (which is concerned only with the procedural aspects of the passage of the Bill) it is sufficient to say that they took the view that Parliament's role was not simply to rubber-stamp a request of the Canadian Senate and House of Commons. In particular, it was for Parliament to decide whether or not a request conveyed the clearly expressed wishes of Canada as a whole.

The Bill received its Second Reading in the Commons on 17 February 1982. Before the debate began the Speaker ruled on certain points on which his guidance had been sought[3]. First, he dealt with the fact that the

Bill included English and French texts. He ruled that the House should direct its attention to the English text, and that if any amendment were made to the English text of the Bill then a consequential amendment might subsequently be made to the French text.

On the question of the extent to which discussion and amendment of the Bill would be in order, the Speaker ruled as follows: "As with any other Bill, that is a matter for decision in the first instance by the Chairman of the Committee concerned. However, it may help the House if I say that I have no reason to believe that the English text of the Bill is unamendable".

The Second Reading was moved by Mr Humphrey Atkins, then Lord Privy Seal, who put forward the Government's view on amendment of the Bill. Having referred to the convention that Acts of the United Kingdom Parliament should not extend to a Dominion "otherwise than at the request and with the consent of that Dominion", he went on: "It would, of course, be inconsistent with this 'request and consent' convention for Parliament to make amendments which have not been requested and consented to by Canada in the first place. This is also the view of the Foreign Affairs Committee . . . In the light of this, I have to state the clear view of the Government that any amendment to the Canada Bill which may be put forward should not be passed by the House. That will be the advice of the Government during all the subsequent stages of the Bill"[4]. In reply to an intervention, Mr Atkins added that his advice would extend to the omission of parts of the existing Bill.

After six hours of debate, the Bill was given a Second Reading by 334 votes to 44 and committed to a Committee of the whole House.

The Committee stage began on 23 February with a brief statement by the Chairman of Ways and Means: "I remind hon. Members that clause 1 of the Bill refers to a specific and complete document, the Constitution Act 1982 as set out in schedule B. In order to protect the Committee's right to consider amendments to the schedule, on my instructions hon. Members have been advised that the effective way to seek to amend the schedule is to table amendments to clause 1. When all the selected amendments have been disposed of, hon. Members wishing to raise other points on schedule B should do so on the Question being proposed, That clause 1 stand part of the Bill"[5]. There followed over half an hour's discussion of points of order, principally concerned with the shortness of the interval since Second Reading.

Some 54 amendments, 3 new Clauses and 1 new Schedule were tabled for the Committee stage. Of those which were selected for consideration, a group of 17 were discussed together on 23 February, for a total of some five hours. After a division on one of the amendments, which was defeated by 154 votes to 42, the Committee stage was adjourned.

The Committee stage was completed on 3 March. On that day the proceedings began with a point of order on the amendability of Schedule B. Mr George Cunningham claimed that the Constitution Act, 1982 contained in Schedule B was not a text with a separate independent

existence such as to make it unamendable[6]. The Chairman reiterated his original ruling, but added: "May I stress that the rulings that I have given today and last Wednesday on the proper course of proceeding derive from the way in which this particular Bill is drafted, and no general conclusions relating to constitutional Bills or Bills for confirming treaties or agreements should be drawn from it"[7]. There followed a point of order by another member, Mr D. N. Campbell-Savours, who was aggrieved at the Chairman's failure to select his amendment. After more than a dozen attempts by Mr Campbell-Savours to raise points of order, he was asked by the Chairman to leave the Chamber and discussion of the amendments began.

After five hours more debate of amendments to Clause 1, a division took place on one of the amendments, which was defeated by 140 votes to 28. After an hour's debate on Clause 1, and a quarter of an hour's debate on an amendment to Clause 2, the Committee stage was completed, and the Bill was reported without amendment.

The Third Reading took place on 8 March[8]. A three-hour debate was followed by a division, on which the Third Reading was carried by 177 votes to 33.

The Bill received its First Reading in the Lords on 9 March, and the Second Reading debate took place on 18 March. Lord Carrington, then Secretary of State for Foreign and Commonwealth Affairs, moved the Second Reading. He did not offer guidance on the role of Parliament in dealing with the Bill, but described the Government's position as follows: "... the Canadian Parliament have asked us to enact legislation on their behalf, as we have done on many previous occasions. The Government believe that we should respond to this request by passing the Bill in the form in which it has been received . . . The Government therefore commends the passage of the Bill but will refrain from either criticising it or defending its detailed contents"[9].

Lord Trefgarne, then Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, winding up for the Government, offered the following guidance (based on advice given by the Clerk of the Parliaments) on the amendability of the Bill: "The rule . . . is that amendments must be relevant to the subject matter of the Bill. That derives from the more general statement of the rule in regard to relevance in Standing Order 25, 'Debate must be relevant to the Question before the House'. This Bill is clearly confined, as indicated by its Long Title, to provisions which give effect to a request by the Senate and House of Commons of Canada. The Bill is, therefore, concerned solely with giving effect to that request. If it is altered in any material particular by any amendment it would no longer be confined to giving effect to that request. I am advised that any amendment of any substance not tabled at the request of the Senate and House of Commons of Canada would thus be irrelevant to the subject-matter of the Bill. I very much hope the House will accept that advice and that noble Lords will desist from tabling amendments. I emphasise that that is advice which has been received and

is in no sense a ruling, certainly not from me"[10]. This advice had also been included in a note prepared by the Clerk of the Parliaments for the use of Lords requiring procedural guidance.".

After a debate of nearly five hours and three-quarters the Bill was given a Second Reading without a division. Lord Stewart of Fulham, the Opposition spokesman, had tabled the following motion to be taken immediately after Second Reading:

"That this House, aware of the anxieties which have been expressed about the Canada Bill now before the House by representatives of the Aboriginal Peoples of Canada, is confident that the Government of Canada, in consultation with representatives of the Aboriginal Peoples, will use the provisions of the Bill to promote their welfare".

In the event the motion, which had been referred to in the debate on the Bill, was not moved.

The Bill was considered in Committee of the whole House on 23 March[12]. In the light of the advice given to members, no amendments at all were tabled and therefore the only questions to be considered were those on the Clauses, Schedules, Preamble and Title. All were agreed to formally except that on Schedule B, on which there was a debate lasting three-quarters of an hour, notable for the fact that Lord Trefgarne, for the Government, adhered rigidly to the line indicated by Lord Carrington on Second Reading and declined to enter into discussion of the content of Schedule B.

The Bill was reported without amendment and the Report was formally received immediately. The Third Reading debate took place only two days later, on 25 March[13]. After a brief speech by Lord Trefgarne, and even briefer interventions by the spokesmen for the Opposition and the Liberal party, the Earl of Gosford (who had not spoken on Second Reading) rose to make a prepared speech. Two interventions by the Leader of the House (Baroness Young), and three by other peers, failed to dissuade Lord Gosford from making what was generally regarded as an inappropriate speech for Third Reading. After some twenty minutes Baroness Wootton of Abinger moved "that the noble Earl be no longer heard", a motion that had not been moved since 1960[14]. The House proceeded immediately to a division, and the motion was agreed to by 147 votes to 15. With the exception of the Lord Chancellor, who voted for the motion, members of the Government abstained from voting. After one further speech the Bill was read a third time and passed without a division.

Four days later, on 29 March 1982, the Royal Assent was notified to both Houses and the Bill became the Canada Act 1982[15]. As a result of special arrangements made by the Clerk of Public Bills in the Lords, the Act was published next morning.

It is noteworthy that, though procedures in the House of Lords are often regarded as being more flexible than those in the House of Commons, a much less restrictive attitude towards the amendment of the Bill had been taken in the Commons. In neither House, however, was the Bill in fact amended.

1. Official Report, Vol. 18, column 293 (17 February 1982).
2. First Report from the Foreign Affairs Committee, Session 1980–81 (H.C. 42): "British North America Acts: the role of Parliament".
3. Official Report, Vol. 18, columns 290–1.
4. Ibid., column 297.
5. Ibid., column 760.
6. Official Report, Vol. 19, columns 287–9.
7. Ibid., column 290.
8. Ibid., columns 655–95..
9. Official Report, Vol. 428, column 759.
10. Ibid., column 825.
11. This note took the form of a photocopied typescript and was not published.
12. Official Report, Vol. 428, columns 928–41.
13. Ibid., columns 1065–73.
14. Official Report, Vol. 223, columns 737–8 (12 May 1960); on that occasion the motion was agreed to without a division. On 1 February 1968 an attempt was made to move a similar motion but the question was not put (Official Report, Vol. 288, column 892).
15. 1982 c. 11.

# XIX. EXTRADITION PROCEEDINGS AGAINST RONALD ARTHUR BIGGS

BY REN KELMAN

*Clerk of Parliament, Barbados*

Extradition proceedings anywhere are usually interesting. Such proceedings a year ago in Barbados against Ronald Arthur Biggs, aroused much interest in Barbados and abroad for probably similar reasons.

For readers of *The Table,* the proceedings assumed a deeper significance, for it was probably the first recorded occasion on which a Clerk of a Commonwealth Parliament was called upon, as it were, to give some account of his stewardship in a court of law. The role and functions of the Clerk of Parliament are well known and oft reported in these columns, thus I am denied a simple repetitive chore; the more awesome task of attempting a dissertation on Statutory Instruments I am spared, by virtue of my own inadequacy, and what follows is no more than a mere account of the said proceedings.

On 23rd March 1981, a yacht with a number of persons on board entered the port at Bridgetown, Barbados, on tow by a vessel of the Barbados Coast Guard. The Chief Immigration Officer accompanied by a senior police officer boarded the said yacht to make routine enquiries. One of these persons gave his name as Ronald Biggs and was without either a passport or other document which could assist in establishing his identity. The Chief Immigration Officer ordered that the said person be taken to the Central Police Station where further examination could be carried out to determine whether or not he should be allowed to remain in Barbados.

Investigation confirmed that the said man indeed was Ronald Arthur Biggs who at the Assizes and General Delivery of the Gaol of our Lady the Queen held at Aylesbury in and for the county of Buckingham on the 16th day of April 1964 was in due form tried and convicted for conspiracy to stop and rob the mail, and robbery with aggravation. In respect of the first offence he was sentenced on 16th April 1964 to 25 years imprisonment and to 30 years imprisonment in respect of the second, the sentences to run concurrently.

Further, that the said Ronald Arthur Biggs had escaped from Wandsworth Prison on 8th day of July, 1965, without completing his sentence and had been at large ever since.

On 30th March, 1981 the said senior police officer referred to earlier, swore to an Information setting out the results of the police investigations and applied for a warrant to be issued under Section 10(1) of the Extradition Act 1979 (Act 1979–21) which deals with the apprehension of fugitives. The warrant for the apprehension of Ronald Arthur Biggs was

issued by the Chief Magistrate on the same day and the Chief Magistrate commenced hearing the application for extradition. Evidence in support of the said Information was adduced, and in the course of so doing, several objections were made by defence counsel which dealt in the main with procedural matters of an evidentiary nature. These objections pertained to the leading of evidence, documentary and otherwise to show that the defendant was a fugitive.

Of much greater interest and import was an objection led on behalf of the defendant which showed that Statutory Instrument No. 74 of 1980 made under the Extradition Act had not been laid in Parliament as required by law. The Clerk of Parliament was called in support of this objection and examined as to his duties in Parliament. He testified that to the date of these proceedings, Statutory Instrument No. 74 of 1980 had not been laid.

The parties could not agree whether the requirement to lay the Instrument was mandatory or merely directory. Protracted legal argument failed to narrow the area of disagreement and the learned Chief Magistrate on 9th April 1981, made the Order committing the Defendant to prison until he could be delivered therefrom in accordance with the Act.

The Defendant thereupon sought leave to appeal to the Divisional Court against committal on grounds identical with the objections taken in the earlier proceedings before the Chief Magistrate.

Following is part of the judgment delivered by the Honourable Sir William Douglas, C.J.

"One of the grounds on which the Applicant is relying in his application for leave in this Court is that the Learned Chief Magistrate erred in law in holding that the requirement to lay in Parliament the Statutory Instrument entitled No. 74 of 1980 was directory and not mandatory.

The Statutory Instrument reads as follows:

"*Extradition Act 1979 (Act 1979–21). The Designated Commonwealth Countries Extradition Order, 1980.*

The Minister in exercise of the powers conferred on him by Section 33 of the Extradition Act, 1979, makes the following order:

1. This Order may be cited as the Designated Commonwealth Countries Extradition Order, 1980.
2. The Commonwealth countries specified in the schedule are designated for the purposes of Section 33 of the Act".

Among the countries specified by the Schedule is to be found the United Kingdom.

The purposes of the Act are, according to Section 3, to repeal and replace the existing laws of Barbados governing the return of criminals to or from other States and further to make the proceedings for the return of fugitives from other States as uniform as circumstances permit irrespective of whether a fugitive is from a Commonwealth country or a foreign State.

Section 4 of the Statute deals with the term "extradition crime".

Sections 6 and 7 deal with power to apprehend and surrender a fugitive, and that power is circumscribed by the provision of Section 7.

Section 8 deals with agreements between Barbados and another Commonwealth country, and Section 10 with the apprehension of a fugitive.

Section 14 deals with his detention and Section 17 deals with his committal for surrender.

So that the Act not only repeals the existing law in regard to the detention of fugitive offenders but it lays down a detailed procedure for this to be done.

Section 33 of the Act is as follows and states:

> "The Minister responsible for External Affairs may, by order subject to negative resolution, designate any Commonwealth country as a Commonwealth country to which Part I applies".

One must look now at the meaning of every word appearing in Section 33. It is agreed by both sides that the words "subject to negative resolution" must be given the meaning which the Statute requires, but there is contention between the parties as to whether the provision "subject to negative resolution" makes the terms of Section 33 mandatory or merely directory.

The definition is to be found at sub-section (7) of Section 41 of the Interpretation Act, Chapter I of the Laws of Barbados. Sub-section (7) provides –

> "The expression "subject to negative resolution" when used in relation to any statutory instruments or statutory documents shall mean that such instruments or documents shall, as soon as may be after they are made, be laid before each House, and if either House, within the statutory period next after any such instrument or document has been so laid, resolves that the instrument or document shall be annulled, the instrument or document shall be valid as from the date of the resolution, but without prejudice to the validity of anything done thereunder or to the making of a new instrument or document."

The Interpretation Act also provides by Section 37 that in any enactment passed or made after the 16th of June 1966, the expression "shall" shall be construed as imperative.

The question of whether or not the words in the Statute are mandatory or directory has been the subject of many decided cases. In this jurisdiction, the case of *Springer v Doorly, West Indies Court of Appeal Case No. 2 of 1949*, dealt with exactly this question. But it must always be remembered that the English cases which have been cited by counsel on either side, and indeed the case of *Springer v Doorly* were decided by Courts applying the Interpretation Acts of the United Kingdom or of Barbados prior to the passing of the Interpretation Act which now is Chapter I of the Revised Laws of Barbados, and therefore any principles laid down in these old cases must be read subject to the specific provisions of the Interpretation Act of Barbados.

So that where in Section 33 the words "subject to negative resolution" are found one cannot go beyond the provisions of the Interpretation Act, Section 41, sub-section (7) in coming to a conclusion as to what these words mean.

The Interpretation Act leaves no doubt that the duty of the Minister responsible for External Affairs is to lay the Statutory Instrument before Parliament and the only way in which that duty could be deemed to be otherwise than imperative or mandatory is if there is in the Statute some contrary intendment in the words of the Statute itself. Learned counsel for the Respondent has not been able to draw our attention to any contrary intendment in the Extradition Act, of 1979.

The Interpretation Act also makes use of the term "as soon as may be". In our view the words "as soon as may be" must mean within a reasonable time, having regard to the care and the despatch with which Parliamentary business should be conducted.

In the evidence taken by the Learned Chief Magistrate it is clear from the evidence of the Clerk of Parliament that although the Statute had been assented to by His Excellency the Governor General as long ago as 13th of July, 1979, it was only brought into effect by Proclamation on 2nd of June, 1980 and at the time of the events complained of by the Applicant, that is to say, at the time when the Order for surrender was made, and before that when the warrant was issued by the Magistrate, the Statutory Instrument had not been laid in Parliament.

Learned counsel for the Respondent with his usual candour conceded that the purpose of the laying of the Statutory Instrument in Parliament was, apart from giving notice to the members of Parliament, to retain control by Parliament itself over the extending of statutory provisions to countries which would be named in an Order designating them as countries to which the Extradition Act would apply.

Having regard to what we have said in relation to the meaning of the words "as soon as may be", it cannot be gainsaid that the care and despatch with which Parliament's business should be conducted would require the Statutory Instrument to have been laid prior to the issuing of the warrant and the making of the Order in this case.

In our view, the failure to lay in Parliament the Statutory Instrument No. 74 of 1980 in accordance with the provisions of Section 33 is fatal. The Statutory Instrument is invalid for this reason.

We will treat the application for leave to appeal as an appeal on this ground only. The appeal will be allowed and we will quash the order of the Chief Magistrate that the Applicant be detained for surrender."

The judgment of the Court represents an authoritative distillation of the present state of the law in this country on the matter raised for determination and I hesitate to risk its dilution by any or further commentary.

Suffice it to say that the order of the Chief Magistrate was quashed, the applicant discharged and awarded $500.00 in costs – partly, I suspect, for being of good behaviour during his stay.

# XX. AN EXCHANGE ATTACHMENT TO THE AUSTRALIAN HOUSE OF REPRESENTATIVES

BY GEORGE CUBIE

*A Deputy Principal Clerk, House of Commons*

Clerks throughout the world often endure the frustration of travelling on official business to faraway places only to find themselves so tightly scheduled that they see little more of the countries they visit than airports, the interiors of offices and of featureless modern hotels. Others who do not travel may have little sympathy with such privations but they are real enough. It was my privilege earlier this year not only to travel to the other side of the world but to spend sufficient time on an exchange visit to the House of Representatives in Canberra to make many new friends, to see how the Australian Parliament works and to visit and come to appreciate a small part of a huge country. In numerous ways it was a memorable visit: for the warmth of the welcome I received, for the insights gained into Australian parliamentary practice, and for the new light Australian practice and procedure shed on my own thinking about procedure at Westminster.

In addition to spending time in the House of Representatives, I was fortunate enough to spend time in the Senate and also to make short visits to the Victorian Parliament in Melbourne and the Queensland Parliament in Brisbane. To all the clerks whom I met I would like to express my warm thanks for the personal kindness shown to me and for the great amount of time they devoted to explaining Australian parliamentary practice to me.

It was a fascinating period to visit the House of Representatives. Members seemed, however, for much of the time to be pre-occupied with electoral battles outside Canberra – on the one hand a crucial by-election in Sydney, and on the other the state elections in Victoria which resulted in the first change of power for 27 years. Furthermore, a strong but unsuccessful challenge to the Prime Minister's leadership of the Liberal party seemed to echo the turbulence of British politics in recent years.

This was the context in which I studied the House's procedure – familiar in its terminology and in so many ways to that of Westminster, yet different in so many particulars. It is facile to comment on the influence of the huge size of the country coupled with its relatively small population on the development of its Parliament and yet it is a crucial factor in understanding how it operates. Since Members may have to travel great distances to their electorates they wish the working weeks of the House to be concentrated into 3 sitting days per week. There are thus considerable pressures to dispatch business expeditiously – and time limited speeches and short debates are normal. Since the population is relatively small (though it officially hit 15 million during my visit) the

number of Members of the House need not be large (now 125) particularly given a federal constitution. A small House leaves less scope for the development of the kind of robustly independent member familiar in the UK Parliament: party discipline is strong and parties apparently have an even stronger role in the ordering of the business of the House than at Westminster. Such general observations illustrate, as clerks throughout the Commonwealth learn rapidly enough, that legislatures are organisms: that one part cannot be viewed in isolation and that to tamper with one aspect of procedure may have unforeseen consequences in some other part of its operation.

The contrast between an administratively highly centralised country to one with a federal constitution is another key part of the context in which to view Australian parliamentary life. Since I did not see either of the state Parliaments I visited in session, it was hard to judge how precisely their ways relate to those of the Commonwealth Parliament. But it is instructive to a clerk who knows the mid-Victorian masterpiece on the banks of the Thames to visit Parliaments 12,000 miles away which are housed in buildings dating from the same period as Barry's building was nearing completion in London. The recent refurbishment of the Legislative Council in Melbourne and work in progress on the original Parliament House in Brisbane show two further examples of Victorian masterpieces.

Perhaps the most striking contrast to procedure at Westminster is the apparent uncertainty about the business of the day which characterises parliamentary life in Canberra – an uncertainty that is even more marked at present in the Senate where the Government do not control a majority. Not for Australia the predictability of business announced every Thursday for the whole of the following week: there the business may change frequently during the week and even during the course of a sitting. While at Westminster ministerial statements are almost invariably made at the end of question-time (or at 11.00 a.m. on Fridays) with the only very rare exceptions being at moments of real or supposed crisis, in Australia statements and also debates on motions moved without notice may occur at almost any time.

Topicality and immediacy have their attractions. At Westminster the S.O. No. 9 application, the bogus point of order, the free-for-all of Prime Minister's question-time give to backbench Members some scope for raising current concerns. In the House of Representatives a variety of opportunities are provided for backbench members – "grievance" debates and adjournment debates (in the latter case a series of five-minute speeches usually on unrelated topics). But these, like the procedure for discussion of matters of public importance, suffer, to Westminster eyes, from the flaw that while they provide publicity for Members and the issues they raise, they do not automatically receive a reply. Much of what takes place seems to be in the nature of a series of *ex parte* statements without the House having the benefit of hearing a ministerial reply. It seems also that recently at least discussion of matters

of public importance has been largely taken over by the official opposition – a reflection perhaps both of the small size of the House and of the predominance of party.

Perhaps the most striking example of the way in which Australian parliamentary proceedings achieve topicality is provided by question-time. Questions without notice take up three-quarters of an hour or so at the start of each day's sitting. All Ministers in the House attend and it can be a rumbustious occasion, but the prime thrust is political rather than information-gathering. Supplementaries are not allowed and Ministers by making lengthy replies can, it appears, cut down the number of questions that may be asked before question-time comes to an end. When, by contrast, questions are placed "on notice" it may be a long time before a Member receives an answer – and in some cases no reply is ever given.

As at Westminster legislation normally takes up much of Parliament's time in Canberra and yet in the House itself remarkably few amendments are moved or carried to bills. It seems that as with so much of what happens there, the "party room" decides what is to happen and little real debate takes place in the chamber on the details of legislation. It was interesting to hear about the recent innovation of legislation committees, akin to standing committees at Westminster in that they deal with the committee stage of bills. But, as yet, only a very small proportion of bills have been referred to such committees. At present, however, the lack of government control of the Senate is thought to have substantially reduced the volume of legislation which Parliament is invited to consider. During my stay a considerable amount of time was spent not on legislation but on debates on, for instance, ministerial statements.

To me, other striking features of the practice of the House of Representatives as compared with that of the Commons at Westminster included the apparent lack of opportunities open to private members, the unfamiliar procedure whereby motions may be moved that "Mr. X be not further heard" – a motion which can be, and is occasionally, moved against the Leader of the Opposition himself – time-limits on speeches, and the relatively limited role of committees in the House. The Senate has for many years had a comprehensive structure of committees, and has recently added to a range of general purpose and legislation committees and separate estimates committees, a new committee on scrutiny of bills. It was fascinating also to exchange notes about administrative developments. The new House of Commons Commission has attracted much interest overseas. For my part it was instructive to hear how the House and the Senate were grappling with similar issues over control of parliamentary expenditure and staffing.

Physically the present Parliament House in Canberra is compact and intimate – intimate to the point of over-crowding. To someone from Westminster it was impressive to learn about the widespread support for the construction of the new and permanent Parliament House a short distance away. Construction is, as I was able to see for myself, well under

way and on schedule for the target opening date of 1988 – the bicentenary of European settlement in Australia. As a building designed to cater for all the needs of Parliament, and to provide ample space for government departments and for the press it has been designed on a huge scale covering a site about half a mile in diameter. Yet given the spaciousness and scale on which Canberra is laid out it should fit in well with the ideas of the original designer of the capital – Walter Burley Griffin.

While physically the new Parliament House lends excitement to the Canberra scene, procedurally the House has recently come of age with the publication in December 1981 of *House of Representatives Practice* edited by Jack Pettifer whose retirement was announced in May this year. The book is a compendium of information about the Australian parliamentary scene, but no book, however vivid, can replace the excitement and value of paying an exchange visit such as I was privileged to make. Whoever is fortunate enough to pay the return half of the exchange will I hope find out that there is more to Westminster than the hallowed pages of May reveal!

## XXI. APPLICATIONS OF PRIVILEGE

### AUSTRALIA: HOUSE OF REPRESENTATIVES

**Newspaper article.**—On 8th September 1981, Mr P. M. Ruddock, M.P., raised a matter of privilege based on a printed reference and an article in the Sydney *Daily Mirror* of 2nd September 1981. Mr Speaker stated that he had formed the opinion that there was a *prima facie* breach of privilege and went on to say that he would exercise his discretion not to give the matter precedence immediately but would allow Mr Ruddock time to consider the form of motion he might wish to move. Later that day Mr Ruddock moved that the matter be referred to the Committee of Privileges, which motion was agreed to by the House. The printed reference on page 1 of the newspaper was preceded by a heading "MP's BLUDGERS, DRUNKS!" and the article on page 9 by the heading "Bludgers on the backbench". The article itself contained other critical references to non-Ministerial Members of the Parliament.

The report of the Committee was presented to the House on 27th October 1981. The Committee determined:

> "(1) That the printed reference on page 1 of the first edition of the article on page 9 of all editions of the Sydney *Daily Mirror* of 2nd September 1981 constitute a contempt of the House of Representatives by the author, editor and publisher;
> (2) having considered the reference and the article, the Committee is of the view that the article and its presentation are irresponsible and reflect no credit on its author, the editor or the publisher, and
> (3) while finding a contempt of the House of Representatives has been committed, the Committee is of the opinion that the matter is not worthy of occupying the further time of the House."

The Committee further resolved that:

> "... the Committee of Privileges –
> (1) notes that on 13th April 1978 the House agreed in principle that there should be an inquiry into the whole question of Parliamentary privilege, as proposed by the Committee of Privileges in its report presented on 7 April 1978, but that such inquiry should be conducted by a joint committee of the Parliament (see *The Table*, vol. XLVII (1979) pp. 148–9);
> (2) notes that the proposed joint committee inquiry has not eventuated;
> (3) calls on the House to immediately initiate a resolution for the establishment of a joint committee as previously proposed, and
> (4) further calls on the House, in the event of the failure of the Senate to agree to the establishment of the proposed joint committee, to move for the establishment of a select committee of the House to conduct the inquiry."

The Committee's report went on to comment on some of the broader issues of privilege which it felt merited particular attention, including: the method of raising complaints in the House; the need to exercise penal jurisdiction sparingly; legal representation before the Committee of Privileges; the conduct of the Committee's inquiries, particularly

referring to the taking of evidence *in camera;* the possibility of transferring inquiries to the courts; the need for codification of contempts, and the publication of evidence.

The report also contained three dissenting reports which, while not disagreeing with the general findings of the Committee, made additional comments on related issues of privilege and the conduct of privilege cases. The House debated the Committee's report on 29th October 1981. Debate was adjourned and had not been resumed when the House rose for the summer adjournment on 18th November 1981.

**Newspaper advertisement.**—On 20th October 1981 the Prime Minister, the Rt Hon. J. M. Fraser, C.H., M.P., drew the attention of the House to an advertisement on the front page of the Melbourne *Herald* of 16th October 1981, under the heading "P.M. VOTES SIGMA NO 1". The advertisement, relating to the Sigma motor car, was placed by Preston Motors Pty Ltd and further read, *inter alia:*

"So join the P.M. and drive Sigma – it's a real vote catcher."

Later that day Mr Speaker stated that he was prepared to allow precedence to a motion to refer the matter to the Committee of Privileges. Mr Speaker commented:

"To any person reading the advertisement, the first impression would be that the reference was to the Prime Minister and that he endorsed that particular make of motor car. . . It is obvious to me that unless some action is taken to examine the whole issue we would be inviting advertisers to attribute to any Member of this House the support of any product."

On the motion of Mr Fraser the matter was referred to the Committee of Privileges.

The report of the Committee was presented to the House on 29th October 1981. The Committee reported that it was of the opinion that advertising of the kind referred to it could constitute a contempt but resolved:

"that having regard to the Committee's most recent report on the *Daily Mirror* inquiry, and its view expressed in that report for the need for a Joint Select Committee to inquire into the general question of Parliamentary privilege, the Committee believes that the matter referred to it on 20th October 1981 should be dealt with by the proposed Joint Select Committee, and accordingly returns this matter to the House."

This report had not been considered when the House rose on 18th November 1981.

## AUSTRALIA: SENATE

**Harassment of a Senator.**—In June 1981 the Senate Committee of Privileges reported to the Senate its opinion that it is a contempt for any

person to harass a Senator by repeated offensive telephone calls, and the Committee recommended that the Senate express its agreement with this conclusion by means of a resolution adopting the report.

The Senator had complained that he had received a number of highly offensive telephone calls at his Parliament House office. The Telecommunications Commission had traced the calls, as it is empowered to do by statute, and had discovered the source of the calls to be a phone at the private address of a person employed in Parliament House. The Senator raised the matter in the Senate, which referred the question to its Committee of Privileges. The Committee was not able to ascertain the identity of the person who made the calls, but the woman concerned expressed her regret that her phone had been involved and indicated her willingness to apologise to the Senator. The Committee reported that the course of conduct involved in the series of telephone calls constituted contempt, but in the light of the evidence did not recommend any action other than the adoption of the report. The motion for the adoption of the report was subsequently passed without debate.

The Senate, which under the Constitution possesses the powers, privileges and immunities of the British House of Commons at the establishment of the Commonwealth of Australia, is empowered to declare an act to be a contempt and to punish such act even where there is no precedent for the offence.

## CANADA

### MANITOBA: LEGISLATIVE ASSEMBLY

**Right of Legislatures to expel Members.**—On 16th December 1980, during the Throne Speech Debate, a Minister interrupted the proceedings on a point of order and said "It is with some regret I have to inform you of the presence of a stranger in the Chamber. I would ask you to act accordingly". The reference was to the entrance of a Member who had been convicted of a criminal offence and sentenced to seven years imprisonment, but who had been released on bail pending the hearing of his appeal. After considerable debate the House resolved that the Member "be ordered to withdraw from the Chamber and remain outside the Chamber unless a competent authority set aside his conviction". The Legislative Assembly Act which, while disqualifying persons who were members of other legislatures of the Parliament of Canada and certain persons who contract with the government was silent on disqualifying persons convicted of criminal offences, was subsequently amended to provide that

"(i) . . . where a member is convicted of an indictable offence for which he is sentenced to imprisonment for a term of 5 years or more, he is ineligible to sit or vote as a member. . . ."

## New Zealand

**Public participation in prayers.**—At the commencement of each sitting day prayers are read to the House by the Speaker. On one occasion in 1981 as Mr Speaker began to read the prayer about 60 people in the public galleries rose and recited the same prayer. Mr Speaker stopped reading the prayer, waited for those in the gallery to finish, and then continued as before. It was subsequently revealed that the incident had been arranged as part of a large number of protests which were being staged throughout the country at that time against the Springbok rugby tour. Participants in the prayer had come to the House armed with copies of the standard prayer read by the Speaker. After the incident the protesters left the galleries peacefully.

The matter was subsequently raised with the Speaker as involving the privileges of the House. He determined that a question of privilege was involved, and, after a heated debate, the matter was referred to the Privileges Committee, a number of members taking the view that it would be best to ignore the incident.

The Privileges Committee was unanimously of the view that there had been a wilful interruption of the orderly conduct of the business of the House and therefore a contempt had been committed. The Committee was divided as to the action which it should recommend to the House as a consequence. Between the referral of the matter to the Committee and the Committee's consideration of it, one of the participants wrote to the Committee indicating that he had intended to show contempt for Parliament or some of its members. The Committee decided that in these circumstances it should publicly ask those involved to apologise, as this would influence its recommendation to the House. The Privileges Committee's active involvement in working out the consequences of its determination before reporting to the House is not unusual although, of course, the power to punish for contempt is one that belongs to the House itself and not to the Committee. In the event no apologies were forthcoming from any of those involved. Indeed a letter described as 'an overt letter of defiance' was received by the Committee signed by a number of individuals who had participated in the protest.

In these circumstances the Committee, by a majority, decided to recommend that those involved in the incident be excluded from the precincts of Parliament for 12 months. This recommendation was agreed to by the House. The implementation of the decision was not without some problems as the individuals excluded were not named by the Committee or the House, nor were the precincts of Parliament defined.

The Parliamentary buildings and grounds are statutorily defined, and are under the control of the Speaker and, when there is no Speaker, the Minister in Charge of the Legislative Department. These officers have legal authority to exclude any persons from the parliamentary complex and so, while it was recognised that there may be doubt as to whether the House could order the exclusion of any person from an area wider than

the immediate place in which it was carrying on its proceedings, recourse could be had to the powers of these officers to carry out Parliament's express intention.

Consequently the Speaker decided that the areas from which the protesters were to be excluded were those areas of Parliament Buildings available for the general use of members or Ministers – the public areas of the building and the areas used by members generally. The exclusion was not to apply to rooms or suites allocated for the personal use of members or Ministers or to the use of otherwise prohibited areas for transit in order to visit a member as his invitee.

Although neither the Committee nor the House named any person to whom the exclusion was to apply, many of the persons involved had voluntarily identified themselves. These were written to individually informing them of the Speaker's decision, and a public statement issued at the same time. A few days later Parliament was prorogued and then dissolved. This does not bring the exclusion to an end. Parliament Buildings are now under the control of the Minister in Charge of the Legislative Department and the authority to exclude derives from his position. Unless he decides not to enforce the wishes of the late Parliament as expressed in its decision, the conditions laid down by the Speaker before the dissolution will continue to be applied.

## INDIA: LOK SABHA

**Recission of a resolution relating to privileges.**—On 7 May 1981, Shri B. R. Bhagat sought to move the following motion for rescinding the resolution adopted by the Sixth Lok Sabha on 19 December, 1978:–

"Whereas the Committee of Privileges of the Sixth Lok Sabha in its Third Report has expressed the view that:

(a) any person, if engaged in collecting information asked for by Parliament should be deemed to be in the service of Parliament and entrusted with the execution of the orders or the performance of the functions of the House even though he is technically not an employee or officer of Parliament;

(b) a person charged with breach of privilege is bound if so required by the Committee to take oath/affirmation and to depose before the Committee and answer any questions regarding the facts of the case;

(c) a person charged with breach of privilege is bound to answer questions even without taking an oath/affirmation, even though that person would not be required to answer any self incriminatory questions;

(d) an averment in a written statement submitted to the Committee by a person charged with breach of privilege, expressing reasonable apprehension of the influence on the members of the Committee belonging to the ruling Party of its openly declared antagonism towards the person involved would constitute a breach of privilege and contempt of the Committee;

Whereas the Sixth Lok Sabha by a Resolution adopted on 19th December, 1978 agreed with the above recommendations and findings of the Committee and on the basis thereof held Shrimati Indira Gandhi, Shri R. K. Dhawan and Shri D. Sen guilty of breach of privilege of the House and inflicted on them the maximum penalty possible in violation of the Principle of Natural Justice;

CONSIDERING that

(a) the above findings are in total contravention of Parliamentary rules, precedents and conventions;
(b) they unduly extended the immunity enjoyed only by the officers of Parliament in the discharge of their duties to an indeterminate number of persons totally unconnected with Parliament and constrict and deny to persons charged with breach of privilege and contempt of the House inalienable rights and safeguards guaranteed by the Constitution;
(c) if the above findings are allowed to remain on record they would serve as standing instruments in the hands of any party in power for narrow, partisan political ends of calumny, harassment and public denigration by persecuting its opponents as actually happened in the case of Smt. Indira Gandhi;
  (i) a pre-determined design to vilify Smt. Indira Gandhi, deprive the electorate of Chikmagalur of its due representation in Parliament, stifle the authentic voice of national dissent from the floor of the House, thus the democratic process;
  (ii) to denigrate and to imprison Smt. Indira Gandhi;
  (iii) to hand out in the guise of privilege proceedings, a finding from the Parliament against Smt. Indira Gandhi so that the same may hang as a compulsive pull over the criminal courts in the then impending trial against Smt. Indira Gandhi and others on charges based on the same allegations; and
(d) the said proceedings of the Committee and the decision of the House were wrong and erroneous and with a view to correct this distortion and establish correct conventions and precedents for future parliamentary procedures.

NOW THEREFORE this House resolves and declares that:

(a) the said proceedings of the Committee and the House shall not constitute a precedent in the law of parliamentary privilege;
(b) the findings of the Committee and the decision of the House are inconsistent with and violative of the well accepted principles of the law of parliamentary privilege and the basic safeguards assured to all and enshrined in the Constitution; and
(c) Smt. Indira Gandhi, Shri R. K. Dhawan and Shri D. Sen were innocent of the charges levelled against them.

AND ACCORDINGLY this House:

rescinds the resolution adopted by the Sixth Lok Sabha on the 19th December, 1978."

Various members thereupon raised points of order that, in admitting the motion, the Speaker had bypassed the Business Advisory Committee, and that the motion offended sub-Rules (ii), (iv) and (v) of Rule 186 which provide that it shall not contain arguments, inferences, ironical expressions, imputations of defamatory statements and it shall be restricted to a matter of recent occurrence and that it shall not raise a question of privilege.

Another point of order was that the resolution (of Sixth Lok Sabha) which was passed under Rule 315 was sought to be rescinded by a motion under Rule 184 which was without a precedent.

Disposing of the points of order the Speaker (Dr. Bal Ram Jakhar) gave the following ruling:–

". . . a question was raised as to whether it was the invariable rule to consult the Business Advisory Committee before allotting time and date for discussion on a motion that has been admitted by the Speaker in terms of the Rules.

I would like to invite attention of Members to Rule 190 which reads as follows:

"The Speaker may, after considering the state of business in the House and in consultation with the Leader of the House, allot a day or days or part of a day for the discussion of any such motion'.

The wording of the Rule is quite clear and gives discretion to the Speaker to allot a day and time for discussion of any such motion in consultation with the Leader of the House, as time for it has essentially to be found from the time available for transaction of Government business.

This in no way impinges on the powers of the Business Advisory Committee, as the item so included is supplemental to, and not in supersession of the recommendations of the Business Advisory Committee.

Further, Mr. Patnaik asked me yesterday if I could cite a precedent. Yes, I can. I understand that in 1968, when a motion under Rule 184 by Shri Madhu Limaye was admitted against the conduct of the then Deputy Prime Minister, the Speaker fixed the date for discussion in consultation with the Leader of the House and this was notified without the matter being placed before the Business Advisory Committee.

Now, if Mr. Patnaik wants to ask any questions on this, he can come to me on any day.

I would now request the Hon'ble Members to kindly extend the courtesy of listening to the observation that I have to make in respect of the points raised by them . . . When the notice of this motion was received, it was examined most carefully with reference to the provisions in the Rules, relevant precedents and only thereafter it was admitted . . . A number of members have drawn attention to the provisions of Rule 186 and sought to make out that these are infringed by the admission of the motion.

As far as Rule 186(ii) is concerned, there are hardly any inferences or defamatory statements or imputations as such in the motion. It is a well drafted presentation of facts which are necessary for purpose of the motion . . . As regards the reference to Rule 186(iv) that it should be restricted to matter of recent occurrence, this has to be interpreted with reference to the nature and substance of the motion. The House is supreme and if it chooses as did the House of Commons in U.K. in Wilkes case to revise its own decision, it has full right to do so and it would not be appropriate to take such a rigid stand.

As regards the objection that it raises a question of privilege, I have already explained in this context that Rules 222–228, as contained in Chapter XX of the Rules of Procedure, are not attracted in the present case, as no fresh question of privilege as such is being raised, but what is sought to be done is to rescind a motion which had been earlier adopted by the House and as such Rule 186(v) is not contravened.

The point has been raised that the earlier Motion had been brought before the House in pursuance of Rule 315 whereas the new Motion has been entertained under Rule 184. As I mentioned a little while ago the present Motion that we are discussing does not as such deal with the question of privilege and therefore the Rules pertaining to privilege as adumbrated in Rules 222 to 228, 313 to 316 are not attracted.

I hold the Motion to be in order and I would now call upon Shri B. R. Bhagat to initiate the debate."

Shri B. R. Bhagat thereupon moved the motion.

After some discussion, Shri B. R. Bhagat moved the following amendment to his motion:–

"I beg to move:

'That in the motion,—

in para 3,—

(i) *after*—

"(c) if the above findings are allowed to remain on record they would serve as standing instruments in the hands of any party in power for narrow, partisan political ends of calumny, harassment and public denigration by persecuting its opponents as actually happened in the case of Smt. Indira Gandhi."

*insert*

"(d) the above gross distortions were engineered in the unconscionable misuse of the majority in Parliament in the pursuit of:"
(ii) *for* '(d)' *substitute* '(e).'"

After further discussion, the amended motion was adopted by the House.

## INDIA: RAJYA SABHA

**Premature publication of a Bill in book form.**—A complaint of breach of privilege and contempt of the House was raised against the authors and publishers of a book entitled "Garg's Income Tax Ready Reckoner 1980–81 and 1981–82" for publishing the Finance (No. 2) Bill, 1980 as the Finance (No. 2) Act, 1980, before the same was passed by both the Houses of Parliament and became an Act. The Chairman in the first instance sought the comments of the principal author and publisher of the book and after considering the same remitted it to the Committee of Privileges, as per rule 203 of the Rajya Sabha Rules.

After careful consideration of the facts of the case and the oral evidence tendered before it, the Committee in its Nineteenth Report, presented to the House on 3rd December 1980, reported that the publication of the provisions of the Bill, when the Bill was yet to be considered by the Rajya Sabha sought to create a misleading impression on the public mind that the aforesaid publication had already become the Finance (No. 2) Act, 1980 as finally passed by Parliament and assented to by the President. The Committee concluded that it "has no hesitation in holding that the publication of the book amounts to deliberate and wilful effort on the part of its authors and publishers to misrepresent the proceedings and action of the House, and, therefore, constitutes a breach of privilege and contempt of the House."

The Committee recommended the penalty of imprisonment till the prorogation of the House to the principal author in view of the gravity of the offence committed by him. With regard to his two co-authors the Committee took a lenient view since they had a very limited role to play in the making of the book and recommended that they be summoned to the Bar of the House and reprimanded. The Committee also recommended to the Government to initiate legal action not only against these offenders but also similar other publishers.

Accordingly two motions were included in the Order Paper of 11th December 1980 in the name of the Leader of the House (Shri Pranab Mukherjee) one for taking into consideration the Report and the other one agreeing with the recommendations of the Committee. However, when the motions came up for discussion, on an amendment, the matter was recommitted to the Committee of Privileges for reconsidering its

recommendation regarding imposition of punishment on the contemners.

The Committee presented its Twentieth Report to the House on 19th December 1980, modifying its earlier decision and recommended that all the three contemners should be summoned to the Bar of the House and reprimanded. The Committee reiterated its earlier recommendation to the Government for initiating legal action against the offenders. On 22nd December 1980 the House on a motion agreed with the findings contained in the Nineteenth Report and the modified recommendations in the Twentieth Report. In pursuance of the decision of the House the three contemners were reprimanded at the Bar of the House by the Chairman on 24th December 1980.

## GUJARAT

**Subjudice matter.**—On 12th February 1981 the Speaker said:

"I have to make an announcement. Shri Kaivalya Desai, of Anand had, through his advocate Kum. Varsha Joshi, sent a registered notice to the then Speaker Shri Kundanlal Dholakia and threatened him to proceed against him and others for contempt of court in regard to the discussion that took place in some form or the other in the House during the Fifth Legislative Assembly on the well known Molasses case. The question of breach of privilege arising out of this threat was referred by the then Speaker to the Privileges Committee under Rule 263. Before the Report of the Privileges Committee in the matter could be presented to the House, the Fifth Legislative Assembly was dissolved and so this Report of the Committee was presented to the House on 27th June 1980 during the First session of the Sixth Assembly. In this report the Privileges Committee has held both the contemners guilty of breach of Privilege and recommended to the House to sentence them to imprisonment. Before the Minister for Parliamentary Affairs could bring a motion in the House under rule 258 of the G.L.A. Rules and before the House could take any decision in the matter, Shri Desai had, through his advocate Miss Joshi, filed a miscellaneous criminal application No. 1293/79 on 26th December 1979, in the Gujarat High Court against 178 Members of the Gujarat Legislative Assembly including the Chief Minister of the State and the Speaker of the Assembly. In this application he had prayed that the Hon. Court should hold that the State including the Legislative Assembly had no power to discuss a *sub-judice* matter, to evaluate the evidence, to conduct summary trial and to decide the matter, and that by allowing a discussion in the House on a *subjudice* matter the Speaker and by participating in this discussion the members have committed a contempt of the court and that they should be proceeded against for the same.

While upholding the privilege of the House the Hon. High Court has dismissed the above application filed by Shri Desai.

Here the privilege involved is the privilege of freedom of speech of the House and the Members. You are aware that under article 194(3) of the Constitution, the State Legislatures, their Members and the Committees enjoy the same powers and privileges as those enjoyed by the House of Commons U.K. and its Members and Committees, at the commencement of the Constitution. Thus our privileges are the same as those enjoyed by the House of Commons. In the United Kingdom by the 9th Article of the Bill of Rights the freedom of speech and debates or proceedings of the House cannot be impeached or questioned in any Court or place out of Parliament.

Thus the Members of the House enjoy the privilege of freedom of speech. A speech or statement made in the House is immune from outside interference. The House is not

answerable to anyone. It is the privilege of the House to decide what to discuss and what not to discuss. Not to discuss the *subjudice* matter is a self-imposed restriction. Even if a *subjudice* matter is discussed in the House, the same cannot be challenged in a court of law. However, if anyone initiates any proceedings, it would mean that the proceedings of the House have been challenged outside the House.

In view of the above, I consider that by challenging the proceedings of the House in regard to the Molasses case, both Shri Kaivalya Desai and his advocate Miss Varsha Joshi have *prima facie* committed a breach of privilege of the House and hence under Rule 263 of the G.L.A. Rules I refer this matter to the Privileges Committee for investigation and report."

**Parallel Assembly Case.**—On 3rd April 1981 Mr Speaker announced:

"In respect of setting up of parallel Assembly at Ahmedabad by the members of the Opposition of Gujarat Legislative Assembly I have received two notices of breach of privilege dated 19th and 20th February from Shri Jashvantsinh Chauhan, one dated 19th February from Shri Barejia, a joint notice dated 19th February from Kum. Shantaben Chavda and Shri Manibhai Ranpara and one notice dated 20th February from Shri Krishnavadan Pachchigar. The Members have attached to their notices clippings of the news items published in different dailies regarding "Parallel Assembly".

Main issues raised by the Members in their notice are as follows:

(1) Contempt of the House is committed by members in holding and participating in the parallel Assembly and have ridiculed the House.
(2) The parallel Assembly has committed a contempt of this House by rejecting the motion of thanks for the Governor's Address which had already been passed by this House.
(3) Contempt of the House is committed by the parallel Assembly passing No confidence Motion against the Government.
(4) Gross contempt and disregard of this House has been committed by placing the agenda of this House before the parallel Assembly and taking up the business shown in that agenda.
(5) Contempt of this House has been committed by deriding this House in the eyes of the Public by holding parallel Assembly.

Before giving consent to the Members to raise the question of breach of privilege in the House I wanted to ascertain whether holding a parallel Assembly *prima facie* amounts to breach of privilege of the House.

On going through the precedents of breach of privilege which have taken place in the House of Commons of England and in Indian Parliament, I have not come across any case of holding of a parallel Assembly.

From the clippings of the dailies attached to the notices given by the Members, it appears that they do not contain anything which would ridicule the House or the Assembly. It would have amounted to a breach of privilege if any unbecoming comment or discussion had taken place in this parallel Assembly in respect of any officer or member of the House or in respect of any decision taken by the House or any proceedings of the House or in respect of conduct of the Members as such. But from the clippings attached to the notices it seems that nothing like this has happened and the Members who have given notices have also not mentioned in their notices that any such thing had happened.

In these circumstances, it cannot be said that there is a *prima-facie* case of breach of privilege and hence I have not given my consent to the Members to raise the question of breach of privilege in the House.

Looking from the other angles, the act of holding a parallel Assembly requires due consideration. No authorised institution can tolerate formation of an unauthorised parallel institution created as a challenge against it. Moreover, when not outsiders but its own Members behave like this and make use of the Question list and other material which they are entitled to get as Members the matter becomes more serious and requires to be considered. Therefore, without taking any decision as to whether this amounts to a breach of privilege or not, under Rule 263 I refer to the Committee of Privileges for examination

and report whether the following three acts severally or jointly amount to a breach of privilege:

(i) act of holding parallel Assembly;
(ii) holding such sitting by the Members themselves and
(iii) making unauthorised use of official literature outside the House which can be utilised only in the House.

# XXII. MISCELLANEOUS NOTES

## 1. Constitutional

**Isle of Man (Presidency of Legislative Council).**—The Constitution (Legislative Council) (Amendment) Act 1980 replaced the Governor as President of the Legislative Council by a person elected by the Council from its members. The question of the Chairmanship of the Legislative Council is one that had been considered very carefully for many years. The matter was taken up by the Select Committee of Tynwald on Constitutional Issues which reported to Tynwald on 19th June 1979 on various matters including this, and which was accepted by Tynwald, the House of Keys voting 17 votes to four and the Legislative Council voting six votes to three. This Act represents a stage in the evolutionary process under which the Lieutenant Governor of the Isle of Man has come to fill a more vice-regal role.

**Isle of Man (Constitutional changes).**—The Constitution (Amendment) Act 1981 provides a new procedure for the election of the Chairman of Executive Council and increases the membership of Executive Council from seven members to eight members. The Executive Council comprises a Chairman elected by Tynwald at the first sitting of Tynwald following each General Election of the House of Keys, before the Branches have sat separately for the purpose of electing members of the Selection Committee, and seven other members, being two members of the Legislative Council and five members of the House of Keys elected in accordance with the existing procedure. The Act also provides that the Chairman of Executive Council, once elected, shall be the Chairman of the Selection Committee of Tynwald. It also provides that the same person shall not be eligible to be both Chairman of the Executive Council and Chairman of the Finance Board. It does not prevent the Chairman of Executive Council holding any other office. It amends certain enactments to provide that certain certificates shall be signed by the President of the Legislative Council as well as by the Governor and the Speaker of the House of Keys and it empowers the President of the Legislative Council to adjourn the Legislative Council and the Speaker of the House of Keys to adjourn the House of Keys without the Council or the Keys, as the case may be, having assembled, in exactly the same way as the Governor may adjourn Tynwald under the Tynwald Court Adjournment Act 1919. Finally, it alters the date for the dissolution of the House of Keys so that this will always now occur on the Thursday following the third Tuesday in the month of October. This will permit a final sitting of Tynwald to be held on the third Tuesday in October immediately before the dissolution of the House of Keys in each election year.

**New South Wales (Length of Parliaments).**—The Constitution

(Legislative Assembly) Amendment Act, 1981, extends the maximum period between general elections for the Legislative Assembly from three years to four years. Under section 24A of the Constitution Act, 1902, the Bill was submitted to a referendum of the people at the last General Election held on 19th September, 1981, and has been Reserved by the Governor for the signification of Her Majesty's Assent.

The figures published in the Government Gazette No. 166, of 30th October, 1981, for the referendum on this matter showed that the –

Number of votes given in favour of the Bill – 1,950,317

Number of votes given not in favour of the Bill – 874,833

whilst the number of ballot-papers rejected as informal totalled 10,657.

The Government was firmly of the view that a 3-year parliamentary term hindered effective government in Australia. In the first instance, many important government initiatives take time to put into operation, this being particularly relevant when a new government comes to office. It also takes time for Ministers to familiarise themselves with their responsibilities and the detailed implications of issues requiring their decision. A 4-year term would enable governments to undertake more long-term planning to the greater benefit of the State.

It was also pointed out that without a further amendment to the Constitution Act the term of Members of the Legislative Council (recently reduced to three Parliaments) would, by the passing of this Act, revert to 12 years and it was not the intention of the Government that that should occur. The Government proposed, subject to the results of the referendum, to reconstitute the Legislative Council so that its Members would serve for two terms of the Legislative Assembly or a maximum of eight years. This latter proposal will now be the subject of a further referendum during the life of this 47th Parliament or in conjunction with the next State General Election in 1984, after which date the 4-year Parliaments will commence.

*(Contributed by the Clerk of the Legislative Council)*

## 2. Electoral

**New Zealand (Representation Commission).**—Further amendments to the electoral law were made in 1981 following the report of a select committee on the subject. Many are of a machinery nature relating to the compilation of the electoral rolls. One of the more interesting amendments was the insertion of a requirement for the Representation Commission (which fixes electoral boundaries following each 5-yearly census) to invite any political party represented in Parliament, but without a representative on the Commission, to make submissions to the Commission. The Commission is similarly required to invite members of Parliament who sit as Independents to make submissions.

The present composition of the Commission is made up of 6 'official' members (four of whom are permanent heads of Government

departments) and two 'unofficial' members. These unofficial members are appointed on the nomination of the House of Representatives, one representing the Government and the other the Opposition. When this was first enacted in 1956 there were only two parties represented in Parliament. However, since 1978 a third party has become established in Parliament and currently holds two seats. There have also been a number of instances in recent years of members resigning the party whip and sitting as independents.

The unofficial Opposition member of the Representation Commission is in practice nominated by the larger of the Opposition parties – the official Opposition – and has not been regarded by the third party as representing its interests. The new provision for the third party's view to be invited is an attempt to involve it directly in the Commission's work. It did not however go far enough for the third party which sought in Committee to amend it to require that the unofficial member nominated to represent the Opposition be acceptable to all Opposition parties. This amendment however was rejected overwhelmingly.

**New South Wales (Funding of parliamentary elections).**—The Election Funding Act, 1981, constituted an Election Funding Authority and also made provision for the funding of parliamentary election campaigns and requires the disclosure of political contributions and electoral expenditure.

The stated purpose of the Act was to recognise political parties – notwithstanding the silence that surrounds their existence in constitutional law of the State – and to provide on a fair and equitable basis for the funding of election campaigns undertaken by political parties, as well as minor groups and individual candidates.

The Act reflects the recommendations by the Joint Select Committee of both Houses of the Parliament on this subject that the amount of electoral funding to be received by any party or candidate would be determined proportionally by the electoral support received at each election. Funding is not limited to the major parties and the quota to enable a party or person to receive funds was considered to be quite low. In respect of both Houses, it is as follows: if any party, group or candidate receives sufficient votes to entitle the return of the deposit paid upon nomination, that party, group or candidate will be entitled to election funding. In respect of Legislative Assembly candidates, it amounts to one-fifth of the first preference votes of the successful candidate and for the Legislative Council one-half of the specified quota of 6.25%, namely 3.125% of all formal first preference votes.

Parts II and III of the Act establish an Election Funding Authority to administer the public funding scheme, to oversee the lodging of declarations of election income and expenditure, and for other purposes. The Authority consists of the Chairman (the Electoral Commissioner) and two part-time members. Part IV of the Act provides for the maintenance of registers by the authority. A political party endorsing

candidates for a General Election must register with the Authority if it is to be eligible for public funding. In addition, candidates or, in the case of the Legislative Council Periodic Elections, groups of candidates must also register with the Authority if they are to seek public funding.

The information required to be supplied to the Authority about political parties is more comprehensive than that required about groups and includes such things as the rules and platform or objectives of the political party. The Authority has certain discretions where applications for registration do not comply in any technical way with the requirements of the Act. Each political party must register the name of its party agent. Groups of candidates and individual candidates must also register their official agent. All the registers maintained by the Authority are open for public inspection.

Part V of the Act deals with the two separate funds: the Central Fund and the Constituency Fund. The total money made available to these funds is to be calculated by multiplying the number of electors enrolled in the State by the number of years of the expiring Parliament and by the monetary unit. The monetary unit for the General Elections held on 19th September, 1981, was 22 cents and that unit will be adjusted from time to time to maintain parity with increases in the Consumer Price Index. The example given at the time the Bill was passing through each House for arriving at the amount for funding was to take 3.1 million votes being enrolled for the 1981 elections and multiplying that figure by 3 (the number of years of the Parliament) and multiplied by 22 cents giving a total of $2.046 million to be allocated between the two funds, the Central Fund receiving two-thirds and the Constituency Fund receiving one-third. The Central Fund was allocated to candidates, groups and parties participating in Legislative Council elections that received more than 3.125 per cent of all formal first preference votes and for this purpose the votes cast for all the candidates in one group could be aggregated. With one exception, the Central Fund was divided among candidates and groups on a strictly mathematical proportion of the number of first preference votes received to the total number of first preference votes received by all eligible candidates. The exception being that the maximum available to any one candidate or group shall not exceed 50 per cent. Under Part VIII of the Act (section 107) the Authority is to prepare and forward to the Presiding Officers of Parliament a report within three months of the end of the financial year. There is a special provision for the Governor to extend the period to be covered by an annual report in circumstances where an election falls around 30th June.

*(Contributed by the Clerk of the Legislative Council)*

**Malta (Electoral Law Reform).**—The electoral laws were amended during 1981 to introduce a system to speed up the voting procedure and, at the same time, tighten up even further the present methods of control.

These purposes were achieved through several changes, of which the most important was the replacement of the notice to voters by a voting

document which is equivalent to a combination of that notice and the identity card. Another important change was the reduction of polling time from two days to one – a Saturday – but extending the time for polling on that day to 15 hours.

## 3. Procedural

**Australia: Senate (Seconding).**—In November 1981 the Senate abolished the procedure whereby motions and amendments, except those moved in Committee of the Whole, were required to be seconded. There had been a long standing practice that seconders were not insisted upon when the movers were Ministers or Opposition Leaders or Deputy-Leaders, and the requirement for other Senators to have seconders for their motions and amendments had occasionally caused some difficulty, particularly in the case of the lone independent Senator. The Senate has now followed both Houses of the United States Congress and the British House of Commons in abolishing seconding, which is an ancient procedure of very obscure origins, and which was inherited by most Houses of Australian Parliaments from the Commons. This change involved extensive amendments of the Standing Orders.

**Australia: Senate (Consideration of Government Reports).**—By means of a Sessional Order, the Senate has adopted a procedure for setting aside at least ninety minutes each week for the discussion of reports and papers tabled by Ministers. Such papers are tabled in a batch after Question Time on Thursday, and it is then in order for Senators to move motions to take note of any of the documents tabled and to speak to such motions for no more than ten minutes. Debate on such motions is interrupted at 1.00 p.m., but if the debate has not extended for ninety minutes, the balance of the time is available at 8.00 p.m., which is normally the beginning of General Business time (i.e. private Senators' business time).

This procedure was adopted mainly as a time saving device, because Senators were, by leave, moving motions to take note of ministerial papers, and a good deal of time was being taken up each day in debate on such papers.

**Australia (Financial privilege of the House of Representatives).**—The Australian Constitution provides at section 53 that:

> "The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people."

and:

> "The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications."

On 17th November 1981 the Speaker had cause to draw the attention of the House to the fact that purported amendments transmitted by the Senate raised issues related to the constitutional restrictions on the Senate. The House having been alerted to the problem then resolved (on division) that:

"the effect of the purported amendments of the Senate would be to increase the burden on the people in contravention of section 53 of the Constitution".

The House declined to consider the purported amendments and the Bill involved was laid aside.

On 21st October 1981 a message from the Senate pressing requests for amendments to certain Sales Tax Bills was reported to the House. The original requests for amendments had been rejected by the House on 14th October 1981. After announcing the message the Speaker drew the attention of the House to the constitutional question the message involved and stated that the right of the Senate to repeat and thereby press or insist on a request for an amendment had never been accepted by the House. On several previous occasions when a request was pressed on the House by repetition, the House had regard to the claim that the public welfare required passage of the bulk of the legislation which was the subject of the pressed request and gave the pressed request the House's consideration notwithstanding that the House resolved to refrain from determining its constitutional rights.

However, in this instance, the House did not feel itself so confined and, after division, endorsed the Speaker's statement, declined to consider the Senate message insofar as it purported to press requests and made the consideration of further action in relation to the Bills an order of the day for the next sitting. No subsequent action was taken to call on the order.

*(Contributed by the Clerk of the House of Representatives)*

**New Zealand (Speakers' Rulings).**—In 1979 (Vol. XLVII) "The Table" carried the results of a Questionnaire on the Recording of Procedural Precedents. It was indicated in the New Zealand return to the questionnaire that a revision of the current (1969) volume of "Speakers' Rulings" was in progress. This work has now been completed and a new volume containing rulings given from the Chair from 1867 down to 1980 has been published. In the 11 years since the last revision of this work three Standing Orders Committees have met and their recommendations have been translated into numerous amendments to the Standing Orders, in fact in the decade of the 70's more frequent changes have been made to the Standing Orders in New Zealand than in any other comparable period of our history. In these circumstances it will be obvious that many of the rulings recorded in the old volume are no longer relevant or do not represent the present position. Examples of the changes which have rendered obsolete much of the existing material are – a wholly new method of raising matters of privilege (following earlier House of Commons changes), the abolition of debate at the Report Stage of a Bill,

the conferring of a right on Ministers to make statements to the House and on the Opposition to speak in reply to such statements, and many others. All of these changes have introduced questions of interpretation of the meaning of the new standing orders or of filling-in grey areas which experience has revealed.

Another example of a subject which has obtruded itself into public consciousness in the last few years is electoral reform in a post-bipartisan environment. In 1956 a provision was introduced into the law prohibiting amendments to a number of important provisions of the electoral law (voting age, duration of Parliament etc.). None of these provisions was to be amended or repealed unless the proposal for amendment or repeal was passed by a majority of 75 per cent of all members of the House. The Act which introduced these "reserved provisions" was silent as to at what stage the proposal had to receive the special majority (whether second reading, in Committee, third reading, or indeed at all stages) which hardly mattered until the last few years for matters of such fundamental importance were not introduced by the Government until there was a consensus on their amendment. Not so now, however. In the last few years the House has had to give specific answers to a number of procedural problems raised in connection with the reserved provisions. A separate category of the more important Speakers' rulings on the issue has been inserted in the new volume.

Rulings given in Committee of the whole House by the Chairman of Committees or other Chairmen are not generally accessible, for proceedings in Committee are not reported in Hansard verbatim except during the Estimates debate when an abbreviated third person report is made. However, where the reasons for a Chairman disallowing an amendment have been fully recorded or where it has been possible to extract a Chairman's ruling on the Estimates, these have been included in the volume if important enough, thus adding to the previously rather thin body of precedent on proceedings in Committee.

The new volume contains over a third more rulings than the old and about 37% of the material in it consists of post-1969 rulings. Fortunately it was possible to economise on space in the printing of the new volume thus getting more rulings to a page and avoiding any significant increase in the number of pages in the new book.

A number of changes were made to the layout of "Speakers' Rulings" hopefully to improve its utility. A greater use has been made of headings and sub-headings than in the past. Within main headings such as Adjournment of the House, Amendments, Appropriations, etc., rulings have been grouped as far as possible into meaningful sub-categories. For example, under Amendments, the rulings have been broken down into those relating to 'Notice', 'Order of Moving' and 'Alterations'. In some sections rulings have been broken down into further categories than this. Thus, under Public Bills one of the main sub-headings is Introduction and First Reading which is divided between Private Members' bills and Government bills, the latter of which is itself divided into rulings on

Procedure (the time at which the Bill may be introduced, the number of copies which must be supplied etc.) and Debate (the special rules for the call and for relevancy on this type of debate).

Allied to this breakdown of rulings into small related groupings are cross-references to other material. In particular all headings are cross referenced to the relevant Standing Orders where there are any; (there are none for instance on the electoral law matters discussed above). It is hoped that this will emphasise the relationship between the Standing Orders and Speakers' Rulings which interpret or flesh-out Standing Orders. On the other hand Standing Orders numbers do change fairly frequently and a cross-reference of this type can be expected to be wrong within a relatively short time. This will probably necessitate more frequent revisions of "Speakers' Rulings" especially if the recent trend of triennial Standing Orders Committees is continued. Other references which have been included are to relevant statutory provisions, passages in Standing Orders Committees reports which embody House practice, and of course to rulings in other sections of the book which may be relevant.

## 4. Standing Orders

**New South Wales: Legislative Assembly (Access to Galleries).**—Standing Order 59 of the Standing Rules and Orders of the Legislative Assembly provided that—

> "The Speaker only shall have the privilege of admitting Strangers to the space at the back of the Speaker's Chair, the Ladies' Gallery, or to the Lower Gallery; but every Member shall have the privilege of admitting, by orders, not transferable, two Strangers to the Upper Gallery."

The Standing Order was amended on 4th March, 1981, by replacing the word "Ladies" with the word "Northern". The Gallery formerly known as the "Ladies" Gallery had been reserved exclusively for women since Victorian times. The growing pressure on accommodation for visitors wishing to be present at the deliberations of the Legislative Assembly; contemporary social attitudes and the lack of the use of the Gallery by women, all led to the change in terminology and custom. The Northern Gallery is now open to all visitors.

**Queensland (Revision of Standing Orders).**—The Queensland Parliament's Standing Orders Committee met in April, 1981, the first meeting held for 7½ years.

Criticism of the Parliament's procedures by some Members and by the Media prompted the Speaker to initiate moves for a review of Standing Orders. Submissions were invited and considered by the Committee, and an Interim Report was prepared, to be debated before the Christmas recess. However, the Committee did not release the Report to the House but met to reconsider its contents and add further recommendations to it, to provide a fresh report.

The First Report for the Parliamentary Session was presented to the Legislative Assembly on 25th March, 1982, the last report having been presented in 1962. The main features of the Report were to amend certain Standing Orders which had been modified for some years by Sessional Orders; to clarify and expand the Standing Orders relating to Questions; to provide for Ministerial Statements and allow for an optional reply to them; to remove the Standing Order relating to adjournment of the House on a definite matter of urgent public importance and to replace it with a new Standing Order covering debate on a Matter of Public Importance; to bring up to date some Standing Orders on the Presentation of Petitions and to incorporate the present practice on Presentation of Bills.

This Report was to be debated before the House rose for Easter 1982. However prior to moving the adjournment, the Leader of Government Business in the House promised that the Report would be considered soon after the commencement of the next Session in August, 1982.

**Victoria: Legislative Council (Divisions).**—The Standing Orders were amended in several respects to streamline procedure, among which was the introduction of machinery to enable a single dissentient to a question put from the Chair to have his dissent recorded or, alternatively, to enable a division to proceed where only one member can be found on one side. It was also provided that, where successive divisions are called without intervening debate, the bells for ensuing divisions shall be rung for one minute only, instead of two minutes.

**Victoria: Legislative Assembly (Presentation of Petitions).**–Standing Order 248 was amended to achieve streamlining of the procedures governing presentation of petitions. The principal alteration was the abolition of the requirement for Members to personally present petitions to the House in a formal way. The new procedure provides for Members to lodge petitions for presentation with the Clerk and the imposition of certain duties on the Clerk. The administrative practice of forwarding copies of the text of petitions to appropriate Ministers was formalised in Standing Order 248E.

**India: Rajya Sabha (Questions).**—According to existing practice, if any question for oral answer is not reached for answer, a written reply to that question is deemed to have been laid on the Table. Rule 45 has been amended to conform to this practice. A proviso has also been added to this rule to provide that if a member states that it is not his intention to ask the question, the question should be treated as withdrawn.

Rule 47(2)(ix) which totally precluded questions on a matter pending before a Parliamentary Committee has been amended so as to permit tabling a question on such a matter in exceptional cases.

Under present practice, the list of Short Notice Questions is circulated to the members beforehand and the member concerned, when called,

asks the question by reference to its number on the list and does not read it out and the Minister concerned gives the reply immediately. Rule 58 has been amended to conform to this practice.

**India: Rajya Sabha (Private Members' business).**—Rule 24 has been amended to provide that (i) Private Members' Business should definitely be discussed for at least two and a half hours on a Friday and (ii) if there is no sitting on a Friday for any reason, some other day in the same week should be allotted for such business.

The practice for determining precedence of private members' resolutions is that the members in the first instance give written intimation of their intention to move resolutions. The names of five members out of all those members from whom such intimations are received, are selected by lot. These five members are eligible to give notice of one Resolution each within ten days from the date of the ballot. Rules 26 and 154 have been amended to conform to this existing practice.

Old Rule 155 provided that a resolution could be in the form of a declaration of opinion by the House only. This rule has been amended giving power to the Chairman to admit a resolution in such other form as he deems appropriate, thereby enlarging the ambit of a private member's resolution.

**Malaysia: House of Representatives (Oral questions).**—Standing Order 24(2) was amended to provide that any member who wishes to make his own any question for an oral reply which is not asked by the member in whose name the question is printed in the Order Paper, due to the latter's absence, can do so when all the other questions for the day have been disposed of, provided that the one-hour question time has not elapsed.

## 5. Emoluments

**Isle of Man (Members' expenses: taxability).**—The Payment of Members' Expenses (Amendment) Act 1980 enables payments made to members to be subject to tax. There had been for some time controversy as to the justification of paying members simply expenses, and it had been the desire of many members to have the situation regularised whereby that payment should be subject to tax placing the payments in the same position as other rewards for their services.

**New Zealand (Members' Allowances and Superannuation).**—The Higher Salaries Commission, which is the body responsible for determining parliamentary remuneration in New Zealand, conducted a general review of allowances during the course of 1981. As part of its review the Commission asked the Members' Services Committee (a joint caucus committee which looks after members' interests generally) to

undertake a survey of actual accommodation arrangements, costs of car running and other parliamentary and electorate costs. This information was gathered and presented to the Commission in the form of a schedule. Representatives of the Members' Services Committee later discussed the results of the survey with the Commission before a determination of allowances was made.

On the basis of this survey all allowances were adjusted, the major change to the system of allowances being that car running expenses have been omitted from the flat-rate basic allowance payable to members (which has been substantially reduced) and included in the variable electorate allowance. The amount of the electorate allowance varies from $4,500 for an urban electorate to $8,250 for a predominantly rural electorate. It is hoped in this way to reflect more accurately the different levels of expenditure on car running incurred by members.

The Commission also agreed to amendments to the parliamentary superannuation scheme to protect pensions against inflation. Retiring allowances will in future be calculated on the ordinary salary of a member at the date the allowance becomes payable, rather than as formerly at the date of retirement. Thus a member who is defeated or retires from Parliament before age 50, and who therefore does not qualify for a retiring allowance until he or she reaches age 50, has the allowance calculated on the salary of a member of Parliament at that latter time rather than on what the salary was when he actually retired. The allowance payable to a surviving spouse is calculated similarly. The Commission has also decided that retiring allowances should be subject to cost-of-living adjustment from age 55 rather than 60, but at one-half of the appropriate rate for the first five years.

**New South Wales (Superannuation).**—The Parliamentary Contributory (Superannuation) Amendment Act, 1981 provides—

(a) that a member of Parliament is entitled to an annual pension after 7 years' service or, as at present, upon retirement on the grounds of ill-health, instead of—
    (i) an annual pension after 10 years' service or, where he does not cease to be a member voluntarily, after 8 years' service; or
    (ii) a reduced annual pension after service in 3 Parliaments;
(b) that the annual pension payable to a member of either House of Parliament is 48.8 per cent of the current basic salary of a member of that House for 7 years' service plus 0.2 per cent of that salary for each month of service after 7 years to a maximum of 80 per cent of that salary (instead of 51.2 per cent plus 0.2 per cent for each month of service after 8 years to a maximum of 80 per cent).
(c) as a consequence of the requirement made by the Parliamentary Contributory Superannuation (Amendment) Act, 1980, that the adjustment in the annual pension payable to a former member of the Legislative Council who ceased to be a member on or before

6th November, 1978, follows movements in the current basic salary payable to members of the Legislative Assembly instead of the Legislative Council, and similar adjustments to be made to the annual pensions payable to the spouses of those members;

(d) that the portion of an annual pension that a member of Parliament may elect to convert to a lump sum is—
  (i) where he is under the age of 45 years – 75 per cent (as at present); or
  (ii) where he is 45 years of age or over – 75 per cent at the age of 45 years, reducing (by 1 per cent for each year) to a maximum of 50 per cent at the age of 70 years or over (instead of 50 per cent between the ages of 45 to 60 years and then reducing to a maximum of 40 per cent at the age of 65 years or over);

(e) the payment to the dependent children of deceased members or former members of Parliament (being children under the age of 18 years or children who are students and under the age of 25 years) of an annual pension at the rate of –
  (i) 10 per cent of the current basic salary of members in the case of orphaned children; or
  (ii) 5 per cent of that salary in any other case;

(f) that a member of Parliament who is not entitled to an annual pension is entitled to a refund of contributions together with a supplementary benefit of—
  (i) where he does not cease to be a member voluntarily – two and one-third times the amount of that refund; or
  (ii) in any other case – one and one-sixth times the amount of that refund

(the provision is to replace the present entitlement to a refund of contributions plus interest or, if the member so elects, payment of pension for half of the member's period of service);

(g) that where a member of Parliament dies without leaving a spouse or children, the amount payable to his legal personal representative is a refund of contributions together with a supplementary benefit of two and one-third times his contributions in the previous 7 years instead of a refund of contributions plus interest;

(h) that where the total amount of pension or other benefit paid to a member of Parliament and to any surviving spouse or children of the member is less than a refund of contributions together with a supplementary benefit of two and one-third times his contributions in the 7 years before he ceased to be a member (instead of the amount equal to a refund of contributions plus interest) the difference is payable from the Parliamentary Contributory Superannuation Fund;

(i) for the removal of the requirement for the suspension of an annual pension payable to a former member of Parliament or to the widow or widower of such a member who holds an office or place of profit

under the Crown.

*(Contributed by the Clerk of the Legislative Assembly)*

## 6. General

**House of Lords (The Test Roll).**—On 31st March 1981 the Procedure Committee recommended that the Test Roll, which is the document which members of the House sign after taking the Oath or affirming, should be replaced by a book. The Committee were told that the sequence of Test Rolls date from 1675. The practice is for a fresh vellum Roll to be started for each Parliament. The first membrane begins with the texts of the oath and the affirmation, followed by the signatures. As the number of signatures increases, further membranes are stitched on. For a Parliament of normal length some 30 membranes are required and the complete Roll may extend to 120 feet. The present cost of the vellum and red ferret (for stitching) is about £325.

The Committee were advised that the Test Roll was expensive to produce, unwieldy to handle and difficult to consult and that all these difficulties could be overcome if a book were substituted for the Roll. A book containing good quality paper would be substantially less expensive, costing about £60–£70. Over the years a number of different types of record had undergone this reform, notably Acts of Parliament which had been enrolled until 1849 but which had been in book form ever since. The Committee also learned that about ten years before, the House of Commons had abandoned their Test Roll in favour of a book.

However, when the Procedure Committee's Report (2nd Report 1980/81) came before the House on 5th May 1981, Lord St. Aldwyn, a former Government Chief Whip, moved an amendment which had the effect of disagreeing to that part of the Report which dealt with the Test Roll. He said that he did not see "why we should abandon a custom . . . after 300 years for very little benefit".

After a brief debate during which considerable support was expressed for the Test Roll, the Chairman of the Procedure Committee advised the House to accept the amendment and so the Test Roll will continue.

**House of Lords (Sittings in the Royal Gallery).**—An article in Volume XLIV outlined the known meeting places of the Houses of Parliament at Westminster. During the evening of Monday, 21st July 1980, while the House of Lords was sitting, an ornamental wooden boss fell from the ceiling of the Chamber on to an empty bench. Immediate investigation revealed that the ceiling was unstable and so it was decided to accommodate the House in the Royal Gallery. As a result of enormous effort overnight, this was possible from the next day, Tuesday, 22nd July. The House continued to sit in the Royal Gallery till it adjourned for the summer recess on 8th August. During the recess a scaffold platform was erected beneath the Chamber ceiling both to allow repair work to proceed and to protect the House from further falls.

**Victoria (Parliamentary Oaths).**—With the passage of the Parliamentary Witnesses Act in 1923, each House of Parliament and their respective committees were given statutory power to administer an oath to witnesses. Subsequently, that provision was incorporated in the Constitution Act Amendment Act, and later again was transferred to the Parliamentary Committees Act. Following its importation into the Parliamentary Committees Act, it was found that the power was expressed to apply only to the parliamentary committees which, by definition, were those to which that Act related, and the authority was inadvertently lost in respect of witnesses before committees of the whole House, *ad hoc* committees, and the Houses themselves.

The Constitution (Parliamentary Oaths) Act 1981 (No. 9695) restored the situation to that which existed before the provisions were removed from the Constitution Act Amendment Act in 1968.

*(Contributed by the Clerk of the Legislative Council)*

**New South Wales (Pecuniary Interests).**—The introduction of a Bill on this matter on 13th April, 1981, was in accordance with the policy of the Government that Members of Parliament should be required to comply with a scheme for the registration and disclosure of pecuniary interests. It was first envisaged that such a scheme be established by Resolutions passed by each House of the Parliament but advice later received was to the effect that the scheme could not be enforced because of certain anomalous defects in the Constitution Act in relation to the powers of the New South Wales Parliament.

The Government was also of the view that the public had a right of access to information of this nature and the current pecuniary interests scheme will provide access to that information. The scheme will also protect parliamentarians from those snide allegations of misconduct which can be so difficult for members to rebut.

The Bill was required to be submitted to a referendum of the people which was held in conjunction with the last General Election held on 19th September, 1981.

The Certificate of the Electoral Commissioner as to the result of the referendum held on the above mentioned date, as published in the Government Gazette No. 166 of 30th October, 1981, at page 5591, states that the–

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|---|---|
| Number of votes given in favour of the Bill = | 2,389,981 |
| Number of votes given not in favour of the Bill = | 388,830 |
| Number of ballot-papers rejected as informal = | 147,986 |

The Act has been Reserved by the Governor for signification of Her Majesty's Assent.

The principal provision in the Act is new section 14A of the Constitution Act, 1902, which will empower the Governor-in-Council to promulgate regulations on various types of interests. Such interests are: real or personal property; income; gifts; financial or other contributions

to any travel; shareholdings or other beneficial interest in corporations; partnerships; trusts; positions (whether remunerated or not) held in, or membership of, corporations, trade unions, professional associations or other organisations or associations; occupations, trades, professions or vocations; debts; payments of money or transfers of property to relatives or other persons by, or under arrangements made by, Members; any other direct or indirect benefits, advantages or liabilities, whether pecuniary or not, of a kind specified in such regulations. These regulations may also provide for the manner in which it must be lodged. The Act requires that the regulations to be promulgated by the Governor must apply equally to both Houses as the Government firmly believes that Members of both Houses should be dealt with on a similar basis.

*(Contributed by the Clerk of the Legislative Council)*

**Queensland (Restoration of Parliament House).**—Late 1982 will see the culmination of planning and work on accommodation for the Queensland Parliament. In 1974 detailed planning and construction was commenced for the provision of additional accommodation for Members' offices, library areas and for a temporary Legislative Assembly Chamber. In March, 1978, the 23-level building known as the Parliamentary Annexe was opened by His Royal Highness the Duke of Gloucester. (*The Table*, Vol XLVIII (1979), page 176).

Work began almost immediately on the renovation and restoration of the original Parliament House buildings, and at the time of writing this note, restoration was well advanced. The anticipated completion date is mid-1982, and it is hoped that the Official re-Opening of the building will be held in September to coincide with the XII Commonwealth Games which are to be held in Brisbane during that period.

Mr. Speaker, the Chairman of Committees, Parliamentary Officers, Hansard Staff and the Staff essential to the running of the Assembly will leave their present temporary office accommodation and return to familiar but beautifully enhanced surroundings. The Sittings will be resumed in the restored Chamber in which much more intimate debates might take place. The restored building will be a great credit to all of the architects, planners and workmen who have been associated with its design and reconstruction.

*House of Representatives Practice.* Editor J. A. Pettifer
(Australian Government Publishing Service, 1981)

*Erskine May* is generally regarded by officials of the House of Lords, perhaps justly, as "a House of Commons book". Nevertheless, those same officials assist in its periodic revision; and, since its first edition, it has set out to present a unified account of the "Law, Privileges, Proceedings and Usage of Parliament" on the basis that Parliament is essentially a unitary institution.

The situation in Australia presents a marked contrast. There the Senate was first in the field, with J. R. Odgers' magisterial *Australian Senate Practice;* and now *House of Representatives Practice* has appeared to present a picture of the Australian constitution from the viewpoint of the Lower House – the House which, the book roundly states on page 29, "is not only the national Chamber but also the democratic Chamber". Reviewing the fifth edition of *Australian Senate Practice* in the Table of 1977, R. H. A. Blackburn drew attention to its author's "forthright language and uncompromising declarations of opinion"; and, although Mr. Pettifer and the team who assisted him in producing *House of Representatives Practice* have in general adhered closely to the conventions of an official work of reference, the arrangement and content of this impressive book have clearly been influenced to some extent by the existence of Odgers' work and, even more strikingly, by the Australian constitutional crises of 1974–5.

Thus, despite the book's title, its opening sections are devoted to a general description of the Australian constitution, designed to make clear the House of Representatives' central role in a system of responsible government. The book then immediately proceeds, in Chapter 3, to deal with "Disagreements between the Houses", much of the chapter being devoted to a blow-by-blow account of the crises of 1974 and 1975, with proclamations, letters and statements by the Governor General set out in full, and with copious quotations from other authorities. At the end the authors themselves step into the arena, declaring that "a rejection of supply by the Senate resulting in the fall of a Government strikes at the root of the concept of representative Government". To this reviewer, watching events from afar and with a natural professional bias in favour of lower Houses, this always seemed both the crucial point at issue and an inescapable conclusion. But it is also possible to see the crisis in a wider historical perspective, as the product of an inherent contradiction in the whole structure of the Australian constitution. To point this up, the book quotes a prophetic analysis by the constitutional authorities Quick and Garran, writing in 1901: "The introduction of the Cabinet system of Responsible Government . . . is repugnant to the spirit and intention of a scheme of Federal Government. In the end it is predicted that either Responsible Government will kill the Federation . . . or the Federation will kill Responsible Government." The issue is still not resolved.

From Chapter 5 onwards the book assumes a form more familiar to those brought up on *Erskine May,* describing clearly and methodically, and with scrupulous reference to precedent, all aspects of the House's procedure and practice. In addition to the strictly procedural sections, there is a useful chapter on the Parliament House and the Chamber, which deals among other things with the different branches of the parliamentary service and with the vexed question of security. The title of the final chapter, "Parliament and the Citizen", has the forbidding ring of political science; but in fact the chapter is mostly devoted to straightforward accounts of the broadcasting of proceedings and the procedure for petitioning the House. The book ends with a *cri de coeur* about the inadequacy of "the machinery by which the House reviews its procedures and practices, and develops and brings forward proposals for change". The establishment of a Procedure Committee in place of the existing Standing Orders Committee is apparently seen as a potential solution to this problem; but hardened observers of the Westminster scene will bear witness that this is not necessarily so. Desirable reforms which seem inescapably obvious to professional proceduralists tend to seem less desirable to politicians, and still less to Governments, no matter what the forum in which those reforms are canvassed.

My overall reaction to this book is a mixture of envy and admiration: envy of Australian colleagues who were able to start with a clean sheet and now have the benefit of a clear and readable work of reference rather than having to dig through the stratified layers of procedural silt that have accumulated over the decades in the pages of *Erskine May;* and admiration for the professionalism and thoroughness with which the whole book, right down to its excellent bibliography and index, has been compiled. The Editor refers in his Introduction to the fact that the Department's ranks had to be 'closed up' to enable manpower to be diverted to the project, and this is readily understandable. All those concerned can feel confident that their efforts have been well worthwhile.
*(Contributed by Roger Sands, a Deputy Principal Clerk in the House of Commons)*

*The European Parliament. The Three-Decade Search for a United Europe.* By Paula Scalingi. (Aldwych Press, London, £11.50).

The twenty-fifth anniversary of the European Economic Community finds it – by no means for the first time – in some disarray. Even if the story of the emergence, rise and irregular decline of European federalism and the search for a united Europe has been told before it is nonetheless worth the retelling and "The European Parliament. The Three-Decade Search for a United Europe" does it well. It is only too easy, in the light of present problems and realities, to forget the early aspirations for a federal Europe, but despite the undoubted value of Mrs Scalingi's account of the ups and downs of the battles between federalist and confederalist it fails to chart clearly the evolution (or lack of evolution) of the European Parliament in its first quarter of a century.

From one, limited, point of view the federalist battle was effectively lost in Rome on 25th March 1957 with the institution of a Community which was, despite the determination in the preamble to the Treaty "to lay the foundations of an ever closer union among the peoples of Europe", basically concerned with customs union, agriculture and competition. Within this essentially economic community there was no place for the sort of Parliament which the federalists desired – indeed as far as the Treaty was concerned there was no room for any form of Parliament, only for an Assembly which had no power to introduce, to amend or to reject Community legislation.

From another point of view however the federalist battle was not lost, as Mrs Scalingi shows, and the debate has continued whether at the level of national governments, the European Council or the European Parliament itself. Indeed since 1957 the Community has outgrown its initial basically economic aims either by venturing into new areas such as regional policy or by enlargements or proposed enlargements for which the motivation was basically political rather than economic. Given aspirations which were not provided for in the Treaty, it is scarcely surprising if today there is considerable doubt whether these aspirations can be achieved within the present framework and that there are serious demands for a revision of the Treaty which would inject a political element in to it.

Since its institution the European Parliament has, of course, been a natural forum where the views of federalists, confederalists and pragmatists can, and do, receive an airing and Mrs Scalingi's book records faithfully the political arguments as they have been advanced. By concentrating on this aspect however only a part of the story is told, and the very real progress that the European Parliament has made goes largely unrecorded.

Whatever the larger issues, from the moment the Assembly was set up the main aim of the great majority of its members has been to confer as great a measure of 'parliamentary' legitimacy on itself as possible; a fact which was symbolised by the immediate wish of the Assembly to call itself a parliament. Hence also the importance that has always been attached to direct elections which having been achieved, even if in a limited form, are seen by the great majority of members as having bestowed a 'democratic' legitimacy on the Parliament which is lacking in the other institutions of the Community. But if within the Parliament there is general agreement on the need to increase its powers there are at the same time two approaches which are by no means mutually exclusive. On the one hand there are those who demand formal new powers, requiring Treaty amendment, which would give Parliament legislative co-decision, or even veto. This approach is currently being pursued in the European Parliament by the new Committee on Institutional Affairs which originated from Mr Spinelli's informal "Crocodile Club", which is also considering the larger question of the overall adequacy of the present Treaty. On the other hand there are the gradualists who believe that

another path is that of increasing Parliament's influential role on both Commission and Council until what has become a *de facto* power can easily be accepted *de jure*. This 'influential' role is illustrated by the more careful and elaborate scrutiny Parliament's Committees are giving to Community legislation with an increasing use (since 1973) of public hearings and the consideration of submission by outside groups and organisations. That this 'influential' role is perceived by those outside the Parliament itself is clearly illustrated by the considerably greater interest that lobby and pressure groups have shown in the Parliament since direct elections. It is perhaps regrettable that Mrs Scalingi makes no reference to this aspect of Parliament's evolution which could have been demonstrated effectively by an examination of the number of increasing amendments to legislation proposed by the Parliament and accepted by the Commission.

It is surely essential that the Parliament continues to pursue this pragmatic and undramatic approach at the same time as it makes its public demands for more formal powers for, whether one is satisfied or not as to whether the present European Economic Community provides the sort of United Europe that is desirable, the fact remains that the Treaty is the framework within which the Parliament (and indeed the other institutions) has to operate and it is within that framework that the Parliament must establish and consolidate its position. Its achievements in twenty-five years, both in formal budgetary powers and in influence over the Commission, have not been insubstantial. The attainment of direct elections may have achieved no new formal powers but it has undoubtedly increased the self-confidence of Members of the Parliament, not only in their dealings with Commission and Council but also in their pronouncements on the wider questions of European Unity. Mrs Scalingi quotes Mr Patijn's somewhat pessimistic assessment "if there is a development towards a more federal Europe, there is a chance that the Parliament will develop in that situation"; the present writer would put it as more than 'a chance', but while at the moment the Parliament can do little more than attempt to influence, and ultimately respond to, political decisions taken from outside its first task must be that of establishing its position in the present Community. It has gone a fair way to doing this, though a lot remains to be done before it can feel confident of being assured a dominant position in a more embracing Community.

*(Contributed by David Dewar, formerly a Senior Clerk in the House of Lords, now an official of the European Parliament)*

*Parliamentary History, Libraries and Records: Essays presented to Maurice Bond.* Ed. H. Cobb (House of Lords Record Office, 1981, £3).

"Parliamentary history, Libraries and Records" is a *Festschrift* of essays presented to Maurice Bond who retired last year after thirty-five years' service as Clerk of the Records. Both the contributors and the

contributions reflect the breadth of his interest in all things parliamentary. Six of the contributors work in the House of Lords, two in the Commons' Library, and one is Curator of Works of Art throughout the Palace. The subject-matter of the essays falls into two categories, the archival-bibliographical, and the historical. The authors have put together a particularly wide-ranging set of topics. Jeremy Maule has found in Chaucer's allegorical parliament-poems evidence of early parliamentary procedure. It is particularly ironic that Thomas Tyrwhitt, Clerk of the House of Commons in the middle of the eighteenth century, although one of the first modern editors of Chaucer, made no comment on the passages which are here used to suggest that the basic stages in reaching a decision in Parliament were fairly clear cut by the time of Chaucer's membership of the House in 1386. The collection moves on in time by way of an account by Phillis Rogers of the provenance of Sir John Soane's eclectic collection of medieval architectural fragments which had come his way through his connection with the restoration or demolition of parts of the old Palace of Westminster, and which he assembled in his back garden. It concludes with a historical and political study by Douglas Slater of Disraeli's reaction to his promotion to a peerage in 1876, when he became Earl of Beaconsfield, until the general election of 1880, shortly followed by his death.

Everyone who reads this collection will find different topics of interest in it. There is, for example, a valuable essay by Harry Cobb on the narratives of State Openings of Parliament under the Tudors, a ceremonial which, unlike its Scottish equivalent, the Riding of the Parliament, does not seem to have caught the public imagination until the television age. Among the interesting sidelights is the fact that at Edward VI's first Parliament the customary Mass of the Holy Ghost was sung "by the Kinges Chappell . . . in mervelous good time and melodye Right plesant to the herares thereof".

The only change from the previous reign was in the language, English and not Latin. It was not until the second Parliament of the reign six years later that Parliament began with a "service". Yet the preparations made for Edward's first Parliament by the Protestant party under Somerset and the Seymours were considerable, and the first session swept away a great deal of the Henrician legislation against heresy. Similarly, it is recorded that in 1559 Elizabeth heard mass; not until the Parliament of 1563 was there a sermon, but "neither Communion nor Offering." Among the articles which are bibliographical in their background there is a description by David Johnson of the Lords' concern for their own records in the early eighteenth century. This is set against a wider aristocratic concern for antiquities and describes the migrations of the records as the premises into which they had overflowed from the Jewel Tower were indirectly affected by the fire of 1834. Suitable space was in such short supply that a room had to be hired in Westminster Hospital and it was not until 1864 that the collection as a whole reached the Victoria Tower. Dermot Englefield has given an interesting account of the printing of the Irish

Journals of the sessions between 1613 and 1800, disentangling the various editions and their appendices and unravelling the complexities of altered volume numbers. It seems that this admirable and often neglected enterprise may well have sprung from the first "attachment" to Westminster, represented by the visit of an Irish clerk to the House of Commons in 1611. Not only were the Irish Journals an immense work, they were also in some ways superior to the contemporary Westminster product. Indexes to individual volumes begin half a century earlier in Dublin, and appendices of papers may well have been introduced to Westminster by Mr. Speaker Abbot or Rickman his secretary, drawing on their previous experience in Dublin. There is an account of the development of the House of Commons' Library up to the fire in 1834, which is the work of the current Librarian, David Menhennet. This draws attention in particular to the loss of the greater part of an irreplacable pamphlet collection, some of it of very high antiquity, and to the substantial progress made by the Library in the decade and a half before the fire. In something of the same area, D. L. Jones has presented details of arrangements made between the Lords' Library and the Upper Chamber in Paris, much delayed in their implementation by the fire, which apart from an interruption between 1848 and 1851 ensured the exchange of books and papers from the early 1830's until the collapse of the Second Empire in 1871.

Finally, there is an essay by John Sainty on one of his unfortunate predecessors as Reading Clerk, Leonard Edmunds. In 1833, under the patronage of Brougham as Lord Chancellor, Edmunds was appointed Clerk of the Patents, and the following year became Clerk of the Crown in Chancery. Fourteen years later he added the post of Reading Clerk in the House of Lords, resigning his position as Clerk of the Crown as part of a package deal. During his service in the Patent and Chancery offices, the climate of public opinion on political jobbery changed both speedily and completely. The Whigs up to mid-century had openly regarded the preferment of their political friends in the public service as perfectly acceptable behaviour. The Tories scarcely dissented – as Peel's appointments as Home Secretary show. But Joseph Hume, Stafford Northcote and Charles Trevelyan each in their separate ways put an end to that. Perhaps because their use of the system had been more thoroughgoing, a lot of mud stuck to the Whigs and their proteges. Charges of all sorts rained in on them. T. L. Peacock called the *Edinburgh* "all lies and bad grammar." Against this background, Edmunds was a tailor-made scapegoat, and in his case there seem to have been a justified suspicion that he had at least condoned embezzlement in the Patent Office, and at worst had used public money for his own private purposes. He resigned from the Patent Office, disowned by Brougham, and was asked to resign from the Parliament Office. A Select Committee investigated the circumstances and suggested in its Report that the then Lord Chancellor had failed to make the Parliament Office Committee aware of all relevant circumstances when deciding the question of

Edmund's pension. The Committee also brought up what must by then have looked like a very shady deal with the Brougham family in 1833 amounting to an agreement by Edmunds to apply part of his new income to pay the debts of one of the Lord Chancellor's brothers. Edmunds lost his pension and, despite attempts on his own part and with the help of others over several years, failed to salvage anything from the ruin until twenty years later. The Edmunds story is also illustrative of the influence that the Broughams in particular exercised in public patronage. While Edmunds was in post in the Lords, one of the Lord Chancellor's political friends (who had been introduced to Brougham by one of the brothers in whose favour the 1833 arrangement was to work) was the Clerk of the House of Commons, and his father-in-law was Clerk of the Fees. No wonder Dr. Chalmers used to say with a shudder that he had a "moral loathing o thae Whugs."

*(Contributed by W. R. McKay, a Deputy Principal Clerk in the House of Commons)*

*The Commons in Perspective.* By Philip Norton (Martin and Robertson, 1981)

In writing this book Mr. Norton has set his sights high. He aims to provide concise "overview of the contemporary House of Commons" and in that phrase he embraces a discussion not only of the various forces which come to bear on the British political system as a whole, complete with flow charts, and of the actual procedures of the Commons, but also a digest of views expressed by other writers in this field and lastly his own views on what the role of Parliament may be and what it should be in the future.

That he has attempted all this in some two hundred and fifty pages vindicates his claim to conciseness. In these pages he has packed a formidable amount of material, and what is there is plainly stated, give or take the odd nit-pick, accurate and up to date at the time of going to press. For the student, to whom he primarily addresses the book, these are considerable virtues.

The very breadth of Mr. Norton's purpose leads to difficulty. He cites fairly lavishly the interpretations of others while at the same time carrying forward his own narrative, and it is not always clear whether he is endorsing those other opinions or merely drawing them to the reader's attention. Some of the opinions which he quotes are of dubious validity. I am reminded of those antique dealers who spend much of their time buying and selling to each other, while the price of the goods goes up. The mere repetition of the opinions of colleagues, even without endorsing them or giving them any factual support, gives them in the end a spurious validity.

I must take issue with Mr. Norton where he deals with select committees. His view is that until 1979, these committees had cut little ice in securing greater accountability of the government to Parliament. When advancing the proposition that the experience of select committees

in the seventies was not a glorious one he gives as reasons, inter alia, and citing from one of his own early publications, that few of their reports were debated in the House and that they lacked the powers which could make them effective, powers which of necessity would detract from the powers of the Government. Now the considerable achievements of the departmentally related committees which were appointed in 1979, and which he endorses, have come about without any greater number of their Reports being debated in the House than was the case in earlier days. The increase in the effectiveness of select committees has been achieved without any strengthening of their formal powers and has been achieved with the co-operation of the Government, not by detracting from its powers. The new departmental committees have no more formal powers than their predecessors. They are still essentially limited to asking questions and making reports. They still have no formal stake in the granting of supply or in the passage of legislation.

It was essentially a case of establishing confidence in the proposition that select committees could, if effectively organised, secure a worthwhile increase in the accountability of the executive to Parliament. Indeed, important though the remodelling in 1979 of the Select Committee system undoubtedly was, the real watershed came a great deal earlier. For example, two developments in the mid sixties – the employment of part-time specialist advisers and changing the normal custom from hearing evidence in private to hearing it in public did much to enhance the value of the work of select committees. In the twenty years before 1979 progress was not uniform nor was it always immediate but each step forward was an advance on the last.

Set against the ambit of the book, this is a minor matter. For the student this is a most useful introduction to the contemporary working and standing of the Commons, the more so if it is understood that the repetition of a proposition does not of itself make it true but does provide a pointer to further study.

*(Contributed by R. S. Lankester, Clerk of Select Committees, House of Commons)*

*The House of Lords in the Parliaments of Edward VI and Mary I: an Institutional Study*. By Michael A. R. Graves (Cambridge University Press (1981) £22.50).

In a year that has seen the publication of two imposing sections of the History of Parliament Trust publications, for 1509–1558 and 1558–1603 which are in fact state subsidised studies in three volumes a piece of the membership of the House of Commons alone in that period, it is heartening to receive a modest if carefully researched study of the House of Lords as an institution for the two short reigns at the centre of that period – from 1547–1558. The battle was lost long ago to make the official History of Parliament a history of Parliament as a whole – which would have inevitably meant that both Houses were covered, or even a satisfactory history of either House as an Institution.

It is the first book on the House of Lords in the Sixteenth century, and so tries to fill the long gap, between the careful work of historians such as J. G. Edwards, J. S. Roskell and K. B. McFarlane of the later medieval period on the House of Lords, when it was the second of the Parliamentary trinity under the Crown, and far outweighed the Commons in political importance, and the work of the Stuart historians, e.g. C. H. Firth, who were inevitably contrasting it with the heroic period of the House of Commons in the reign of Charles I. It was thus above all necessary to exorcise that reading of parliamentary history which sees all events in the sixteenth and early seventeenth centuries as precursors to the events of the English Revolution, and that it was an ability and willingness to oppose the Crown which were the marks of political success or parliamentary vigour.

Coke painted the true picture in clearer words when he wrote in his *Institutes* (as Mr Graves quotes):–

"that Parliaments have not succeeded well in five Cases. First when the king hath been in displeasure with his Lords or with his Commons. 2. When any of the Great Lords were at variance between themselves. 3. When there is no good correspondence between the Lords and the Commons. 4. When there was no unitie between the Commons themselves. 5. When there was no preparation for the Parliaments before it began."

Mr Graves seeks to present an institutional rather than a political study; it is always difficult to divide the two. He seeks "to restore the lords to its rightful place in the parliamentary trinity . . . as one of the three essential parties to the legislative process". He gives an analysis of the composition of the House, the fairly constant lay peerage (43 in 1509, 54 in 1529 and 55 in 1603), and the spiritual lords, whose numbers had shrunk following the dissolution of the monasteries to the 26 bishoprics which are still a component part of the present House of Lords. By use of a mass of research to be found in learned articles by himself and colleagues, he gives a clear and lucid picture of the House of Lords under Edward VI and Mary with a total membership of between 65 and 79, in which the 26 bishops appointed to their sees for service to church and state, and the created lords – a third of the Lords temporal – together formed the backbone of the House, that mixture of prelates and enobled "politicians, civil servants and military experts" who made the House work. They were increasingly educated in the Universities and in the Inns of Court, as well as serving long years at Court, or in the royal service, at home or abroad. It has been assumed that these bishops and enobled Royal servants naturally constituted an obedient, even subservient House. Instead, Mr Graves suggests that the two orders – the Lords spiritual and temporal – were not united either in their opinions or in their interests. Above all religious differences separated them both – a division later to be perpetuated between the established and Protestant Church of England and Roman Catholicism.

Readers of *The Table* will be interested to read the chapter on the Clerks and Assistants to the House, which describes the slow evolution of the Clerk of the Parliaments from his origins as a chancery clerk on loan

to the Lords when occasion demanded, to the head of the Parliament Office, to which the chancery competence in written and oral Latin, French and English, were added an expertise in parliamentary procedure, and custodianship of the developing parliamentary archives. The Clerks had begun to keep a record of proceedings on bills which in the course of the century were transformed into the official *Journals*. They read aloud the text of bills – the necessary method of informing those members of the House who were unlettered, of legislative proposals. The Clerk of the Parliaments was subject to the Lord Chancellor, upon whom as Minister, Speaker of the House, head of the judiciary and principle spokesman for the Sovereign devolved much of the responsibility for management of the Upper House, including the delivering of the Opening Speech, the descendant of the fifteenth century parliamentary sermon and the ancestor of the Speech from the Throne.

The House of Lords was also helped by its 'assistants', the judges, the kings serjeants, the master of the rolls, the kings legal counsel (the attorney and solicitor-general) and by the secretaries of state – who in practice usually sat as Members of the House of Commons, where the Crown was much less well represented than in the House of Lords. The assistants not only gave legal advice to the highest Court in the land, long before Law Lords had been thought of, but also provided a professional support for the amateur legislators. The Lords had inherited the assistance of those who had served the medieval parliament, especially the kings counsel, and the chancery; it was they who sought to put into the correct language the sweeping legislative changes of the mid-Tudor period.

Mr Graves concludes his work with two chapters on the procedure of the House and on its legislative activity, which will be of great interest to clerks. It is no wonder that the number of readings of a bill was then not firmly established, although the idea of the classic three readings was already in being by 1547. But in 1549/50 a bill "against the Rising of the Common People" went to six readings; a process which modern "business managers" of the government legislative programme would sorely deprecate. Clerks will not be surprised to read of the role of the legal assistants in drafting bills and amendments, for which they were paid substantial fees – sums comparable to those paid to the Speaker of the House of Commons. Legislative activity was then, as now, the nub of parliamentary activity, but in the mid-sixteenth century there was the important difference that the majority of bills passed into law originated in the Upper House. But in 1553–5, under Queen Mary, the Lords revolted against the Crown, and pushed its resistance to the Marian Catholic reaction by attempting to sabotage a number of major bills, and the result was that the Commons' share of business increased.

Those interested in the evolution of Parliament will find much to stimulate them in this study, which refreshingly compensates for past neglect.

*(Contributed by M. A. J. Wheeler-Booth, Clerk of the Overseas and European Office, House of Lords)*

## XXIV. EXPRESSIONS IN PARLIAMENT 1981

The following is a list of examples occurring in 1981 of expressions which have been allowed and disallowed in debate. Expressions in languages other than English are translated where this may succinctly be done; in other instances the vernacular expression is used, with a translation appended. The Editors have excluded a number of instances submitted to them where an expression has been used of which the offensive implications appear to depend entirely on the context. They have also excluded the words "lie" and "liar", which are invariably disallowed in all legislative assemblies. Unless any other explanation is offered the expressions used normally refer to Members or their speeches.

**Allowed**

"dacoits, sought the help of" (*UPVS Procs.* 1981)
"demolition gang" (*Can. Com. Hans.* p.8806)
"diversion" (*TNLC Debs.* 9.2.81. Vol. CLXXIII, p.43)
"drunk" (*W.A.L.A. Debates* 1981, p.3382)
"Going back on word" (*Can. Com. Hans.* pp.8653–4)
"inactive government" (*UPVS Procs.* 1981)
"in the tone of an irresponsible person" (*Malta Debs.* 5.10.81)
"is not telling the truth" (*Can. Com. Hans.* p.9252)
"little albino peanut" (*Tas. H.A. Hans.* p.6390, 31.3.81.)
"nitpicking" (*Bermuda Hans.* 1981)
"presumptuous" (*Malta Debs.* 20.7.81)
"political thug" (*Tas. H.A. Hans.* p.990, 24.9.81)
"puppetism" (*Zambia Debs,* 56v, c.1154)
"rubbish" (*Bermuda Hans.* 1981)
"shut up" (*Can. Com. Hans.* p.8893)
"silly" (*Bermuda Hans,* 1981)
"spurious" (*Can. Com. Hans.* p.8871)
"The Honourable block-headed Member" (*Tas. H.A. Hans.* p.1779)
"trifling business, to be employed in" (*Gujarat L.A. Procs.* 1981, Vol.72, c.117)
"you silly guys" (*Can. Com. Hans.* pp.9817–8)

**Disallowed**

"abnormal teachers are found in our schools" (*Zambia Debs,* 56j, c.734)
"Ape" (*N.Z. Hans.* Vol.439, p.2413)
"Asses, Braying of" (*N.Z. Hans.* Vol.437, p.121)
"arch criminal" (*R.S. Procs,* 2.9.81)
"bastard" (*Can. Com. Hans.* p.8435)
"betrayed the country" (*L.S. Deb.*, 3.3.81, c.294)
"Big fat bag of wind" (*Q'ld. Hans.* 1981, p.3133)
"black sheep" (*L.S. Deb.*, 4.5.81. c.370)
"Bloody" (*Q'ld. Hans.* 1981 pp.1302, 1482)

"bloody child" (*S. Aust. H.A. Hans*, p.2177)
"buck-up lioness" (of a lady member) (*U.P.V.S. Procs*, 1981)
"Bullshit" (*Vict. L.A. Hans.* 31.3.81. p.6650)
"broken his word" (*Com. Hans.* Vol.1, No.69, c.264)
"brute majority" (*Gujarat Procs.* 1981, Vol.71, c.590)
"buffoon" (*R.S. Procs*, 24.3.81)
"bunch of thieves" (*S. Aust. H.A. Hans*, p.2960)
"calling the kettle black" (*Vict. L.C. Hans.* 1981, p.7080)
"cheap leadership" (*Gujarat Procs.* 1981 Vol.71, c.101)
"cheap popularity" (*Gujarat Procs.* 1981, Vol.73, c.634)
"cheat" (you are a) (*Vict. L.C. Hans.* 1981, p.7741)
"complete oaf" (*Aust. Sen. Hans.* 1981, p.989)
"compost heap" (*W. Aust. L.A. Debs.* 1981, p.2571)
"comrade" (*Zambia Debs*, 56k, c.824)
"conspiracy, premier is in, with oil companies" (*Vict. L.C. Hans.* 1981 pp.2487–9)
"constitution, manipulates the" (*W. Aust,. L.A. Debs.* 1981, p.4211)
"corrupt" (*Q'ld. Hans.* 1981, p.2563).
"coward" (*W. Aust. L.A. Debs.* 1981, p.2571, 3413)
"crocodile's tears" (*Gujarat Procs.* 1981, Vol.73, c.814)
"crook" (*Q'ld. Hans.* 1981, p.1958)
"damn disgraceful" (of the judiciary) (*L.S. Deb.*, 23.4.81, c.322)
"deliberately misleading" (*Can. Com. Hans.* pp.11357, 11744)
"demagoguery" (*Can. Com. Hans.* p.6193)
"dishonest man" (*Vict. L.C. Hans.* 1981, pp.3227–8)
"disreputable" (*S. Aust. H.A. Hans.*, p.1413)
"dumb lady" (*N.Z. Hans.* Vol. 439, p.1947)
"exchanging bulls with human beings" (*Zambia Debs.*, 56n, c.1191)
"farrago of lies" (*Vict. L.C. Hans.* 1981, p.3392)
"Fibber" (*Q'ld. Hans.* 1981, p.627)
"Fibbing" (*N.Z. Hans.* Vol.438, p.1595)
"fraud" (*Com. Hans.* Vol.999, No.54, c.787)
"goose" (*S. Aust. H.A. Hans, p.760)*
"gulah" (*Aust. Sen. Hans.* 1981, p.2508)
"He did not have a great deal between the ears" (*Q'ld. Hans.* 1981, p.3765)
"Head of the great fools conference" (*U.P.V.S. Procs.* 1981)
"hooliganism" (of teachers) (*U.P.V.S. Procs.* 1981)
"hopeless case" (*Bermuda Hans.* 1981)
"hypocrisy" (*Gujarat Procs.* 1981, Vol.72, cc.29 & 211)
"hypocritical" (of the Premier) (*Vict. L.C. Hans.* 1981, p.8037)
"idiot" (*Aust. Sen. Hans.* 1981, p.238)
"ignorant" (*Zambia Debs*, 56n, c.1176)
"instigation" (*Malta Debs.* 21.4.81)
"intentionally misleading" (*Can. Com. Hans.* p.8163)
"intoxicated comments, he should keep his, to himself" (*N.S.W. L.A. Hans.* 1980–81, 6371.)

"jellyfish , like the backbone of the" (*N.Z. Hans.* Vol.438, p.1945)
"lackeys" (*L.S. Deb.* 17.8.81, c.388)
"lunatic" (*R.S. Procs,* 14.9.81)
"madness, it is . . . to let people suffer" (*Zambia Debs,* 55ii, c.3333)
"meaningless talk" (*U.P.V.S. Procs.* 1981)
"Megalomania" (*N.Z. Hans.* Vol.439, p.1941)
"Mental deterioration" (*N.Z. Hans.* Vol.439, p.1941)
"Mentally unbalanced" (*N.Z. Hans.* Vol.438, p.1565)
"Moral masturbation" (*Vict. L.A. Hans.* 25.11.81. p.3668)
"notorious for stuffing his pockets full of cigars in VIP lounges at airports" (of a Minister) (*Aust. Sen. Hans.* 1981, p.1353)
"Old gummy ewe" (*N.Z. Hans.* Vol.438. p.1606)
"only a married woman will know the woes of widowhood" (to an unmarried lady member) (*Gujarat Procs.* 1981, Vol.73, c.672)
"peanuts – you are the, that won't give us . . ." (*Vict. L.C. Hans.* 1981, p.6568)
"peons, group of" (of the government) (*U.P.V.S. Procs.* 1981)
"persons who feast over the dead" (*Gujarat Procs.* 1981, Vol. 73, c.651)
"pimps" (*R.S. Procs.* 14.9.81)
"Pious weasel" (*Vict. L.A. Hans.* 1.12.81. p.3939)
"psychopath, the member is a" (*N.Z. Hans.* Vol.439, p.1872)
". . . put profit before lives" (*N.S.W. L.A. Hans.* 1980–81, 1135)
"poisonous treachery of Rasputin, diabolical designs of Idi Amin and fraudulent propaganda of Goebbels" (*R.S. Procs,* 16.9.81)
"quisling, Premier is" – (*Vict. L.C. Hans.* 1981, pp.803–8)
"Rabble, what a bunch of bloody" (*N.Z. Hans.* Vol.442, p.4342)
"Race – You're a disgrace to your own race" (*N.Z. Hans.* Vol.442, p.4341)
"raise hue and cry" (*Gujarat Procs.* 1981, Vol.71, c.634, Vol.73)
"ravings" (*Vict. L.C. Hans.* 1981, pp.7079)
"rednecks" (*W. Aust. L.A. Debates* 1981, p.3009)
"ripped off huge profits from insider trading" (of a Minister) (*Aust. Sen. Hans.* 1981, p.908)
"rumoured" (*Malta Debs.* 30.6.81.)
"rigged the books" (of the previous government) (*S. Aust. H.A. Hans.,* p.2960)
"scurrilous" (*Can. Com. Hans.* p.6193)
"scurrilous bastard" (*Vict. L.A. Hans.* 11.11.81. p.2752)
"senile due to age" (*Gujarat Procs.* 1981, Vol.72, c.50)
"sent all his clients bankrupt" (*N.S.W. L.A. Hans.* 1981, 813)
"silly little Minister . . . interjecting" (*N.S.W. L.A. Hans.* 1980–81, 1265)
"simple soul" (*S. Aust. H.A. Hans,* p.3522)
"Skungy little man" (*N.Z. Hans.* Vol.441, p.3626)
"stranglers of democracy" (of Presiding Officers) (*Tas. H.A. Hans* p.2172, 3.11.81)
"stupidity, incompetence and ignorance" (of the Minister) (*Vict. L.C. Hans.* 1981, p.7062)

"Super rat is on his feet" (*Q'ld. Hans.* 1981, p.3396)
"sycophant" (*R.S. Procs,* 24.3.81)
"thief and a scoundrel" (*Vict. L.A. Hans.* 19.3.81. p.6167)
"thief of water" (in a drought) (*N.S.W. L.A. Hans.* 1980–81, 6921)
"thug, you great" (*W. Aust. L.A. Debs.* 1981, p.1389)
"Toad, preaching little" (*N.Z. Hans.* Vol.438, p.1346)
"tough and effective fighter in protecting the social security empire" (of a Minister) (*Aust. Sen. Hans.* 1981, p.629)
"trafficking in girls" (of a Minister) (*U.P.V.S. Procs.* 1981)
"Twit, silly, sick, little" (*N.Z. Hans.* Vol.439, p.1934)
"Twits, what a bunch of" (*N.Z. Hans.* Vol.440, p.2816)
"uproar" (of the opposition) (*Gujarat Procs.* 1981, Vol.71, c.807)
"Useless, you loud-mouthed useless fellow" (*N.Z. Hans.* Vol.442, p.4342)
"usually the preface to a lie" (*Aust. Sen. Hans.* 1981, p.1613)
"villain (*L.S. Deb,* 24.2.81, c.282)
"warmongering Prime Minister of Great Britain" (*R.S. Procs,* 24.4.81)
"We know about (his) standard of morals" (*N.S.W. L.A. Hans.* 1980–81, 6723)
"white lie" (*Gujarat Procs.* 1981, Vol.71, c.874)
"Why was he expelled from the King's School?" (*N.S.W. L.A. Hans.* 1980–81, 6722)
"You couldn't lie straight in bed" (*Vict. L.A. Hans.* 18.3.81., p.6123)
"you mug" (*Vict. L.C. Hans.* 1981, p.6557)
"zoological garden" (of the House) (*L.S. Deb,* 7.5.81, c.340)

## XXV. RULES AND LIST OF MEMBERS

# The Society of Clerks-at-the-Table in Commonwealth Parliaments

*Name*

1. The name of the Society is "The Society of Clerks-at-the-Table in Commonwealth Parliaments".

*Membership*

2. Any Parliamentary Official having such duties in any legislature of the Commonwealth as those of Clerk, Clerk-Assistant, Secretary, Assistant Secretary, Serjeant-at-Arms, Assistant Serjeant, Gentleman Usher of the Black Rod or Yeoman Usher, or any such Official retired, is eligible for Membership of the Society.

*Objects*

3. (a) The objects of the Society are:

(i) To provide a means by which the Parliamentary practice of the various Legislative Chambers of the Commonwealth may be made more accessible to Clerks-at-the-Table, or those having similar duties, in any such Legislature in the exercise of their professional duties;

(ii) to foster among Officers of Parliament a mutual interest in their duties, rights and privileges;

(iii) to publish annually a JOURNAL containing articles (supplied by or through the Clerk or Secretary of any such Legislature to the Officials) upon Parliamentary procedure, privilege and constitutional law in its relation to Parliament;

(iv) to hold such meetings as may prove possible from time to time.

(b) It shall not, however, be an object of the Society, either through its JOURNAL or otherwise, to lay down any particular principle of parliamentary procedure or constitutional law for general application; but rather to give, in the JOURNAL, information upon these subjects which any Member may make use of, or not, as he may think fit.

*Subscription*

4. (*a*) There shall be a subscription payable to the Society in respect of each House of each Legislature which has Members of the Society.

(*b*) The minimum subscription of each House shall be £20 per member, payable not later than 1st January each year.

(*c*) Failure to make such payment shall make all Members in that House liable to forfeit membership.

(*d*) The annual subscription of a Member who has retired from parliamentary service shall be £3.00 payable not later than 1st January each year.

*List of Members*

5. A list of Members (with official designation and address) shall be published in each issue of the JOURNAL.

*Records of Service*

6. In order better to acquaint the Members with one another and in view of the difficulty in calling a full meeting of the Society on account of the great distances which separate Members, there shall be published in the JOURNAL from time to time, as space permits, a short biographical record of every Member. Details of changes or additions should be sent as soon as possible to the Officials.

*Journal*

7. One copy of every publication of the JOURNAL shall be issued free to each Member. The cost of any additional copies supplied to him or any other person shall be £5.50 a copy.

*Administration*

8. (*a*) The Society shall have its office at the Palace of Westminster and its management shall be the responsibility of the Clerk of the Overseas Office, House of Commons, under the directions of the Clerks of the two Houses.

(*b*) There shall be two Officials of the Society, one appointed by the Clerk of the Parliaments, House of Lords, and one by the Clerk of the House of Commons, London; each Official shall be paid an annual salary, the amount of which shall be determined by the two Clerks. One of these Officials shall be primarily responsible for the editing of the JOURNAL.

*Account*

9. Authority is hereby given to the Clerk of the Overseas Office and the Officials of the Society to open a banking account in the name of the Society and to operate upon it, under their signature; and a statement of account, duly audited, and countersigned by the Clerks of the two Houses of Parliament at Westminster shall be circulated annually to the Members.

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## XXVI. MEMBERS' RECORDS OF SERVICE

**Note.** – **b.**=born; **ed.**=educated; **m.**=married; **s.**=son(s); **d.**=daughter(s).

*Members who have not sent in their Records of Service are invited to do so, thereby giving other Members the opportunity of knowing something about them. It is not proposed to repeat individual records on promotion.*

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# XXVII. CONSOLIDATED INDEX TO VOLUMES XLI—L

## ABBREVIATIONS

(Art.)=Article in which information relating to several Territories is collated. (Com.)=House of Commons.