



THE 2016 ANNUAL LORD RENTON LECTURE

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by

The Rt Hon. the Lord Hope of Craighead KT

A View from the Crossbenches

It is an honour for me to have been invited once again to deliver a lecture to the Statute Law Society. I can look back to the early years when the late Lord Renton laid down the foundations for the Society, and to the work of the late Lord Rodger who took up the reins when Lord Renton had to pass on the work to someone else. I recall how much time and dedication Alan Rodger gave to the task which he had taken on. It was a task that was dear to his heart, which is why he took his responsibilities so seriously. He had learned much about how statutes were put together from his time as Solicitor General for Scotland and then as Lord Advocate, when he was the minister having formal responsibility for the draftsmen who prepared Scottish legislation in Whitehall¹. One can tell from his judgments how interested he was in the subject, and how many of its inner secrets he had mastered. He convened what I took to be the Society's Board meetings in the Law Lords' library, just round the corner on the Law Lords' Corridor on the West front of the Palace of Westminster from where I had my room. These meetings seemed to me to be unusually frequent, and they seemed to me to go on for a very long time, but he did not seem to be in the least troubled by that. When he invited me to give a lecture to the Society in December 2006 it was an invitation that I could not refuse². Nor, when Philip Sales approached me last year after my retirement from the Supreme Court and had I decided that my time for giving lectures was over, could I refuse his invitation either. I recall how highly Lord Rodger thought of him, and I know how delighted he would have been by the success he is making of his life on the Bench. So here I am and, given my background of memories, I am glad to be here too.

Time has, of course, marched on since those days when Alan Rodger and I worked on the Law Lords' Corridor. We were told to leave those premises in the summer of 2003 as part of the constitutional reforms that were sprung on us, without warning or consultation, by Tony Blair³. Six years later, after much searching for new premises and much planning as to how our new Supreme Court was to operate as we had been left to work this out for ourselves, we moved to the Middlesex Guildhall and started our work as Justices of that court. The separation in terms of distance between it and the Palace of Westminster is not very great –

¹ See Lord Rodger, "The Form and Language of Legislation", The Holdsworth Club of the University of Birmingham 1998.

² Lord Hope, "Voices from the Past - The Law Lords' Contribution to the Legislative Process", 7 December 2006 (2007) 123 LQR 547.

³ See Constitutional Reform Act 2005, Part II, for the provisions about the UK Supreme Court.

only a few hundred years from the Peers' Entrance to the House of Lords. Given favourable traffic conditions and not too many tourists blocking the way, one can move from one place to the other within five minutes. But the mental and institutional separation is profound. Those of us who were Law Lords were allowed to keep our passes, although we were disqualified from sitting and speaking in the House and its committees while we remained as Justices⁴. But we are a diminishing band. Those who were former Law Lords such as Lord Brown and Lord Walker, and in due course I myself too, have retired and new Justices, who were not made members of the House on their appointment, have taken our place. Today fewer than half of the current team of eleven Justices are former Law Lords⁵.

Furthermore, our daily contact with the progress of business and with other members of the House was lost. We no longer had the monitors in our rooms which told us what was going on in the Chamber and allowed us to view and listen to the debates both there and in the other place. In theory we could still follow proceedings by going over to the House of Lords, sitting below the Bar or on the steps of the throne and collecting copies of Bills and amendments to Bills from the Printed Paper Office. That was so easy when our rooms were just upstairs and the Printed Paper Office was on our route to the room on the Committee Corridor where we sat to hear appeals. But it was no longer worth the effort in our new location, even if we could find time to make what seemed now to be a pointless journey.

The question whether this separation from the legislative process has affected the jurisprudence of the Supreme Court is not an easy one to answer. It is one that one cannot help wondering about as we await the decision of the eleven Justices on the forthcoming appeal from the decision of the High Court in *Gina Miller and others v Secretary of State for Exiting the European Union*⁶. But it is, of course, not a new question. It has been in my mind, at least, ever since the move took place. For one thing, the court no longer has the benefit of jurists such as Lord Rodger, who spent a lot of time in the Chamber as a minister on the government front bench while he was Lord Advocate and really did understand how statute law was made. It is most unlikely that we will see someone of his experience in the Supreme Court again. His judgment on the issue of Parliamentary privilege in the case of Parliamentarians who were accused of making fraudulent expense claims is a masterpiece that no-one else who was sitting with him could match⁷. But it would not be surprising if there was less sensitivity to the Parliamentary process among the new Justices than there was among the former Law Lords. When I joined the Lords of Appeal in 1996 it was still the practice for serving Law Lords to take part in the legislative process by speaking, proposing amendments and occasionally voting too. They were very familiar with the way the legislative business of Parliament was handled. That has changed. All but one of the former Law Lords who are still members of the Supreme Court⁸ took no interest what was going on in the Chamber while they were there, and all but one have yet to make their maiden speech. Such added value to the Law Lords' way of thinking that came from their familiarity with how things were done has now disappeared.

A question on the other side of the coin, of course, is whether the absence from the Chamber of serving Law Lords has affected the way the House of Lords does its business. Until the last decade of their presence there, as I have just indicated, the serving Law Lords were

⁴ Constitutional Reform Act 2005, section 137(5).

⁵ Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr and Lord Clarke.

⁶ [2016] EWHC 2768 (admin).

⁷ See *R v Chaytor* [2010] UKSC 52, paras 94 and following.

⁸ The exception is Lord Mance.

frequently seen and heard in the Chamber during public business. They felt free to contribute their specialist knowledge to debates on legislation, so long as they avoided political controversy. I myself felt no inhibition about doing this when I joined them in 1996. Then in 2000 Lord Bingham of Cornhill was appointed as Senior Law Lord. His aversion to participating in business in the Chamber was as complete as that of Lord Steyn. This brought about a change of approach which had already become inevitable with the passing of the Human Rights Act 1998. We could no longer take the risk of a challenge under article 6 of the Convention on the ground that our independence as judges had been compromised. Even those of us who had taken part before felt that it was no longer right for us to do so. Changes in the timing of public business and stricter rules about taking part in it also worked against us. For this reason it can be said that the disqualification of the serving Law Lords upon their removal to the Supreme Court has made no difference in practice to the way proceedings in the House are being conducted now compared with the way they were being conducted immediately before they left.

The former Law Lords were however, and are, in the happy position that upon their retirement as Justices their disqualification no longer applies.⁹ That is what happened to me when I retired at the end of June 2013. I took the oath the following week and returned to sit in the Crossbenches where the Law Lords always sat. I found myself among a small group of former Law Lords, notably Lord Lloyd of Berwick and Lord Brown of Eaton-under-Heywood¹⁰, who were contributing regularly to debates on issues of law. I joined them as best I could in this activity. Two years later I was elected to be the Convenor of the Crossbench Group. This was a very considerable privilege, and I am the first former Law Lord to have held this position. That appointment brought about a fundamental change in the way I could contribute to the work of the House of Lords. I found myself faced with a range of duties and responsibilities which make it harder for me to take an active part in the legislative process or the work of the select committees. But it has brought me into much closer contact with the way things work in the House than was enjoyed by any of my predecessors. I do not think that until now anyone has devoted a lecture to what this involves. So it is the role of the Convenor and the view of the legislative process as seen from the Convenor's seat that I wish to talk about.

The role of the Convenor

What is the Convenor? What does he or she do? What does he or she convene? And is convening, whatever it is, all that they do?

Well, to understand the role of the Convenor in the House of Lords you have to know something about the history of the House and the layout of the Chamber. For much of its history the House was composed only of hereditary peers and a handful of bishops. Some of them had no wish to align themselves with a political party but wished nevertheless to contribute to the work that was done in the Chamber. To demonstrate that this was so they chose not to sit on the benches occupied by the government or the opposition parties. Separate benches were provided for them, which became known because of where they were placed as the crossbenches. In 1876 they were joined by judges who were appointed to sit in the House as members of the appellate committee, who became known as the Law Lords. By

⁹ Constitutional Reform Act 2005, section...

¹⁰ Lord Phillips of Worth Matravers also contributes on occasion, as does Lord Scott of Foscote who retired before the move to the Supreme Court.

virtue of their office they were necessarily independent of any political party, and they remained as independent members of the House after their retirement. So they did not sit on the political benches either. And the Lord Chief Justice, made a peer upon appointment, and the Master of the Rolls and the Lord President of the Court of Session when and if made peers too, kept themselves separate from the political benches too on their appointment to the House. Former Law Officers who had become Lords of Appeal in Ordinary such as Lord Simon of Glaisdale¹¹ and Lord Rodger, and peers who became judges like Lord Cameron of Lochbroom and McCluskey¹², became members of the Crossbench group on their appointment as Law Lords. Conversely, those peers who previously held the office of Lord Chancellor – there are only three of them still alive¹³, and it seems very unlikely indeed that there be will any more – sat with the party group to which they belonged when in office. As time went on the independent peers were seen to have formed a group of their own – a group of peers with no affiliation with any political party whatever, who were free to speak and vote as they thought fit without being directed to so by anybody. This is the group which is now recognised as the Crossbench group, of which I am the convenor

The layout of the Chamber will be reasonably familiar to most of you. But for completeness I should explain that the benches in the House are arranged in the form of a long-sided rectangle. The benches occupied by the political parties are on the opposite sides of the rectangle – on the long sides of that arrangement, that is. These are the spiritual and non-spiritual sides, as the east and west sides are known because the spiritual side is side on which the bishops sit. Between them, on one of the short sides of the rectangle (the south side), are the throne and the woosack, on which the Lord Chancellor used to sit and is now the seat of the Lord Speaker. In the middle is a table at which the clerks at the table sit. On the other short side (the north side), just inside the Bar, are three benches which lie across the space between the opposite sides of the political benches. These are the crossbenches. There are now many more members of the Crossbench group than there is room for there. So the group has been allocated four rows of benches in the section nearest to the Bar on the spiritual side of the Chamber. But the crossbenches are not exclusively for use by members of the Crossbench group. A number of peers such as Lord Sugar who are no longer aligned to any political party¹⁴ sit there too, seeking to distance themselves from the party to which they previously belonged. They include several peers who, unlike Lord Sugar, have made it clear that they would like to become members of the Crossbench group but have not yet been admitted to it as complete separation from their previous political affiliation must be demonstrated before that can happen. Peers are, in fact, at liberty to sit wherever they like, though the convention is for members of a political party to sit with the other members of that party's group. Those who have no such group tend therefore to go to the crossbenches, even although they are not, or are not yet, members of the Crossbench group.

As a result of changes introduced by the Life Peerages Act 1958, the House of Lords Act 1999 and the Constitutional Reform Act 2005 the composition of the House is now very different from that which existed for most of its history. The total number of peers who are entitled to sit today is 810, if one excludes those on leave of absence or members of the judiciary who are disqualified¹⁵. Of that number 182, or about 22 per cent, are

¹¹ A former Solicitor General for England and Wales.

¹² A former Solicitor General for Scotland.

¹³ Lord Mackay of Clashfern, Lord Irvine of Lairg and Lord Falconer of Thoroton.

¹⁴ Lord Sugar was previously a Labour Peer, having been appointed by Gordon Brown without any previous party-affiliation as Government Enterprise Champion.

¹⁵ This is the figure as at 28 November 2016. The absolute membership amounts in total to 845.

Crossbenchers. The number of those entitled to sit is substantially lower than it was before the 1999 Act removed the hereditaries when it was just over 1,200¹⁶, but the number of those who attend daily has greatly increased from about 250 in 1999 to just over 500 today¹⁷. Under the 1999 Act most of the hereditary peers have now gone, but 90 were allowed to remain to provide continuity and experience at a time of great change and that number of hereditary peers is still there. This because there is a process under that Act by which every vacancy which is created by the death or retirement of a hereditary peer is filled by electing another hereditary peer to take his place¹⁸.

With the exception of 15 hereditary peers¹⁹ who are elected by the whole House if there is a vacancy, the electorate on these occasions is confined to the number of hereditary peers who remain in the party group to which the previous hereditary belonged. The hereditary peers in this category are spread unevenly across the House. There are only two on the Labour benches and only three on the Liberal Democrat benches. In their case the electoral system looks rather absurd. The remainder are split between the Tory benches and the crossbenchers. The division between them varies from time to time, as there are occasional movements from one group to the other as the enthusiasm for a political allegiance waxes or wanes. The current split is 42 for the Tories and 28 for the Crossbench group. They make up about one fifth of the total number of Crossbenchers, and many of them play a significant part in the work of our group. So replacing vacancies when they occur by means of the election process, while frequently criticised, is important if the size of our group in comparison with the other groups is to be maintained. 14 Crossbenchers have entered the House by means of these elections since the system was set up, eight of them during the past two years. On average their attendance record in comparison with the life peers is very good. This is because the electoral process produces people with a substantial background of experience who really want to contribute to what the House does. A private members' bill²⁰ designed to end the election system had its second reading in September. But it did not get government support as it was thought that piecemeal membership reforms of this kind were undesirable. This bill seems unlikely to progress any further.

Appointments to the political benches are made by the Prime Minister under a prerogative power. The rapid growth in the size of the House is due mainly to the fact that there are no restrictions on the number of new peers she can create under that power. Her predecessor David Cameron made liberal use of it to increase the voting power of his party on the government benches. We have yet to see what use Teresa May will make of this power, but that route is not available in the case of those appointed to sit as Crossbenchers.

Peerages in their case come by two quite different routes. The first is under a convention which enables the Prime Minister to appoint to membership of the House a small number of people who have achieved distinction in public life, currently limited to 10 during the lifetime of a Parliament. They include cabinet secretaries, very senior members of the military and diplomatic services and former speakers of the House of Commons. They have no political

¹⁶ The absolute membership was just over 1300. The effect of the 1999 Act was to reduce the absolute membership to about 690.

¹⁷ The average daily attendance in the last full session, 2015-16, was 497.

¹⁸ There is only one hereditary peer who is a woman, the Countess of Mar, whose title is the Premier Earldom of Scotland.

¹⁹ Such as the Deputy Chairs of Committees, who sit on the Woolsack when the Lord Speaker is unable to be present.

²⁰ House of Lords Act 1999 (Amendment) Bill.

affiliation, and they always sit on the crossbenches when they join the House. Two new peers have joined the Crossbench group by this route this autumn, one a former Cabinet Secretary²¹, the other a former Head of the Diplomatic Service²². The second route is by a process of selection which is conducted by an independent House of Lords Appointments Commission. Its function is to recommend for appointment members of the public who are, in the view of the Commission, able to make an effective and significant contribution to the work of the House of Lords and have a record of significant achievement within their chosen way of life. 67 life peers have come in by this route since the Commission started its work in 2000. The Prime Minister has no part whatever to play in their selection, although it is on her recommendation that the nominations are passed on to Her Majesty and she does control the numbers who can come in by this route. Under the previous Prime Minister the quota was two a year. There is broad agreement across the House that the Crossbench peers should make up about 20 per cent of the House²³. It is not easy to maintain this balance when there is no limit on the number of peers who can be appointed to the political groups by the Prime Minister, and it is thought that an informal group led by Lord Cormack has been pressing for that privilege to be given up or at least curtailed. But it is not realistic to think that the Prime Minister will ever agree to that.

As for the Convenor, it was not until 1964 that the holder of such a position emerged. There was no need for anyone to fill that role when the House was dominated by the hereditary peers, most of whom supported the Conservative party. But time moves on, and the status and functions of the office holder have developed gradually over the years as the Crossbench group itself has developed too. To begin with there was no formal process of appointment. In 1964 Lord Strang was simply asked to act as what was termed the Co-ordinator. His successor, Lady Hylton-Foster, changed this title to that of Convenor. It was all rather informal at that stage. But things began to change with the appointment in 1995 of Lord Weatherill, a former Speaker of the House of Commons, just before I became a member of the House. The practice now is for the Convenors to be elected after a carefully regulated nomination process, for them to offer themselves for re-election after two years and for them then to stand down after four. I was elected in July 2015 and took up office in October of that year. The post is full-time, and it is unsalaried. It is the product, as so many other things are in the House, of practice and convention. It is not provided for in legislation or in the Standing Orders. But it is mentioned only very briefly in the Companion to the Standing Orders, which is the authoritative guide to procedure in the House. The current edition states, in a paragraph²⁴ which deals with the “usual channels” on which the smooth running of the House largely depends, that while the usual channels consist of the Leaders and Whips of the three main political parties, for certain purposes they include the Convenor of the Crossbench peers too. Broadly speaking, things that relate to the daily progress of business through the House are discussed between the party leaders and their whips. For that purpose they are the usual channels, and I am simply told what has been decided by Chief Whip with whom responsibility for the progress of business ultimately lies. But there are many other things that are the product of a close working relationship between all the groups, and for those purposes the Convenor is part of the usual channels too.

²¹ Lord Macpherson of Earls Court.

²² Lord Ricketts.

²³ As at 28 November 2016 they were the third largest group in the House, at 22 per cent. The fourth largest group at 13 per cent, were the Liberal Democrats.

²⁴ Paragraph 49.

The primary role of the Convenor is to act as a conduit of information in both directions, between his group and the leaders and chief whips of the three main political parties, and to provide guidance and support to members of the group as and when required. He meets each of the chief whips for about half an hour each week to discuss the arrangement of business and other matters before the House. The business of the House is, as I have said, settled without consulting him as the timing of business is essentially a political exercise, but he is consulted on issues where the Crossbenchers' views are sought or need to be represented such as the size and composition of select committees on which they sit and he is given early warning of issues that may go to a vote. He also meets regularly with other office holders, including the Lord Speaker and the Clerk of Parliaments, to discuss domestic matters. This enables him to feed back to them any issues which the Crossbench peers wish to raise or which he thinks ought to be brought to their attention. Much of what goes on in the House is arranged and settled in this way, so his attendance at these meetings is valued and it is important.

The Convenor also chairs a weekly meeting which all members of the Crossbench group are invited to attend. The group hears from guest speakers, who include members of the political parties responsible for legislation currently before the House and senior members of staff who can speak about matters involving the way the House is run. This gives the Crossbenchers the opportunity to question the speakers face to face, and for the government and the opposition to present their case to the group. The Convenor also informs the meeting about forthcoming business, as to when votes are expected and the issues they are expected to raise. In these and all other matters it is important that he is seen to be wholly impartial in all matters that are political. He does not seek to influence the group as a whole or to tell its individual members when or how to vote. To do that would be inconsistent with his impartiality. It would diminish his authority, which owes everything to that impartiality. But he can and does offer guidance to members of the group about how to conduct themselves in the Chamber. This can include guidance as to how to table amendments, and reminding members about the conventions of the House as to the way and the extent to which government business there can be challenged. He also has a role when an amendment in the name of a Crossbencher is put to the vote, to do what he can ensure that the two tellers that are required for the mover of the amendment's side are from the Crossbenches too, to avoid any suggestion that the mover was primarily influenced by a political party in putting the matter to a vote.

The Convenor has a seat on the front of the cross-benches just across the gangway from the government Chief Whip and the Leader of the House. This gives him an advantage during Question Time, which is the first item of business on every sitting day except on Fridays, and when statements are being made to the House on behalf of the government. This is because his role on these occasions is to ensure that the Crossbenchers have a proportionate opportunity to ask supplementary questions, and to assist a member who has relevant expertise to intervene if he or she wishes to do so. The Convenor can take part in debates, move amendments or vote in a personal capacity. But it is not easy for him to play much part in that aspect of the business of the House, as he has so many other things to do outside the Chamber. And he has to be careful not to undermine his independence by giving way to any political inclinations that he might have. But there are some occasions when he has to be there, such as when tributes are being paid by the party leaders to such as persons as retired Lords Speaker, retired party leaders and retired Clerks of the Parliament. There was also the occasion of Her Majesty's ninetieth birthday. On such occasions the Convenor speaks on the group's behalf. And there are ceremonial occasions both inside the Chamber and externally

at which he represents the group, such as when Parliament is being prorogued. When Parliament is prorogued he sits on a bench behind the Woolsack as a member of a Commission made up of the Lord Speaker and the leaders of the four groups within the House, all of whom are robed. The members of the Commission who are male wear cocked hats, which they are expected to doff in acknowledgement from time to time during the ceremony. A high standard of drill is expected on those occasions.

The Convenor has a lot of things to do outside the Chamber too. He is a member ex officio of the House of Lords Commission, which is responsible for decisions on matters of policy as to how the fabric of House is served and maintained and its organisational business is run. He is a member of the Services Committee too, which has the responsibility of the day to day running of the services provided to members. He represents the group on a number of other domestic committees which deal with matters such as procedure, members' privileges and conduct and security. He also has responsibility for nominating members of the Crossbench group to sit on a large number of select committees which carry out inquiries into a wide variety of issues of current interest such as science and technology, international relations and leaving the EU. The group has among its members people with a wide range of experience and expertise which extends across the whole range of public, academic and professional life. So the involvement of Crossbench peers in the work of committees is important and valuable, and appointment to these committees is much sought after. The Convenor has key role in ensuring, in discussions with the usual channels, that the group is deployed to best advantage in committee work. From time to time, as in the case of the setting up of the committee to deal with petitions against the HS2 Bill which is chaired by Lord Walker of Gestingthorpe, he is looked to by the Chief Whip for the selection of a member of his group to act as a select committee's chairman.

Finally he has a pastoral role to perform. Members of the group may inform him about the state of their health, whether or not they are able to attend. He may offer guidance to members, all of whom are entitled to remain as members of the House for life, as to when they should they should take leave of absence for the time being or should retire. And he meets and offers guidance and support to new members on their introduction to the House, and advises any peers who may wish to move to the Crossbenches from membership of a party group as to when – usually quite a long time – it would be acceptable for them to become a Crossbencher.

The Convenor is supported by a private office, which consists of a private secretary and an executive assistant who acts as his diary secretary and makes the administrative arrangements for the weekly meeting of the Crossbenchers. The private secretary provides oral and written briefings for meetings, and assists the convenor with his responsibilities in providing accommodation and nominating members to sit on select committees. He also supports other members of the Crossbench group with their inquiries and proving them with information. He prepares a weekly notice which goes to all Crossbenchers. It includes a minute of the weekly meeting and draws attention to things of current interest relating to business in the House that they ought to know about. He arranges for the speakers who are to be invited to address the Crossbenchers' weekly meeting. He also sends out briefings or letters from ministers which have been sent to him for circulation to the members of the group and provides members with an advisory note when votes on legislation are expected. The notice gives information about the amendments that are to be debated and the members who will move them. They are intended to provide impartial information to assist members of the

group in deciding if and how they wish to vote. These decisions are each member to take according to their own judgement, as the Crossbenchers are not whipped.

The Convenor is allocated a small amount of money which comes from a fund which is provided by the government to help the opposition parties in the House of Lords with their costs. This money is used to pay for the two posts in the private office. There is a small reserve to cover ad hoc expenses, but in practice it is seldom drawn upon. Items such as security, cleaning, stationary, IT and communication services are provided by the House without charge as part of the services provided for and shared by all members. A certificate from an independent auditor is provided to confirm that this money has been properly accounted for and is used only for parliamentary purposes.

So much for the Convenor. What then do the Crossbenchers actually do? What role do they play in the legislative process? What advice do I give to those members of my group who wish to participate?

The role of the Crossbenchers in the legislative process

The legislation with which the House deals consists for the most part of public Bills which are initiated by the government. There is also a private Bill procedure by which legislation can be introduced by individual members, as is the case in the House of Commons too. And there are numerous statutory instruments made by ministers which, if laid under the affirmative procedure, require the approval of both Houses before they can take effect. Mondays and Wednesdays are the days when the House concentrates on public bills in their various stages. For much of the year Tuesdays and Thursdays are debate days. And the House sits about once a month on Fridays to consider private members' bills, which are dealt with according to the same procedure as public bills. I shall concentrate on the Crossbenchers' role in the handling of public bills, as it is to this that the House devotes most of time when it is dealing with legislation.

At the heart of this subject are two key, but rather obvious, points. The first is that any attempt to influence the progress of legislation in the House of Lords depends on persuading the government to agree with what you are proposing, or on securing a majority of votes in the Chamber against the government if persuasion has not worked. The second is the constitutional principle that the democratic mandate rests with the House of Commons. This means that, while the House of Lords can scrutinise and revise legislation, it must in the end give way to the House of Commons in the event that the two Houses cannot agree. So securing a majority in the Lords on a vote against the government will get one nowhere if the government can and does use its majority in the Commons to overturn what the Lords have voted through. It is not always as simple as that, however. A really big majority against the government in the House of Lords may persuade a government to change its mind, or at least to compromise by substituting an amendment of its own which gives the opposition part of what it wants. That is especially so when, as now, its majority in the Commons is quite small. There are occasions, such as when the Government was defeated in October last year on its motion for the approval of a statutory instrument by which it was seeking to give effect to its policy on universal credit²⁵, when changes of mind occur. Many thought that this measure should have been brought forward by primary legislation and not by an

²⁵ The draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015, laid under section 66 of the Tax Credits Act 2002.

unamendable statutory instrument, as it was so controversial. The Government decided not to run the risk of a vote in the Commons, which it might have lost, to reverse its defeat in the Lords. So the policy, which many outside the House of Lords too thought was obnoxious, was later departed from. In a situation such as that votes in the House of Lords do matter. The greater the majority against the government, the more influence the vote will carry.

There is another point that should be borne in mind. It is that the House of Commons does not handle the legislation that comes before it very well. Detailed scrutiny, line by line, is not what its members usually wish to engage in – or if they do, they are cut short by timetables which mean that the Bills which start in the House of Commons tend to leave that House in an imperfect state. The government may not have had time to think its own business through – something which happens surprising often. The opposition parties are quite likely not to have been able to develop all their own thinking on all points either. And many interested parties outside Parliament will have been frustrated in their attempts to influence the line that the legislation should take while the Bill is before the Commons, because of the limited opportunities for debate on points of detail. The part that the House of Lords plays as a revising House is, therefore, a vital part of the Parliamentary process. In that situation the Crossbenchers have a legitimate role to play. They do not have even the semblance of a democratic mandate what for what they do. But they can use their knowledge and expertise in scrutinising the Bill with an eye to how its provisions can be expected to work in practice, and in the end of the day the decision as to whether what they think right should be adopted lies with the Minister, who is guided by government policy.

The Crossbenchers can begin by making their points in debate at Second Reading and then again when the bill returns for the Committee Stage. Ministers in the Lords tend on the whole to listen carefully to the arguments that are advanced in Committee, and they are open to persuasion if the argument is good enough. They often go to considerable lengths to engage with those from the other groups in the House who are criticising the Bill to see if some common ground can be reached. They write briefing letters and convene informal meetings for open discussion in the committee rooms, and they and their Bill teams meet individual members round the table for a more intense discussion on points of detail. But in the end they always have to consult their senior ministers, who sit in the other place and are in charge of overall policy, before a final decision can be taken. So when the Bill reaches the Report Stage, if the government is not willing to accept the principle of an amendment, it may be necessary to put the matter to a vote.

The Crossbenchers are not large enough as a group to carry any vote on their own. They amount to no more than twenty per cent of the membership, after all. And by no means all of the twenty per cent ever attend together at any time. Many of them have interests and functions to perform outside the House, and some feel that they are not sufficiently in touch with the legislative programme for them to be able to exercise their votes responsibly. In practice the number of Crossbenchers who will exercise their vote rarely exceeds 70. To put that figure in context, the total number of those voting at peak times on busy days can reach about 400. The later the evening wears on those numbers will, for obvious reasons, reduce. Peers often have commitments outside the House. Unlike the political groups who can require their members to attend by means of whipping and tell them exactly how they should vote, there is no compulsion on the Crossbenchers whatever to attend, or to vote at all even if they do attend. Nor is it the practice for the Crossbenchers to attempt to reach a group view on anything. On the contrary, the principle on which the Crossbenchers operate is that every peer is free to make up his or her own mind. This is not always an easy task, especially when

a vote is called after a debate to which one has not listened. You might think that they could look to me as their Convenor for guidance. But I have no function as their Convenor to indicate how they should vote, nor is it my job to keep a track on whether they have voted or how they voted if they have decided to do so. I must remain, and be seen to remain, impartial. It is in the Crossbenchers' interest that I should adhere to this principle, as I have to retain the confidence of the Chief Whips with whom I meet each week. So the only guidance I can give to them is that they must make up their own minds.

Nevertheless, as the Crossbenchers know each other very well and are quick to spot who has a good point to make because of special knowledge or expertise that bears on the point at issue, they do tend to group together for or against the government when it comes to a vote, and the way the Crossbenchers vote is of considerable interest to the leaders of the political groups. The details are published on the Parliamentary website after each vote, showing the numbers which have voted each way according to each party group as well as the names of all those who have voted. They are closely scrutinised by the whips of all three parties, who are almost as much interested in how the Crossbenchers have voted as they are in the performance of their own members. The balance of power between the government and the opposition varies from government to government. And with it so does the extent to which the Crossbench peers can influence the result. The coalition, which was usually able to secure the support of all the Liberal Democrat peers, was rarely in difficulty. But there were occasions when some of the more strong-minded of the Liberal Democrats were at odds with their Tory coalition partners. When that happened, the way the Crossbenchers were inclined to vote could matter. This is not to say that the Crossbenchers all vote the same way. On the contrary the group contains a wide range of opinions. What usually happens is that the Crossbenchers split at about the thirds for, and one third against, the government. This is because the majority favour giving effect to the constitutional principle that the elected government in the end have its way, while the minority are more inclined to be politically motivated. But the boundary between them is not fixed. There are occasions when the split is the other way if the sense is that that is where the expertise or experience of one of the more prominent members of the group is pointing. When that happens it is just possible that the way the majority of the Crossbenchers voted can be decisive when all the votes are counted up.

It is, however, not just a matter of pure numbers. The Crossbench group is made up of people from a variety of backgrounds. Among them are acknowledged experts in their particular field, whose opinions will always carry respect. The retired Law Lords do not have the same influence in that way as some of them used to do. It will come as no surprise to you to be told that the House tends to be suspicious of lawyers. But expertise in other fields can have the same effect. This was shown in the case of the Housing and Planning Bill during the last session, when it became clear that those who knew most about the practical aspects of what the Bill's housing provisions were dealing with were on the crossbenches. They tended to carry most of the Crossbenchers with them when it came to a vote, and their arguments carried much influence with government too. The government is more likely in such a situation to listen and be open to persuasion to change its mind. The combination of expertise and the ability to attract votes in support in the event that a vote has to be called can be quite powerful.

Conclusion

As I see it, from my very privileged position as Convenor, the contribution that the House makes to the legislative process would be much diminished if the Crossbenchers were not there. Of course it can be said that they have no democratic mandate whatever for what they do. But insisting on a democratic mandate misses the point. The Upper House under our constitutional arrangements operates on a different principle. It is that, as the democratic mandate lies with the other place, its role is to advise and to revise, not to direct the other place as to what it should and should not do. The Crossbench group is well qualified to participate in this process. Indeed there are areas of expertise among its members which are not found anywhere else in the House, or in the House of Commons either, which can make a real difference to the government's understanding of the effect of the legislation that it is putting through the House. The position of the government is, of course, key to the working out of the whole process because proposals for the amendment of a Public Bill cannot get anywhere unless the government, which has the democratic mandate, can be persuaded to agree to them. It is the weight that members of the Crossbench group can bring to bear in the process of persuading the government to change its mind, or at least think again, that contributes most to the work of the House.

For that reason it seems now to be common ground across the parties in the House that, whatever shape a future reform of the House may take, there should continue to a group of Crossbench peers, that membership of that group should be by appointment, not election, and that the group should comprise about twenty per cent of its membership. The fact that this is so is quite an achievement, given the rather ad hoc way that the Crossbench group has evolved. My task as Convenor is to do everything I can to hold on to this advantage by sustaining the group in everything it does and ensuring that the post I hold continues to be respected on all sides. It is hard work, but so much good can come of it if I can achieve what I have been asked to do.

David Hope

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