

Can May appoint new Lords to pass the EU Withdrawal Bil...

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In the context [of the comment I made on the House of Lords and the threat that Theresa May might pack that House with New Tory peers](#) I had this twitter thread by George Peretz QC published on 2 January drawn to my attention. I thought it worth sharing. I apologise for it being in reverse order: start at the bottom and work up (and if the formatting is untidy, I apologise: there is the day job to do as well):

George Peretz QC ([@GeorgePeretzQC](#))

[02/01/2018, 19:50](#)

36. Views tentative at this stage. But this is a topic well suited for legal Twitter. Fire away!

35. So, I would suggest, the appointment of new peers solely to railroad through legislation without resorting to the Parliament Acts could not just be contrary to convention but be unlawful and subject to legal challenge.

34. That power that is, in any event, highly dubious in any constitutional arrangement

where there is any attempt at separation of the powers.

[33.Here](#), the statutory scheme is the Parliament Acts. Those Acts displace the prerogative power to create peers with the avowed purpose of altering the make-up of the legislature.

32.The point here is a familiar one, dating from the famous De Keyser case. Where there is a statutory scheme to deal with a problem, the royal prerogative gives way.

31.The Parliament Acts are, as Lord Bingham observed, designed to make such action unnecessary. If the Government with a HoC majority wishes to enact legislation in a form unacceptable to the HoL, those Acts provide the route that should be used.

30. Since the GCHQ case it is clear that acts of the Royal prerogative can be judicially reviewed.

29.It is also, I would tentatively suggest, quite possible that the appointment of new peers simply in order to force through controversial legislation without having to use the Parliament Acts would be unlawful, and could be judicially reviewed.

28. It is not something that should be done or threatened in anticipation of problems that have not yet arisen.

27.Further, given the need to avoid the Queen being asked to take any decision that is politically controversial, the PM is, I'd suggest, required to try all other approaches

before seeking to employ the creation of peers as a device to overcome potential obstacles in the HoL.

26. As to the point that the Parliament Acts can't in practice be used here, that is the consequence of the Government's own decisions (as to the single session and as to the timing of the A50 notification which creates the urgency): it shd not affect the constitutional position.

25. For the Queen to be obliged accede to such a request by her PM would, arguably, unbalance the constitution by giving the executive a wholly improper degree of control over the legislature.

24. If the HoL's refusal to pass a Bill save with certain amendments is unacceptable, the answer is to use the Parliament Acts, not to pack the HoL with new peers.

23. Those doubts are perhaps even stronger where the PM has not managed to win a majority for her party's programme.

22. The UK constitution has few enough checks and balances against what Lord Hailsham memorably called the elective dictatorship of a PM with a HoC majority. The HoL is one of them.

21. Standing back, it is not surprising that there should be some doubt as to whether the Queen is obliged to accede to a request by her PM that, in effect, substantially affects the composition of one of the legislature and does so in a way that suits the Government of the day.

20.The doubt is, indeed, implicit in the language used by Lord Bingham: it is the fact that there could be some doubt as to what the Queen should do that makes her decision necessarily political.

19.The lesson from that is that it was not regarded as entirely obvious what the duty of the King was when asked by a PM to create enough peers to get a Bill through the HoL in a form acceptable to the Government.

18.The HoL then backed down and passed the Bill.

17.At that point, the Government (with the King's agreement) told the Opposition that the King would agree to create enough peers. This came as a shock to some of the Opposition. The King had however been reluctant to allow this threat to be made any earlier.

16.After the Asquith Government was re-elected, the Bill passed the HoC again, and was effectively rejected by wrecking amendments, again, by the HoL.

15.The King received conflicting advice from his private secretaries. In the end, he agreed to give such a promise (partly because he was told, wrongly as it happened, that Balfour, who was then Leader of the Opposition, wld refuse to form a government if Asquith then resigned)

14. That election was to be fought on the very question of whether the HoL should

pass the Parliament Bill (which it had just rejected).

13. The King was first asked by PM Asquith, in November 1910, to give a contingent but secret promise conditional on the Government winning the proposed general election of December 2010.

12. It was not, however, regarded as inevitable that the King would agree to create enough peers to get the Bill through. The history is explained in detail in Roy Jenkins' great history of the constitutional crisis "Mr Balfour's Poodle".

11. That threat did though have to made in 1910/11 in order to get the HoL to pass the Parliament Bill (which became the 1911 Act).

10. Lord Bingham observed that one of the purposes of the Parliament Acts was, precisely, to obviate the need for any such threat.

9. Ld Bingham in Jackson [2005]UKHL56, 25: the threat "was a procedure necessarily unwelcome to a constitutional monarch, rightly anxious to avoid any appearance of participation in politics, and one which constitutionally-minded politicians were accordingly reluctant to invoke"

8. Since 1911, no Government has had to employ this threat. None have had to. The Parliament Acts enabled measures opposed by the Lords to become law anyway. On matters ranging from Irish Home Rule to the ban on fox-hunting.

7. Would such a step be constitutional, however? (A difficult term in the U.K. context: it doesn't necessarily mean "challengeable in Court": there are conventions that are not.)

6. So the Government may consider either creating enough new peers to give it reliable support on all important votes, or threatening to create peers if the HoL votes for amendments unacceptable to the Government.

5. That is because the Parliament Acts apply only where the HoC passes effectively the same Bill in two successive sessions.

4. But the effect is to make it impossible to use the Parliament Acts in order to get a Bill enacted that has been passed by the HoC but rejected (or amended in a way unacceptable to a HoC majority) by the HoL

3. The decision to have one long session (2017-19) is a decision of the Government: it is the Crown that prorogues Parliament (brings a session to an end) and then opens a new session.

2. The problem the Government has created for itself is that the current parliamentary session, which started last year, will carry on until 2019 — after the planned Brexit day.

1. It has been suggested that the Government wants to create enough new peers to ensure that the EU Withdrawal Bill passes through the HoL unscathed.

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[02/01/2018, 19:21](#)

A thread about the potentially very topical subject of the creation of new peers to get controversial legislation through the House of Lords.