Principles of Public Law

Andrew Le Sueur, LLB, Barrister
Reader in Laws, University College London
Javan Herberg, LLB, BCL, Barrister
Practising Barrister, Blackstone Chambers
Rosalind English, LLM, MA, Barrister

Cavendish
Publishing
Limited

London • Sydney

THE UK PARLIAMENT

6.1 Parliament: from sovereignty to power-sharing

There once was a time when almost everyone agreed that the UK Parliament was, and ought to be, the pre-eminent institution of the constitutional system. Dicey's explanation of the constitution was filled with Victorian optimism about the role of MPs. These men were able to give legitimacy to the Acts of Parliament by reason of the fact that they were elected representatives expressing the will of the electors; MPs controlled those of their colleagues who went on to form the government for the time being; and MPs would not legislate to infringe people's freedoms because MPs shared the moral feelings of the time and society, which were predisposed to liberty (see above, 5.2). People of very different political outlooks, antithetical to Dicey's, also once looked to Parliament as an institution capable of bringing about potent change in society. For socialists, the universal franchise was a preliminary step to getting representatives of the working class into the House of Commons, from where they could transform life for ordinary people (they thought), by legislating to turn the State into a Welfare State, a State that owned and controlled important industries and redistributed income.

Times have changed. Today, the case for saying that Parliament is, or ought to be, central to the constitutional system is harder to make. Whereas once, campaigns for the right to vote by working class men, and later by women, invigorated the country, now many ordinary people are bored by politics and see the work of Parliament as wholly irrelevant to their aspirations for a better life (see above, 1.7.2). The news media's exposé of sleaze during the 1990s – the sexual, financial and political improprieties of MPs inside and outside government – has added to the malaise (see below, 6.7). Moreover, people who understand how the modern constitution operates know that the UK Parliament's role in ever wider fields of policy and law making has been overtaken by the powers of the institutions of the European Union (see below, Chapter 7). The recent flux of constitutional reform (see above, Chapter 2) can be explained as attempts to inject the whole constitutional system with renewed moral authority, which once attached to Parliament but which has now ebbed away from that institution. Some of the reforms are directed at Parliament itself: the modernisation of procedures; abolishing the powers of hereditary peers in the House of Lords; and the possible replacement of the first past the post electoral system with one of proportional representation. Many other planks in the Labour government's pledge to modernise British politics, however, aim to remove constitutional

powers from the UK Parliament, and disperse them elsewhere (see above, 4.4.2). The basic constitutional functions of legislating and calling government to account are to be shared with elected bodies in Cardiff, Edinburgh and Belfast (see above, Chapter 2). (MPs sent to Westminster from these parts of the UK can no longer, it is believed, effectively represent the interests of their constituencies there.) Power sharing also involves giving the courts new powers to prevent Parliament enacting legislation contrary to the European Convention on Human Rights, by making declarations of inconsistency under the Human Rights Act 1998. (MPs are no longer to be trusted to strike the right balance in the public interest between individual rights and the needs of the State to govern.) This lack of confidence in the ability of MPs at Westminster to regulate themselves was evident under the previous Conservative government when faced with various allegations that a small number of MPs, including ministers, had acted improperly. Whereas, in the past, the House of Commons jealously guarded its historic powers to investigate wrongdoing and discipline its members itself, in the 1990s the government turned to outside, independent bodies to do this task – to a committee chaired by Sir Richard Scott (a judge of the Court of Appeal) into the arms to Iraq affair, by establishing a permanent Committee on Standards in Public Life under the chairmanship first of Lord Nolan (a Law Lord), and then Lord Neill QC, and the post of Parliamentary Commissioner for Standards.

6.2 What is the point of Parliament?

During the current period of constitutional flux, it is more important than ever to ask the question what is the constitutional purpose of Parliament? In Chapter 2, we gave some brief pragmatic answers: Parliament provides a body of men and women from whom a government is formed; the remaining MPs act as a watchdog over government and hold its purse strings; and Parliament is a legislature (see above, 2.4.2). In this chapter, we delve deeper into the question. Part of the answer is that, in a system of liberal democracy, people consent to be governed through fair, multi-party elections on the basis of universal suffrage. As early as 1791, Thomas Paine was able to write that the people of England as a whole ought to have three fundamental rights: '(1) To choose our own governors; (2) To chasier them for misconduct; (3) To frame a government for ourselves' (*The Rights of Man*, 1791–92 (1969) London: Pelican, p 62, quoting Dr Price).

In a parliamentary system such as that of the UK, the status of MPs and the functions they carry out are of obvious importance to the practical realisation of this form of governance. To assess the extent to which current parliamentary arrangements are adequate, and whether the various reforms are be an improvement, they need to be measured against a set of criteria. Six

principles, which ought to guide the law and practice of Parliament, may be identified:

(a) that MPs are representative;

(b) that MPs are fairly elected to Parliament;

(c) that MPs have power to enact legislation;

(d) that, once elected, MPs are free to speak out on any issue;

(e) that MPs do not act corruptly or otherwise dishonestly;

(f) that MPs are able to call ministers to account for their actions.

In the rest of this chapter, we look at each of these principles in turn.

6.3 That MPs are representative

In our constitutional system, one of the primary mechanisms by which people express their consent to be governed – an essential feature of a liberal democracy – is through their elected representatives in Parliament (see above, 1.6.2 and 1.7.2). As AH Birch explains: 'It is generally agreed that a political system can be properly described as a system of representative government if it is one in which representatives of the people share, to a significant degree, in the making of political decisions' (*Representative and Responsible Government*, 1964, London: Allen & Unwin, p 13). The concept of representation, and its connection to the idea of consent, is a complex one. Elsewhere, Birch states what is at its core:

> Parliamentarians are representatives because they have been appointed by a particular process of election to occupy that role ... Members of Parliament ... are people who have been authorised by the process of election to exercise certain powers. This is their defining characteristic, and they remain legal representatives until they step down, die or are defeated, no matter how they behave in the assembly [*The Concepts and Theories of Modern Democracy*, 1993, London: Routledge, p 74].

This is clearly an important point. You will remember (see above, 5.2) that Dicey argued that the democratic justification for the legislative powers of Parliament was the fact that MPs reflected the wishes – were influenced by – the electorate. What exactly does this mean?

According to one strand of theory, MPs, once elected, are to be regarded as independent, in the sense that they should exercise their judgment on issues debated in Parliament according to their personal views of what is in the nation's best interest. MPs are not merely delegates of their constituents or spokesmen for some particular sectional interest group. Edmund Burke famously propounded such a view in his speech to the electors of Bristol in 1774:

> Parliament is not a *congress* of ambassadors from different hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but Parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole.

For most of the 20th century, such a theory has seemed quaint and of little relevance to political reality. The coming of universal suffrage, mass political parties and working class representation in Parliament made elections appear to be about the clash of two great interests – that of country landowners and capitalists (represented by the Conservative Party) and organised labour (represented by the Labour Party). Research shows that almost all electors cast the vote for a candidate because of the political party to which that candidate belongs, rather than because of the candidate's personal views or attributes. Today, it is uncontentious to say that MPs do not decide how to speak and vote in the Commons merely according to their individual views of what is right, but are strongly influenced by the policy objectives and attitudes of their political party. This has led some writers to go a step further, and propound a theory of representation based on the notion of electoral mandate.

Before a general election, each party publishes a manifesto setting out its policies, often including reference to specific legislation it will introduce if its leaders form the government after the election. The link between the electorate and MPs' powers to enact legislation may, therefore, be explained in terms of the mandate which the majority of the House of Commons derives from a party's electoral victory. Some writers have suggested that notions of a mandate establish constitutional conventions. Jennings wrote:

> It is now recognised that fundamental changes of policy must not be effected unless they have been in issue at a general election. This appears as a limitation upon the Government. But since the Government ... controls Parliament, it is a limitation upon Parliament itself [*The Law and the Constitution*, 5th edn, 1958, London: London UP, p 176].

More specific is the so called Salisbury convention, under which peers do not reject government Bills on their second reading in the House of Lords if the Bill is intended to put into effect a manifesto commitment of the governing party.

There are, however, a number of objections to the notion of a mandate. One is that the current electoral system fails to translate the electoral support gained by each party throughout the country into a proportionate share of seats for the party forming the government in the House of Commons (see below, 6.4). Research has also shown that voters rarely either know about, or, if they do, agree with, many of the policies outlined in the manifesto of the party whose candidate they support. Moreover, legislation and policy may have to be made in response to problems not foreseen, or addressed, in party

manifestos. Some writers also object that mandate theories are apt to blur the important distinction between MPs and the government. As Adam Tompkins explains:

> Contrary to Tony Blair's erroneous view, it was not his government, but a new Parliament, which was elected on 1 May [1997]. It is because and only because Parliament allows it and wants it (for the time being) that he and his ministers hold office. That is why they are constitutionally responsible to Parliament. ... It is easy to overlook this. The power of the party machines and the scourge of the whips have successfully managed to blur the formal distinction between Parliament and government [*The Constitution After Scott: Government Unwrapped*, 1998, Oxford: OUP, p 269].

To summarise, it may be said that the constitutional justification for MPs' powers to legislate (including those MPs who go on to form a government) arises simply from the fact that they were elected, or, because the MPs exercising most power – those in government and their supporters – were elected on a the basis of commitments made in a manifesto.

6.4 That MPs are fairly elected

The principle of formal legal equality is central to liberal democracy. In the context of the parliamentary system, this means that all citizens of the UK have one vote (and one vote only) in elections. As we saw in Chapter 3, by 1928, the struggle for the universal franchise was won when first manual workers, then women, were given the legal right to vote. The principle of one person, one vote was not established, however, until the 1940s, when the additional votes of people who occupied business premises and university graduates were abolished. Many people, however, still do not regard the present voting arrangements for the UK Parliament, contained in the Representation of the People Act 1983, as fair. Three main complaints are levelled against the current electoral system: that the first past the post system leads to unfair representation of some political parties in the Commons; that the second chamber of Parliament, the Lords, is wholly unelected; and that the composition of MPs, in terms of their sex and ethnicity, does not reflect that of the general population of the UK.

6.4.1 First past the post elections

MPs are elected to the UK Parliament by a first past the post (or plurality) system, in which voters in each constituency may vote for only one candidate, and the candidate gaining the most votes (which will not necessarily be a majority of votes) is elected. Arguably, such a system fails to give each person a vote of equal value. The plurality system is also used for elections to local authorities (see above, 2.9.1), but elections to other representative institutions

are conducted using other schemes. For the Northern Ireland Assembly and for Northern Ireland representatives in the European Parliament, it is a single transferable vote system (see above, 2.6.1). The Scottish Parliament and the National Assembly for Wales are elected using additional member systems (see above, 2.5.1, 2.7). Members of the European Parliament for England, Scotland and Wales are elected under a party list system (see below, 7.5.2). Many campaigners prefer these other systems, claiming they are fairer than the plurality system. Richard Rose puts the problem succinctly, 'The right to vote is not enough; how votes are counted and converted into seats in Parliament is considered equally important' ('Electoral reform: what are the consequences?', in Vibert, F (ed), *Britain's Constitutional Future*, 1991, London: IEA, p 122). The importance arises because the outcome of a general election determines not merely which MP represents a particular constituency in Parliament, but also which political party goes on to form the government.

The first past the post system often results in a disproportion between the number of votes the candidates of a political party receive throughout the UK and the number of parliamentary seats which that party wins. For example, in the 1997 general election, Labour gained a landslide majority with two-thirds of the seats in the Commons, though throughout the UK as a whole, only 44% of people who voted supported Labour candidates. The system can also mean that the party gaining most votes throughout the UK actually loses a general election: in 1951, Labour gained more votes, but fewer seats, than the Conservatives.

In 1997, the government set up an independent commission on the voting system, under the chairmanship of Lord Jenkins of Hillhead, to consider alternatives to the first past the post system. The commission reported in October 1998, recommending what has been described by others as an 'ingenious' 'alternative vote top up' system (*Report of the Independent Commission on the Voting System*, Cm 4090-I, 1998, London: HMSO). Electors would, in effect, each have two votes. The first would be used to choose a constituency MP. However, instead of simply putting one cross next to the candidate of their choice (as at present), electors would rank candidates in order of preference. A candidate getting more than half the first choices would be elected automatically. If no candidate is in this position, then the candidate with the lowest votes would be eliminated, and the other preferences of that candidate's supporters would be reallocated to the remaining candidates. If this did not produce a winner, the process would be repeated until there was a candidate with more than half the preferences. An elector would use his or her second vote to choose a political party (or a particular candidate) from a different list of 'top up candidates'. About 80% of MPs would come from constituency preferences and about 20% from the top up list. The point of choosing 'top up' MPs is that it is a method of correcting the disproportionality in the number of constituency seats political parties win compared with the level of support they have throughout the country. It

remains to be seen whether the government will accept the recommendations of the Jenkins commission.

Despite the inconsistencies which sometimes emerge, there is, however, a strong case to be made for retaining the first past the post system. First, most systems of proportional representation would break the tradition that one MP represents one constituency, and this would diminish the authority of MPs to speak out and assist their constituents. Secondly, some forms of proportional representation which use 'party lists' would give too much power to bureaucrats in the headquarters of the main parties to determine who gets on to the lists and so into Parliament. Thirdly, proportional representation is more likely to result in 'hung' Parliaments, in which no single party is able to form a government, and so has to form a coalition, depending on the support of MPs in other parties. Small parties would become disproportionately powerful in the backroom negotiations and deals would inevitably follow. Fourthly, it must be asked whether, given the raft of other far reaching constitutional reforms being put in place – devolution, the Human Rights Act 1988, reform of the Lords, newly empowered local authorities – there is still any pressing need for proportional representation. The argument that used once to be made, that the UK constitution needed proportional representation because there are inadequate checks and balances against an overbearing central government, is far less convincing. The first past the post system has a great virtue: it produces effective and stable single party government which is held to account at the following election for its conduct and the extent to which it has met its manifesto commitments at the previous election.

6.4.2 The unelected upper chamber

A second stark dent in the principle of fair elections is the fact that only one of the two chambers of Parliament is elected. There are 659 elected MPs in the Commons; in the Lords, as at December 1997, there were 1,274 non-elected parliamentarians composed as follows:

Hereditary peers:	750
Hereditary peers of first creation:	9
Life peers:	465
Law Lords:	26
Bishops:	26

Many of the hereditary peers are heads of aristocratic landowning families whose interests have been represented in Parliament for centuries; several have inherited their right to sit and vote in the Lords from a forebear granted a peerage more recently (for instance, Mrs Thatcher recommended to the Queen that former Prime Minister Harold Macmillan be granted an hereditary peerage and his grandson is now a member of the upper house). Since the Life Peerages Act 1957, the Prime Minister has had the power to recommend to the

Queen that a person be made a member of the House of Lords for that person's lifetime.

Although many commentators highlight the effectiveness of much of the work of the Lords, especially in scrutinising legislation, there is long standing and widespread consensus that its composition needs to be altered (see above, 3.9.1). In 1968, the Labour government unsuccessfully attempted reform. The present Labour government plans to start by removing the rights of hereditary peers to sit and vote (*Modernising Parliament: Reforming the House of Lords*, Cm 4183, 1999, London: HMSO). In February 1999, the government set up a royal commission with terms of reference to consider and make recommendations about the role and functions of a second chamber and to suggest methods of composition for the new chamber. The royal commission is expected to report in December 1999. A wholly nominated chamber would not be consistent with the principle of fair elections. If the new chamber is elected, it would have to be according to some method different from that used for the House of Commons. There is, however, a logically prior question: what constitutional function should the upper House serve? If it is mainly to expose legislation and government action to better scrutiny than the Commons is able to carry out, then the answer surely is to improve the effectiveness of the Commons or to give power to some external body, such as the courts, to ensure that legislation passed by the Commons does not infringe basic rights (which is now the case under the Human Rights Act 1998). A bi-cameral Parliament is not essential.

6.4.3 The composition of MPs and peers

A third concern, linked to the principle of fair voting, is that the current composition of the Commons fails to reflect the social make-up of the country as a whole. In former years, the campaigns were for working class people to have a vote and have their representatives sit in Parliament. Social class has ceased to be a defining issue in politics, and instead, the concerns are about imbalances in the ethnicity of MPs and their sex. After the 1997 general election, there were still only 120 women MPs. The Labour Party increased the number of its female prospective parliamentary candidates by requiring some constituency Labour parties to have all-women short lists when selecting their candidate, but this scheme had to be abandoned, as it was held to be contrary to the Sex Discrimination Act 1975. A characteristically radical proposal has come from Tony Benn MP, who suggests that each constituency should return two MPs, one male, one female:

> The point about gender is that while men and women may be black, white, Asian, Christian, Muslim, atheist and sometimes a combination of these, they are either men or women [*Common Sense*, 1993, London: Hutchinson, p 107].

6.5 That Parliament enacts legislation

In a liberal democracy, government regulation ought to take place with the consent of the people and in accordance with the law. Parliament is a central mechanism for achieving this overarching goal, as Dicey's work explained to generations of readers (see above, 6.1, Chapter 5). Before examining the general principle that Parliament enacts legislation, it is necessary to understand how Parliament does this in practical terms.

6.5.1 Primary legislation

Most primary legislation is initiated by government, though there are some opportunities for backbench MPs and peers to introduce draft legislation (see below). Bills (draft Acts of Parliament) may be introduced either into the House of Commons or the Lords, and must pass through a series of stages prescribed by parliamentary Standing Orders:

(a) First Reading. This is a formality at which the title of the Bill is read out and a date set for its Second Reading.

(b) Second Reading. Here, the general policy embodied in the Bill is debated on the floor of the House.

(c) Committee stage. During this part of the legislative process, there is line by line scrutiny of the text of the Bill. In the Commons, this normally takes place in a standing committee of about 40 MPs. They sit in a mini debating chamber, opposing political parties facing each other. They are thus very different in nature from the generally consensual, cross-party select committees (see above, 6.8). The committee stage of some particularly important Bills, especially those dealing with constitutional issues, takes place in the Chamber of the Commons so that all MPs have an opportunity to contribute to the debate. Amendments to the text of the Bill are proposed by opposition MPs and also by the government itself (for example, to deal with matters overlooked during the drafting of the Bill, or to respond to criticisms). Amendments suggested by opposition MPs are only rarely accepted. When a Bill is in the Lords, the Committee stage takes place in the Chamber.

(d) Report stage. This is when the Bill, as amended in committee, returns to the floor of the Chamber. This provides an opportunity for the government to try to change any unacceptable amendments which may have been agreed to in committee.

(e) Third Reading. This is normally a short debate, with only very limited scope for MPs to table further amendments.

Once a Bill has passed through this procedure in one House, it is then introduced into the other. Thus, if the Bill was first considered by the Commons, it will then go to the Lords where it is considered further; and vice versa. Throughout the legislative process, the government is able to exercise a

great deal of control over the length of debate. Its supporters in the Commons can normally be relied upon to vote for a guillotine motion which ends debate on a Bill after a certain number of hours.

While in the Lords, each Bill is subject to scrutiny by a select committee to see whether it proposes to enact any undesirable delegated powers – in other words, to give powers to civil servants (acting in the name of a minister or some other body) to make rules with the force of law, usually in the form of statutory instruments. The potential for misuse of delegated rule making powers has, for decades, been of concern to constitutional lawyers, as it is a means by which the executive may legislate with little or no effective parliamentary scrutiny of their proposals (see below, 6.5.2). The increasing use of framework Bills presents problems for Parliament. This is where the Bill seeks to confer broad powers on a minister to make by statutory instrument, at a later date, more detailed rules dealing with the subject matter of the Bill; MPs will often have little idea about the content of that secondary legislation.

In almost all cases, a majority in both Houses of Parliament agree as to the final form of the Bill, and it may then go on to receive the royal assent, which is a formality (see above, 2.11). The Act of Parliament may either state that it comes into force immediately, or on a specified day, or on such day as a minister may determine.

In very rare cases, after scrutiny of a Bill, both Houses of Parliament, the Commons and the Lords, may fail to agree as to its final form. Under the provisions of the Parliament Act 1911 (as amended in 1949), the Commons – which effectively means the government with a majority of MPs – may insist that the Bill go on to receive royal assent after 13 months, even in the absence of consent by the upper house. In recent years, the Parliament Act has only been invoked once (for the War Crimes Act 1991).

In 1992, the Hansard Commission, a pressure group, published a report, *Making the Law*, London: Hansard Society, which contained scathing criticism of the present effectiveness of parliamentary scrutiny of legislation. It called for better consultations between government and particularly parties affected by legislation before Bills are introduced into Parliament. Parliament should, it recommended, play a greater role in the period before a Bill is drafted, for example through cross-party select committees which would take evidence and issue reports on the subject of the proposed legislation. Once Bills are introduced into Parliament, the scrutiny process is far too rushed, the Commission found, and MPs often lack the necessary expertise to understand the likely impact of proposed legislation. Many of these issues are now under consideration by MPs in the select committee on the Modernisation of House of Commons, set up in 1997.

Parliamentary procedure also permits backbench MPs to introduce Bills, though few of these ever complete their passage through both Houses of Parliament. Some important pieces of social legislation, such as the Sexual Offences Act 1967 (decriminalising homosexuality) and the Abortion Act 1967,

have been initiated by backbench MPs or peers. When the government is hostile to a particular private members' Bill, it will usually be able to wreck it by its ability to control the legislative timetable, by its supporters tabling numerous amendments at report stage, or by getting a sympathetic MP to filibuster (talking at great length to prevent a Bill making progress). Even if a Private Members' Bill fails to reach the statute book, introducing one may be an effective way of generating publicity for a cause.

6.5.2 Subordinate legislation

As well as enacting Acts of Parliament, peers and MPs are involved in consenting to subordinate (or 'secondary' or 'delegated') legislation drafted by government departments under rule making powers conferred on a minister by an Act of Parliament (see above, 2.4.3). Most secondary legislation is in the form of statutory instruments. One main reason for the use of statutory instruments is to spare Parliament from having to consider in detail highly technical and relatively uncontentious legal regulations. Some statutory instruments, however, deal with matters of considerable practical or constitutional importance. There are, however, a handful of Acts of Parliament which give ministers powers to make statutory instruments which may be of great significance. One such is the Human Rights Act 1998, under which ministers are able to use statutory instruments to amend or repeal primary legislation declared by the court to be inconsistent with the European Convention on Human Rights (see below, 19.10.3). The European Communities Act 1972 also provides ministers with broad powers to make legislation necessary to bring national law into compliance with directives agreed by the Community institutions (see below, 7.6.2).

Statutory instruments are considered by a joint select committee of backbench MPs and peers which has power to draw to the attention of Parliament any statutory instrument which falls foul of one of 11 criteria (such as, that its drafting appears to be defective, or that the minister is seeking to make some unusual or unexpected use of powers conferred by the statute under which the statutory instrument is made). This Joint Committee on Statutory Instruments has no power to question the policy or merits of statutory instruments. It finds only a very small number of the 3,000 or so statutory instruments made each year to be of concern, and on these it reports to both Houses of Parliament. After scrutiny by the committee, an statutory instrument is subject to one of two main types of procedure (which one is specified in the particular enabling Act of Parliament). Most are subject to the negative resolution procedure, under which an statutory instrument becomes law 40 days after being laid before Parliament unless an MP challenges it and calls for a debate. Under the other, affirmative resolution procedure, there is a short debate of no more than 90 minutes. MPs have no power to make amendments to the statutory instrument, only to accept or reject it as a whole. (See, further, Ganz, G, 'Delegated legislation: a necessary evil or a

constitutional outrage?', in Leyland, P and Woods, T (eds), *Administrative Law Facing the Future*, 1997, London: Blackstone).

6.6 Once elected, MPs should be able to speak out on any issue

Once MPs are elected to Parliament, it is important that they are able to speak out on any issue without fear that they will be sued or punished by people inside or outside Parliament. This principle was recognised in the Bill of Rights 1688, Art 9 of which provides 'That the freedom of speech, and the debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside of Parliament'. One effect of this provision is to give MPs absolute immunity from being sued for defamation for statements made during parliamentary business. The Defamation Act 1996 amended the law to allow MPs who are themselves sued for defamation to use proceedings of Parliament – for example, extracts from Hansard – as part of their defence (see, further, Sharland, A and Loveland, I, 'The Defamation Act 1996 and political libels' [1997] PL 113).

Set against this formal protection of MPs' free speech are the pressures which may lead MPs to be less than forthright in challenging government policy in Parliament. Critics argue that the leaders of political parties (especially the party which forms the government) have far too much power over other MPs in their party. When legislation is being considered in the Commons, MPs are instructed by the whips of their party (MPs appointed by the party leader to maintain discipline) exactly which way to vote; failure to follow instructions in an important vote may lead to suspension from a party. Most MPs, however, vote and otherwise support their party because they agree with the policies pursued by the leadership. The suggestion that MPs should be more independent from their party leadership overlooks the fact that most electors vote for a candidate because he or she represents one or other of the main political parties, not because of the candidate's personal views (see above, 6.2).

In principle, the whip system is not meant to operate during select committee investigations – in other words, when MPs are carrying out watchdog functions, rather than acting as legislators, they have independence from their own political party. From time to time, however, it has emerged that whips have sought to influence the course of investigations. When the select committee on employment investigated the banning of trade union membership for GCHQ employees in 1984, allegations were made that some members of the committee were nobbled (see Le Sueur, AP and Sunkin, M, *Public Law*, 1997, London: Longman, p 380). Another instance was revealed in December 1996, when David Willetts MP, the then Paymaster General (a junior ministerial post in the Treasury) was forced to resign from office after it

came to light that two years previously, when he was a government whip, he had attempted to influence the chairman of a select committee about how an inquiry should be conducted. It is not only select committees that government seeks to influence: in March 1998, it revealed that Nigel Griffiths MP, a junior minister in the Department of Trade and Industry, drafted a question for another Labour MP to put to him. As well as seeking to control scrutiny by backbenchers of their own party, the government effectively controls the parliamentary timetable with the result, for example, that time is rarely made available for the reports of select committees to be debated in the chamber of the Commons.

6.7 That MPs are not corrupt or dishonest

During the early 1990s, the news media became preoccupied with allegations of sleaze – the sexual, financial or political improprieties of MPs (including ministers). So far as sexual matters are concerned, if nothing illegal has taken place, this ought normally to be an entirely private matter with no bearing on a person's fitness to hold public office (though, for a different view, see Brazier, R, 'It *is* a constitutional issue: fitness for ministerial office in the 1990s' [1994] PL 431).

The more important, if less titillating, area of concern were allegations that MPs or ministers improperly benefited financially from their public office, or had misled Parliament in some way. Two main series of events triggered calls for something to be done. In a constitutional system so heavily influenced by conventions, the study of such episodes is capable of revealing important norms which ought to regulate behaviour.

In the first, a small number of MPs were revealed to have been paid for asking questions of ministers in Parliament on behalf of businesses which paid them to do so (cash for questions), and that, during the legislative process, some MPs had tabled amendments to Bills, on behalf of clients, in the name of other MPs without asking their consent. Partly in response to these events, in 1994, the government established the permanent independent Committee on Standards in Public Life (see above, 6.1). Its first report, in 1995, dealt with MPs, ministers and civil servants. It recommended that a new officer of the House of Commons be established – the Parliamentary Commissioner for Standards; Sir Gordon Downey, a former senior civil servant, was appointed to this post; his successor was Ms Elizabeth Filkin. A code of conduct for MPs was proposed. In the same year a new, cross-party select committee of MPs was also established in the Commons – the Committee on Standards and Privileges. In its first inquiry, one MP, the Conservative Neil Hamilton, came in for particular censure, though he strongly maintained he had not acted with impropriety and claimed that the committee's procedures were unfair.

The second scandal concerned the actions of ministers during the Arms-to-Iraq affair, in which directors of a company called Matrix Churchill Ltd were prosecuted for selling defence-related goods to Iraq in breach of export restrictions contained in delegated legislation. It later emerged that ministers had secretly agreed to alter government policy to permit these exports, while at the same time defending the restrictions in Parliament. At the trial, however, government ministers issued public interest immunity certificates, seeking to prevent the defendants having access to government documents which would have aided their defence. The trial collapsed, and the prosecution was withdrawn in a blaze of publicity. The Prime Minister, John Major, set up a judicial inquiry into the events surrounding the case, chaired by Sir Richard Scott. In 1996, a 1,800 page report was published, finding, among other things, that a minister (William Waldegrave MP) had given answers to Parliament which were neither ... adequate [nor] accurate and answers by other ministers to MPs' questions had deliberately failed to inform Parliament of the current state of government policy on non-lethal arms sales to Iraq (para D4.42). (On arms to Iraq, see, further, Tomkins, A, *The Constitution after Scott*, 1998, Oxford: OUP.)

The practical outcome of these episodes has been significant. New rules governing the conduct of ministers have been published. Parliamentary rules have been amended, but have stopped short of banning MPs from receiving any paid employment from outside bodies. The new rules do prevent MPs being sponsored. In the past, many MPs received funds from organisations (such as trade unions and employers' organisations and pressure groups) which they used to pay for things such as research and secretarial assistance; in return, the MPs were expected to act as spokesmen for their group in the Commons, though such sponsorship always had to be declared when speaking in parliamentary debates. In a further move, amid concern that there was a lack of openness and potential for improper favours being given by government, the Committee on Standards in Public Life conducted an inquiry in 1998 into the funding of political parties. This was partly prompted by the revelation that the Labour Party had received a donation of £1 million from Formula One motor racing, which is heavily dependent on advertising from cigarette companies, and that the government had agreed to exempt this sport from a general ban on tobacco sponsorship (see Fifth Report, *The Funding of Political Parties in the UK*, Cm 4057, 1998, London: HMSO).

Some commentators have questioned the preoccupation with the alleged improprieties of backbench MPs and ministers. For James Heartfield, the debate about sleaze is much more than a symptom of popular disaffection. It is also a self-righting mechanism, employed by the elites to win back the voters' trust in the State. Within the preoccupation with corruption there are two processes intertwined, each pushed forward any the other. 'Sleaze' is about discrediting and delegitimating the old political order – and, at the same

time, legitimising and winning authority for a new one ('The corruption of politics and the politics of corruption' (1997) 103 LM 14, p 17).

6.8 That MPs and peers call the government to account

It is one of the basic constitutional functions of MPs and peers that they call ministers to account for their policies and actions. Our consent to be governed is not limited to voting for MPs in elections, but is continued in more specific ways by our elected representatives' actions in the Commons. MPs carry out this task in various ways:

(a) motions on government policy are debated on the floor of the chambers in both Houses. Opposition parties are given some opportunities to choose the subject matters of debate;

(b) written and oral questions are asked of ministers by MPs and peers. The Prime Minister answers oral questions on general government policy once a week for 30 minutes in the Commons. Other ministers take oral questions according to a departmental rota. The answers to written questions are published in *Hansard*;

(c) select committees, which typically comprise 15 backbench MPs or peers, conduct inquiries by taking oral and written evidence from ministers, pressure groups and others. Senior civil servants may also be called to give evidence, but do so on behalf and under directions of their ministers rather than in their own rights. Members are drawn from across the political parties and they sit around a horseshoe-shaped table. Reports containing findings and recommendations are published. In the Commons, select committees scrutinise the work of the main government departments. In the Lords, the select committees on the European Communities and on Science and Technology are especially prominent.

Commentators identify several failings in these arrangements which prevent the principle that ministers should be made accountable to Parliament being given full effect. The first and fundamental problem is said to be the erosion in the constitutional convention of ministerial responsibility. This broad concept includes two main features (see, generally, Woodhouse, D, 'Ministerial responsibility: something old, something new' [1997] PL 262). One is a duty to explain – that ministers give accurate and truthful information to Parliament, refusing to disclose information only when disclosure would not be in the public interest (see the First Report of the Public Service Committee, *Ministerial Accountability and Responsibility* (1996–97) HC 234, Annex 1). The other aspect of ministerial responsibility is that ministers and their departments are expected to take amendatory action in the light of criticisms made in Parliament and, in the final resort, that a minister resign from office and return to being a backbench MP. Very few ministers have resigned in recent years in consequence of criticism made of their department's serious

mistakes, and it may, therefore, be doubted whether resignation continues to be a constitutional convention.

Critics suggest that neither the Commons nor the Lords have yet adapted themselves to the new, more diffuse forms of government decision making institutions (see below, 8.2.1) which have been created over the past decade (see Woodhouse, D, *In Pursuit of Good Administration: Ministers, Civil Servants and Judge*s, 1997, Oxford: Clarendon). Peter Riddell writes that:

> My worry ... is that Parliament has failed to cope with the growth of alternative centres of power. The formation of Next Steps executive agencies, the creation of regulators for the privatised utilities and the devolution of key decisions over, for example, the setting of interest rates to the Bank of England all have far-reaching implications for accountability. The official line that these bodies are still accountable, via ministers, to Parliament is an unconvincing and inadequate description of the real position [*Parliament under Pressure,* 1998, London: Gollancz, p 32].

Perhaps even more significant than changes to decision making structures within the UK is the fact that more and more governmental decisions are made inside European Union institutions, and the UK Parliament has little or no opportunity to call anyone to account for these (see below, Chapter 7). In short, the traditional focus on ministerial responsibility is outmoded as less and less policy making and practical policy implementation is carried out by ministers themselves or by civil servants in their departments.

6.9 Parliament's diminishing importance

Parliament's status as a forum for great political debates has waned in recent years (see above, 6.1), the result of the decline of adversarial politics. As *The Economist* notes, the chamber 'was suited for great set-piece debates, in eras when politics took place across gaping class and ideological divides. Modern politics and government do not on the whole consist of such issues' ((1998) *The Economist*, 10 January, p 32). The process of European integration (see below, Chapter 7) and Labour's 'Third Way' constitutional reform programme (see above, Chapters 2 and 4) result in political decision making and scrutiny moving to a range of other institutions, including the devolved assemblies and the courts. Parliament's pre-eminence as a legislative body has also waned. Parliament has no choice but to legislate to give effect to directives made by the institutions of the European Community (see below, 7.6.2). Inadequate opportunities for scrutiny of proposed legislation means that the principle of consent to legislation by elected representatives is often illusory. Peter Riddell, the political journalist, captures the prevailing mood when he writes:

> I believe that Parliament should be at the centre of our political system but in a stable and creative relationship with other political institutions with their own legitimacy and authority. MPs should not always be whinging about threats to some absolute notion of sovereignty [p 20].

In other words, while the UK Parliament is important, it is not the whole story; and other bodies – not all of them elected – are now to form a new constitutional package.

While some welcome this new diffusion and plurality of State power, others worry. William Hague MP praises the Westminster system that is fast disappearing:

> Of all the features of our constitution today, it is this strong democratic accountability which is the most important. Practical political power in our country resides primarily with the national government, not with individual MPs or unelected judges or local or regional parliaments. That power is derived from the national government commanding a working majority in the House of Commons. That working majority is bestowed on political parties by the British people at the ballot box. There is a clear line of accountability. We know who to praise when things go well, and, more importantly, we know who to blame when they do not. And when things do not go well, our voting system allows us to do something about it and kick the Government out ['Change and tradition: thinking creatively about the constitution', lecture at the Centre for Policy Studies, 24 February 1998].

THE UK PARLIAMENT

It is now questionable whether the UK Parliament has a central place in the constitutional system. Developments have transferred practical powers from the UK Parliament to other institutions – the institutions of the European Union, the Scottish Parliament, the Northern Ireland Assembly, the National Assembly for Wales and also, to an extent, to judges.

Parliaments ought to be an important feature in liberal democracies. In the UK, it provides a body of people from whom a government is formed, and the remaining MPs act as a watchdog over government. Elected assemblies ought also to be the main legislative bodies in a constitution. Six principles should influence the practical arrangements for choosing MPs and guide their practices:

(a) that MPs are representative. There are different constitutional justifications for MPs' rights to legislate. It may be said that their powers arise simply by the fact that they were elected – and that, once elected, MPs ought to exercise their judgment on issues debated in Parliament in according to their own personal views of what is in the nation's best interest. Alternatively, the notion of mandate suggests that MPs representing a political party should be bound by the manifesto promises made to electors at the time of the election;

(b) that MPs are fairly elected to Parliament. Many people believe that the first past the post electoral system is unfair. In 1998, the Jenkins commission on the voting system recommended the adoption of an 'alternative vote top up' scheme. Parliament's upper chamber is unelected, containing people who have inherited their right to sit and vote or people appointed by the Prime Minister. A royal commission is due to report in December 1999 with recommendations for reform of the House of Lords;

(c) that MPs have power to enact legislation. Procedures exist for MPs and peers to debate and vote on Bills before they become Acts of Parliament. In rare cases, Acts of Parliament have been made despite the fact that the House of Lords has not given its consent. Critics question the effectiveness of parliamentary scrutiny of proposed legislation, particularly of subordinate legislation (rules made by ministers);

(d) that, once elected, MPs are free to speak out on any issue. They should be able to criticise and reveal information without fear of being sued or punished. This is recognised by Art 9 of the Bill of Rights 1689. The political parties enforce party discipline and require MPs to vote as instructed. One area where party discipline is less strong is in the work of

select committee inquiring into the running of government departments; here MPs often work co-operatively with opponents in other parties;

(e) that MPs do not act corruptly or otherwise dishonestly. During the 1990s, a small number of MPs were revealed to be accepting money from businesses to ask questions of ministers in Parliament and to table amendments to Bills. The scandal led in 1995 to the creation of a permanent Committee on Standards in Public Life and the post of Parliamentary Commissioner for Standards. A second scandal occurred when it became known that ministers had not been open with Parliament about policy on the export of defence-related goods to Iraq, and that several business people had been unfairly prosecuted. An inquiry by Sir Richard Scott led to new rules governing the conduct of ministers and stopped the practice of MPs being 'sponsored' by bodies such as business associations and trade unions;

(f) that MPs are able to call ministers to account for their actions. Procedures exist for MPs and peers to question the actions and policies of the government – through formal written and oral questions, debates and select committee inquiries. Commentators point out that these methods are not always well designed for scrutinising decision making by executive agencies and by the institutions of the European Union.