

provision in question, despite the fact that interpretation would depart from the unambiguous meaning of legislation, as conventionally construed.

There is no reason in theory, at any rate, which would prevent the courts developing such a principle. But there are formidable obstacles which need to be addressed. First, there may well be no obvious or compelling rationale for this development, beyond the fact that Parliament abolished the HRA. Secondly, the modified principle has no legal pedigree, unlike the long established principle of legality. Thirdly, it is difficult to reconcile the reasoning to justify the modified principle with *Brind*—where the House of Lords rejected the broad argument that legislation should be interpreted in conformity with the European Convention, but accepted that it might be used to resolve ambiguity or uncertainty in a statutory provision.<sup>55</sup> There are other difficulties of principle to overcome; so that the modification of the principle of legality is not straightforward.

## Conclusion

I would argue that weak status the common law accords to rights protection is a fundamental obstacle to their future development. Although some of the recent cases suggest that common law rights must not be overlooked, their general significance should not be overstated.

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## The House of Commons’ “financial privilege” on Lords amendments: perceived problems and possible solutions<sup>1</sup>

☞ Amendments; House of Commons; Legislative proceedings; Privilege

Early in 2012 controversy erupted over the House of Commons’ treatment of Lords amendments to the Coalition’s Welfare Reform Bill. In response to seven Government defeats in the Lords, the Commons asserted its “financial privilege”, and ministers argued that by convention the Lords could not insist on its proposals. The episode sparked widespread anger and confusion, as the defeats covered high-profile matters such as the new “benefit cap” and so-called “bedroom tax”. Inside Parliament, former Conservative Chancellor Lord Lawson of Blaby suggested that such use of financial privilege was “completely contrary to the conventions of the constitution”,<sup>2</sup> while former Commons Speaker Baroness Boothroyd claimed that the Government was acting in a “very heavy-handed manner”.<sup>3</sup> Outside

<sup>55</sup> *R. v Secretary of State for the Home Department Ex p. Brind* [1991] 1 A.C. 696.

<sup>1</sup> This research was funded by the Nuffield Foundation, although the views expressed are those of the authors and not necessarily of the Foundation. More information is available at [www.nuffieldfoundation.org](http://www.nuffieldfoundation.org) [Accessed November 5, 2014].

<sup>2</sup> *Hansard*, HL Vol.734, col.1674 (February 2, 2012).

<sup>3</sup> *Hansard*, HL Vol.735, col.688 (February 14, 2012).

Parliament, the episode attracted strong criticism in outlets such as the *Guardian*,<sup>4</sup> and *Public Finance* magazine.<sup>5</sup> Two months later controversy resurfaced on seven defeats to the Legal Aid, Sentencing and Punishment of Offenders Bill. This prompted respected lawyer Lord Pannick to claim that financial privilege had been cited “quite inappropriate[ly]”.<sup>6</sup>

These episodes raised big questions about the legislative process, and in particular the relationship between the two Houses. Responding to the first controversy, legal academic Jeff King argued that “it would be an abuse of [financial] 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”.<sup>7</sup> The events also highlighted poor understanding, and indeed misunderstanding, about the use of financial privilege. To address this, we conducted detailed empirical research into the process, in particular identifying every occasion between 1974 and 2013 on which the Commons claimed financial privilege, reading relevant parliamentary debates, and conducting interviews with key figures. We also compared practice in Westminster with that in three legislatures abroad (Ireland, Canada and Australia). We believe that our findings provide the most complete recent explanation of how financial privilege works.<sup>8</sup> This article begins by briefly describing the process, before evaluating three important criticisms made of it: that it lacks transparency and accountability, that the government controls it, and that its operation has changed over time. We end by arguing that the current process is unsatisfactory, and making proposals for how it might be reformed.

## The operation of financial privilege

Financial privilege is one component of the Commons’ historic financial primacy over the Lords. This was formalised in the late 17th century, and its better-known implications include limitations on peers’ scrutiny of “money bills” and “bills of aids and supplies”. Financial privilege specifically affects the “ping pong” stages of the legislative process, when the Commons receives Lords amendments. Given the widespread confusion that exists, we begin this section by clarifying how the process works, before providing a summary of our empirical findings about how financial privilege has operated in practice.

Once the Commons receives Lords amendments, the first step in the process is for the Commons to identify whether any have tax or spending implications (or “engage” financial privilege). This is known as “designation” and is conducted by Commons clerks (particularly the Clerk of Legislation). Although it formally takes place under the Speaker’s authority, in practice, according to one official briefing,

<sup>4</sup> P. Toynbee, “The Welfare Reform Bill will Incentivise People: To Turn on David Cameron” (February 2, 2012), *The Guardian*, <http://www.theguardian.com/commentisfree/2012/feb/02/welfare-reform-bill-cameron-frightening> [Accessed November 5, 2014].

<sup>5</sup> C. Wood, “Welfare Bill: An Abuse of Privilege” (February 6, 2012), *Public Finance*, <http://opinion.publicfinance.co.uk/2012/02/welfare-bill-an-abuse-of-privilege/> [Accessed November 5, 2014].

<sup>6</sup> *Hansard*, HL Vol.736, col.1796 (April 25, 2012).

<sup>7</sup> J. King, “Welfare Reform and the Financial Privilege” (February 3, 2012), UK Constitutional Law Association, <http://ukconstitutionalallaw.org/2012/02/03/jeff-king-welfare-reform-and-the-financial-privilege/> [Accessed November 5, 2014].

<sup>8</sup> For our full conclusions see M. Russell and D. Gover, *Demystifying Financial Privilege: Does the Commons’ Claim of Financial Primacy on Lords Amendments Need Reform?* (London: Constitution Unit, 2014), available at: <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/160> [Accessed November 5, 2014].

“[t]he Speaker is not directly involved”.<sup>9</sup> The next step is for MPs to decide on the floor of the House how to respond to each amendment. They have three broad options, and in the case of those that engage financial privilege this decision determines what happens next. If MPs agree the amendment outright, they are automatically judged to have “waived” their financial privilege and a statement to this effect is recorded in the Journals of the House of Commons. If they propose an alternative (e.g. an amendment in lieu, or an amendment to the Lords amendment), this is returned to the Lords and “the question whether the Lords amendment infringes privilege does not arise”.<sup>10</sup> But if MPs disagree to the amendment outright, the Commons’ longstanding practice is to “invoke” its financial privilege, sending the Lords a “Reason” (formally agreed by a “Reasons Committee” of MPs) ending with the words: “and the Commons do not offer any further Reason, trusting this Reason may be deemed sufficient”.

When the Commons invokes financial privilege, the official guide to the Lords’ practice advises that “the Lords do not insist on their amendment”, though peers may agree an alternative amendment in its place.<sup>11</sup> It is this limitation on peers’ power to respond that has provoked particular grievances. In recent years it has been suggested that peers should also not return amendments in lieu that “clearly invite the same response”,<sup>12</sup> although this has never been formally accepted by the Lords. It is in any case unclear how this statement should be interpreted, though it might apply most obviously in cases where there was only a trivial change of words.

Official statistics on financial privilege give a somewhat misleading account of how it has operated in practice. According to data issued by the parliamentary authorities, between December 2000 and February 2012 financial privilege was waived on a total of 610 Lords amendments and invoked on just 56.<sup>13</sup> In 2009, Baroness Royall of Blaisdon, then Leader of the House of Lords, cited similar figures to argue that “financial privilege has not often given rise to difficulties for the Lords” and that “in many cases, the Commons decides not to exert its financial privilege”.<sup>14</sup> Yet this overlooks the fact that the great majority of agreed Lords amendments are government-sponsored, and the Commons (with its in-built government majority) routinely accepts these.<sup>15</sup> To present a more complete picture, we analysed amendments to four government social security bills between 1989 and 2012.<sup>16</sup> On these bills, financial privilege was engaged on 123 Lords

<sup>9</sup> “Financial Privilege: A Note by the Clerk of the House and the Clerk of Legislation” (February 2012), House of Commons, <http://www.parliament.uk/documents/commons-information-office/financial-privilege.pdf> [Accessed November 5, 2014].

<sup>10</sup> House of Lords, *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* (London: House of Lords, 2013), p.165.

<sup>11</sup> House of Lords, *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* (2013), p.165.

<sup>12</sup> Joint Committee on Conventions, *Conventions of the UK Parliament*, Vol.1, HL Paper No.265-1/HC Paper No.1212-1 (November 3, 2006), Session 2005–06, p.79; see also Baroness Royall of Blaisdon in *Hansard*, HL Vol.705, col.1359 (November 25, 2008), and Lord Strathclyde in *Hansard*, HL Vol.734, col.1673 (February 2, 2012).

<sup>13</sup> Figures provided by House of Lords Library.

<sup>14</sup> Memorandum by the Leader of the House, deposited in the House of Lords Library in February 2009. As this was not made publicly available, we reproduced it in Russell and Gover, *Demystifying Financial Privilege: Does the Commons’ Claim of Financial Primacy on Lords Amendments Need Reform?* (2014), p.49, available at: <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/160> [Accessed November 5, 2014].

<sup>15</sup> For example, according to figures from the House of Lords Public Bill Office, in the session 2010–12 there were 2405 amendments agreed in the chamber, of which 2268 (94%) was sponsored by a minister.

<sup>16</sup> The Social Security Bill (1989–90), Welfare Reform and Pensions Bill (1998–99), Pensions Bill (2007–08) and Welfare Reform Bill (2010–12).

amendments; it was waived on 90 (all of them Government amendments) and invoked on 26 (all defeats), with alternatives proposed in the remaining seven cases (again, all involving defeats). The essential question is therefore how financial privilege is applied to Government Lords defeats. A second weakness of the previously published data was that they covered a relatively short time period, making it difficult to establish trends over time.

We addressed these deficiencies by compiling an exhaustive list of every invocation of financial privilege between 1974 and 2013, before tracing the origin of each one. In total, the Commons invoked financial privilege on 160 Lords amendments over this period. All but seven resulted from defeats, and the others also from non-government amendments (mostly following unwhipped “free” votes). These 153 amendments resulted from 102 individual defeats (since a single defeat can result in multiple amendments), representing 9 per cent of total Lords defeats in this period. However, there was noticeable variation over time. Under the Coalition Government (2010–13)<sup>17</sup> financial privilege was invoked in response to 24 per cent of Lords defeats. In the previous Parliament under Labour (2005–10) only 6 per cent of defeats were responded to in this way. This suggests that something has changed in how financial privilege operates, but does not tell us why. We return to this question below.

## Complaints about financial privilege

Locating each invocation of financial privilege allowed us to go further, by consulting *Hansard* records to identify how parliamentarians responded. We supplemented this with media reports and our own interviews with key actors, to identify the main complaints made about financial privilege. We summarise these in three categories: lack of transparency and accountability, government control of the process, and change over time.

### *Transparency and accountability*

The first complaint is that the process lacks transparency and accountability. We found evidence of widespread misunderstanding about how financial privilege works, among outside groups, MPs, peers, and even ministers, government officials and senior Lords clerks. This undesirable situation is exacerbated by the serious lack of clear, accessible and authoritative information about the process. An obvious place to look for guidance might be the Commons standing orders, but these do not even mention the term. Another key source is Erskine May but, although this provides some information, it is incomplete: for example, being entirely silent on the process preceding the formal Commons debate, and indicating only two options open to MPs rather than the three outlined above.<sup>18</sup> In any case Erskine May is difficult for the public and even many pressure groups to consult, as it is not freely accessible online. Recent briefing papers by the parliamentary authorities have

<sup>17</sup> The 2010–15 Parliament was incomplete at the time of study.

<sup>18</sup> M Jack (ed.), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 24th edn (London: LexisNexis, 2011), pp.785–798.

helped to clarify matters somewhat,<sup>19</sup> but these are scattered and leave various key questions unanswered.

The most important area of confusion concerns the criteria against which the Commons judges whether a Lords amendment engages financial privilege. The most authoritative definition is in Erskine May, which states:

“With regard to the charges in respect of which they claim privilege, 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; and in addition, any alteration in respect of the persons who pay, receive, manage, or control it, or in respect of the limits within which it is leviable.”<sup>20</sup>

This suggests that financial privilege is engaged by any Lords amendment that increases, decreases, or modifies in any other way taxation or public spending. Yet were this applied rigidly a very high proportion of Lords amendments would engage financial privilege, as almost every substantive provision has some resource implications. Decisions on what falls within the definition appear to be based largely on precedent, using historic records held by the Clerk of Legislation. However, one Government official suggested to us that there was no “clever principle that runs through all the cases” and that there was “a lot of inconsistency”, proposing that decisions were instead based more on “smell”. Another similarly emphasised “feel”, rather than reliance on precise rules. We learned that the Commons employs a “de minimis” threshold when designating amendments, on which basis those with only minor spending implications are not considered to engage financial privilege. But we were unable to establish what the threshold is or whether it has been applied consistently. Indeed, one senior official told us: “looking back over a career I can’t say that I can regard it as ever having been applied in a way that I could tell you what the rule is”. Overall, the most complete definition we found of what is covered by financial privilege came from internal guidance used by Parliamentary Counsel (i.e. government lawyers responsible for legislative drafting), which indicated a surprisingly wide scope—encompassing for example the commencement and sunset of financial provisions, and changes to “the parliamentary procedure for secondary legislation making financial arrangements”. However, this paper has never been officially published<sup>21</sup> and, as a government document, is not an authoritative guide to parliamentary procedure. We discuss some potentially surprising applications of financial privilege further below.

Compounding this lack of clarity is that, once financial privilege has been invoked, the Commons gives no explanation as to why. This complaint was voiced

<sup>19</sup> See: “Financial Privilege: A Note by the Clerk of the House and the Clerk of Legislation” (2012) <http://www.parliament.uk/documents/commons-information-office/financial-privilege.pdf> [Accessed November 5, 2014]; D. Beamish, “House of Commons Financial Privilege and the Welfare Reform Bill” (February 13, 2012), House of Lords, <http://www.parliament.uk/documents/lords-information-office/Note-on-HC-financial-privilege-Welfare-Reform-Bill-2012-02-13.pdf> [Accessed November 5, 2014]; also Constitution Committee, *Tenth Report of Session 2010–12, Money Bills and Commons Financial Privilege*, HL Paper No.97 (February 3, 2011).

<sup>20</sup> Jack (ed.), *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (2011), p.787.

<sup>21</sup> It is reproduced in Russell and Gover *Demystifying Financial Privilege: Does the Commons’ Claim of Financial Primacy on Lords Amendments Need Reform?* (2014), p.50, available at: <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/160> [Accessed November 5, 2014].

particularly prominently by Lord Pannick in relation to his amendment to the Legal Aid, Sentencing and Punishment of Offenders Bill. This aimed to write into the Bill that the purpose of legal aid was to ensure “(within the resources made available and in accordance with this Part) that individuals have access to legal services that effectively meet their needs”, which Pannick argued would “not require any further expenditure by the Government”.<sup>22</sup> When the Commons subsequently invoked financial privilege against the amendment, he thus sought an explanation from the Commons authorities. But they indicated by email that none could be provided, because “[d]esignation of financial privilege constitutes procedural advice from the Clerk of Legislation to the Chair and as such is confidential”. This led Lord Pannick to suggest:

“I doubt that I am the only noble Lord who finds it very regrettable that this House should be told that financial privilege controversially applies to an amendment but noble Lords are not told why that is so”.<sup>23</sup>

Later, in responding to our research results, he noted that:

“Outside parliament, public authorities are required to give reasons for their decisions ... The courts have made very clear that the giving of reasons is an essential element of proper administration and good government. It encourages higher standards of decision-making and it makes adverse decisions more acceptable to the subject if they are told the applicable criteria and why [they have] failed to satisfy them.”<sup>24</sup>

This lack of transparency and accountability makes it very difficult for peers and their supporters to anticipate financial privilege, and exacerbates grievances. It also feeds perceptions that the process is abused for political gain, to which we now turn.

### *Government control*

The second complaint is that the Government manipulates financial privilege in order to suit its own political purposes. This concern is recorded repeatedly in *Hansard*, with assertions that “the Government chose to claim privilege”,<sup>25</sup> “the Government’s claim to financial privilege is simply misplaced”<sup>26</sup> and that “the Government are trying to invoke financial privilege”.<sup>27</sup> Outside Parliament, one charity that lobbied on the Welfare Reform Bill accused the Government of “strong-arm tactics” by claiming financial privilege.<sup>28</sup> This perception has arguably been exacerbated by ministers themselves, who on recent occasions have told the Commons that they would “ask the Reasons Committee to ascribe financial privilege as the reason” for disagreeing to Lords amendments, creating an

<sup>22</sup> *Hansard*, HL Vol.735, col.1559 (March 5, 2012).

<sup>23</sup> *Hansard*, HL Vol.736, col.1561 (April 23, 2012).

<sup>24</sup> D. Pannick, speech at launch of *Demystifying Financial Privilege* report, House of Lords (March 12, 2014).

<sup>25</sup> Baroness Farrington of Ribbleton in *Hansard*, HL Vol.574, col.1223 (July 22, 1996).

<sup>26</sup> Baroness Blatch in *Hansard*, HL Vol.592, col.738 (July 21, 1998).

<sup>27</sup> Liam Byrne in *Hansard*, HC Vol.539, col.879 (February 1, 2012).

<sup>28</sup> C. Davey, “A House Divided: The Cost of Financial Privilege” (February 17, 2012), Huffington Post UK, [http://www.huffingtonpost.co.uk/caroline-davey/a-house-divided-the-cost-\\_b\\_1285583.html](http://www.huffingtonpost.co.uk/caroline-davey/a-house-divided-the-cost-_b_1285583.html) [Accessed November 5, 2014].

impression of ministerial discretion.<sup>29</sup> This has fuelled allegations that financial privilege has been abused by the Government to avoid unwelcome scrutiny of its legislation.

Financial privilege is a purely parliamentary process concerning relations between the two chambers. However, the distinction between Commons primacy and Government control can easily become blurred given the Government's majority in the lower chamber. As described above, whether or not financial privilege is invoked or waived on a Lords amendment ultimately depends on how MPs choose to respond to it. In most cases, this in turn depends on how the Government instructs its MPs to vote. Even where the Government does not wish to accept a Lords amendment it may nevertheless propose an alternative, thus avoiding financial privilege being invoked. In this sense, government clearly does have significant control.

Yet ministers are only in a position to make this choice where the Lords amendment has already been judged by Commons clerks to engage financial privilege. The Government's role at this earlier stage is more distant, but also less transparent. Although "designation" is conducted by clerks, they lack expertise in the policy at hand and may be unable to predict the financial consequences of implementing individual provisions. In some cases decisions will be clear-cut, but in many others clerks require contact with the Government, so conversations with Parliamentary Counsel about designation are commonplace. Sometimes the Clerk of Legislation will initiate contact, for example to clarify the effect of a particular amendment; Counsel may then refer back to the relevant government department, for instance to establish the cost of an amendment. On other occasions, Parliamentary Counsel will initiate contact in order to argue the Government's case that an amendment engages financial privilege, perhaps following discussions with the Government's business managers about how to respond to a Lords defeat. Anecdotally, we were told of one case where a minister sought directly (and unsuccessfully) to influence designation, although this seems likely to be rare.

None of this suggests that the Government controls designation, and importantly we found no evidence of impropriety. One senior Commons official stressed to us that the Clerk of Legislation is "not a soft touch" and would not accept Counsel's advice "uncritically". However, the involvement of Government at this early stage does suggest a possible imbalance of power, as the supporters of non-government amendments are not consulted in a similar way. This might not be a problem were there transparent criteria on which the clerks based their decisions; yet so long as the process remains shadowy and opaque, suspicions are likely to persist. The involvement of government figures arguing in favour of designation also raises the possibility that precedent may expand over time to encompass a greater range of amendments, which leads us to the third complaint.

### *Change over time*

The last complaint is that the operation of financial privilege has changed over time. This is clearly conflated with allegations of Government control: one peer

<sup>29</sup> *Hansard*, HC Vol.539, cols 826, 871, 907 (February 1, 2012); *Hansard*, HC Vol.543, cols 200, 216–217 (April 17, 2012).

recently described the process as “one more noxious constitutional innovation on the part of the coalition”.<sup>30</sup> Although there have been complaints about financial privilege for decades, controversy peaked in 2012 over the Welfare Reform Bill. As shown above, under the Coalition financial privilege has been invoked against a greater proportion of Lords defeats than previously. In this section we explore the reasons for such a trend.

One possible explanation, as indicated above, is that the definitions of financial privilege could have expanded over time. Comprehensive analysis of this was beyond our scope: it would require examination over an extended period not only of amendments on which financial privilege was invoked but also of the many more on which it was not. Nevertheless, our limited survey found some evidence of possible creep at the margins. One example was the invocation of financial privilege on an amendment to the Criminal Justice and Immigration Bill in 2008, which required future secondary legislation with financial implications to be subject to the “affirmative” parliamentary procedure in some circumstances. In contrast, privilege was not engaged on an amendment to the Social Security Bill in 1998, which also made regulations with financial implications affirmative.<sup>31</sup> Looking back even further, we found a series of Lords amendments to the Agricultural Land (Utilisation) Bill (1930–31) that deleted an entire spending provision. The Commons overturned the amendments, but did not cite financial privilege; peers subsequently insisted on their amendments on the basis that the bill “involve[d] an expenditure which is unjustifiable in the present financial situation”.<sup>32</sup> It seems almost certain that such amendments would have engaged financial privilege today. Yet, even if these examples do reveal creep, this would be gradual and cannot alone explain the flare up of tensions under the Coalition.

Instead we believe that the reason for recent pressures is twofold. First, the 1999 reform of the Lords, which removed most hereditary peers, turned a Conservative-dominated chamber into a more politically balanced one that felt itself more legitimate. This in turn bolstered the Lords’ assertiveness against the Commons. Defeats under Labour became commonplace and, perhaps more importantly for financial privilege, the Lords also became more willing to return bills to the Commons after MPs had rejected its amendments. This occurred on 38 bills in the 13 year period 2001–13, compared to just 7 over the 23 years 1974–97.<sup>33</sup>

Secondly, the Coalition Government brought a redrawing of the political dividing lines. Whereas under Labour the main fault lines between the chambers had been over civil liberties and constitutional propriety, under the Coalition they began to concern “austerity” and public spending cuts.<sup>34</sup> The more politically-balanced Lords, in which the Labour opposition could win occasional victories if supported by sufficient Crossbenchers (or Government backbench rebels), thus became more inclined to challenge the Government over spending. To demonstrate this, we

<sup>30</sup> Lord Howarth of Newport in *Hansard*, HL Vol.723, col.1003 (December 21, 2010).

<sup>31</sup> For additional recent examples, see Russell and Gover, *Demystifying Financial Privilege: Does the Commons’ Claim of Financial Primacy on Lords Amendments Need Reform?* (2014), pp.23–24, available at: <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/160> [Accessed November 5, 2014].

<sup>32</sup> *Journals*, HC Vol.186 (1930–31), p.392.

<sup>33</sup> M. Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived* (Oxford: Oxford University Press, 2013).

<sup>34</sup> Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived* (2013).

compared between the first sessions of the three most recent Parliaments: 2001–02, 2005–06 and 2010–12. Although the total number of relevant Lords legislative defeats remained relatively stable per session (45, 44 and 39 respectively), the vast majority of those on which financial privilege was invoked (17 out of 19) were in 2010–12. This growth was not because peers were more likely to defeat the Government, or because the Commons was more likely to invoke financial privilege on amendments where it was engaged, but because 18 of the 22 defeats on which financial privilege was engaged in the first place occurred in the 2010–12 session.

Recent tensions over financial privilege are thus driven principally by political rather than procedural changes. As with other parliamentary conventions—for example the “Salisbury convention” and the Lords’ treatment of delegated legislation<sup>35</sup>—a new political context has placed financial privilege under growing strain. This makes it ripe for reform.

## Solutions

Unless financial privilege is reformed, problems may worsen in the future; indeed, one official suggested to us that “financial privilege is a serious bubble waiting to burst”. Controversy in 2010–13 was almost certainly limited by the Liberal Democrats’ participation in the Coalition, making it more difficult for Labour to assemble sufficient votes to defeat the Government in the Lords. Two scenarios could see future tensions significantly increase. First, a return to single-party rule in 2015 would ironically leave the Government in a weaker position in the Lords, facing combined opposition from the remaining two major parties. Under the previous Labour Government, the Liberal Democrats were the key “pivotal group” in Lords’ votes,<sup>36</sup> and the party is likely to regain this position in future. Although either of the two largest parties might pursue further spending cuts, controversy over financial privilege seems most likely in the case of a single-party Conservative Government facing combined opposition from the “left”. A second scenario is the introduction of elections to the Lords—a likely demand of the Liberal Democrats in any coalition negotiations—which would weaken the basic rationale for the Commons’ financial primacy.<sup>37</sup>

The central problem that we have identified is a lack of transparency. Basic explanatory texts are incomplete and scattered, while there is no authoritative published definition of what is covered by financial privilege. This makes it difficult to assess objectively whether financial privilege has been applied fairly, feeding suspicions that practice has changed over time or has been abused for political ends. Peers—along with outside groups, which increasingly lobby the Lords given the Government’s vulnerability in that chamber—are unlikely to tolerate for much longer a situation where the rules against which their amendments are judged are not made public. Both chambers of Parliament should thus consider how to provide more complete explanations of the process. Most importantly, the Commons Speaker should publish a clear definition of how the Commons currently

<sup>35</sup> For a discussion see Joint Committee on Conventions, *Conventions of the UK Parliament* (2006).

<sup>36</sup> M. Russell and M. Sciarra, “Why Does the Government get Defeated in the House of Lords?: The Lords, the Party System and British Politics” (2007) 2 *British Politics* 299, 314.

<sup>37</sup> For example see discussion at Joint Committee on the Draft House of Lords Reform Bill, Vol.2, *Draft House of Lords Reform Bill*, HL Paper No.284-II/HC Paper No.1313-II (April 23, 2012) (Session 2010–12), p.391.

understands the scope of financial privilege, ideally with categories and illustrated by examples. This should also clarify the “de minimis” threshold. Once the definition is agreed, this should be made publicly available via the Parliament website. The Commons would not necessarily be precluded from making changes in future, but these would at least then be transparent and open to scrutiny.

Another important step would be for the Commons to provide statements explaining why financial privilege was engaged on specific (particularly non-government) amendments. Our examination of comparable legislatures found good examples of such statements being used.<sup>38</sup> In Australia, for example, s.53 of the Constitution prevents the Senate from amending legislation “so as to increase any proposed charge or burden on the People” (though notably there is no such limitation on decreases). Hence any such proposal must instead reach the House of Representatives in the form of a “request” and, since 2000, written statements are required to explain why given proposals take the form of requests.<sup>39</sup> In Canada, when disagreeing to Senate amendments the House of Commons has agreed explanatory messages that have on occasion even specified the amount of money involved.<sup>40</sup> Similar statements could be produced by the British House of Commons, and should ideally be made available prior to the Commons debate, allowing MPs (particularly from opposition parties) to scrutinise them.

One peculiarity of the existing system is that decisions taken by clerks in the Commons primarily affect members in the Lords. Peers have no routine access to Commons clerks, and it is unreasonable to expect clerks to take the lead in defending the Commons’ position to the Lords. The Speaker should therefore become more clearly accountable for financial privilege (which would bring practice into line with that on money bills). As with all Commons procedure, the Speaker’s decision must remain final as far as MPs are concerned. But, should peers wish to question or challenge the Commons’ interpretation of financial privilege, the Speaker would be in a position to justify the Commons’ decision. Such disagreement between the chambers over their respective powers over finance is well-established in other jurisdictions such as Canada<sup>41</sup> and Australia,<sup>42</sup> and may be an inevitability of bicameral life. As things stand, the Lords cannot be forced to accept the Commons’ definitions, as the system depends largely on convention. Some (particularly in the Lords) might wish to argue that the Commons’ current definitions are too broad; but to have a rational discussion of such matters at least requires these definitions to be out in the open.

Pressures over financial privilege reflect broad political trends and are unlikely to go away anytime soon. Unless changes are made, major clashes over the issue seem quite possible in future parliaments. The proposals we have made in this article are a necessary part of adapting to a more genuinely bicameral parliament,

<sup>38</sup> Russell and Gover, *Demystifying Financial Privilege: Does the Commons’ Claim of Financial Primacy on Lords Amendments Need Reform?* (2014), pp.35–38, available at: <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/160> [Accessed November 5, 2014].

<sup>39</sup> For example see *Senate Official Hansard* (Australia), p.460 (February 4, 2010).

<sup>40</sup> For example see *House of Commons Debates* (Canada), p.1668, (May 9, 1990).

<sup>41</sup> See for example, A. O’Brien and M. Bosc (ed.), *House of Commons Procedure and Practice*, 2nd edn (Ottawa: House of Commons, 2009) p.838.

<sup>42</sup> See for example, B.C. Wright and P.E. Fowler (eds), *House of Representatives Practice*, 6th edn (Canberra: Department of the House of Representatives, 2012), pp.451–452; and H. Evans, and R. Laing (ed.), *Odgers’ Australian Senate Practice*, 13th edn (Canberra: Department of the Senate, 2012), p.364.

and a more assertive House of Lords. They also fit basic requirements for transparency in a modern parliament.

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## **The European Court of Human Rights, gross disproportionality and long prison sentences after *Vinter v United Kingdom*<sup>1</sup>**

☞ Extradition requests; Inhuman or degrading treatment or punishment; Proportionality; Right to liberty and security; Sentence length; Sentencing; Whole life orders

The nature of prison regimes and conditions has undergone considerable review by the European Court of Human Rights (ECtHR). Simon argues that its effect has been to develop a distinctly “European” approach to punishment, which is milder and more respectful of the rights of the imprisoned than in the United States of America.<sup>2</sup> Snacken and van zyl Smit also argue<sup>3</sup> that the Convention’s influence has had a progressive impact on a variety of areas, including the degree of contact prisoners may have with the outside world,<sup>4</sup> in the fairness of the decision-making processes applicable to prisoners,<sup>5</sup> and regarding the quality of prison conditions.<sup>6</sup> van Zyl Smit, Weatherby and Creighton argue further that the Convention is moving towards the recognition of a right to rehabilitation,<sup>7</sup> which is becoming a recurring theme in the decisions of the Court.

While the Convention has led to some important advances in the treatment of prisoners, it has had much less impact on the question of the appropriate length of sentences. This is so despite the fact that matters such as overcrowding, which is moving towards becoming a breach of art.3 even when not accompanied by otherwise impoverished regimes,<sup>8</sup> may be partially attributable to policies giving rise to, or indeed requiring, the imposition of long sentences. It is also in spite of repeated calls by the Committee for the Prevention of Torture for states to address the issue of overcrowding by means of alternatives to custody.<sup>9</sup>

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<sup>2</sup> J. Simon, “Editorial: Mass Incarceration on Trial” (2011) 13(3) *Punishment and Society* 251.

<sup>3</sup> D. van Zyl Smit and S. Snacken *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford: Oxford University Press, 2011).

<sup>4</sup> See for example, *Ciorap v Moldova* (12066/02) June 18, 2007 ECHR; *Moiseyev v Russia* (2011) 53 E.H.R.R. 9.

<sup>5</sup> See, for example, *Enea v Italy* (2010) 51 E.H.R.R. 3.

<sup>6</sup> See for example comments of the Court on overcrowding in *Ananyev v Russia* (2012) 55 E.H.R.R. 18; *Torreggiani v Italy* (43517/09) May 7, 2013 ECHR.

<sup>7</sup> D. van Zyl Smit, P. Weatherby, and S. Creighton, “Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?” [2014] *Human Rights Law Review* 1.

<sup>8</sup> *Ananyev v Russia* (2012) 55 E.H.R.R. 18.

<sup>9</sup> Council of Europe, Committee for the Prevention of Torture, *7th General Report* (1997).