A note on the creation of peers

1. It is often stated that the creation of peers is an exercise of the prerogative.[1] However, this note seeks to show that, in the creation of life peers to sit in the House of Lords, the power exercised by the Queen (upon advice) is statutory, not of the prerogative, following the Life Peerages Act 1958.

2. Such a conclusion would render most of the reasoning in *Black v Chrétien* (2001)[2] obsolete, since that case assumed – without reference to the 1958 Act – that the power in question was the prerogative of bestowing honours.

Life peerages before the Life Peerages Act 1958

3. Although life peerages have been created under the prerogative since at least the fourteenth century (Guichard D'Angle, Earl of Huntingdon (1377)), it is unclear whether any of those peerages conferred the right to sit in Parliament.[3]

4. In 1856, Sir James Parke was appointed Baron Wensleydale for life, with the aim that he would sit as a judge in the House of Lords. This use of a life peerage was opposed by the former Lord Chancellor, Lord Lyndhurst, but supported by the then Lord Chancellor, Lord Cranworth. After hearing argument, the Committee for Privileges decided that the mere grant of letters patent appointing a life peer was insufficient to grant an entitlement to sit in Parliament: *Wensleydale Peerage* [1856] 5 HLC 958.

5. Parke was then granted an hereditary peerage (though he had no sons to inherit the title), and the Appellate Jurisdiction Act 1876 granted power to the Crown to create a number of Lords of Appeal in Ordinary, being peers for the duration of their office and entitled to receive a writ of summons to the House of Lords. The 1876 Act was amended in 1887 to extend these to peerages for life, even after ceasing to be a Lord of Appeal in Ordinary.

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[1] *Eg* AW Bradley, KD Ewing & C J S Knight (2015), *Constitutional and Administrative Law* (16th Ed), pp 258-263 (cited in House of Commons (2017), *The Royal Prerogative*, Briefing Paper 03861).
[2] 2001 CanLII 8537 (ON CA)
[3] Full list in Palmer (1907), *Peerage Law in England: A Practical Treatise for Lawyers and Layman*, pp 86-7

The Life Peerages Act 1958

6. The Life Peerages Act 1958, s. 1 states that '*Her Majesty shall have power by letters patent to confer on any person a peerage for life having the incidents specified in subsection (2) of this section*.' There are three possible interpretations of this provision.

7. Firstly, it may be that it is merely declaratory of a pre-existing prerogative to appoint life peers to sit in the House of Lords. However, the language of the Act tends away from this interpretation: the use of '*shall have*' rather than '*has'* signifies that the Act will effect a change of Her Majesty's powers. Further, although several of their Lordships in debate on the Bill considered it a corrective to the Wensleydale case, the Act does not explicitly overturn that decision. Rather, it appears to grant a new power.

8. The second and third interpretations differ on the nature of that power. It may either be (i) a power to create life peers (the new peerage having the incidents set out in subsection (2)) or (ii) a power supplementary to a prerogative power of creation, allowing Her Majesty to grant to new life peers the right to receive writs of summons and thus to attend the House of Lords. It is submitted that the former of these is the correct interpretation.

9. The first point in favour of this interpretation is the plain language of the statute. The power is *'to confer…a peerage for life'*, not merely *'to confer…the incidents specified in subsection (2)'*. Further, subsection (2) uses the language of a '*peerage conferred under this section'*, indicating that the creation itself is a use of the statutory power.

10. Secondly, it is submitted that the Act clearly envisages the rights set out in subsection (2) as '*incidents'* of the peerage created. That is, the new rights stem from the very nature of the peerage created. To construe the Act as creating a supplementary statutory power to grant those rights is therefore inconsistent with the Act's language.

11. The language of the 1958 Act may be contrasted with the Peerages Act 1963, s 6: '*A woman who is the holder of a hereditary peerage in the peerage of England, Scotland, Great Britain or the United Kingdom shall (whatever the terms of the letters patent or other instrument, if any, creating that peerage) have the same right to receive writs of summons to attend the House of Lords, and to sit and vote in that*

House… as a man holding that peerage.' The power to create life peers under the prerogative was not in dispute at the time of the 1958 Act. What was in dispute was the right to attend the House of Lords. Had Parliament wished simply to create that right, it would have done so in the clear language of the 1963 Act.

12. Thirdly, s. 1(3) permits a 'life peerage [to] be conferred under this section to a woman'. This clearly envisages the s. 1 power as one of creating a life peerage (with certain incidents). Life peerages had previously been conferred upon women under the prerogative (without the right to sit in Parliament), and so no special power was required to create the peerage itself. The intended effect of s. 1(3) is to clarify that the power granted by s. 1 is a power to confer a life peerage of a new kind, carrying a right to attend Parliament and capable of being bestowed on men and women alike, and not merely to bestow supplementary rights.

13. It follows that, even if there was a pre-existing prerogative power to create life peers with the right to sit in the House, the 1958 Act has subsumed it: *AG v De Keyser's Royal Hotel Ltd* [1920] AC 508.

The letters patent

14. It is submitted that an ambiguity surrounding the nature of the power exercised in the creation of life peers was at the forefront of the mind of the drafters of the *pro forma* letters patent, first issued in the Crown Office Rules Order 1958 and now contained in The Crown Office (Forms and Proclamations Rules) Order 1992. The forms for life peerages (both barons and baronesses) are to be found as Forms F and G of Part II of the Schedule to the 1992 Order.

15. The relevant formula is *'…Know Ye that We of Our especial grace certain knowledge and mere motion <u>in pursuance of the Life Peerages Act 1958 and of all other powers in that behalf Us enabling</u> do by these presents advance create and prefer…'*.

16. This can be compared with the (now defunct) form for creating Lords of Appeal in Ordinary (Form H): '*Know Ye that We of our especial grace have <u>in pursuance of the Appellate Jurisdiction Act 1876 as amended by subsequent enactments</u> nominated and appointed and by these Presents do nominate and appoint…'*.

17. It will be noted that Forms F and G include reference to 'all other powers', which must refer to prerogative powers. It is submitted that this element of the formula is legally redundant, but was perhaps included *ex abundanti cautela*.[4]

Can life peers be appointed under the prerogative?

18. Although the 1958 Act has subsumed any pre-existing prerogative power to create life peers entitled to sit in the House (under the principle in *De Keyser*), it is plausible to argue that it has not subsumed any pre-existing prerogative power to create life peerages without that right.

19. The 2017 report of the Lord Speaker's committee on the Size of the House noted this possibility as a way of conferring high-ranking honours without precipitating a growth in numbers.[5]

Besides technical exactitude, what is the significance of this point?

20. *Justiciability:* Whether the power is statutory or of the prerogative is important for shaping arguments as to the justiciability of its exercise. As noted above, rebuttal of the fundamental assumption of the Ontario court in *Black* v *Chrétien* may render much of its reasoning otiose. Such arguments are also frequently visited in debates over "packing the Lords". The justiciability of statutory powers begins with the plain words of the statute, not with revisiting the case-law flowing from *CCSU*.[6]

21. *HoLAC:* It may be argued that it is more appropriate for the House of Lords Appointments Commission to be placed on a statutory footing if the power upon whose use it advises is statutory.

22. *Governmental approach:* The conclusion of this note provides a tonic to remedy the impression of some Government ministers that the appointment of peers is – by

[4] Or does it point us to another interpretation of the *De Keyser* line of case-law? In De Keyser, the prerogative had been replaced by a statutory *scheme* (cf the 1876 Act for Law Lords). Here, the 1958 Act merely replicates an existing power (NOT with regard to women!), with no additional controls (except the ranking as a baron??).

[5] https://www.parliament.uk/globalassets/documents/lords-committees/size-of-house/size-of-house-report.pdf

[6] *CCSU v Minister of State for the Civil Service* [1985] AC 374

accident of history – a prerogative power the control of whose exercise requires no principled rationale.

a. An example of such an impression may be gleaned from the answer to a question put to Lord True (Minister of State for European Union Relations and Constitutional Policy) by Lord Judge on 5 January 2021. Lord Judge asked whether the Minister could *'kindly clarify the principled justification—if any—for permitting the appointment of Members of the sovereign Parliament to continue to be vested in the unconstrained power of the Prime Minister of the day?'* The Minister replied simply *'My Lords, the Prime Minister of the day is the monarch's principal adviser on the exercise of patronage, which is part of the royal prerogative.'*[7] As this note has shown, the Minister was incorrect in that assertion.

23. <u>*Other scrutiny:*</u> Indeed, it would be a welcome change if the purported prerogative nature of a power ceased to be used as a shield against scrutiny. It may be that some prerogative powers should not be justiciable, but that is a far cry from accepting that their use should not be challenged or scrutinised in any forum. For, as this note has shown, the prerogative nature of a power is not to be too readily assumed. Our constitutional arrangements are of too long a standing for any such assumption to be a prudent one to make.

Further information

- Amritpal Bachu, House of Lords (2017), *Life Peerage Creations: Powers of the Crown*, Library Note LLN
- Glenn Dymond, House of Lords (2008), *The Life Peerages Act 1958*, Library Note LLN 2008/011
- Mari Takayanagi (2008), 'A Changing House: The Life Peerages Act 1958', *Parliamentary History* 27, pp 380-392

[7] HL Deb (5 Jan 2021), Vol. 809, Col. 16

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Last updated 30 January 2021