Welfare Reform and the Financial Privilege

On 1 February 2012, a committee of the House of Commons resolved that the Welfare Reform Bill, which proposes to cap benefits for most families at £26,000 a year, engages the financial privilege of the Commons. Under such a privilege, the Commons is entitled to 'disagree' with any Lords amendment and ultimately reject it without feeling obliged to provideany reasons other than the existence of the privilege. By convention, the Lords will accept this determination (though increasingly with protest). I argue below that it would be a mistake to read the financial privilege sobroadly, and also that the Lords have both the constitutional power, and good cause,to assert themselves in reply.

The scope of the privilege

It is for the Commons (and not the Courts or the Lords) to decide on the scope of its own privilege: Art. 9, Bill of Rights; *Stockdale v Hansard*(1839) 9 Ad & E 1; *R v Chaytor* [2010] UKSC 52. But it must still provide an interpretation of the subject-matter of the privilege – it can get it wrong or abuse its power to define it, in other words. The basic scope of the privilege is set out in the following passage from*Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (23rd edn, pp.919-920):

> "The Commons' claim to sole rights in respect of financial legislation applies indivisibly to public expenditure and to the raising of revenue to meet that expenditure. … The Commons treat as a breach of privilege by the Lords not merely the imposition or increase of such a charge but also any alteration, whether by increase or reduction, of its amount or of its duration, mode of assessment, levy, collection, appropriation or management …"

The reference to 'public expenditure' suggestsat first that the Welfare Reform Bill squarely would fall within the scope of the privilege.TheReport of the Select Committee of the House of Lords on the Constitution, *Money Bills and Commons Financial Privileges*(10th Report of Session 2010-2011) (2 February 2011), includes an Appendix containing a paper by Michael Pownall, the Clerk of Parliament,claiming at [7] that 'the Commons take a wide view of matters which they consider infringe their privilege' and he confirmed that it does apply clearly to expenditure.(The report of the Constitution Committee itself is less assertive in respect of the breadth of the privilege).There is no doubt that matters of taxation and voting supplyare squarely within the financial privilege. This is indeed the origin of the privilege, relating back to a resolution of the House of Commons in 1671, which stated '[t]hat in all aids given to the King by the Commons, the rate of tax ought not to be altered by the Lords.' In a further resolution of 1678, the 'undoubted and sole right of the Commons' was asserted in respect of all bills of aids and supplies.

Yet the extent to which it applies as clearly to all matters of expenditure is in greater doubt. There are a range of early precedents (1920s) cited in *Erksine May* (23rdedn, p.920)of social security legislation, in which the Commons invoked the financial privilege. Yet it is likely at that time that the legislation indirectly concerned increases in taxation – it is doubtful the Lords were then telling Prime Minister Lloyd George that his government being was being too stingy. However, there has been a recent revival in invoking the privilege in respect of expenditure embodied in social welfare statutes: see e.g. Pensions Bill (HL Deb, 24 July 2007, col. 707ff.) (Lord Skelmersdale, objecting); 2008: Planning Bill (HL Deb, 25 Nov 2008,

col. 1364) (Baronness Hollis, objecting); 2009: Personal Care at Home Bill (HC Debates, 30 Mar 2010, col. 777) (Minister of State, Phil Hope, moving to disagree amendments on grounds of privilege).Indeed, on 10 Nov 2009, the Speaker of the Commons claimed that privilege was engaged in proposed Lords' amendments to the Welfare Reform Bill itself (HC Debates, Col.192), and though a number of those amendments were agreed after substantive debate, the vote recorded an express waiver of the privilege when recorded (as is the custom) (HC Debates, Col. 212).

Despite being invoked on such occasions, it has been controversial for the Lords. A search of Lords and Commons Hansard suggests that the financial privilege has been asserted far more vigorously in the last five years in respect of expenditure, and has been objected to consistently by the Lords. Baroness Hollis, for instance, claimed in 2008 that '[a]ny Minister … might find it extremely convenient for controversial regulations to be swathed with the financial privilege embargo. Would my noble friend be happy if, as a result, virtually all social security regulations were not debatable by this House because they came with a flag saying financial privilege?I find this the beginning of an extraordinarily slippery slope and I am profoundly worried.' ((HL Deb, 25 Nov 2008, col. 1364-65) Lord Howarth (formerly an MP and Under-Secretary of State), in debates over the Identity Documents Bill, raised his concern whether the Government were proposing an 'extension of the doctrine of financial privilege to cover matters of expenditure as well as measures concerned with revenue raising', and whether it 'is an appropriate new doctrine for them to espouse and to use for their political convenience. [I]f that is the case, there are large implications for this House, which we should ponder and take seriously.' (HL Deb, 21 Dec 2010, Col. 1031).It is an overstatement to say that this would be wholly novel. Yet these remarks themselves show how it is in part novel and they reflect the tone of the debate (outrage) in the last two recent days in the Lords.

The breadth of the privilege asserted on 2 February 2012 by the Chancellor, Lord Strathclyde, defending the invocation of the privilege as a clear right of the Commons, was spectacularly wide: 'any amendment with implications for public expenditure might involve privilege.' (HL Deb, 2 February 2012, col. 1673).Many of their Lordships registered objections to this claim, with Lord Lawson claiming that though the privilege existed, it was a convention that it had been invoked 'sparingly' rather than 'promiscuously': (Col.1674).

The correct position would appear to be as follows. The privilege was originally concerned chiefly with taxation and supply, and invoked more sparingly in respect of expenditure. The standard proposed by Lord Strathclyde would, if respected,radically constrict the range of matters over which the second chamber could reliably exercise its revising and scrutinizing function (though not from debating or passing resolutions on such matters, or examining them in committees: *Erskine May*, 23rdedn, p.918). Such matters would include health care, education, university fees, pensions, social security, the courts service, prisons, immigration, and so much else. Does the privilege require that the Lords should avoid amendments on any such matters, or worry that any debate on them will ultimately prove not only futile, but unworthy of response and possibly even be unconstitutional? They would have potentially infringed the privilege when voting on university top-up fees on 14 December 2010, when they opposed the Asylum and Immigration Bill in 2004 (a bill explicitly advanced on cost grounds), in the current debate legal aid reform and so on.The wide view would appear untenable. There are few matters discussed in the Lords which do not have 'implications for public expenditure' and it cannot be contended that the Lords tramples on the privilege

of the Commons as its daily fare. The wide view would also require the Speaker to claim that the privilege is engaged far more often than is now the case, a practice that would itself stifle debate and encourage opportunism.

I would conclude that the Commons enjoy a clear power to invoke the privilege in respect of expenditure, but it would be an abuse of the privilege to use it to foreclose the revising role of the Lords on matters of social policy not relating directly to taxation or supply of money. An expenditure bill that would squarely engage the financial privilege would in my view include votes on supply, but also any bill whose central and nearly exclusive rationale relates to the problem of resource scarcity. Where, as in the Welfare Reform Bill or legal aid reform, the rationale is said to encompass much more than saving money, it is right that the amendments of the Lords only be rejected with reasons, and that its delaying and reforming powers as constricted under the Parliament Acts, be allowed to run their course. This is consistent with the practices of both Houses in recent decades, and as well as with the rationale for the privilege and the present constitutional role of the second chamber.

What recourse does the House of Lords have?

It is for the Commons tojudge the scope of the privilege in any given dispute, but the Lords need not accept its judgment without protest. They have two recourses. First, they can assert by way of resolution that they make no admission regarding the reasons offered by the Commons, and do not consent to such reasons constituting a precedent. (See 125 Lords Journals 425; 138 Lords Journals 337; 140 Lords Journals 345). Presumably, they may go further and positively assert their disagreement while acquiescing nonetheless, just as they may do with a legal decision they disagree with but grudgingly accept. The second recourse is that, contrary to the tenor of the Clerk of Parliament's report on the Lords' options in such a case, the Lords do in fact have the right to reject a bill in its entirety. The rule is stated succinctly in *Halsbury's*: 'The House of Lords may reject a bill in its entirety without infringing the financial privileges of the Commons. Its power to reject even a bill of aids and supplies has been acknowledged in former times by the House of Commons.' (*Halsbury's Laws of England*, Vol.78 (2010) 5thEdn, s.826; also noted in*Erskine May*, 23rdedn., p.927). Both these recourses would be strong measures, but can be reasonably viewed as appropriate responses to the Commons' attempt to overextend its privilege. Yet were the Lords to take such a step, the Commons would not be without a remedy.

Welfare Reform Bill and the Parliament Acts of 1911 and 1949

As is well known, the Parliament Acts of 1911 and 1949 allow the Lords to delay but not prevent the passage of most bills presented to it by the Commons. The Parliament Act 1911 was adopted after a great constitutional crisis prompted by David Lloyd George's People's Budget of 1909, which would have imposed substantial tax increases on the landed gentry and was opposed by the Conservative dominated Lords as a species of class warfare. The Parliament Act 1949, reducing the period of delay under the 1911 Act from two years to one, was introduced for similar reasons relating to Labour's fears over Lords' obstruction of its post-war nationalisation programme and other reforms to the welfare state.

Section 1 of the 1911 Act does not allow the Lords to delay a 'money bill' for more than a month. Couldthe Welfare Reform Bill have been deemed a money bill? Here the criteria for such bills are less nebulous than the boundaries of financial privilege, for they are defined in s.1(2) of the Parliament Act 1911:

> 'A Money Bill means a Public Bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, the National Loans Fund or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them. In this subsection the expressions "taxation," "public money," and "loan" respectively do not include any taxation, money, or loan raised by local authorities or bodies for local purposes.'

The'conclusive' power to 'certify' a money bill rests with the Speaker: s.1(3) Parliament Act 1911. In the present controversy over the Welfare Reform Bill, the Speaker did not certify that the bill was a money bill when it was sent up, effectively precluding it from now being designated as such. But the question of whether it might have been, or similar legislation might be in the future, remains.

In my view, the Welfare Reform Bill could not reasonably be so certified. The clear target of this provision is bills of supply and aid, imposition of taxes and charges on the Consolidated Fund, appropriations of accounts, and 'subordinate matters incidental to those subjects.' And the bill must contain '<u>only</u>' provisions dealing with those subjects, a point emphasised by the Constitution Committee in its report: see above, Appendix 2, [3]; *Erksine May*, 23rdedn, p.928. This view is confirmed in practice as well. The Constitution Committee showed that of sixteen bills other than consolidated fund bills that were certified as money bills in the last ten years, virtually all relate directly to taxation or finance. There is one apparent exception to this practice, the Age-Related Payments Bill 2004 (now an Act). Yet that measure was narrowly or 'only' concerned with adjustments to payments, and is the exception in a long list, one that itself stands in need of justification. In my view, it would be a misreading of s.1(2) for the Speaker to certify measures such as the Welfare Reform Bill as a money bill.They are far broader, and concern holistic matters of social policy.

However, the Commons could still push through such bills by relying on s.2 of the Parliament Act 1911 (as amended by the 1949 Act), and present them for royal assent after a year has elapsed and the other formalties in that section have been complied with. This would not be unprecedented, of course. It has exactly seven precedents, only four since 1949 (i.e. the War Crimes Act 1991, European Parliamentary Elections Act 1999, Sexual Offences (Amendment) Act 2000, and Hunting Act 2004).

What legacy will this leave?

A bad one, whatever is done.First, the very fact that the Governmentinvoked the privilege means that it defends the welfare reform bill as a matter of austerityrather than a bona fide attempt to address a social problem (whether dependency, or fairness). The move exposes the truth that the Government took such pains to deny. Second, if the Commonsinvokes the privilege successfully against the Lords,then it will have stretched it to potentially radical proportions. As David Howarth MP claimed, 'a policy that does not have resources attached to it is generally just hot air': (HC Deb, 4 Nov 2009, col. 958). That move would in turn complicate parliamentary practice, as I've explained above. Third, if the Lords decides to push back against any such move – as I think it is right to do as a matter of constitutional

self-defence and as a matter of principle on the substance of the issue at stake – then it can either register a protest (which puts the scope of privilege in some doubt) or it can reject the bill in its entirety. If the latter, the Commons would then be faced with either producing another bill or using the Parliament Acts to pass the existing one without the Lords' assent. This would be ironic in the extreme: the Commons using the Parliament Acts to dismantle a part of the welfare state, over the opposition of the Lords. Lloyd George and Atlee will turn in their graves.

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