ADVICE

THE VISCOUNT MONCKTON OF BRENCHLEY

SUMMARY

I am asked to consider whether The Viscount Monckton of Brenchley was correct when, in a recent radio interview in Australia, he answered the question "Are you a member of the House of Lords?" by saying, "Yes, but without the right to sit or vote." My conclusion is that Lord Monckton's answer was and is correct at all points. We have the authority of two Law Lords in the Privileges Committee that the meaning of the words "membership of the House" in the Act is confined to the right to sit and vote. The implication is that in all other respects excluded Hereditary Peers remain members of the House. Also, the Letters Patent that created Peerages such as that of Monckton of Brenchley have not been revoked, and we have the recent authority both of the Leader of the House and of the High Court for that. Though the House of Lords Act 1999 purported to remove "membership of the House of Lords" from excluded Hereditary Peers including Lord Monckton's late father, its constitutionality is questionable. Peerages entail membership of the House. Lord Monckton is correct to state that he does not at present have the right to sit or vote, though if the 1999 Act is unconstitutional the excluded Hereditary Peers are unlawfully excluded. Therefore, Lord Monckton remains a Member not only of the Peerage but also of the House of Lords, save only that he cannot for now sit or vote there, and he was and is fully entitled to say so.

INTRODUCTION

The question before me is whether, notwithstanding the provisions of the House of Lords Act 1999, Viscount Monckton and all Hereditary Peers are members not only of the Peerage but also of the House of Lords. This question is one of definition, depending on ancient legal principles and on interpretation of statute.

The Right Honourable Christopher Walter Monckton, Third Viscount Monckton of Brenchley, succeeded to the Peerage in 2006 on the death of his father, the Second Viscount. The Viscountcy was created in 1957 for his grandfather, Walter Turner Monckton, who came to political prominence as advisor to Edward VIII during the sensational events following the abdication crisis.[1]

Lord Monckton's late father was disqualified from sitting and voting in the House of Lords as a consequence of the House of Lords Act 1999 (hereinafter "the Act"). Lord Monckton, on his succession, was thus automatically disqualified in turn.

Lord Monckton has nonetheless continued to assert that he is a member of the House of Lords, albeit accepting the *de facto* position that he is prohibited from sitting and voting in Parliament. In particular, during a radio interview with Australia's national broadcaster, ABC, in the late summer of 2011, Lord Monckton was asked, "Are you a member of the House of Lords?" He replied, "Yes, but without the right to sit or vote."

[1] The King abdicated on 10 December 1936.

The question whether Lord Monckton is a member of the House of Lords has attracted considerable national and international attention. It is not for me to speculate on the political reasons that may underlie some of this interest. Even the US Congress, before which Lord Monckton has frequently testified, has raised the question. Lord Monckton's reply to the Democrat chairman of the Energy and Commerce Committee was as follows:

> "The House of Lords Act 1999 debarred all but 92 of the 650 Hereditary Peers, including my father, from sitting or voting, and purported to – but did not – remove membership of the Upper House. Letters Patent granting Peerages, and consequently membership, are the personal gift of the Monarch. Only a specific law can annul a grant. The 1999 Act was a general law. The then Government, realizing this defect, took three maladroit steps: it wrote asking expelled Peers to return their Letters Patent (though that does not annul them); in 2009 it withdrew the passes admitting expelled Peers to the House (and implying they were members); and it told the enquiry clerks to deny they were members: but a written Parliamentary Answer by the Lord President of the Council admits that general legislation cannot annul Letters Patent, so, as my passport shows, I am The Viscount Monckton of Brenchley."

Lord Monckton made that public statement after the enquiry clerks at the House of Lords had begun telling members of the public that he was not a member of the House, but before anyone from the House had told him that the House authorities did not regard him as a member. He legitimately questions whether the House has in this respect acted in good faith, and states that as soon as he heard (via third parties) that the clerks were saying he was not a member of the House he put their opinion on record (his statement to Congress is just one example) so that no one could be misled. In this context, suggestions by the Clerk and his predecessor that Lord Monckton had misled people by saying he was a member of the House seem inappropriate. Lord Monckton may legitimately raise not only the matter but also the manner of the conduct of officials of the House with the Privileges Committee.

A letter of 21 October 2011[2] from the Clerk of the Parliaments ("the Clerk") says:

> "Viscount Monckton is not and never has been a member of the House of Lords."

Furthermore, and much to the continuing distress of the Monckton family, the Clerk has caused a letter from him to Lord Monckton to be published on the House of Lords website. At the time of writing, he also proposes to publish the entire correspondence with Lord Monckton, who has protested vigorously at this proposal on the ground that the Clerk could and should have made his position clear without mentioning him by name and without publishing the correspondence in breach of Article 8 of the European Human Rights Convention, which entitles the citizen to respect for his privacy in his correspondence.

In the light of these contradictory positions, I am asked to give an opinion on whether Lord Monckton's answers to questions from the ABC and from the US Congress were correct.

[2] Typed on House of Lords headed notepaper and signed by Mr Alex Daybank as Information Compliance Manager.

THE ACT

The effect of Section 1 of the Act is that Hereditary Peers are no longer entitled to sit and vote in the House of Lords. The provision states:

> "No one shall be a member of the House of Lords by virtue of Hereditary Peerage."

Section 1 in particular was examined by the Committee for Privileges (hereinafter "the Committee") in the Motion of Lord Twysden of Mayhew[3] (hereinafter "Mayhew"). The Committee concluded that the effect of section 1, read with section 7, is to take away the right of any excluded Hereditary Peer to receive and answer a writ of summons[4] and in consequence to sit and vote in the House of Lords.

STATUTORY INTERPRETATION

To remove the rights of Hereditary Peers, clear words of legislation must be used. In Viscountess Rhondda's Claim,[5] for example, Viscount Birkenhead LC pointed out that words of a statute must be sufficiently clear to achieve the result that Parliament intended. If the words adopted are ambiguous or doubtful, that too must be acknowledged:

> "The words of the statute are to be construed so as to ascertain the mind of the legislature from the natural and grammatical meaning of the words which it has used, and in so construing them the existing state of the law, the mischiefs to be remedied, and the defects to be amended, may legitimately be looked at together with the general scheme of the Act."

To which we might add the more general rule that a fundamental or constitutional right, such as the right to participate in government, cannot be abrogated otherwise than by specific provision.[6]

MAYHEW

The canons of statutory construction just mentioned were applied *inter alia* in the important 1999 reference when the Committee was asked to consider

> "whether the House of Lords Bill would if enacted, affect the right of those Hereditary Peers who have answered to their writ of summons before the Bill receives Royal Assent to continue to sit and vote throughout the Parliament in which the bill is enacted".

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[3] [2002] 1 A.C. 124.

[4] The writ is at the centre of a Peer's capacity to exercise his up to now indefeasible right to sit in the Lords. See The Vaux Peerage case wherein it was declared that " all Peerages must have their origin in a writ."

[5] *[1922] 2 AC 339,365*

[6] A principle argued in Mayhew by Michael Beloff QC acting for the Motioner. See also R v Secretary of State for the Home Department, *ex parte* Pierson [1998] AC 539 and R v Secretary of State for the home Department, *ex parte* Simms [2000] 2AC 115.

The Committee concluded that the question posed could be answered in the affirmative. In the course of its opinion it examined very carefully the wording in the Act and thought the words of the Act were abundantly clear.

Lord Slynn of Hadley, a member of the Committee, said something that has, I think, immediate ramifications for Viscount Monckton's query. After noting the less than ideal wordage used in Clause 1, he nevertheless concluded that by combining Clauses 1, 7(1) and 7(2) (which, he opined, "must be read together"):

> "Clause 1, which takes away the right to be 'a member of the House of Lords', can be read (as counsel for Lord Mayhew accept), and in my view clearly is to be read, as taking away the right of anyone to receive and answer a writ of summons and in consequence to sit and vote in the House of Lords (a shorthand form for which is 'to be a member of the House of Lords') by virtue of an Hereditary Peerage."[7]

In short, Lord Slynn of Hadley is saying that the formulation "to be a member of the House of Lords" in what is now section 1 of the 1999 Act refers specifically to the right to sit and vote. Membership of the House in the wider sense is not affected by the Act.

In the same Committee Lord Birkenhead, although he too appeared to accept the ambiguity of the wording of Clause 1, also agreed that the intention of that clause, read with clause 7, is clear and the language is adequate to achieve its exclusionary purpose. At the end of the session in which the Bill is passed, he concluded that a Hereditary Peer "will cease to be a member of the House". Like Lord Slynn, however, he defined what he meant by "member of the House":

> "He will no longer be entitled to receive a writ of summons to attend Parliament. He will, accordingly, not be entitled to participate in future Parliaments."[8]

For Birkenhead, therefore, as for Slynn, membership of the House of Lords as provided under what is now section 1 of the Act meant the narrow but important statutory restriction placed on Hereditary Peers from sitting and voting in the House of Lords when sitting as a coordinate branch of Parliament. It did not, in my view, go any further than that. In particular, it did not revoke the Letters Patent that created the Hereditary Peerages whose holders are now excluded from sitting or voting, and it did not, therefore, take away membership of the House or of the Peerage in the wider sense.

HOUSE OF LORDS

The Act did not employ the phrase "membership of the House of Lords" as a term of art. What it did intend, according to the reasoning of the Committee, was to use the term merely as a form of shorthand or symbolism for the prohibition on excluded Hereditary Peers from sitting and voting from the commencement of the Act.[9]

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[7] See note 3 above.
[8] See note 3 above.
[9] 11 November 1999, the Prorogation date for the 1998-1999 Session of Parliament.

At no point did the Committee suggest that any other privilege incident to the dignity of a Peer was in any other way affected by the Act.

As explained again by Lord Slynn of Hadley, the legislation might well have been drafted in more technical and precise terms. He gave an example of what he had in mind:

> "No Hereditary Peer, unless accepted in terms of section 2 below, shall be entitled to a writ of summons to the House of Lords."

Importantly for this discussion, though, and adapting the purposive approach discussed above, the learned Law Lord was able to extrapolate from the expression "membership of the House of Lords" in section 1 the precise but confined sense that Hereditary Peers were not entitled to sit and vote. In all other respects, they remain members of the House.

Lord Slynn's opinion goes a long way, in my view, to clarifying our understanding to what it means to be a member of the House of Lords in the statutory sense,[10] and whether the legislation on which the Clerk now seeks to rely was intended to take away membership of the House or of the Peerage in the wider sense. It was not.

THE PRIVILEGES OF THE PEERAGE

All the remaining privileges incidental to the Peerage, save only the right to sit and vote in Parliament in answer to a writ of summons, were left intact, and were unaffected by the Act. Indeed, for ten years the excluded Hereditary Peers were issued with passes allowing them to use the facilities of the House, and Lord Monckton, in his reply to the US Congress, makes a reasonable point when he says that these passes indicated that the House authorities recognized the excluded Hereditary Peers as members.

The numerous individual privileges[11] of Peers, though interesting, need not be considered in detail here. What one can say, however, is that once a Peerage has been bestowed by a Monarch it cannot be degraded easily even by statute. As Palmer points out:

> "The omnipotence of Parliament under our Constitution may do anything. It may, it would seem, deprive a Peer of his Peerage on grounds of public policy, but such a proceeding is naturally of very exceptional character, and in fact one instance only is to be found on the record of a deprivation of this kind,[12] declaring the degradation of George Neville from his name of duke."[13]

The most remarkable privilege was the right to take part in Parliament, a right to which the Peer was entitled *ex debito justitiae* by the constitutional usages of many centuries. The right has been said to have been recognized as having existed, at least in its most recent form, from the time Parliament assumed its present shape in the reign of Edward I.[14] It is this privilege that was obviously the target aimed at by the words of Section 1. Though the privilege of sitting and voting has been abrogated, a question nevertheless remains whether it was lawfully abolished or suspended. I shall address that question later in this Opinion.

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[10] To sit and vote in Parliament.
[11] See Palmer, Stevens, London, 1907, for an excellent rendition of the subject at Chapter X, p. 137.
[12] 17 Edw. IV. (Rot. Parl. V. 409).
[13] *Ibid*., p. 227.
[14] See Anson, *The Law and Custom of the Constitution*, Clarendon Press Oxford, 1922 Vol. I, p. 137.

Since the Act cannot bind future Parliaments, and since the meaning of the legislation can only be assigned its most confined sense, the Act's removal of the privilege of sitting and voting in the House of Lords must be seen especially in the historical perspective as temporary and provisional.

The present limitation on the privileges of some members of the House of Lords might be described as akin to the disqualification of bankrupt Peers. The Peer in question might nevertheless enjoy the other privileges of the Peerage, including, for example his immunity from arrest for debt. Crucially for the matter under discussion in this paragraph, his disqualification from sitting and voting was lifted on the annulment of his bankruptcy, or in cases where a court was willing to certify his good conduct notwithstanding his insolvent status. He could not sit or vote, but he remained a member of the House of Lords. *Mutatis mutandis*, the disqualification from sitting and voting cannot be seen as in any way restraining any excluded Hereditary Peer from saying that he is a member of the House of Lords, for that is precisely what he is.

MEANINGS OF THE TERM "HOUSE OF LORDS"

The incremental development of the House of Lords in history is inextricably bound up with the way the Peerage itself had developed.[15] The term 'Peerage' has always been used in several senses[16]. This is well elucidated by Palmer in *Peerage Law in England.*[17] A parallel observation might equally be made about the signification of membership of the House of Lords. The term "House of Lords" has always clearly denoted multiple meanings.

As stated by Anson[18], for example, we are apt to speak of "Lords of Parliament" or of "members of the House of Lords" as though these were terms interchangeable with the term "Peerage". The use of the terms in that way is in fact the common usage, notwithstanding that Anson goes on to distinguish the technical distinctions between the two. It is clearly arguable in the light of this peculiar historical evolution that there are at least three discrete meanings to the term "House of Lords". Before I turn to these meanings, I pause to consider once more the interpretation of the words in the Act.

When the Act refers to "membership of the House of Lords", it can only mean the particular gathering of those presently qualified to sit and vote in the Upper Chamber of Parliament. However, the phrase contains a number of meanings not exhausted by the construction placed on section 1 in particular by the opinions in *Mayhew.* Therefore, the Act never intended to spread a net wider than to remove the right to sit and vote from the excluded Hereditary Peers. If there had been any intention to achieve a wider purpose, clear and precise words should have been but, in the opinion of at least two learned members of the Committee of Privileges, were not deployed.

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[15] Degrees of Peerage are Duke, Marquis, Earl, Viscount and Baron but for 300 years – from the time of the Conqueror to the reign of Edward III – to give but one example of the piecemeal development there were only two: Earls and Barons. The dignity of Viscount, ranking between that of Earl and Baron, was first introduced into England by Henry VI, who created John, Lord Beaumont, Viscount de Beaumont in 1440.

16 A Peerage is real property[16]. To be precise it is an incorporeal hereditament conferring Peerage rights. It was for this reason that in Peerage cases judges were often asked questions on what the analogous situation might be concerning land.[16] It is for that reason alone surprising that no Hereditary Peer sought compensation for the deprivation of his tenement on the coming into effect of the Act.

[17] Stevens, London, 1907, pp. 7 ff.

[18] See note 14 above.

THE HOUSE OF LORDS AS A COUNCIL OF THE CROWN

I offer one illustration of such a meaning. The House of Lords is a Council of the Crown. It is true that Their Lordships have never been summoned in this capacity since 1688, but their historical rights are, according to Anson,[19] preserved in two ways. First, the writ of summons addressed to the temporal and spiritual Peers is a call to "treat and give counsel". Secondly, it is the privilege of each individual Peer to have audience of the Sovereign.

It follows that the Peers convened in this way as a Council to the Crown are known as the House of Lords and as this function had not been in any way abrogated or reduced by the Act an individual Peer is clearly a member of the House of Lords in this sense which is to say, when not assembled in Parliament, the permanent council of the Crown.

THE JUDICIAL ROLES OF THE HOUSE OF LORDS

The judicial function of the House of Lords was recently brought to an end, but it affords another example of how the term was used in a sense wider than the mere right to sit and vote. Likewise, not so long ago the Lords also had the role of trying a Peer indicted for treason of felony. That right was legislated away by Parliament in 1946, but again the House sat in a capacity other than as a constituent assembly and, crucially, was nevertheless known as the House of Lords.

Allied to the Lords' judicial role is the traditional function of deciding on Peerage claims. Yet again, few would argue that when discharging that role, albeit through the Committee of Privileges, the collective body of Peers was known by any other name than the House of Lords. Closely connected is the power of Peers collectively to determine questions of precedence amongst members of the House.

IS THE ACT CONSTITUTIONAL? THE MEREWORTH CASE

Dominick Brown, 5th Baron Oranmore and Brown, is a Hereditary Peer. In 2003 he succeeded to the Irish Peerage in the Barony of Oranmore and Brown as well to the English Baronetcy of Mereworth on his father's death in the previous year at the age of 100. His late father had much earlier taken his seat in the House of Lords in 1927 as Baron Mereworth, in the United Kingdom Peerage: for the older Barony of Oranmore and Browne, in the Irish Peerage, did not then entitle its bearer to a seat in the Lords.

Lord Mereworth brought a declaratory action by which he sought orders allowing him essentially to exercise the right to sit and vote in the House of Lords notwithstanding the Act. While various authorities were cited in the claim there is no mention of the important Mayhew judgment[20], discussed earlier. The claim was unsuccessful. However, Lord Mereworth won one point that is crucial to the present discussion. The Court held that the Act, though it had deprived the excluded Hereditary Peers of the right to sit or vote, had not revoked the Letters Patent that created those Peerages and the consequent membership of the House of Lords.

[19] See note 14 above.
[20] See note 5 above.

The bedrock of English constitutional theory,[21] an idea which attracts almost universal belief, is that any law once made cannot be challenged in the courts. If Parliament were to abrogate the House of Commons or, as now seems imminent, abolish the House of Lords, the argument runs that no court would have the power to question the validity of the legislation.

The traditional adherence to this central tenet of our constitution separates the law of the United Kingdom from that of most constitutional democracies throughout the world. Those include, most notably the United States, but also all the ex-colonies and dominions where, largely according to written constitutions, the courts are allowed to review legislation for constitutional validity.

It might come as little surprise therefore, in view of the prevailing orthodoxy that a very aggrieved but ancient constituency of government appeared to assent, not a little fatalistically, it has to be said, to such a revolutionary development.

When the 1999 Bill came up for scrutiny more recently in the Jackson case[22] but also in Mayhew, Counsel made it plain to the courts that what was not in issue was the power of Parliament to make the legislation.[23] That deference must be understood in the context of the consensus I have mentioned.

Recently influential judicial and academic figures have voiced strong doubts whether an unconstrained, sovereign legislature has in fact survived international developments. Not only has the EU emerged as a supra-legal system: also, international human rights impose supranational limitations on the freedom of Parliament to make and unmake laws. Most notably, the rule of law has recently emerged as the primary consideration[24] in modern constitutional democracies. Francis Jacobs[25] wrote in 2006:

> "Legally, it is difficult, if not impossible, to identify today a state in which a 'sovereign' legislature is not subject to legal limitations on the exercise of its powers. Moreover, sovereignty is incompatible, both internationally and internally, with another concept which also has a lengthy history, but which today is widely regarded as a paramount value ... The rule of law cannot coexist with traditional conceptions of sovereignty"[26]

In a similar vein, and of immediate interest, Vernon Bogdanor thought there is an obvious conflict between protecting the rule of law and an inflexible, Diceian rule of parliamentary sovereignty. The present Oxford Professor of Politics noted that if such a conflict is not resolved it could generate a constitutional crisis.[27]

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[21] Or, according to **Dicey,** Parliament has "under the English Constitution, the right to make or unmake any law whatever; and further ... no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament." In other words, all that a court of law can do with an Act is to apply it.

[22] [2005] UKHL 56 [2005] 4AER 1253

[23] See Steyn's speech at para. 109 ff.

[24] Lord Bingham of Cornhill.

[25] Professor of European Law at the University of London. Associate Professsor Kings College. Former Advocate General at the Court of Justice of the European Communities.

[26] The Sovereignty of Law: The European Way, Hamlyn Lectures 2006 (Cambridge University Press, 2007), p.7

[27] Bogdanor, Vernon, *The Sovereignty of Parliament or the Rule of Law?*, Magna Carta Lectures, 15 June 2006, p. 20.

Reflecting this view, some distinguished academic authors and also some judges in extrajudicial utterances and *obiter* observations have suggested that Parliament is not, or is no longer, supreme; that in some circumstances the judges might, without the authority of Parliament, hold a statute to be invalid and of no effect because it is contrary to a higher, fundamental, law or to the rule of law itself. That notion is widely recognised in many constitutions. This is so particularly throughout the English-speaking world, not least in Ireland, where since the 1960s the Irish Superior courts have been striking down legislation as incompatible with fundamental constitutional values both explicit and implicit in the *Bunreacht* – the Irish Constitution.[28]

Lord Steyn, in Jackson,[29] said:

> "The Attorney General said at the hearing that the Government might wish to use the 1949 Act to bring about the constitutional changes such as altering the composition of the House of Lords. The logic of this proposition is that the procedure of the 1949 Act could be used by the Government to abolish the House of Lords. Strict legalism suggests that the Attorney General might be right. But I am deeply troubled about assenting to the validity of such an exorbitant assertion of government power in our bicameral system. It may be that such an issue would test the merits of strict legalism and constitutional principle in the courts at the most fundamental level."[30]

As Mullen[31] notes in his detailed examination of the constitutional implications of the Jackson decision, between them Lord Steyn, Lord Hope and Baroness Hale canvass a number of traditional arguments why the UK constitution ought not properly to be viewed as one which incorporates the orthodox view of parliamentary supremacy.[32]

THE RULE OF LAW

As with natural law of old, it is not possible to formulate a simple and clear-cut statement of the rule of law as a broad political doctrine. However, as with natural law, the rule of law has acquired a mantric power far beyond its cogency. Crucially though, the idea of the rule, though undefined, takes pride of place in the Constitution Reform Act 2005. Section 1 states that the 2005 Act

> "does not adversely affect the existing constitutional principle of the rule of law, or the Lord Chancellor,s existing constitutional role in relation to that principle."

This is a first in UK legal history.

Lord Bingham, in a recent lecture on the rule of law, says that the principle, now that it is embedded in a statute, cannot any longer be dismissed as mere meaningless verbiage or as the jurisprudential equivalent of motherhood and apple pie.

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[28] For example, see Ryan v. Attorney General [1965] IR294.
[29] Jackson v Attorney General [2006] 1 AC 262.
[30] At para. 101 ff.
[31] Mullen, Reflections on Jackson v Attorney General: questioning sovereignty, 2007, *Legal Studies,*27:1, pp. 14-15.
[32] See also Clarke & Sorabji, *The Rule of Law and our Changing Constitution* in *Tom Bingham and the Transformation of the Law: a Liber Amicorum,* Oxford, 2009.

Quite so: the courts, in the presence of a statutory mention and in the absence of a statutory meaning, may yet have to construe the term “rule of law”. It is at the very least possible that they will construe it it in favour of curtailing the executive power of government: for limitation on the unbridled abuse of governmental power is an idea central to the notion of the rule of law. In the words of Lord Denning,

> “Be you never so high, the law is above you.”

Lord Bingham said:

> “It is perhaps more likely that the authors of the 2005 Act recognised the extreme difficulty of formulating a succinct and accurate definition suitable for inclusion in a statute, and preferred to leave the task to the courts if and when the occasion arose.”[33]

Actually His Lordship took the argument further, suggesting in the same lecture that the judges “in their role as journeymen judgment-makers” would be bound to construe a statute so that it did not infringe an existing constitutional principle. We may be allowed to wonder, then, whether the courts are also bound to strike down any statute that derogates from an existing constitutional principle such as the primary one that the government of the UK is carried out by Monarch, Lords and Commons.[34]

In this context, widely understood overseas but new to the United Kingdom, it is legitimate to argue that the Act, and in particular sections 1 and 7, are unconstitutional and repugnant to the ancient mores, customs, laws and usages of the Realm as well as contrary to the rule of law, in that the offending sections constitute or perpetrate a violation of the rights of Peers and their successors vested in them by Royal Letters Patent in perpetuity since time immemorial, and a violation of the personal rights and titles of the excluded Hereditary Peers. Indeed, it might legitimately be argued that the Act, having failed to revoke the Letters Patent that fully permit Lord Monckton to assert that he is a member of the House of Lords, has also failed lawfully to extinguish his right to sit and vote.

Even if the Act is to be regarded as valid, it did not and does not take away membership of the House of Lords in its wider sense from the excluded Hereditary Peers. Lord Monckton and his fellow excluded Hereditary Peers remain members of the House.

CONCLUSIONS

In common usage, the term “House of Lords” is synonymous with membership of the Peerage (although it might be also argued that they are not technically coextensive). There is, on the other hand, absolutely no doubt in my mind that, although the present Viscount Monckton of Brenchley has never been given an opportunity to swear his Oath and participate in Parliament, he nevertheless remains a member of the House of Lords and of the Peerage by virtue of the Letters Patent that created his Viscountcy. He is, therefore, entitled to all of the privileges of Peerage except to sit and vote in the House of Lords. On that basis alone, he may legitimately state that he is a member of the House of Lords.

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[33] Lord Bingham, *The Rule of Law*, 6th David Williams Annual Lecture, Center for Public Law, Cambridge University, 2006, p. 2.

[34] *Ibid.*, p. 4.

Furthermore, the various functions and roles of the Peers sitting collectively are discharged traditionally as a group under the rubric "House of Lords". While the political function of the excluded Hereditary Peers has been abrogated (whether lawfully or otherwise), the other roles of the excluded Hereditary Peers remain intact as they have over the centuries.

The strongest of many arguments in Lord Monckton's favour is that since the Mayhew case it is clear that the sense intended by Parliament in removing "membership of the House of Lords" was confined to the objective of disqualifying all Hereditary Peers from sitting and voting in the House. The phrase "membership of the House of Lords" in section 1 was, as identified by Lord Slynn, mere symbolism to denote a functional restriction as opposed an exhaustive definition of the term *latae sententiae.*

Lord Monckton's statement that he is a member of the House of Lords, albeit without the right to sit or vote, is unobjectionable. His claim is not a false or misleading claim. It is legitimate, proportionate, and reasonable. Likewise, Lord Monckton was correct when he wrote to the US Congress that "Letters Patent granting Peerages, and consequently membership [of the House of Lords], are the personal gift of the Monarch. Only a specific law can annul a grant. The 1999 Act was a general law." He legitimately drew attention to a parliamentary answer by no less a personage than the Leader of the House, making it plain that the Act was a general law and not a particular law that might have had the effect of revoking Letters Patent. We now have the recent authority of the High Court, in the Mereworth case, for Lord Monckton's assertion that the 1999 Act did not revoke or annul his Letters Patent. Unless and until such revocation takes place, Lord Monckton remains a member of the House of Lords, and he is fully entitled to say so.

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