

Judges and Politics:

The Parliamentary Contributions of the Law Lords 1876-2009

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11,364 words (14,056 including footnotes)

Keywords: Law Lords, House of Lords, judicial independence, constitutional conventions, law and politics.

There is a common perception that, prior to the exclusion of serving judges from the House of Lords in 2009, a 'politics convention' operated which required them to stay aloof of partisan political controversy and which ensured that they contributed only rarely. On this view the presence of the Law Lords in Parliament prior to 2009 presented a judicial independence and separation of powers problem in theory only. An examination of the contributions of serving Law Lords and other judicial peers to debate in the House of Lords from 1876-2009 (and retired judges 1876-2015) reveals that the Convention either did not exist or was frequently ignored. While most judges were infrequent participants in parliamentary debate, some were enthusiastic – a small amongst the most active parliamentarians in the Lords. The most active judicial peers were conservative in their politics and the best predictor that a judge would be active in the House was an association with conservative politics or causes.

INTRODUCTION

Until 2009 serving judges in the UK were permitted to contribute to debate in Parliament. These judicial peers were the members of the Appellate Committee of the House of Lords (known as the Law Lords), as well as senior judges from England and Wales, Scotland and Northern Ireland who held peerages. Section 137 of the Constitutional Reform Act 2005 now disqualifies a member of the House of Lords who holds judicial office from sitting or voting in the Lords. By that provision, the 133 years of the Law Lords' presence in the House of Lords were brought to a close, a decision that many senior judges continue to lament.¹ There has been extensive work on the policy and political orientation of the senior judiciary in their court-based decision-making in recent decades,² but little on their behaviour *as parliamentarians*.³ The parliamentary record of the judicial peers provides an under-examined historical record, unique in a modern democracy, of engagement by judges with the political and legislative process over a long period.

This article dips into this historical record, looking at the activities of the Law Lords and other judicial peers in parliamentary debate over a period of more than a century: between the creation of the first Law Lords in 1876 and their departure from Parliament in 2009. It has two related objectives: firstly, to create a picture of how active the judicial peers were as parliamentarians, and to draw lessons from this behaviour for judges and public law. Secondly, to examine the common perception that judicial peers abided by a convention that limited their participation in the House to

* Fellow in Public Law, LSE Law Department. Part of the research underpinning this article was done for an AHRC-funded research project on 'The Politics of Judicial Independence in Britain's Changing Constitution' (Grant no: AH/H039554/1). I am grateful to anonymous reviewers for the journal, to the participants in an LSE staff seminar in November 2015, and to numerous colleagues, especially Robert Hazell, Kate Maleson, Graham Gee, Ben Yong and Michael Blackwell for their comments and suggestions.

¹ Eg Lord Judge 'Constitutional Change: Unfinished Business' delivered at University College London 4 December 2013

² See eg A. Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Oxford: Hart, 2013), A. Paterson, *The Law Lords* (London: Macmillan, 1982), B. Dickson, 'Judicial Activism in the House of Lords 1995-2007' in B. Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford: OUP, 2007) and B. Dickson, 'Close Calls in the House of Lords' in J. Lee (ed), *From House of Lords to Supreme Court* (Oxford: Hart, 2011).

³ The only detailed analysis is now over 40 years old and is contained in cpt 10 of L. Blom-Cooper and G. Drewry, *Final Appeal* (Oxford: OUP, 1972). Gavin Drewry expresses some surprise and disappointment that this subject has not excited more interest from lawyers and political scientists in his contribution to L. Blom-Cooper, B. Dickson and G. Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford: OUP, 2009), cpt 25, especially 448-451.

non-controversial matters. To answer these questions I conducted quantitative and qualitative analyses of contributions by judicial peers to parliamentary debate during the period 1876-2009. Because some significant contributions were made by judges other than the Law Lords – notably the Lord Chief Justice and the Master of the Rolls – I use the term ‘judicial peers’ throughout to denote the group of all serving senior judges (including the Law Lords) who held peerages. Judicial peers include the Law Lords, Lord Chief Justice of England and Wales, the Master of the Rolls, as well as the Lord President of Scotland and Lord Chief Justice of Northern Ireland. This definition deliberately excludes the office of Lord Chancellor.⁴ Including data for Lord Chancellors would drown out the data for the judicial peers and could only confirm what is already known: the status of the Lord Chancellor as a senior Cabinet minister entailed that the role was largely political.⁵ To conflate the Lord Chancellor with the judicial peers is to risk missing or underplaying the significance of the (separate) politics of the professional judges, who were often at odds with the Lord Chancellor on matters of professional interest to them.⁶ The activities of *retired* judicial peers are considered at points below, as they often acted in concert with their serving counterparts and in some cases appear to have taken over some of their parliamentary role after 2009. But the kinds of considerations that applied to serving judges – concerns about engagement with politics, or with the possibility of recusal on grounds of bias – did not apply to them.⁷ Unlike members of most other professions (notable exceptions being civil servants or generals) serving judges were in a significantly different position to their retired predecessors with regard to political engagement. My primary focus in this article is on activity of the serving judicial peers between 1876-2009: on how serving judges made use of their voice in Parliament and on how their behaviour changed over time.

⁴ Following the approach of Blom-Cooper and Drewry (1972), above n 3.

⁵ See D. Woodhouse, *The Office of Lord Chancellor* (Oxford: Hart Publishing, 2001) and R. Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor's Office* (Oxford: Clarendon Press, 1993).

⁶ The professional judiciary were, for example, outraged by cuts to their salaries in the early 1930s, by Lord Elwyn-Jones' refusal as Lord Chancellor to promote Mr Justice Donaldson to the Court of Appeal in the 1970s, and by Lord Mackay's reforms to judicial pensions in the early 1990s.

⁷ Although retired judges did sometimes continue to hear cases into retirement and the supplementary panel for the Supreme Court may include retired judges with peerages (s. 39 Constitutional Reform Act 2005). The only current member of the panel in this position – Lord Collins – has never spoken in the Lords.

The first Law Lords were created under the Appellate Jurisdiction Act 1876 ‘[f]or the purpose of aiding the House of Lords in the hearing and determination of appeals’.⁸ This was done at a time of significant constitutional change. The appellate jurisdiction of the House had fallen into disrepute because of the poor quality of its decision-making and had been due for abolition⁹ but a change of government from Liberal to Conservative led to a change of policy. The 1876 Act retained the appellate jurisdiction of the House but sought to professionalise it. Appeals now had to be heard by at least three Lords of Appeal – made up of the Lord Chancellor, the newly created Law Lords, or other peers who had previously held high judicial office.¹⁰ The Act did not specify that lay peers could not contribute to judicial decisions, but a convention to that effect developed very quickly. A few years after the 1876 Act came into force a lay peer, Lord Denman, attempted to vote on the disposal of *Bradlaugh v Clarke*¹¹ but his raised hand was ‘utterly ignored by the Lord Chancellor’.¹² No significant distinction was made between the judicial and ordinary business of the House after 1876. Both took place in the main chamber, with judicial business taking place before ordinary business. A dedicated Appellate Committee which sat outside the chamber was not created until 1941 and this was done for practical reasons. The chamber of the House was being rebuilt following a wartime bombing raid and the noise of building work during the day made judicial business impossible. This arrangement became permanent from 1948 onwards, although judgments were still delivered in the chamber.¹³

When the judicial peers spoke in Parliament they did so against the backdrop of a form of constitutional politics that was highly pragmatic and intellectually capable of accommodating engagement between judges and politicians. As Lord Irvine put it ‘we are a nation of pragmatists,

⁸ Appellate Jurisdiction Act 1876, s 6.

⁹ Supreme Courts of Judicature Act 1873.

¹⁰ 1876 Act, s 6.

¹¹ (1883) 8 App Cas 354.

¹² T. Beven, ‘The Appellate Jurisdiction of the House of Lords’ (1901) 17 LQR 357, 370. An earlier and looser form of this convention arose out of *O’Connell’s Case* (1844) 11 Cl & F 155.

¹³ J. Vallance White, ‘The Judicial Office’ in L Blom-Cooper *et al* (eds), *The Judicial House of Lords 1876-2009*, above n 3.

not theorists, and we go, quite frankly, for what works'.¹⁴ Judges had served as ministers up until the eighteenth and early nineteenth centuries. The appointment of a serving Chief Justice of the King's Bench, Lord Ellenborough, to the Cabinet in 1805 was perhaps the last major example, and negative reaction to this appointment helped to crystallise the principle that serving judges should not also be members of the Cabinet.¹⁵ Nonetheless, whilst judges no longer took on political roles during their judicial tenure, it was not unheard of for judges to move from judicial office to political positions (especially that of Lord Chancellor), and *vice versa*, and sometimes back again¹⁶ and MPs were appointed to senior judicial positions as a matter of routine until the early twentieth century.¹⁷ There was an informal practice until the 1940s that the Attorney General had first refusal of the office of Lord Chief Justice of England and Wales.¹⁸

There is an obvious fascination in the idea of judges speaking as legislators from a separation of powers perspective, but the separation of powers was never a conspicuous feature of the constitution. What was historically emphasised was the concept of judicial independence, which often served as a separation of powers *manqué*. Judicial independence was policed 'significantly by tradition'¹⁹ – by the knighthoods, peerages and generous salaries of the judiciary – rather than by formal arrangements. Indeed, often the principle was reduced to little more than a prohibition against interference with judges' pay and conditions.²⁰ It is typical of this approach that the Lord Chancellor's institutional position was regarded by many – including most judges – as a bulwark of judicial independence, so much so that when the Government announced without warning in June 2003 that the office of Lord Chancellor was to be abolished this was regarded by judges as a threat

¹⁴ Lord Irvine in evidence to the Commons Select Committee on the Lord Chancellor's Department, 2 April 2003 at Q28.

¹⁵ S. Shetreet and S. Turenne, *Judges on Trial* (CUP: Cambridge, 2nd ed, 2012), 33-34.

¹⁶ Lord Reading served briefly as Ambassador to the United States (1918-19) whilst he was in office as Lord Chief Justice. Lord Macmillan's tenure as a Law Lord was interrupted by a brief appointment as Minister of Information during the Second World War. Lord Maugham and Lord Simonds both interrupted their service as Law Lords with brief stints as Lord Chancellor (in the late 1930s and early 1950s respectively).

¹⁷ R. Stevens, *The English Judges* (Hart: Oxford, 2005), 16.

¹⁸ R. Stevens, *The Independence of the Judiciary*, above n 5, 29.

¹⁹ R. Stevens, 'A Loss of Innocence? Judicial Independence and the Separation of Powers' (1999) 19 OJLS 365, 376.

²⁰ See G. Gee *et al*, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge: CUP, 2015), Cpt 2.

to judicial independence rather than the reverse.²¹ The reforms reflected a movement away from pragmatism. Influenced in large part by jurisprudence of the European Court of Human Rights on the right to a fair trial, the blended roles of the Lord Chancellor and the Law Lords had fallen under a shadow. In the *McGonnell* case²² the Strasbourg court held that a judge in Guernsey could not participate in a decision in respect of which he had had a legislative role. For a New Labour government that came to power in 1997 determined to modernise the constitution, the argument that the historical practices worked was no longer enough.²³ The judicial and legislative functions of the office of Lord Chancellor were removed by the Constitutional Reform Act 2005, leaving only the executive ‘justice minister’ function. The judicial peers were excluded from Parliament in 2009, to the evident dismay of some of their number,²⁴ and a new Supreme Court was created.

²¹ *Ibid.* See also P. O’Brien, ‘Does the Lord Chancellor really exist?’, UK Const. L. Blog (26 June 2013) (available at <http://ukconstitutionallaw.org>). Last accessed 14 January 2016.

²² *McGonnell v Bailiff of Guernsey* (2000) 20 EHRR 289.

²³ See R. Cornes, ‘*McGonnell v. UK*, the Lord Chancellor and the Law Lords’ [2000] Public Law 166.

²⁴ See eg the final and slightly mournful speech given by Lord Hope before the Law Lords left Parliament for the Supreme Court: ‘Lords of Appeal in Ordinary, Motion of Appreciation’ HL Deb vol 712 col 1507 21 July 2009.

HOW ACTIVE WERE THE JUDICIAL PEERS AS PARLIAMENTARIANS?

There are two commonly accepted views about participation by judicial peers in the political and legislative business of the House of Lords. The first is that participation gradually declined over time, so that judicial peers took a relatively full part in the work of the pre-1945 House of Lords, but that in the post-war period participation declined to the point that the presence of the Law Lords in Parliament was ‘largely symbolic’²⁵. The second is that there was a convention that restricted the participation of the judicial peers in political matters. These blend into one other, so that it is thought that participation gradually dried up because of increasing discomfort about participation by judges in politics. This article draws on Hansard and biographical data for each of the judicial peers in office or in retirement during the period 1876-2015 to show that both of these perceptions are largely incorrect.

To address these questions I drew on Hansard records of all contributions made by each peer holding judicial office or in retirement during the period 1876-2015 their term of judicial office and during their retirement, in order to create a quantitative picture of when and how judicial peers contributed to parliamentary debate.²⁶ A small sample of debates was selected for qualitative analysis. This sample is made up of debates during one month from each year 1880-2010 at ten year intervals, with 2015 added for more recent comparison. The month selected in each year was chosen using a random number generator. In the event that the House of Lords was not in session during that month, the random number generator was used to select an alternative month. This method resulted in a selection of 29 debates. Based on the available literature and on my wider reading of judicial peers’ Hansard contributions, the random sample, whilst small, appears to be a fair representation of the whole.

²⁵ R. Cornes, *Reforming the Lords: The Role of the Law Lords* (London: The Constitution Unit 1999, 7.

²⁶ Hansard data is taken from Historic Hansard (<http://hansard.millbanksystems.com>) and They Work for You (<http://www.theyworkforyou.com>) and biographical data for the judicial peers is taken from *The Gazette* (<https://www.thegazette.co.uk>) and the Oxford Dictionary of National Biography (<http://www.oxforddnb.com/public/index.html>). These websites last accessed 11 May 2016.

Writing in 1958, Peter Bromhead detects a gradual decline in contributions in the previous 20 years.²⁷ He attributes this primarily to the departure of judicial business from the chamber of the House with the creation of the Appellate Committee in 1948. Previously, legislative business could not begin until judicial business was concluded. Once the Appellate Committee was established the House could get on with legislative business at the same time that the Law Lords dealt with judicial business. The Law Lords could not be in both places at once. Their function may also have changed. Lord Hope notes that after the creation of life peerages from the 1950s onwards the judicial peers were not the only legal experts available to the Lords: many life peers were lawyers. As a result the judicial peers were no longer needed to advise the House on legal matters.²⁸ It seems likely that these changes had an effect on the manner in which judicial peers engaged with the ordinary business of the House but my analysis of the data on contributions by judicial peers suggests that the contributions of judicial peers were actually relatively consistent during the entire period. Indeed judicial peer contributions gradually increased over time until the turn of the twenty-first century. Table 1 offers a summary of the data broken down by judicial office.

Table 1: Judicial peers and their contributions to Lords debate

Judicial Position ²⁹	Number with peerages	Number who contributed	Mean/Median CAAC
Law Lord	112	87 (78%)	5.16/1.68
LCJ (England & Wales)	16	13 (81%)	4.64/3.25
MR	13	9 (69%)	4.74/1.75
LP (Scotland)	8	4 (50%)	1.16/0.06
LCJ (Northern Ireland)	2	0	0
LCJ (Ireland, pre-1920)	1	0	0
All serving judicial peers	134	104 (78%)	4.87/1.81

²⁷ P. Bromhead, *The House of Lords and Contemporary Politics* (London, Routledge and Kegan Paul, 1958), 70-71.

²⁸ D. Hope, 'Voices from the Past – the Law Lords' contribution to the legislative process' (2007) 123 LQR 547.

²⁹ Figures in each row in Table 1 are calculated independently from each other because a number of judges (16 in total) served in more than one of the judicial offices considered. Thus some individuals appear in the figures for more than one category (e.g. Lord Woolf appears in the figures for Law Lord, Master of the Rolls and Lord Chief Justice, but in the 'all serving judicial peers' category the figures are calculated using the sum of his contributions in all three roles).

<i>All retired judicial peers</i> ³⁰	103	63 (61%)	6.38/0.22
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The ‘CAAC’ figures in the last column of Table 1 are for ‘*career average annual contributions*’ for each judge. The CAAC score for each judicial peer is calculated by dividing the total number of contributions to debate by a judicial peer by their number of years in post. These figures are used as a means of comparing how active each judicial peer was in parliamentary debate. Around a fifth of judges never spoke. Were it not for the contributions of a single judge to the debates on a single piece of legislation – those of Lord Rodger to the debates on the Scotland Act 1998 – the figure for Lord Presidents of Scotland would be very close to zero. Remoteness from Westminster is a significant barrier to participation so this is not surprising. A majority of the London-based judicial peers also contributed infrequently: half spoke less than twice a year. A large number of judicial peers spoke only a handful of times during their careers (and some of those spoke only in connection with their role in chairing parliamentary committees). A few high volume contributors pull up the overall mean of nearly five contributions per year. Roughly adapting figures from Bromhead we can classify a peer who contributes more than eight times per year as ‘active’, one who contributes between three and eight times per year as ‘moderately active’ and one who contributes at least once, but less than three times per year as an ‘occasional contributor’.³¹ By this measure, 23 judicial peers would count as active parliamentarians, 21 as moderately active, 59 as occasional contributors. A further 30 never contributed.

Looking at the data in another way – at the figures for the total contributions by all judicial peers in a year – reveals a similar story (see Figure 1). They confirm that in general the number of contributions by all judicial peers was fairly low (less than 50 in most years), but with some quite

³⁰ The ‘all retired judicial peers’ counts contributions made in retirement by those in the ‘all serving judicial peers’ category. It does not include the small number of retired judges who were raised to the peerage on retirement as a reliable list of these judges is unavailable.

³¹ Bromhead’s figures are based on two samples of three years each, with ‘active’ meaning 25 or more contributions in the three years, ‘moderately active’ between 10 and 24 contributions, and ‘occasional contributor’ meaning between one and nine times. Bromhead, above n 27, 34.

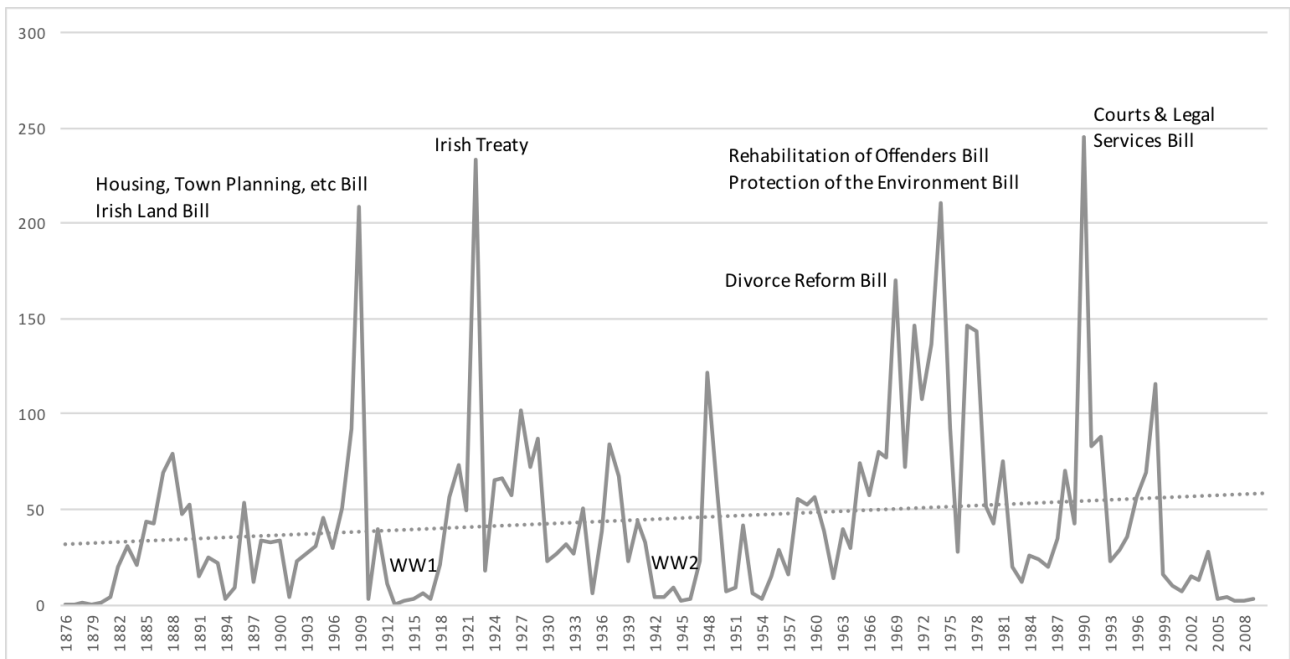
significant peaks. In some cases these are accounted for by specific issues, such as the debates on the Irish Treaty in the early 1920s or Lord Mackay's reforms to the legal system in 1990. Other peaks are harder to explain. Those in 1909 and in the 1970s are not attributable to any single issue, rather they seem to be due to changing personalities.³² Lord Hope refers to the contributions by Law Lords in the late 1960s and the 1970s – particularly by Lords Wilberforce, Simon and Brightman – as a 'golden age' for judicial peers contributing on technical legislative matters.³³ By far the most significant contributor in the 1970s was Viscount Dilhorne. Dilhorne was a prolific contributor who engaged with all kinds of business in the House. (Indeed his CAAC score of 58 contributions per year is second to and only very slightly lower than Lord Carson's score of 58.25, and is vastly higher than the mean CAAC score of 4.87 contributions per year). Donald Shell notes that most peers who contributed more than 50 times in a year were front-bench spokespersons, so Dilhorne and Carson (together with Lord Ackner in the 1980s and Lord Morris in the 1890s) would have been amongst the most active parliamentarians in the Lords.³⁴

Figure 1: Annual total contributions by all judicial peers, 1876-2009

³² The contributions by judicial peers in 1909 do not appear to be connected to the furore over Lloyd George's 'People's Budget' of that year.

³³ Hope, above n 28, 563-4.

³⁴ D. Shell, *The House of Lords* (Oxford: Philip Allan, 1988), 43.



The data suggest that, rather than declining, contributions by judicial peers in fact went up between the 1950s and 1990s (this gentle increase is indicated by the dotted trend line in Figure 1). The most sustained period of high volume contributions appears to have been the 1970s. The number of Law Lords (and so the total number of judicial peers) increased steadily throughout the course of the twentieth century (from four at the beginning to 12 at the end). This increase will have had an influence on the total volume of contributions, although it does not account for the increase observed between the 1950s and 1990s as there was no significant change in judicial peer numbers during this time.³⁵ General levels of activity in the House of Lords (measured by the number of sitting hours) did increase steadily but significantly – roughly doubling between the 1970s and the late 1990s³⁶ – so the later part of this peak may be connected with this. Judicial peers would have had more opportunities to contribute during this period than they had before.

If the belief that contributions by judicial peers gradually declined over the twentieth century is not borne out, the belief the judicial peers ever had a period of significant activity is also something of a

³⁵ The number of serving Law Lords hovered between 9 and 10 from 1947 to 1992. See Appendix 2 to Blom-Cooper *et al* (2009), above n 3, 748.

³⁶ Royal Commission on Reform of the House of Lords, *A House for the Future*, Report Cm 4534 (2000), para 2.9.

myth. Throughout the entire period of existence of the Law Lords, few judicial peers could be regarded as high volume contributors. What is clear is that there is an abrupt and significant drop-off in contributions in the last decade. Previous similar declines coincided with the First and Second World Wars. In 1960 there were 56 contributions in total for all judicial peers and in 1980 the equivalent figure was 43. In 2000, by contrast, there were only 10 contributions, and the average for the final decade was a total of just under 9 contributions per year. Judges appointed from around the mid-1990s onwards were, based on their CAAC scores, markedly less likely to contribute to debate (although their contributions – such as that by Lord Browne-Wilkinson to the debates on what became the Human Rights Act 1998³⁷ – could still be highly significant). The decline arose largely out of the constitutional debates of the time, and in particular as a result of the hostility of Lord Bingham, as Senior Law Lord, to *any* contribution by judges to legislative policy. The Royal Commission on the Reform of the House of Lords (chaired by Lord Wakeham) took a largely positive view of the role of the Law Lords in its report of 2000, concluding (as had many similar reviews in past decades) that their presence in the upper house was a largely positive arrangement, keeping the judges in communication with politics and providing Parliament with the benefit of their legal expertise.³⁸ The presence in the Lords of retired judges and a number of high profile lawyer-peers with this kind of expertise might be thought to count against this argument, but the Commission expressed reluctance to changing the Law Lords' role 'unless that was judged to be essential', especially given the (then recent) enactment of the Human Rights Act 1998, which in the view of the Commission required senior judges to be aware of the wider political context of their work. The Commission did, however, recommend that the Law Lords clarify the terms upon which they would contribute to ordinary debate in the Lords. Lord Bingham did so in a practice statement delivered to the House in 2000.

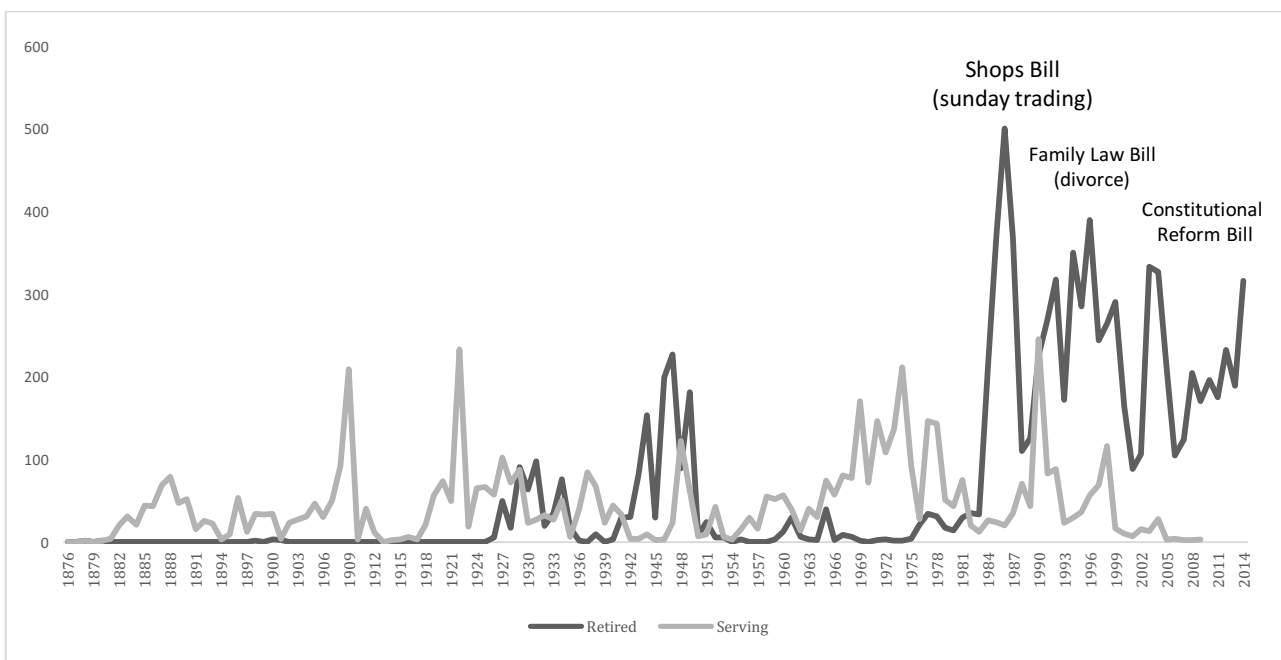
³⁷ Lord Browne-Wilkinson made two highly influential contributions to the second debate at the Committee Stage of the Human Rights Bill: HL Deb vol 583 col 490-527 18 November 1997.

³⁸ Royal Commission on Reform of the House of Lords, above n 36, paras 9.6-9.7.

... [F]irst, the Lords of Appeal in Ordinary do not think it appropriate to engage in matters where there is a strong element of party political controversy; and secondly the Lords of Appeal in Ordinary bear in mind that they might render themselves ineligible to sit judicially if they were to express an opinion on a matter which might later be relevant to an appeal to the House.³⁹

This statement was a little vague, and arguably permitted participation in most parliamentary activity, which is not especially partisan in the Lords. The ambiguity arose because the Law Lords were divided. Some, such as Lord Steyn,⁴⁰ were firmly opposed to any such participation and others, such as Lord Hope, preferred the position of the Wakeham Commission. Notwithstanding the content of the practice statement Lord Bingham made it clear soon afterwards that he regarded all participation in debate as incompatible with the judicial role.⁴¹ Contributions reduced significantly from then until 2009.

Figure 2: Annual contributions by retired and serving judicial peers, 1876-2015



³⁹ HL Deb vol 614 col 419 22 June 2000.

⁴⁰ J. Steyn, 'The Case for a Supreme Court' (2002) 118 LQR 382.

⁴¹ A view reported by Lord Hope in 'Law Lords in Parliament' in Blom-Cooper *et al* (2009), above n 3, 176.

Figure 2 charts the contribution by retired judicial peers against those of serving judicial peers. Contributions by retired judicial peers were almost unheard of until the 1920s (perhaps because many judges died in office). They remained insignificant, with a few exceptions, until the 1980s but grew enormously from that point onwards. The initial stages of this increase are not down to any single issue, but rather to the enthusiasm of a few individuals – Lords Denning, Simon and Ackner – all of whom were highly active in retirement, with CAAC scores of above 50 (Denning scored 81.5). Nonetheless, Figure 2 suggests that some retired judicial peers stepped into the vacuum left by the retreat of serving judges from Parliament, and that this has continued post-2009.⁴² Lord Hope, who retired from the Supreme Court in 2013, became convener of the crossbench peers in 2015 and counts as highly active (CAAC of 52.7).

The data indicate quite strongly that contributions by serving judicial peers to debate in the Lords were infrequent, but also that they were individualistic and episodic. There is significant variation between these judicial peers, with some being quite high volume contributors and some never contributing at all, and there are notable points during the period when contributions increase considerably, often in response to issues of acute concern to judges as a profession ('trade union' issues). This appears to be true not just of the individual judicial peers, but also of the pattern of contributions by the judicial peers collectively over time (see Figures 1 and 2). A random selection of months taken at ten-yearly intervals between 1880 and 2000 emphasises the uneven character of judicial peer participation (figures for retired judicial peers are included up to 2015 for comparison).

Table 2: Judicial Peer contributions to debate during sampled months⁴³

⁴² Eg HL Deb vol 755 col 329 10 July 2014.

⁴³ Note that none of the debates to which retired judicial peers contributed were the same as those to which the serving judicial peers contributed.

Sample month	% judicial peers (speakers/total)	Judicial peer debates	% retd judicial peers (speakers/total)	Retd judicial peer debates
1880: March	0% (0/1)	0	None	n.a.
1890: July	80% (4/5)	10	0% (0/1)	0
1900: April	20% (1/5)	1	None	n.a.
1910: February	0% (0/7)	0	0% (0/2)	0
1920: July	37.5% (3/8)	4	0% (0/1)	0
1930: February	11% (1/9)	1	20% (1/5)	2
1940: August	0% (0/8)	0	0% (0/3)	0
1950: March	18.2% (2/11)	2	0% (0/4)	0
1960: April	18.2% (2/11)	1	0% (0/6)	0
1970: December	25% (3/12)	7	0% (0/7)	0
1980: January	7.7% (1/13)	1	12.5% (1/8)	1
1990: December	16.7% (2/12)	2	30% (3/10)	5
2000: May	0% (0/17)	0	31.6% (6/19)	12
2010: April	Excluded	Excluded	11.8% (2/17)	5
2015: January	Excluded	Excluded	18/2% (4/22)	9

Temperament and personal outlook were highly important in determining whether a judicial peer would contribute and what kind of contribution he would make. A few judicial peers took to the parliamentary side of their work with enthusiasm, in some cases because they were former politicians (although in retirement judicial peers with political backgrounds were less likely to contribute than those without). The importance of personality is emphasised when we come to look at the content of contributions by serving judicial peers to the ordinary business of the House.

THE SUBSTANCE OF THE JUDICIAL PEERS' PARLIAMENTARY CONTRIBUTIONS

The noble and learned Lord has now become a judge, a member of the highest Court of this realm. I hope that in our debates ... he will remember that he is not only an advocate but, by virtue of his judicial position, he has become in large measure an arbiter.⁴⁴

Thus did Marquess Curzon, then Foreign Secretary, gently warn Lord Carson before the latter rose to give his maiden speech in the House of Lords in 1921. He was wasting his breath. Lord Carson, a new Law Lord and until recently the leader of the Ulster Unionist Party, rose to excoriate his erstwhile colleagues in the Coalition Government for their agreement with Sinn Féin in Ireland.

I say there never was a greater outrage attempted upon constitutional liberty than this Coalition Government have attempted at the present time. ... And now, not only am I to have no indignation at the grant of what they are pleased to call Dominion Home Rule ... but I get a long lecture from the noble Marquess which, may say, I hope in the future he will spare me; because the man (let me speak plainly) who, in my opinion at all events, has betrayed me, has no right afterwards to lecture me.⁴⁵

What rules governed the participation of the judicial peers in political debate? There is a common impression that the judicial peers were a group set apart from the ordinary work of the House of Lords, who contributed seldom and were bound by a convention that barred them from participating in politics, or in controversial or deeply partisan politics. Examination of the record, however, reveals no clear pattern of obedience to the Politics Convention. In this section I paint a broad-brush picture of the kinds of contribution made by serving judicial peers to parliamentary debate, based

⁴⁴ HL Deb vol 48 col 34 14 December 1921.

⁴⁵ HL Deb vol 48 col 39-40 14 December 1921. Bromhead notes that Carson was less qualified for the job than most Law Lords, and that the Government may have calculated that by making the appointment they had ensured his silence.

on the random sample described in connection with Table 2. The subsequent sections close in on the more specific question of whether, and how, the Politics Convention might have been respected.

During the 13 randomly selected months described in Table 2 serving judicial peers participated in 29 debates (some of the 29 selected represent separate portions of the same debate). On occasion I stray outside of those 29 debates here to support particular points.⁴⁶ The majority of these debates concern technical or procedural matters in the Lords (such as judicial peers introducing or moving motions), or concern what we might call ‘lawyers’ law’ – ‘matters of primary concern to lawyers and the profession’.⁴⁷ With a few notable exceptions, sparks did not normally fly when the judicial peers spoke.

Table 3: Categories of Judicial Peer contributions in sample of 29 debates

Lawyers’ law	Judicial Trade union	Ordinary parliamentary
11	8	10

In 10 of the debates, judicial peers act as ‘ordinary parliamentarians’, meaning that their contribution did not arise out of any special judicial interest or expertise but rather was the kind of contribution that any politician might make. Lord Macnaghten, for example, is recorded as having moved several purely formal motions for Second Reading of bills relating to taxation. Judges sometimes participated in purely formal parliamentary activity, such as moving legislative amendments, as a means of pursuing a particular debating point or probing the meaning of a piece of legislation, in which case the amendment would be withdrawn without debate (a common practice in the Lords). Sometimes the amendment would be put to a vote. One of the debates concerns a rare bill proposed by a judicial peer: in 1900 the Lord Chief Justice, Lord Russell,

⁴⁶ This departure from absolute rigour should not affect the accuracy of the picture because we have already used the quantitative results from the total sample as well as the randomly sampled months to conclude that judicial peer contributions were episodic. In this sense, most contributions are outliers anyway.

⁴⁷ J. du Vergier, ‘Instruments of Law Reform: The Supreme Court and the Law Commissions of the United Kingdom’ (2012) 2 Cambridge Journal of International and Comparative Law 47, 48.

proposed a bill to deal with secret commission payments in commerce (despite fulsome Government support, the bill did not get anywhere).⁴⁸

Judicial peers often spoke as advocates on their own behalf and on behalf of their colleagues, interventions that I categorise here as relating to the ‘judicial trade union’. Matters concerning judicial pay and pensions, and the court system, were taken to fall within their remit. Lord Dilhorne and Lord Ackner, in the 1970s and 1980s, were perhaps the most assiduous defenders of judicial interests amongst the judicial peers. In the debates on the Courts Bill 1970, Lord Dilhorne objects to the idea that Circuit judges will be appointed as temporary High Court judges, fearing that the measure will become a *de facto* long term cost saving measure. ‘Am I right in thinking that a Circuit judge sitting as a High Court judge will not get the rate for the job?’⁴⁹ Lord Ackner, in a debate on ‘Sentencing Policy’ complains bitterly that in recent political criticism of sentencing ‘the role of the trial judge has been misunderstood out of sheer ignorance of the trial process, or intentionally misrepresented.’⁵⁰

Engagement on ‘lawyer’s law’ – technical matters of law and law reform – is perhaps the popular paradigm of the role of the judicial peers, wonderfully described by Lord Hope (speaking about Lord Wilberforce).

One can get some impression of [Lord Wilberforce], and his formidable attention to detail, from his intervention at 04.02 in the committee stage of a Housing Finance Bill, when he spoke for the first and only time in the debate - no doubt from his usual place on the cross-benches, having been keeping an eye (he had only one eye that worked; the other was always covered by an eye patch) on the proceedings all night - simply to support an

⁴⁸ HL Deb vol 81 col 919 2 April 1900.

⁴⁹ HL Deb vol 313 col 881 8 December 1970.

⁵⁰ HL Deb vol 524 col 544 12 December 1990.

opposition amendment that the word “shall” should be used to ensure that a clause was applied in the way the Government intended rather than the word “may”.⁵¹

This image of the judge as an ascetic and almost heroic legal character, dedicated to ensuring the proper development of the law, has some truth to it.⁵² Many of the contributions disclosed in the sample were comments on matters of drafting and legal policy. Contributions by Viscount Simonds, arguing against an opposition amendment that a legal definition of charitable purpose is simply impossible – fall into this category, as do those by Lord Denning in the same debate, encouraging the chamber to give some thought to the difference between ‘and’ and ‘or’ in drafting a charitable bequest.⁵³

Yet not all of the debates that could fairly come under the category of ‘lawyers’ law’ are technical, politically neutral matters. Viscount Cave, moving an amendment on a Government bill reforming property law seeks effectively to protect the interests of big property owners, and laments the effect of the legislation on golf clubs:

I do not know what will be the value of the common where a golf club has a lease now if any member of the public can go over the common and interfere with the game. ... The clause, in effect, takes away a great part of the value of every acre of commonable land in the country. It gives no compensation to owners; it sets up no control.⁵⁴

⁵¹ Hope, above n 28, 564.

⁵² Although Hope, *ibid*, is quick to clarify that Wilberforce’s contributions were not all so austere.

⁵³ HL Deb vol 222 col 964-1004 12 April 1960.

⁵⁴ HL Deb vol 41 col 499 26 July 1920.

Throughout the debates sampled it is clear that judicial peers were willing to express views for or against motions and draft statutory provisions, as well as to vote in Divisions.⁵⁵ It is clear from some of the debates that an informal judges' caucus sometimes operated, and some judges explicitly claimed to speak for the profession. Judges can also have influence by proxy (as in the debate in 2012 on the role of the Chief Executive of the Supreme Court, discussed below) and could often rely on a sympathetic cohort of retired judicial peers and other peers with legal backgrounds to speak to matters of broad professional interest. Sometimes judicial peers may not have spoken because their views had been canvassed prior to the debate.⁵⁶

Of only four of these debates could it be said that judges commit themselves on a matter of deep political controversy, and of only one of those four could it be said that the matter is completely outside the remit of the judiciary. That was a 1920 motion in support of General Dyer who had fired on unarmed civilians at a protest in India in an incident that was to become known as the Amritsar Massacre, and the judicial peer who spoke was Lord Sumner. Sumner's contribution to the debate was an extended and quite emotive piece of advocacy on Dyer's behalf. A sample:

Are we to be silent, because we cannot hope, any more than anyone else who takes part in public debate, to escape misrepresentation? We must take our chance of that ... I am afraid there is a stubborn vein in Englishmen still, and that if they think a soldier, of whatever rank, has been publicly treated with injustice, by whomsoever it may have been done, they are disposed to say so.⁵⁷

Sumner's strongly imperialistic views were a matter of public knowledge. The threat that this kind of intervention could pose to judicial independence is obvious. Given his publicly expressed views,

⁵⁵ In one or two cases the judicial peers appear to have voted *en masse*. Note, however, that Divisions (votes) are relatively rare in the Lords.

⁵⁶ As Blom-Cooper and Drewry (1972) point out: above n 3, at 201.

⁵⁷ HL Deb vol 41 col 323 20 July 1920.

how could litigants from India or Ireland believe that their cases would be fairly tried? Robert Stevens notes that concern about Sumner (together with Carson and Viscount Cave) influenced the determination on the part of Irish negotiators to prevent appeals from Ireland going to the Judicial Committee of the Privy Council, upon which those judicial peers also sat, in the 1920s.⁵⁸

Of more relevance to the judges' role, but equally politically controversial, were the contributions by Lord Goddard and Lord Oaksey to a rather hysterical debate on 'Crimes of Violence' in 1950. In this case, the judges wanted a return to corporal punishment (abolished two years earlier).⁵⁹ Lord Oaksey commented that:

I think that those of us such as Judges, police and prison officers who are in the closest possible touch with the criminals themselves are in a position to form a better opinion about the effect which such sentences have upon the criminals than any of your Lordships who sit here in the comparative comfort of your Lordships' Chamber, and who may be informed by statistics which do not deal with the particular facts of the case but simply with the broad categories into which the offence may be classified.⁶⁰

A notable feature of the contributions of Goddard and Oaksey, but also of many of the other lay speakers who supported their positions, was the firm insistence that judges knew best. Indeed, some speakers felt that the judges had taken this idea too far, and were in fact responsible for fomenting the media panic about violent crime that had precipitated this debate.

⁵⁸ See R. Stevens, *The Independence of the Judiciary*, above n 5, 67. Sumner resigned from the bench early, in 1930, and his biographer suggests that he did so out of boredom with the law and a desire to engage more deeply with politics, especially the campaign against Indian independence. A. Lentin, *The Last Political Law Lord* (Newcastle: Cambridge Scholars Publishing, 2008), 216-217.

⁵⁹ Criminal Law Act 1948.

⁶⁰ HL Deb vol 166 col 345 21 March 1950.

Lord Goddard's contribution was punctuated by lurid depictions of the violent crimes he had to deal with as a judge. Goddard was, like Lord Sumner, a deeply conservative and abrasive personality. He was a consistent advocate for harsh criminal punishments and known in his judicial work for his antipathy to criminal defendants.⁶¹ In the course of the debate he defended himself against the suggestion that he had advocated a return to capital punishment from the Bench, but also asserted his right to challenge Parliament's view on these matters as a parliamentarian.

... [I]n passing sentence I said that it was not for me to question the wisdom of Parliament in altering any sentence. For it is not the duty of a judge to question the wisdom of Parliament from the Bench, and it is not desirable that he should do so. But perhaps I might be permitted to do it here on the floor of this House, because I am speaking here in a different capacity.⁶²

Moving to the last judge in this context, Lord Ackner, in his contribution to the debate on Sentencing Policy referred to above, spoke something that is foursquare within the judicial remit: he essentially speaks as a shop steward for the 'judicial trade union'. But in doing so he embroiled himself in partisan politics, singling out the then Labour opposition, and shadow Home Secretary Roy Hattersley MP in particular, for making 'wild and baseless' allegations.⁶³ Ackner unambiguously lent his weight as a judge to the arguments of the Government in favour of a punitive attitude to imprisonment and was praised by a Conservative Government minister for confirming 'the purpose and necessity of prison to protect the public from those who are determined to lead a life of crime' and for blowing those who took a contrary view 'out of the water'.⁶⁴

⁶¹ Goddard's 'crude emotionalism', as Bernard Levin put it shortly after the judge's death, was entirely in character and his 'influence on the cause of penal reform was almost unrelievedly malign.' B. Levin, 'Judgment on Lord Goddard' *The Times* 8 June 1971.

⁶² HL Deb vol 166 col 463 23 March 1950.

⁶³ HL Deb vol 524 col 544 12 December 1990.

⁶⁴ Earl Ferrers, *ibid*, col 565.

It is difficult to assess how much influence the judicial peers were able to exert when they did participate. Their contributions were intermittent and the judicial peers were not always of one mind. The challenge to analysis is compounded by the consensual nature of business in the Lords' chamber, in which amendments are often moved simply in order to clarify a matter and then withdrawn, yet may nonetheless be adopted following private discussions. The judicial peers did not always get their own way by any means. The trenchant contributions by Lord Goddard on corporal punishment (and indeed the general judicial agitation on the matter outside of Parliament) did not lead to the reinstatement of corporal punishment. Nor were the judges listened to when they resisted the abolition of capital punishment. In the 1980s debates on the reforms by Lord Mackay (as Lord Chancellor) to judicial pensions and the legal professions, the judges expressed their opposition in the strongest terms. Lord Lane memorably, if rather incautiously, compared Lord Mackay's proposals to the rise of Nazism,⁶⁵ and Lord Ackner expended a great deal of energy challenging the proposals in the House. The reforms were brought in anyway. In this, judicial peers may not have been all that different from other parliamentarians, especially those who were outside the party system. Committed politicians, particularly in the far more powerful Commons, would not be deterred by the judicial peers from a course of action they were set on. On smaller matters, especially technical ones, (for example Lord Dilhorne's interventions on the Courts Bill in 1970) the judicial peers' interventions seem often to have been quite effective.

⁶⁵ 'Oppression does not stand on the doorstep with a toothbrush moustache and a swastika armband. It creeps up insidiously; it creeps up step by step; and all of a sudden the unfortunate citizen realises that it has gone.' HL Deb vol 505 col 1331 7 April 1989.

DID THE POLITICS CONVENTION EXIST?

There is a strong impression that something like a Politics Convention debarred the judicial peers from participation in political matters, or at least in partisan or controversial politics. Yet, as the small selection of random debates in the last section showed, judicial peers sometimes engaged with deeply political issues, even if their interventions were often clothed in the apparent objectivity of legal language.

Few academic writers appear to have looked at the Politics Convention at all, and still fewer in any depth. Those who have present a slightly confused picture. Peter Bromhead, writing in 1958, gives the matter detailed consideration but concludes only hesitantly that ‘there does appear to be a convention debarring [the judicial peers] from participation in political controversy’, but he notes that the Politics Convention is difficult to trace ‘if it exists at all’.⁶⁶ Bromhead dates the creation of the Convention back to Lord Carson’s incendiary interventions in the Treaty debates (extracted above). Carson’s attacks on the Government during the debates on the Treaty were atypical not just of the judicial peers but also of the very courteous and consensual style in which business in the Lords was normally transacted. Those debates prompted a separate debate about the appropriateness of Carson’s intervention and the role of the judicial peers in the House.⁶⁷ Carson defended his approach as consistent with the past practice of the House and the Law Lords. Sumner was dismissive of the suggestion that his own publicly known views on India and Ireland would render it inappropriate for him to hear appeals from those jurisdictions. He had in an earlier debate expressed the view that “the only constitutional rule is this, that a Peer has the right to address your Lordships upon any subject”.⁶⁸ This approach of engagement may be contrasted with the counsel of restraint advocated by the Lord Chancellor, Viscount Birkenhead, who maintained that something like a Politics Convention had existed since the creation of the first Law Lords and had seldom been

⁶⁶ P. Bromhead, above n 27, 68-69.

⁶⁷ HL Deb vol 49 col 931-973 29 March 1922.

⁶⁸ HL Deb vol 49 col 719 22 March 1922.

broken. Indeed in recent decades, he argued, ‘those who were interested in our constitutional practice found that the only road alike of sanity and of safety was to exclude our Judges from all, even the slightest, participation in political affairs.’⁶⁹ Lord Dunedin, another judicial peer, broke a self-imposed silence of seventeen years by speaking in the debate. He explained that his restraint derived from a belief that ‘the man in the street will not have the same complete confidence in one’s impartiality if one mixes oneself up in political questions.’⁷⁰

For Bromhead, this was a watershed moment for the Politics Convention: ‘the general rules seemed to have been given a definition which had not been required before’. Yet the debate itself discloses no definitive conclusion. Rather it appears that the participants on both sides of the argument remained in the fixed positions they had occupied before the debate. Last word in the debate went to Lord Salisbury, who expressed the hope that the judicial peers would continue to contribute to debate.⁷¹ Only ‘with benefit of hindsight’, as Sumner’s biographer puts it, did those who counselled restraint have the better part of the debate.⁷² These two contradictory approaches – one of restraint and the other of engagement – continued to co-exist. Some judicial peers continued to involve themselves in matters of serious controversy, for example, on capital and corporal punishment between the 1940s and 1960s, the Human Rights Act in the 1990s, and on fox hunting in the 2000s. Louis Blom-Cooper and Gavin Drewry, writing in 1972 and having conducted a significant study of the legislative contributions of judicial peers, are only able to describe the arrangement referred to by Bromhead as a ‘tradition’ and they comment that a ‘self-denying ordinance’ that the Law Lords should steer clear of party political controversy is (or was at that time) ‘relatively recent’.⁷³ Later still, Donald Shell, writing in 1988, puts the matter no more strongly than:

⁶⁹ HL Deb vol 49 col 946.

⁷⁰ *ibid*, col 950. Lord Dunedin was given a peerage upon appointment as Lord President in 1905, and was appointed a Law Lord in 1913.

⁷¹ *ibid*, col 973.

⁷² A. Lentin, *The Last Political Law Lord* (Newcastle: Cambridge Scholars Publishing, 2008), 145.

⁷³ Blom-Cooper and Drewry (1972), above n 3, 198.

Serving law lords are not forbidden from taking part in any business before the Lords, though there is a predisposition against their participation in matters of political controversy.⁷⁴

Richard Cornes, writing in 2000 notes that there *is* a Politics Convention and that it is not always observed.⁷⁵ Yet Lord Hope, one of the last judicial peers, is of the view that [e]very Law Lord, on his or her appointment as a Lord of Appeal in Ordinary, becomes entitled to all the rights and privileges enjoyed by every other member of the House'.⁷⁶ He too adverts to a Politics Convention, although he suggests that the line between partisan and non-partisan matters was for individual judicial peers to draw.⁷⁷

An excursus into the theory of constitutional conventions is beyond the scope of this article, but a basic account of conventions is necessary before we proceed further. Conventions are non-legal rules of constitutional practice, a form of 'constitutional morality',⁷⁸ enforced not through the courts but through the ordinary operations of politics and through public opinion. Key constitutional conventions include the rule that the Monarch must pick as Prime Minister the person who commands the confidence of the House of Commons, and the rule that the House of Lords will not resist measures that appeared in the election manifesto of a governing party (the Salisbury-Addison convention). Ivor Jennings's classic test for the existence of a convention remains a useful guide for identifying a valid convention:

⁷⁴ Shell, above n 34, at 48.

⁷⁵ Cornes, above n 25, 6.

⁷⁶ Hope, above n 28, 549.

⁷⁷ D. Hope, 'Law Lords in Parliament' in Blom-Cooper *et al* (2009), above n 3, 172. Hope cites advice issued by the Clerk of the Parliaments that emphasised the freedom of the judicial peers to participate whilst also stressing that it was incumbent on judges to avoid becoming involved in party political controversy.

⁷⁸ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 10th ed, 1959), 24.

We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe they were bound by a rule; and thirdly, is there a reason for the rule?⁷⁹

The second and third questions are important because they allow us to distinguish conventions from insignificant habits and practices by looking at the psychological dimension of the rule and the principles involved. Geoffrey Marshall presents constitutional conventions as a form of ‘critical morality’. We should, he insists, focus not just on the beliefs of the participants, but also on the rules that they *ought* to have felt obliged by, if they had considered the conventional precedents and the reasons that animated them correctly. This affords critics and commentators the scope to suggest that a conventional rule may be wrongly interpreted, or that practice should be changed if it is to comply properly with the reason that lies behind the convention.⁸⁰ In essence, we need to look for a Dworkinian ‘line of best fit’ as a means of understanding and refining the convention.⁸¹ A breach of a convention does not necessarily mean that the convention does not exist or that it has ended, any more than breach of a criminal law means that that law is not in effect.⁸² It may, instead, mean that we have misunderstood the point of the convention, and that our line of best fit needs to be redrawn.

In the case of the Politics Convention, we see evidence of low-level, but consistent, practice apparently in violation of the Convention throughout the period studied, suggesting at least a degree of weakness about the rule. This weakness may be usefully contrasted with the equal and opposite convention that precluded lay peers from actively participating in the judicial work of the Law Lords. This convention was obeyed without exception since the early years of the Law Lords and this record casts the effectiveness of the Politics Convention in poor light. Bearing in mind Jennings’ requirement that the subject matter of the convention be treated *as a rule*, if the Politics Convention were effective we should expect to see criticism of judges by their fellow parliamentarians – and

⁷⁹ I. Jennings, *The Law and the Constitution* (London: University of London Press, 5th ed, 1959), 134-5.

⁸⁰ G. Marshall, *Constitutional Conventions* (Oxford: OUP, 1987), 12-13.

⁸¹ J. Jaconelli, ‘The nature of constitutional convention’ (1999) 19 *Legal Studies* 24, 34-35.

⁸² *ibid.*, 32.

especially by their fellow judicial peers – when they cross the line into partisan politics. Yet, apart from the discussions on the fringes of the Irish treaty debates in 1922, there is no evidence of public criticism of judges in the random sample of debates, indeed quite the reverse. Judges’ contributions on all topics tend to be welcomed by other peers.

The existence of a body of contrary practice by some judicial peers that went unchecked by their colleagues suggests two possibilities for the Politics Convention: firstly, that it did not exist or, secondly, that it was subject to a large number of exceptions (and so that we need to redraw our line of best fit). The latter is entirely possible. The most apposite contemporary statement of a similar rule – the Judicial Executive Board’s guidance for judges giving evidence to parliamentary committees⁸³ – sets out significant restrictions on the kinds of issue judges may engage with, especially that judges may not comment on the merits, meaning or likely effects of prospective legislation or government policy. This rule would appear to prohibit discussion of Bills or policies, but it is subject to an exception permitting judges to discuss these things where they affect the independence of the judiciary, or the operation of the courts or the administration of justice.⁸⁴ Similarly, statements of the scope of the Convention tended to be quite narrow. Speaking in the 1922 debates, the Lord Chancellor (Viscount Birkenhead) linked the Convention to a broader and more widely accepted convention that ‘the salaried judges of this country are neither expected nor allowed to take part in political controversy’.⁸⁵ Lord Bingham’s practice statement, if we take that to be the most definitive statement of the Politics Convention in the latter years of the judicial peers, similarly referred to ‘party political controversy’. Judges were permitted (or permitted themselves) to engage in matters that were *political* falling short of partisan politics. Indeed it is difficult to imagine any plausible definition of politics that would not count the activities of the judicial peers as ‘political’. Politics is a notoriously elusive concept but even the narrowest definitions, which

⁸³ Judicial Executive Board, ‘Guidance for Judges on Appearances before Select Committees’ (2012): judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/select_committee_guidance.pdf. Last accessed 17 January 2016.

⁸⁴ *ibid.*, para. 13.

⁸⁵ HL Deb vol 49 col 949 29 March 1922.

limit the usage of the term to the processes of government in public institutions, would define contributions to legislative debate as ‘politics’.⁸⁶ Given this elusive character of politics, it is not surprising that the Convention itself proves elusive, and that judicial peers interpreted the Convention differently. Most people will have an intuitive sense of what a partisan political controversy is – one that provokes divisive or emotionally charged debate across party lines – but it is difficult to articulate a hard and fast line between this kind of controversy and ‘ordinary’ politics.

All versions of the Convention permitted judges to engage in matters to do with the law, the courts, and the judiciary – ‘lawyers’ law’ – even if they were highly political. Thus when judges engaged in judicial trade union matters, or technical lawyers’ law topics, even when they were politically divisive, they would likely have regarded themselves as staying within its strictures. In the late 1980s and early 1990s judges felt free enough to argue in robust terms against Lord Mackay’s reforms to the legal system. A few years before his practice statement, Lord Bingham had felt able to participate in the debates on the Human Rights Act, welcoming a bill that was opposed by the Conservative opposition of the time.⁸⁷

The identity of the judicial peers as legal experts appears at times to have had the effect of giving their contributions an air of legal neutrality – ‘the political asexuality of the legal profession’ as Robert Stevens puts it⁸⁸ – even when they were not neutral. In one debate, for example, Lord Oliver politely but firmly rebukes the Government for what he perceives to be a negative response to his committee’s report recommending that EU citizens be allowed to vote in local elections.

... [C]an it really be morally justified that, by the exercise of a right which lies at the very root of the treaty, those persons while compelled to contribute to local government

⁸⁶ See eg B. Crick, *In Defence of Politics* (London: Bloomsbury, 5th ed 2013), cpt 1, C. Hay, *Why We Hate Politics* (Cambridge: Polity Press, 2007), cpt 2 and A. Leftwich (ed), *What is Politics?* (Cambridge: Polity Press, 2004).

⁸⁷ Eg Lord Bingham, HL Deb vol 582 col 1245 3 November 1997. It is possible that Bingham’s thinking changed over time. His practice statement was his last contribution to debate in the Lords.

⁸⁸ Stevens was describing the lawyerly environment of the old Lord Chancellor’s Office: Stevens, above n 5, 7.

finances, should be deprived of any say in the conduct of affairs in the local community in which they spend their working lives?⁸⁹

This contribution essentially made a point about political morality, and Lord Oliver spoke as the chair of a select committee – essentially as an ordinary politician – rather than as a legal expert.⁹⁰ Indeed he did not discuss the law at all in his contributions to the debate. Yet Lord Oliver was described by another speaker in the debate as having identified the legal issues. The comforting concept of lawyers’ law creates false neutrality and this can mislead both lay peers and the judicial peers themselves. The judicial peers’ sometimes misplaced sense of their own political neutrality could prompt hostile reactions. In 1971 the judicial peers sought to defeat a measure that the remarriage prospects of a widow should no longer be taken into account in an assessment for damages for the loss of her husband under the Fatal Accidents Acts.⁹¹ Five Law Lords, led by Lord Diplock, moved amendments against this clause of the bill, arguing strenuously against the measure because (they argued) it would lead to serious inequality of treatment of otherwise equal plaintiffs. They cast their objection not as a practical or political one, but in the most portentous tones as a threat to the rule of law.⁹² But far from receiving the objection as neutral legal advice, opponents in the Lords castigated the judges for completely missing the point of the reform. In the words of Baroness Summerskill, the judges “appeared to regard the housewife as an appendage to a man who is prepared to subsidise her”.⁹³ The judges withdrew from the fight ‘as decorously as they were able’.⁹⁴

⁸⁹ HL Deb vol 524 col 809 18 Dec 1990.

⁹⁰ Although the role of chair of EU Sub-Committee E on Law and Justice was typically reserved for a Law Lord, so the categories here are unavoidably muddled.

⁹¹ Law Reform (Miscellaneous Provisions) Bill 1971, s 4. HL Deb vol 318 col 521 6 May 1971 and HL Deb vol 318 col 1527 14 May 1971. See Blom-Cooper and Drewry (1972), above n 3, at 213-5.

⁹² Lord Morris of Borth-y-Gest argued against his fellow Law Lords and in favour of the measure.

⁹³ HL Deb vol 318 col 536 6 May 1971.

⁹⁴ Blom-Cooper and Drewry (1972), above n 3, 215.

The problem of recusal was perhaps the most concrete objection raised in support of the Politics Convention. It first came to prominence in the 1922 debates when the Lord Chancellor noted that ‘it was becoming impossible to constitute a Court to deal with Irish appeals because almost every Lord had taken, or was threatening to take, some part in the debate’⁹⁵ and complained that judicial peers engaging with that debate were effectively rendering themselves ineligible to perform the job they were paid to do. Yet it was not until 2005 – after the Human Rights Act 1998 and the *McGonnell* case⁹⁶ – that judges were formally recused as a result of their actions in the chamber. Lords Hoffmann and Scott, who had voted against the Hunting Act 2004, were recused from the *Jackson* case, in which the validity of the Act was challenged.⁹⁷ But this was a broader objection than the Politics Convention had aimed at: voting in the chamber had never really been regarded as problematic. (Lord Dunedin, despite his self-imposed vow of silence until 1922, is recorded by Hansard as having voted in divisions prior to that.) It seems unlikely that this objection could have had any real bite (other than in the very unusual imperial context into which Lords Carson and Sumner waded) until at least the 1960s because of the very limited availability of judicial review and other means of challenging the political institutions of government until that time. The distinction between partisan and non-partisan, or controversial and non-controversial, comment by judicial peers has intuitive weight, but had eagle-eyed private lawyers been paying attention to Hansard, recusal would surely have been much more appropriate in relation to the dry and decidedly *non*-partisan comments judicial peers made on matters of private and commercial law. Partisan political comments, by contrast, could only very rarely have had purchase on the kinds of cases likely to come before the judicial peers. If the issue lying behind the Politics Convention was the risk of recusal due to bias, Lord Dunedin’s general policy of silence in relation to all of the ordinary business of the House seems more consistent and appropriate.⁹⁸ Indeed the subject matter of the *McGonnell* case that indirectly precipitated the ending of the judicial peers’ role – planning

⁹⁵ Viscount Birkenhead, HL Deb vol 49 col 943 March 1922.

⁹⁶ *McGonnell v UK* (2000) 30 EHRR 289.

⁹⁷ *R (Jackson) v Attorney General* [2005] UKHL 56. Lord Scott had also spoken against an earlier bill that proposed a hunting ban: HL Deb vol 623 col 626 12 March 2001.

⁹⁸ A point noted by Lord Hope in his ‘Law Lords in Parliament’ piece in Blom-Cooper *et al* (2009), above n 3, at 175.

permission for glasshouses – was hardly the stuff of full-blooded partisan controversy. Separate from the recusal problem but of more uncertain application was the objection that participation in debates on corporal punishment, or on India, threatened the legitimacy of the judiciary in the eyes of the public.

It is entirely possible that – most of the time – the Politics Convention did not impose any meaningful restriction on anything a judicial peer might be likely to speak about. The Convention may have operated at a very high level of generality to create a culture in which judges became more cautious about political engagement as time went on. As Blom-Cooper and Drewry concluded in 1971, it seems to have become less common for judges to weigh into political controversies as time went on. But that was true of the connections between judges and politics more generally. A general sense that judges should be chary about political entanglement was bound up with the more general trajectory of constitutional arrangements since the eighteenth century but the matter seems to have been determined far more by the personality and political outlook of individual judicial peers than by anything else. Shell seems to capture the matter when he notes that:

Among the law lords of each generation there also appear to be one or two who choose to become House of Lords men, drawing on their legal expertise, but applying this in an unabashed way in debate on a wide range of topics.⁹⁹

This conclusion seems to fit more accurately with the actual practice of the judicial peers in Parliament than the idea that judicial peers were adhering to the Politics Convention as such. A small number of judicial peers – including Carson, Dilhorne, Morris, Ackner, Fitzgerald, Simon and others – seem to have felt relatively free to engage with political controversy. As it happens these

⁹⁹ Shell, above n 34, 50

judges are also amongst those with the highest individual CAAC contributions.¹⁰⁰ They have in common a certain political and temperamental outlook: by and large they tended to come from conservative political backgrounds or share a conservative attitude to social morality, and were often uncompromising figures. Carson had served as Solicitor General in a Conservative Government and was the leader of Irish unionism from 1910, during the Home Rule crisis. Dilhorne had been a Conservative Attorney General and Lord Chancellor prior to becoming a Law Lord. Morris, Fitzgerald and Simon were former Conservative MPs. The effect of a prior political career appears to be less important than a connection to conservative politics or a conservative outlook. Judges with a known conservative disposition were more likely to have high CAAC scores than judges who had been MPs. Sumner for example, became notorious as a Law Lord ‘for his political outspokenness from the “diehard” wing of the Conservative party’¹⁰¹ despite having no political involvement prior to his appointment. Ackner, similarly, expressed ‘unashamedly conservative’ views on the bench and in his public pronouncements post-retirement.¹⁰² Denning, although generally remembered for the liberalism with which he developed some areas of the law in his judgments, was highly conservative on moral and social matters and reactionary in some of his extra-judicial views.¹⁰³ There may have been a certain constitutional conservatism and a predisposition towards an older way of doing things that for some judicial peers went with conservatism in political and social matters. Against this overall impression of conservatism we can set the willingness of a few liberal judges, such as Lord Bingham and Lord Browne-Wilkinson, to advocate for and speak in the debates on the Human Rights Act and the devolution statutes in the final decades of the Appellate Committee. Liberal judges perhaps felt able to engage with these debates as a matter of constitutional reform – perceived to be an inherently lawyerly matter – even

¹⁰⁰ Nine out of the top ten CAAC scorers, and a slightly lower proportion of the top 20, had known associations with conservative politics or causes.

¹⁰¹ Lentin, above n 58, 4.

¹⁰² From Ackner’s entry in the Oxford Dictionary of National Biography: oxforddnb.com/view/article/97069. Last accessed 17 Jan 2016

¹⁰³ See Stephen Sedley’s obituary of Lord Denning in *The Guardian* (6 March 1999).

though some of them expressed discomfort with their role as parliamentarians more broadly.¹⁰⁴ These interventions were, however, exceptional. The most prolific contributors amongst the judicial peers were overwhelmingly conservative by background or inclination.

Looming large over all of this discussion was the figure of the Lord Chancellor. In the 1922 debates Carson points out, not unreasonably, that the category of peers known at that time as the ‘Law Lords’ included the Lord Chancellor – ‘the most political one of all’ – as well as ex-Lord Chancellors and other peers who held some judicial office or legal qualifications.¹⁰⁵ All of these peers were entitled, under the 1876 Act, to participate in the judicial business of the House. Whilst the office of Lord Chancellor, in particular, existed it seems unrealistic to expect that judicial peers who were of a strongly political bent and a constitutionally conservative disposition would be minded to hold the line against dabbling in politics. If, on a personal level, judicial peers saw their colleague (who regular sat with them on judicial matters as the effective chair of the Appellate Committee) engaged with partisan politics day-in-day-out it must have felt natural, at least for some, to do likewise.

The Politics Convention was weak at best. Although there appears to have been a widespread belief that *some kind* of rule of this nature existed, personality, rather than adherence to the Convention, appears to have been the driving force in determining whether and how judicial peers engaged with the ordinary business of the House. Or, at least, those judicial peers who were minded to engage with politics did not find that the Convention posed an obstacle. This is not quite the same as saying that the Convention did not exist, because the category of ‘convention’ has blurry and forgiving edges. But it does suggest that there is little analytical value in using the Politics Convention as a framework for evaluating the historical role of the judicial peers within Parliament.

¹⁰⁴ Eg Lord Bingham, ‘A New Supreme Court for the United Kingdom’ The Constitution Unit Spring Lecture 2002, 1 May 2002.

¹⁰⁵ Lord Carson, HL Deb vol 49 col 931-973 29 March 1922.

JUDGES AND POLITICS: LAWYERS' LAW

The ambiguity we have recorded in the history of the Politics Convention picks out an ambiguity about how we think about judicial engagement with policy and law-making more broadly. The contributions by judicial peers to parliamentary debate were an important part of a wider spectrum of engagement by judges with politics and political argument. Judges have always given lectures, written opinionated books and articles and advocated law reform. In recent decades, judges have engaged with parliamentary committees with increasing frequency.¹⁰⁶ Putting aside the doubts registered above about the usefulness of the Convention as a means of understanding how the judicial peers behaved, by its own terms the Convention permitted judges to engage with matters of 'lawyers' law' and matters relating to judicial independence and the rule of law, just as the guidance offered to judges giving evidence to parliamentary committees does today. This highlights a problem about the idea of 'lawyers' law', which in itself tends not to be examined very much. As a lawyers' shorthand, lawyers' law connotes the idea of something purely technical, and politically neutral; something of concern mainly to the legal profession.¹⁰⁷ But if the Politics Convention permitted judges to talk about 'lawyers' law' it permitted them to talk about a great deal. Just in the sample examined for this article, it embraced agricultural boundary disputes, whipping, rights of appeal from Courts Martial, judicial deployment and pensions, and voting rights for EU nationals. Judicial peers were afforded broad scope by the Politics Convention and the idea of lawyers' law to discuss matters of politics covered by the cloak of reasonableness and expertise that the law provides. To put it another way: what other than lawyers' law could judges have wanted to talk about?

¹⁰⁶ R. Hazell and P. O'Brien, 'Meaningful Dialogue: Judicial Engagement with Parliamentary Committees at Westminster' [2016] PL 54.

¹⁰⁷ J. du Vergier, above n 47.

Judicial peers were afforded significant freedom of action in some debates because of a kind of deference by their fellow parliamentarians. Lay peers exercised restraint in relation to material they would have viewed as arcane. For many, part of the purpose of the judicial peers may have been to address this material as experts. Their restraint may also in some cases have had something to do with the exalted status that judges held during much of the period, and arguably still hold (to a lesser extent) today. The debates in which judicial peers participated are replete with expressions of gratitude from lay peers to their judicial colleagues for explaining a measure to the House, or for carrying forward the debate on legal matters. Occasionally this gave way to frustration. One contributor in 1927 noted plaintively that ‘no one can regret more than I do the absence of my noble and learned friend the Lord Chancellor this evening, because as I listened to the wealth of legal criticism which thundered around our heads for the last hour, I felt that the intervention of a mere laymen in this discussion would be viewed by your Lordships as a most audacious proceeding.’¹⁰⁸ In a debate on the Courts Bill in 1970, a contributor apologises that “as a layman one has great hesitation in intervening in a debate in which so many noble and learned Lords are taking part”.¹⁰⁹ If the legal profession is a conspiracy against the laity, it is one in which the laity are sometimes complicit.

In the debates on judicial trade union matters, and especially on technical matters of lawyers’ law, it often seems that serving and retired judges, together with the occasional lawyer, are the only active contributors to the debate. Sometimes, as Shell notes in passing, they dominate proceedings,¹¹⁰ and they appear to have done so with the consent of their fellow parliamentarians. Judicial peers would not have been unusual from a parliamentary perspective as crossbenchers acting as trade union advocates for their profession (doctors, entrepreneurs and others do the same), but they possessed a special kind of status as serving judges – a sense of neutrality and objectivity. This combination of judicial peers’ ‘political asexuality’, as Stevens put it, and lay peers’ deference cannot be regarded

¹⁰⁸ The Lord Privy Seal (Marquess of Salisbury), HL Deb vol 66 col 315 2 March 1927.

¹⁰⁹ Lord Shepherd, HL Deb vol 313, col 1544 17 December 1970.

¹¹⁰ Shell, above n 34, 61.

as healthy for Parliament as an institution. As George Gretton puts it in a piece about the Scottish Law Commission, ‘Nobody speaks of plumbers’ plumbing; lawyers’ law is as absurd. ... [L]aw reform commissions have great technical expertise, but have no particular claim to wisdom in matters of social, economic or political reform.’¹¹¹ The same is true of judges. On some matters, the cloak of legal neutrality may have allowed judges to advocate for their own politics on more substantive matters. There are one or two examples of this in the sample of 29 debates,¹¹² where contributions on property, company law or criminal law appeared to draw on a politics of the judiciary – small ‘c’ conservative and elite-oriented – that John Griffith would have found familiar.¹¹³

Contemporary judges engage with politics and policy in other ways, but these kinds of arguments continue to play out. Retired judicial peers are regular contributors to debate (see Figure 2 above), and sometimes act as proxies for their serving judicial colleagues. Just after his retirement in 2012 Lord Phillips, for example, introduced an amendment to the Constitutional Reform Act 2005 regarding the role of the Chief Executive of the Supreme Court. He did so at the instance of his successor as President of that Court (Lord Neuberger).¹¹⁴ The short debate on the matter was almost exclusively carried on by senior lawyers, and predominantly by eminent retired judges who agreed on the merits of the amendment. Nonetheless, despite a glimmer of the old deference,¹¹⁵ the debate was substantial. Partly this reflects changes to the nature of the upper house. Since the reforms of 1999 (when most of the hereditary peers were excluded) the House of Lords has evolved into an expert revising chamber, able to draw on a spectrum of expertise and experience from across society. The House is now more professionalised and ‘responds well to reasoned argument, to well-

¹¹¹ G. Gretton, ‘Of Law Commissioning’ [2013] Edin. LR 120,127.

¹¹² Eg Viscount Cave speaking (above fn 54) about the enclosure of commonable lands from the perspective of big landowners and golf courses, but claiming to speak as an expert and ‘for the profession as a whole’, or Viscount Dilhorne’s contributions to various debates on the Courts Bill in December 1970 (above fn 49).

¹¹³ J. Griffith, *The Politics of the Judiciary* (5th edn, London: Fontana Press, 1997), chapter 9 (and generally).

¹¹⁴ HL Deb vol 741 col 1488 18 December 2012. The amendment was contained in the Crime and Courts Act 2013 and amended sections 48 and 49 of the 2005 Act.

¹¹⁵ In the contribution of Lord Butler: “My Lords, I hesitate to intervene in the debate when so many distinguished members of the judiciary have spoken.” HL Deb vol 741 col 1497 18 December 2012. Note that Lord Butler was nonetheless intervening to speak against the amendment.

argued persuasiveness, to evidence-based cases'.¹¹⁶ Expert peers speaking, as most retired judges do, from the non-party crossbencher group can play a positive and influential role, but equally their lay counterparts in the Lords are likely to be a little less deferential to judges and less receptive to trade union-style special pleading.¹¹⁷ The debate shows how retired judicial peers can continue to play a positive role as bridges between the serving judiciary and Parliament. Lord Phillips withdrew his amendment on the promise of further negotiations between the Ministry of Justice and Lord Neuberger, but the proposal did ultimately form part of the legislation as enacted.

In the same vein, retired senior judges can play a valuable expert scrutiny role on key committees like the Lords Constitution Committee.¹¹⁸ Serving judges also give evidence to parliamentary committees – a practice that has grown significantly in the last fifteen years – and in this form of engagement the same kind of divide (between more enthusiastic and more reserved judges) can be detected.¹¹⁹ As we noted above the guidelines issued by the Judicial Executive Board to judges in this context suggest something similar to the Politics Convention.¹²⁰ There is a related debate in the context of judicial speech-making. Since the relaxation of the Kilmuir Rules judges have become much more willing to make public speeches more generally.¹²¹ In a recent public lecture, Sir Brian Leveson suggests in language highly reminiscent of some accounts of the Politics Convention, that serving judges should not take sides in matters of political controversy.¹²² On that basis it was entirely proper for Lord Scarman to advocate the incorporation of the European Convention into UK law in the 1970s, because the latter position attracted little political interest. It would be highly

¹¹⁶ Baroness Royall, 'Noble Opposition: Scrutiny in the Lords', speech to the Centre for Opposition Studies, 9 February 2012.

¹¹⁷ See M. Russell, *The Contemporary House of Lords* (Oxford: OUP, 2013), cpt 4.

¹¹⁸ Lord Judge, former Lord Chief Justice of England and Wales, and Lord Cullen, former Lord President, currently sit on that committee.

¹¹⁹ See Hazell and O'Brien, above n 106.

¹²⁰ Above n 83.

¹²¹ On the rather misleadingly-named Kilmuir Rules, the history and content of which have striking parallels with the Politics Convention, see A.W. Bradley, 'Judges and the Media – the Kilmuir Rules' [1986] PL 383, 384; S. Shetreet and S. Turenne, *Judges on Trial* (Cambridge: CUP, 2012), 359-363. It is doubtful that Kilmuir intended to set out a general rule at all: N. Duxbury, *Kilmuir* (Oxford: Hart Publishing, 2015), 68-73.

¹²² Sir Brian Leveson, 'Justice for the 21st Century: Catherine Weatherill Lecture', Isle of Man, 9 October 2015, 14 and citing in part S.A. de Smith and R. Brazier, *Constitutional and Administrative Law* (Penguin, London, 8th ed 1998), 375.

improper for a contemporary judge to do so because the issue of incorporation and the future of the Human Rights Act have become matters of the most profound political controversy. Sir Brian contrasts his own position with the slightly more cautious approach of Lord Neuberger, expressed when the latter was Master of the Rolls, that Lord Scarman crossed a line when he adopted this position even in the 1970s.¹²³ In the words of Lord Neuberger, judges should be very cautious when speaking extra-judicially on the controversies of the day ‘not only in the choice of subject, but also in the manner in which their contributions to public debate are phrased’.¹²⁴ Unlike parliamentary contributions by the pre-2009 judicial peers, the matter is not entirely for judges to determine for themselves. In 2013 Mr Justice Coleridge was formally disciplined by the Lord Chief Justice and Lord Chancellor for criticising the government’s policy on same-sex marriage. He subsequently resigned over the matter.¹²⁵

The record of the judicial peers suggests that the sky will not fall in if judges sometimes offer opinions on political matters. Judges have, in fact, quietly engaged on both sides of the politically-charged debate on the Human Rights Act.¹²⁶ Judicial independence has historically been regarded as compatible with a significant degree of engagement between judges and politics. Indeed, engagement between judges, politicians and officials is an important and often essential way of *protecting* judicial independence.¹²⁷ The experience of the judicial peers in parliament suggests that judges have a valuable part to play in public debate, but that non-judges should be prepared to look beneath the cloak that ‘lawyer’s law’ and legalistic argument can sometimes cast over contentious political issues.

¹²³ Lord Neuberger MR, ‘Where Angels Fear to Tread’, the 2012 Holdsworth Club Presidential Address, 5.

¹²⁴ *ibid* 10.

¹²⁵ S. Doughty, ‘Anger of the Judge Forced to Resign for Championing Marriage: Sir Paul Coleridge Says Only “One or Two” Colleagues Are Opposed to His Views’, *Daily Mail* 19 December 2013.

¹²⁶ See E. Bates, ‘The Senior Judiciary on ‘Strasbourg’ – More Supportive Than Some Would Have You Believe’, UK Constitutional Law Blog (28 May 2015) (available at <http://ukconstitutionallaw.org/>; last accessed 3 May 2016).

¹²⁷ See Gee *et al*, n 20.

CONCLUSION

The record of the judicial peers in the ordinary business of Parliament between the creation of the Law Lords in 1876 and the removal of serving judges from the House of Lords in 2009 is of a piece with a general movement away from constitutional pragmatism and towards a rationalist disentanglement of political and judicial roles. But, although there is some evidence that in their contributions to parliamentary debate judicial peers engaged less with political controversy over time, the general impression that judges gradually ceased to contribute to ordinary debate in the Lords over the twentieth century appears to be incorrect. The overall level of contributions by judges gradually increased over the course of the century, only ebbing – abruptly and significantly – around 2000. The impression that a Politics Convention controlled the way in which judicial peers engaged with the political business of the Lords appears also to be incorrect. What mattered was personality. There is evidence of persistent practice in contradiction of the Convention (overwhelmingly by judges of a conservative disposition) and little evidence of criticism of judicial peers who crossed the line. Whilst most judges contributed little, some were amongst the most active peers of their time, and the most active judges were generally not shy about engaging with partisan political controversy. Some of the representative role gradually abandoned by the judicial peers from 2000 onwards appears to have been taken up by retired judicial peers, and this approach has been continued by judges who have retired post-2009. Seen in this light, the post-2005 constitutional settlement – which insulated serving judges from politics, but preserved their input in other ways – arguably gets the balance right.