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# Legal Nature of Parliamentary Procedure

John Waldeck

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## *Legal Nature of Parliamentary Procedure*

John Waldeck\*

PARLIAMENTARY PROCEDURE is law. Its origins are found in the English and American legislatures and it was adopted by the non-legislative assemblies in this country for ordering the conduct of meetings and the making of decisions.

The legal system has neglected this part of the law, with only eight pages being found on the subject in *Corpus Juris Secundum*, and none in *American Jurisprudence*, where it is not even indexed, although the editors of *American Jurisprudence Second* have announced they will have a section on parliamentary law.

It is amazing that the legal maxim for making decisions by majority vote, *lex majoris partis*, does not appear in the law dictionaries, *Bowvier's Unabridged*, *Black's*, *Ballentine's* or *West's Words and Phrases*. This however, tends to show the lack of interest of lawyers and legal writers in parliamentary law and the disregard into which this branch of law has fallen.

While the law and lawyers have shown a consistent neglect of parliamentary procedure, the layman has illustrated an intense concern in this area. Laymen have recognized the public interest and wide use of parliamentary procedure in non-legislative organizations by the publication of more than 200 books on the subject, with more than 40 currently in print, all but three being written by non-lawyers and one, an all time best seller at 2,750,000 copies, written by an army general.

The law has been projected into *parts* of parliamentary procedure by case and code law but it has been ignored in the broad field. Most laymen have conversely ignored the law and proceeded to write and publish with no regard to the legal aspects.

It is in this area, between the lawyers and the laymen, that a blind spot has developed in the law. We must explore this area and discover the legal nature of parliamentary procedure.

### **Common Law Theory**

Parliamentary procedure is common law, developed under the doctrine of *stare decisis* in the courts, precedents in the legislatures and by common usage and custom in non-legislative assemblies.<sup>1</sup>

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<sup>1</sup> L. CUSHING, *MANUAL OF PARLIAMENTARY PRACTICE*, 5 (1950).

The common parliamentary law of England in use at the time of the American Revolution and the Declaration of Independence became the parliamentary law of the United States of America.<sup>2</sup>

The courts have applied common parliamentary law in both legislative cases and non-legislative cases, and considered custom and usage in this country to determine what the common law rule is. The court test is the law, customs, and usages of similar bodies in like cases, or in analogy to them.<sup>3</sup>

When rules or orders have been established by a legislature, they become the law of that body for such purposes, and are binding upon legislators as the law to govern them in such proceedings; and this is called parliamentary law. Legislators may not arbitrarily depart from such law and conduct meetings by other rules not known or adopted by such body.<sup>4</sup>

The United States Supreme Court has looked to the general rule of parliamentary bodies and applied it as the general law of such bodies in reviewing legislation passed by Congress.<sup>5</sup>

Deliberative assemblies, in order that the will of the majority of members may be ascertained and registered in an orderly way, must be governed by rules of procedure to which each member must conform. In the absence of special rules of procedure adopted by such an assembly, or of superior law, its procedure is governed by the general parliamentary law.<sup>6</sup> All proceedings in meetings should be had in accordance with and subject to the incidents of the ordinary procedure of parliamentary assemblies.<sup>7</sup> Any departure from the established methods of procedure is fraught with danger, and the courts will look to the general rule applicable to deliberative assemblies. A proper regard for established rules of procedure will cause little trouble and avoid cases in court.<sup>8</sup>

The courts will follow the fundamental rules of parliamentary practice governing assemblies to protect the rights of the minority against the will of the majority.<sup>9</sup>

The rule is, in the absence of any provision in the laws of an association prescribing the manner in which its meetings shall be conducted, that common parliamentary principles in use by all deliberative assemblies may be resorted to in considering the regularity of the proceedings.<sup>10</sup>

<sup>2</sup> Brake v. Callison, 122 F. 722 (S.D. Fla. 1903), *cert. denied*, 194 U. S. 638 (1904).

<sup>3</sup> Kerr v. Trego, 47 Pa. 292 (1864); Mixed Local v. Hotel & R. Employees, 212 Minn. 587, 4 N.W.2d 771 (1942).

<sup>4</sup> People v. Devlin, 33 N.Y. 269, 88 Am. Dec. 377 (1865).

<sup>5</sup> United States v. Ballin, 144 U.S. 1 (1892).

<sup>6</sup> Witherspoon v. State, 138 Miss. 310, 103 So. 134, 137 (1925).

<sup>7</sup> Mansfield v. O'Brien, 271 Mass. 515, 171 N.E. 487, 489 (1930).

<sup>8</sup> Strain v. Mims, 123 Conn. 275, 193 A. 754, 758 (1937).

<sup>9</sup> Terre Haute Gas Corp. v. Johnson, 221 Ind. 499, 45 N.E.2d 484, 489 (1942).

<sup>10</sup> Marvin v. Manash, 175 Ore. 311, 153 P.2d 251, 254 (1944).

Common parliamentary law has been found and enforced by the courts in reconsideration,<sup>11</sup> time of doing business,<sup>12</sup> mode of voting,<sup>13</sup> action by less than a quorum,<sup>14</sup> unanimous consent,<sup>15</sup> adjourning,<sup>16</sup> questions of order and appeal,<sup>17</sup> absence of rules,<sup>18</sup> meaning of a parliamentary by-law,<sup>19</sup> refusal of elections by member to office,<sup>20</sup> conduct of meeting,<sup>21</sup> less than quorum adjourning<sup>22</sup> and election of officers.<sup>23</sup>

### Contract Theory

Parliamentary procedure is a contract in non-legislative assemblies. Parliamentary procedure can be made a part of the bylaws and thus become a contract between the member and the association. A bylaw is a contract between the corporation and its members,<sup>24</sup> among the shareholders,<sup>25</sup> and even a void bylaw may become a valid contract.<sup>26</sup>

Where a parliamentary manual has been adopted, it becomes the law applicable, and a plaintiff has the right by contract to its proper application. An action in expulsion, contrary to its terms, is unauthorized and the proper remedy is an order of reinstatement in a mandamus action.<sup>27</sup>

The majority of an association has the power to make a contract of rules binding upon all the members, directors, officers, and agents. The consent of all parties, as in the case of ordinary contracts, is not necessary to pass effective bylaws.<sup>28</sup>

The constitution, bylaws, rules and regulations constitute a contract between the members and the association. When the association departs from that contract, it is not reasonable to require that a member conform to those rules to secure relief from such unauthorized acts.<sup>29</sup>

<sup>11</sup> *People v. Davis*, 284 Ill. 439, 120 N.E. 326, 328 (1819).

<sup>12</sup> *Kimball v. Marshall*, 44 N.H. 465 (1863).

<sup>13</sup> *Richardson v. Union Congregational Society of Frankestown*, 58 N.H. 187 (1877).

<sup>14</sup> *Board of Supervisors Oconto County v. Hall*, 47 Wis. 208, 2 N.W. 291 (1879).

<sup>15</sup> *Brown v. Winterport*, 79 Me. 305, 9 A. 844, 845 (1879).

<sup>16</sup> *O'Neil v. Tyler*, 3 N.D. 47, 53 N.W. 434, 437 (1892).

<sup>17</sup> *State v. Lashar*, 71 Conn. 540, 42 A. 636 (1899).

<sup>18</sup> *Ostrom v. Greene*, 161 N.Y. 353, 55 N.E. 919, 922 (1900).

<sup>19</sup> *Commonwealth v. Vandergrift*, 232 Pa. 53, 81 A. 153, 154 (1911).

<sup>20</sup> *State ex rel. Hatfield v. Farrar*, 89 W. Va. 232, 109 S.E. 240 (1921).

<sup>21</sup> *Young v. Jebbett*, 213 App. Div. 774, 211 N.Y.S. 61 (App. Div. 1925).

<sup>22</sup> *Shelby v. Burns*, 153 Miss. 392, 121 So. 113 (1929).

<sup>23</sup> *In re Election of Directors of Bushwick Sav. & Loan Ass'n*, 189 Misc. 316, 70 N.Y.S. 2d 478 (Sup. Ct. 1947).

<sup>24</sup> *Farmers Cooperative Co. v. Birmingham*, 86 F. Sup. 201, 223 (N.D. Iowa 1949).

<sup>25</sup> *Hornsby v. Lohmeyer*, 364 Pa. 271, 72 A.2d 294, 299 (1950).

<sup>26</sup> *Palmer v. Chamberlin*, 191 F.2d 532, 536 (5th Cir. 1951).

<sup>27</sup> *People ex rel. Godwin v. American Institute of New York*, 44 How. Pr. 468, 63 Am. Dec. 776n (1873).

<sup>28</sup> *Cheney v. Canfield*, 158 Cal. 342, 111 P. 92 (1910).

<sup>29</sup> *Rueb v. Rehder*, 24 N.M. 534, 174 P. 992 (1918).

Power and authority to change the bylaws is conferred on an association by the acceptance of a contract reserving the right to do so.<sup>30</sup>

The rules and regulations of an Ohio corporation have all the force of a contract between the corporation and its members and between the members themselves, and a regulation on a quorum is valid and binding.<sup>31</sup>

The charter and bylaws of a business corporation constitute a binding contract between the shareholders. The contract cannot be altered except according to the terms of the contract.<sup>32</sup>

The bylaws are a part of the contract of membership and a member is bound by them.<sup>33</sup> Where the bylaws give authority to ten members to continue an organization, the action by a majority in dissolution is invalid as a breach of the contractual obligation in the bylaws, and is invalid.<sup>34</sup>

Under statutory power to make bylaws, the membership application, constitution, and bylaws of membership corporations are the contract by which a member is bound.<sup>35</sup>

The contract between members created by the bylaws is of limited scope. A breach of the bylaws is not actionable in law for damages as a tort or breach of contract, but the remedy is punishment of the offending member according to the bylaws.<sup>36</sup>

The relationship of members to each other and to an organization is contractual, and the articles of association or bylaws constitute the terms of the contract.<sup>37</sup> Becoming a member of an organization is an agreement to be governed by the constitution and bylaws of that organization. Suspension as a communist supporter according to the terms of the constitution and bylaws was held proper.<sup>38</sup>

The rights of union members and their duties are defined in the contract made by the constitution, bylaws and rules not inconsistent with the Landrum-Griffin Act of 1959.<sup>39</sup>

A member of a membership corporation makes valid bylaws a part of his contract of membership and is bound thereby, and must pay

<sup>30</sup> *Steen v. Modern Woodmen of America*, 296 Ill. 104, 129 N.E. 546 (1920).

<sup>31</sup> *State ex rel. Schwab v. Price*, 121 Ohio St. 114, 167 N.E. 366 (1929).

<sup>32</sup> *St. Regis Candies, Inc. v. Hovas*, 8 S.W.2d 574 (Tex. Civ. App. 1928).

<sup>33</sup> *Cubana v. Holstein-Friesian Ass'n of America*, 196 App Div. 842, 188 N.Y.S. 277 (App Div. 1921).

<sup>34</sup> *St. John of Vizzini v. Cavallo*, 134 Misc. 152, 234 N.Y.S. 683 (Sup. Ct. 1929).

<sup>35</sup> *Associated Press v. Emmett*, 45 F. Supp. 907, 918 (S.D. Cal. 1942).

<sup>36</sup> *Weissman v. Birn*, 270 App. Div. 757, 56 N.Y.S.2d 269, *aff'd mem.*, 59 N.Y.S.2d 917 (App. Div. 1945).

<sup>37</sup> *Anderson v. Amidon*, 114 Minn. 202, 130 N.W. 1002 (1911).

<sup>38</sup> *Rosen v. Dist. Council No. 9 of New York City of the Brd. of Painters, Decorators & Paperhangers of America*, 198 F. Supp. 46 (S.D.N.Y. 1961).

<sup>39</sup> *Cleveland Orchestra Committee v. Cleveland Federation of Musicians, Local No. 4*, 303 F.2d 229, 230 (6th Cir. 1962).

dues when they are increased by the body, where he did not withdraw or resign.<sup>40</sup>

### Legislative Parliamentary Procedure

One of the reasons given for the argument that parliamentary procedure is not law is that the courts will not enforce the rules of parliamentary procedure where state legislatures are concerned. Joseph F. O'Brien, author of *Parliamentary Law for the Layman*,<sup>41</sup> cites six cases to support this claim, from Robert Luce's book *Legislative Process*.<sup>42</sup> They both admit that *People v. Devlin*,<sup>42a</sup> which is discussed below, is contrary to their theory.

A careful examination of these six cases shows a variety of reasons for refusal to act by the courts, and they are not based on the grounds that parliamentary procedure is not enforceable law.

One of the six cases, *Illinois v. Hatch*,<sup>43</sup> is strongly in favor of enforcing parliamentary law by applying parliamentary usage as laid down by all writers on parliamentary law to interpret Constitutional requirements, and to apply it where the constitution, statutes or rules are silent. In the case of *State v. Brown*,<sup>44</sup> the court merely said that rules may be suspended by action of the body, the same position taken in parliamentary law. The right to suspend, amend or rescind rules was also upheld in *Railway v. Gill*.<sup>45</sup> The common parliamentary law rule that the majority rules was likewise upheld in *Sweitzer v. Terr. of Oklahoma*,<sup>46</sup> which overruled the theory of Robert and O'Brien that it takes a two-thirds vote to suspend rules. In the case of *Manigault v. Ward*,<sup>47</sup> the Court recognized there was a diversity of opinion among the states as to the status of parliamentary law and judicial review. The federal court applied the South Carolina rule, and said it would look behind the state seal on a bill and examine the parliamentary procedure as set forth in the journals.

In the case of *People v. Devlin*,<sup>48</sup> the court allowed evidence to be introduced to impeach legislative journals and to show the real parliamentary situation. The court said it would resort to the constitution, the statute, and to the common or parliamentary law to test the act of the legislature.

<sup>40</sup> Associated General Contractors of America, New York State Chapter, Inc. v. Lapardo Bros. Excavating Contractors, Inc., 43 Misc.2d 825, 252 N.Y.S.2d 486, 488 (Sup. Ct. 1964).

<sup>41</sup> J. O'BRIEN, PARLIAMENTARY LAW FOR THE LAYMAN (1952).

<sup>42</sup> R. LUCE, LEGISLATIVE PROCEDURE (1922).

<sup>42a</sup> *People v. Devlin*, 33 N.Y. 269, 88 Am. Dec. 377 (1865).

<sup>43</sup> *People ex rel. Harless v. Hatch*, 33 Ill. 9 (1863).

<sup>44</sup> *State v. Brown*, 33 S.C. 151, 11 S.E. 641, 643 (1890).

<sup>45</sup> *St. Louis & S. F. Ry. Co. v. Gill*, 54 Ark. 101, 15 S.W. 18, 19, *aff'd* 156 U.S. 649 (1891).

<sup>46</sup> *Sweitzer v. Territor*, 5 Okl. 297, 47 P. 1094 (1897).

<sup>47</sup> *Manigault v. S. M. Ward & Co.*, 123 F. 707, 716 (D.S.C. 1903).

<sup>48</sup> *People v. Devlin*, 33 N.Y. 269, 88 Am. Dec. 377 (1865).

A comprehensive review of common parliamentary law was made by the court in *Brake v. Callison*, which held that the established parliamentary law of England in force at the time of the American Revolution applied, and had not been changed by statute.<sup>49</sup> The courts have followed universal legislative procedure,<sup>50</sup> usual parliamentary procedure,<sup>51</sup> and parliamentary law methods,<sup>52</sup> in testing legislative actions.

However, the continued use of legislative parliamentary rules in meetings of non-legislative deliberative organizations today is open to question. The law is criticized as being behind the times, especially in the case of modern organizations.

The code writers have adopted new rules for the formation and organization of non-profit corporations and associations in some states, in the Model Non-Profit Corporation Act. But the codes stop short of conduct-of-meeting-procedures, although they do give the power and authority to adopt rules of parliamentary procedure.

The jurisprudence systems also stop short of this area and recommend that the parliamentary manuals, written by laymen, such as Robert's *Rules of Order*, be adopted by reference. By such practice an organization will adopt all the rules of a legislative nature in the manual, tending to confuse both presiding officers as well as the members with these complicated and obsolete rules. Robert's *Rules of Order* is not a mandated guide, but the courts do resort to for light, or for suggestions as to relevant parliamentary usage of deliberative assemblies.<sup>53</sup> Every meeting must be conducted according to *rules*. The question is, what rules? Some rules are already prescribed by the law, both case and code, and are not included in the parliamentary manuals of laymen. However, there is a shortage of case law in parliamentary procedure for the conduct of meetings, and those decisions have become antiquated with the use of modern code law. Modern organizations can not wait on litigation to resolve the issues engendered by the continual use of old legislative parliamentary rules to meet the problems of today.

The solution lies in the preparation of rules of parliamentary procedure *by lawyers*, for the conduct of modern meetings, taking into consideration the case law, resort to the parliamentary manuals of laymen for light on parliamentary usage, and based on statutes, giving to the members rule-making power.

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<sup>49</sup> *Brake v. Callison*, 122 F. 722 (S.D. Fla. 1903), *cert. denied*, 194 U.S. 638 (1904).

<sup>50</sup> *State ex rel Coleman v. Lewis*, 181 S.C. 10, 186 S.E. 625 (1936).

<sup>51</sup> *Hood v. City of Wheeling*, 85 W. Va. 578, 102 S.E. 259 (1920).

<sup>52</sup> *State ex rel. Coleman v. Lewis*, 181 S.C. 10, 186 S.E. 625 (1936).

<sup>53</sup> *Posner v. Bronx County Medical Society*, 19 App. Div. 2d 89, 241 N.Y.S.2d 540, 544 (App. Div. 1963).

## Rule Making Power

Deliberative groups have the right and power to adopt rules of parliamentary procedure for the conduct of meetings. This rule making power is given by the general parliamentary law, constitutional provisions, *ex-necessitate rei*,<sup>54</sup> and now by code in the Model Non-Profit Corporation Act,<sup>55</sup> other state acts,<sup>56</sup> and by federal code.

The power and authority to enact rules that will apply to parliamentary situations, where the code law and charter do not provide otherwise, was recognized early by the courts, in holding that directors may proceed by resolution to appoint inspectors of elections as prescribed in duly adopted bylaws.<sup>57</sup>

In pre-code cases, the power to adopt rules of procedure lay in the stockholder-member, and not in the directors, unless authorized by law, articles or by action of the stockholders.<sup>58</sup> The board of directors usually has no authority to amend such rules, for the basic power to make bylaws and regulations for the government of a corporation lies in the stockholders.<sup>59</sup> The power to make rules for the government of corporations is deemed an incident of ownership and voting power of stockholders. This power to adopt rules is not lost to the stockholders by delegation of authority to the directors to make and alter bylaws.<sup>60</sup> The bylaws ultimately come into existence by action of the *members* of a corporation.<sup>61</sup>

A deliberative body such as a town meeting, may not pass procedural rules which will tightly bind the body in subsequent meetings.<sup>62</sup> The rules and regulations made by a church or by long and established custom and usage will be enforced by the court, if not in conflict with civil law.<sup>63</sup>

Rules of procedure in Robert's *Rules of Order* are not a binding procedure to be followed in the conduct of meetings, but every corporation has the power to adopt, change, amend and repeal bylaws relating to the regulation of business procedure to be followed in a stockholders' meeting. In the absence of evidence to the contrary, it will be presumed that a meeting was held in accordance with the

<sup>54</sup> *Witherspoon v. State*, 138 Miss. 310, 103 So. 134, 137 (1925).

<sup>55</sup> MODEL NON-PROFIT CORP. ACT § 5(L) (1964) (To make and alter bylaws for the administration and regulation of the affairs of the corporation).

<sup>56</sup> OHIO REV. CODE ANN. §1702.11 (Page 1964) (The regulations . . . may provide . . . the manner of conducting . . . meetings of members . . . or their elected representatives or delegates).

<sup>57</sup> *In re* Election of Directors of the Mohawk & Hudson R.R. Co., 19 Wend. 135, 13 N.Y. Common Law Rep. 556 (Sup. Ct. 1838).

<sup>58</sup> *North Milwaukee Town-Site Co. No. 2 v. Bishop*, 103 Wis. 492, 79 N.W. 785 (1899).

<sup>59</sup> *State v. Kreutzer*, 100 Ohio St. 246, 126 N.E. 54, 55 (1919).

<sup>60</sup> *Rogers v. Hill*, 289 U.S. 582 (1933).

<sup>61</sup> *Hopewell Baptist Church of Hartford v. Craig*, 143 Conn. 593, 124 A.2d 220, 222 (1956).

<sup>62</sup> *Town of Exeter v. Kanick*, 104 N.H. 157, 181 A.2d 638, 640 (1962).

<sup>63</sup> *Schumann v. Dally*, 29 S.W.2d 422, 426 (Tex. Civ. App. 1930).



statutes, charter, and bylaws.<sup>64</sup> It will not be presumed that a voluntary association is governed by the commonly accepted parliamentary rules.<sup>65</sup>

The Landrum-Griffin Act requires labor organizations to adopt a constitution and bylaws providing procedures for the following: qualifications for or restrictions on membership,<sup>66</sup> the calling of regular and special meetings,<sup>67</sup> the selection of officers and stewards and of any representatives to other bodies composed of labor organizations' representatives, the manner in which each officer is elected or appointed or otherwise selected,<sup>68</sup> the disciplining or removal of officers or agents for breaches of their trust,<sup>69</sup> the imposition of fines or suspensions, and expulsion of members; these provisions including the grounds of such actions and any provisions made for notice, hearing, judgment on the evidence, and appeal procedures.<sup>70</sup>

### Parliamentary Law In Articles

Some parliamentary law applies to the articles of incorporation, by provisions of the code law directly or by provisions giving the power to the directors or members, in the various states.

In the Model Non-Profit Corporation Act, and as adopted by fourteen states and the District of Columbia, the articles of incorporation *may* contain any provision, not inconsistent with law, for the regulation of the internal affairs of the corporation, and a two-thirds vote is required to amend by the members. Where a provision in the articles is inconsistent with the bylaws, the articles are controlling.<sup>71</sup>

The regulations in the Model Act govern (*unless* otherwise provided in the articles, or in most cases by the bylaws) the conduct of meetings, as follows: stating that power lies in the board of directors to alter, amend or repeal bylaws; who may call special meetings of members; the proper content and time of notices of meetings of members; the right to vote; the right to vote by proxy; the rule of simple-majority vote; that a majority of the directors is a quorum and may act by majority vote of a quorum; and that the directors shall

<sup>64</sup> *Abbey Properties Co. v. Presidential Ins. Co.*, 119 So. 2d 74 (Dist. Ct. Fla. 1960).

<sup>65</sup> *Gipson v. Morris*, 31 Tex. Civ. App. 645, 73 S.W. 85 (Tex. Civ. App. 1903).

<sup>66</sup> Landrum-Griffin Act. §201(a), 29 U.S.C. §431 (1964).

<sup>67</sup> *Id.* at (f).

<sup>68</sup> *Id.* at (g).

<sup>69</sup> *Id.* at (h).

<sup>70</sup> *Id.* at (i).

<sup>71</sup> MODEL NON-PROFIT CORP. ACT §29 (1964); ALA. CODE tit. 10 §231 (1959); D. C. CODE ENCYCL. ANN. §29-1030 (1968); ILL. ANN. STAT. ch. 32, §163a28 (Smith-Hurd 1970); IOWA CODE ANN. §504A.29 (1949); MO. REV. STAT. §355.045 (1966); NEB. REV. STAT. §21-1928 (Supp. 1969); N. C. GEN. STAT. §55A-7 (1966); N. D. CENT. CODE §10-24-29 (1960); OHIO REV. CODE ANN. §1702.30 (1964); ORE. REV. STAT. §61.095; TEX. REV. CIV. STAT. art. 1396-3.02 (1968); UTAH CODE ANN. §16-6-46 (1962); VA. CODE ANN. §13.1-231 (1964); WASH. REV. CODE ANN. §24.03.025 (1969); WIS. STAT. ANN. §181.31 (1957).

have the sole voting power when there are no members or when members have no right to vote.

The Model Act makes no flat rule but *allows* the articles to determine the following: if greater than majority vote is required, rules for executive or other committees, for cumulative vote, for classes of voters, or for government when there are no members. The articles or bylaws are to set forth members' rights, officers' qualifications and manner of election or appointment, and use of classes of membership.

In Ohio the articles may set forth any qualifications for and classification of membership. The board of trustees may adopt amended articles that are in force at that time, or the voting members at a meeting called for such purpose may adopt such amended articles by the same vote as required to adopt an amendment. The trustees may adopt bylaws for their own government, not inconsistent with the articles or regulations.<sup>72</sup>

### Parliamentary Law In Bylaws

Some elements of parliamentary law are found in the bylaws. At common law,<sup>73</sup> and under parliamentary procedure, the power to adopt, amend or repeal bylaws was in the members. Now, by the Model Act, the power is vested in the directors, *unless* the articles or bylaws provide otherwise.<sup>74</sup>

For membership control, the power over the bylaws should be reserved to the members. The bylaws may contain any provision for the regulation and management of the corporate affairs not inconsistent with law or the articles. This makes the articles superior to the bylaws. There are no provisions for the procedure of amending bylaws in the Model Act, so such a procedure should be written in by the lawyers.

In the Model Act, the bylaws *must* provide for the notice of directors' meetings, election or appointment or term of officers. The initial bylaws are adopted by the board of directors.

The rules in the Model Act will apply, *unless* the bylaws provide otherwise, in the following parliamentary situations; place of meeting, quorum for members' meetings, quorum for directors' meetings, and vote by proxy. For individual membership control, proxy voting must be barred by the bylaws or articles.

The Model Act makes no rule in other parliamentary matters but leaves them to be determined in the bylaws, *e.g.*; such as: time of the annual meeting, voting by mail, kind of notice for directors' meetings, and officers in the organization other than president and secretary.

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<sup>72</sup> OHIO REV. CODE ANN. §1702.30 (Page 1964).

<sup>73</sup> Lawson v. Hewel, 118 Cal. 613, 50 P. 763 (1897).

<sup>74</sup> MODEL NON-PROFIT CORP. ACT §34 (1964).

In Ohio, the trustees may adopt bylaws for their own government not inconsistent with the articles or regulations.<sup>75</sup>

The Model Act gives the directors the authority to adopt *emergency* bylaws that may be practical and necessary during an emergency resulting from an attack on the United States or any nuclear or atomic disaster.<sup>76</sup> This provision has not been adopted by any Model Code State except Virginia.<sup>77</sup>

In New York, the Membership Corporation Act was repealed by the Not-For-Profit Corporation Law, effective September 1, 1970 and follows the Model Business Corporation Act, giving more control to the directors and less to the members.<sup>78</sup>

The Landrum-Griffin Act requires that labor unions adopt bylaws and a constitution and file a copy thereof with the Secretary of Labor.<sup>79</sup>

Bylaws become the law,<sup>80</sup> or the private statutes,<sup>81</sup> of the corporation, when enacted by the members for the regulation of its affairs. A corporation may make any bylaws for the call and conduct of meetings and elections that are not contrary to statute, articles, general law or public policy.<sup>82</sup>

Where there is an inconsistency between two bylaws, the one most recently adopted modifies the first.<sup>83</sup> Where the certificate of incorporation and bylaws conflict in respect to election of directors, the certificate will control.<sup>84</sup>

Members are bound by the constitution and bylaws, and are conclusively presumed to know them.<sup>85</sup> Even a fugitive from justice is entitled to protection of corporate bylaws.<sup>86</sup>

### Conclusions

The exact nature of parliamentary law, like the nature of all law, is yet to be fully discovered. It may be said that it contains three legal elements: common law, contract law, and code law. It is made up of both substantive law and procedural law.

The nature of parliamentary law as to *majority rule* by stockholders in a meeting has been held to be *substantive* law rather than

<sup>75</sup> OHIO REV. CODE ANN. §1702.30 (Page 1964).

<sup>76</sup> MODEL NON-PROFIT CORP. ACT §12A (1964).

<sup>77</sup> VA. CODE ANN. §13.1-212.1 (1964).

<sup>78</sup> N.Y. NOT-FOR-PROFIT CORP. LAW, Book 37 (1970).

<sup>79</sup> Landrum-Griffin Act §201(a), 29 U.S.C. §431 (1964).

<sup>80</sup> Weisblum v. LiFalco Mfg. Co., 193 Misc. 473, 84 N.Y.S.2d 162, 166 (Sup. Ct. 1947).

<sup>81</sup> Elliot v. Lindquist, 356 Pa. 385, 52 A.2d 180, 182 (1947).

<sup>82</sup> Booker v. First Fed. Sav. & Loan Ass'n, 215 Ga. 277, 110 S.E.2d 360, 362, cert. denied 361 U.S. 916 (1959).

<sup>83</sup> New England Trust Co. v. Penobscot Chem. Fibre Co., 142 Me. 286, 50 A.2d 188, 191 (1946).

<sup>84</sup> *In re* Election of Directors of Radiant Knitting Mills, Inc., 20 Misc. 2d 915, 194 N.Y.S.2d 232, 234 (Sup. Ct. 1959).

<sup>85</sup> Schroeder v. Meridian Imp. Club, 36 Wash. 2d 925, 221 P.2d 544 (1950).

<sup>86</sup> Bickston v. Federal Firearms Corp. of Cal., 38 Cal. Rptr. 793, 796 (Cal. App. 1964).

merely procedural, in a conflict of laws case. The Venezuelan law, requiring that derivative actions be authorized by vote at a stockholders' meeting, is substantive rather than procedural; and, under the New York conflicts of laws rules, it governed in a stockholders' derivative action in the New York federal court.<sup>87</sup>

Parliamentary procedure is enforceable both where *property* rights are concerned, and also where it involves *personal* rights. The concept of parliamentary law as a natural right is commented on by the court in *Berrien v. Pollitzer*<sup>88</sup> and by Howard L. Oleck in *Non-Profit Corporations Organizations and Associations*.<sup>89</sup>

The Illinois Non-Profit Corporation Act, used as the basis for the Model Act, is slanted too much towards the business-manager's concept, with control of the corporation in the hands of the directors instead of the members. The courts have been too concerned with the idea of the need for a property interest before they will take jurisdiction in applying parliamentary law.

The majority voting rule (majority vote prevails) is final unless it violates a contractual right, property right, or a liberty protected by the Constitution or general laws, and only if a basic right is violated does a court have jurisdiction to review tyrannical action by the majority over the minority.<sup>90</sup>

The better view is one giving priority to personal rights or natural rights. The courts must see to it that a membership corporation does not become a vehicle for personal-profit use or abuse<sup>91</sup>.

Certain rules in the conflict of laws among the states have developed concerning parliamentary law. Under the "Massachusetts Rule", a stockholder's derivative action is barred unless it is approved by an independent majority of stockholders.<sup>92</sup>

The aspects of parliamentary law in use in international organizations that have been recognized are termed "international parliamentary law."<sup>93</sup>

Professor R. K. Gooch, of the University of Virginia, pointed out in 1926 that sometimes the rules of procedure are just as important in their application as is constitutional law. It is his conclusion that such rules of procedure are law because they have the same importance and nature as other law derived from constitutions.<sup>94</sup>

<sup>87</sup> *Hausman v. Buckley*, 299 F.2d 696 (2d Cir. 1962).

<sup>88</sup> *Berrien v. Pollitzer*, 165 F.2d 21 (D.C. Cir. 1947).

<sup>89</sup> H. OLECK, *NON-PROFIT CORPORATIONS, ORGANIZATIONS & ASSOCIATIONS*, 377 (2d ed. 1965).

<sup>90</sup> *Stansberry v. McCarty*, 238 Ind. 338, 149 N.E.2d 683, 686 (1958).

<sup>91</sup> *Hungarian Freedom Fighters Federation, Inc. v. Samson*, 30 Misc. 2d 354, 219 N.Y.S. 2d 348, 355 (Sup. Ct. 1961).

<sup>92</sup> *Hausman v. Buckley*, 299 F.2d 696, 705 (2d Cir. 1962).

<sup>93</sup> Jessup, *International Parliamentary Law*, 51 AM. J. INT'L. L. 396 (April, 1957).

<sup>94</sup> Gooch, *The Legal Nature of Legislative Rules of Procedure*, 12 VIRGINIA L. REV. 529 (May, 1926).

The rule making decisions of organizations should be based on the legal history of the old rules as well as on current law. The great democratic tradition of free and full debate, with majority rule, but always with the protection of the minority and the rights of the individual members, should always be remembered.

Jefferson said, in the introduction to his *Manual*, on the importance of adhering to rules:<sup>95</sup>

It is much more material that there should be a rule to go by, than what that rule is; that there may be a uniformity of proceeding in business, not subject to the caprice of the Speaker, or capriciousness of the members. It is very material that order, decency and regularity be preserved in a dignified public body.

But I have begun a sketch, which those who come after me will successively correct and fill up, till a code of rules shall be formed for the use of the Senate, the effects of which may be accuracy in business, economy of time, order, uniformity and impartiality.

Following the advice of Jefferson on uniformity, a proposed uniform set of bylaws of parliamentary procedure for the conduct of meetings will appear in a contributed chapter in the third edition of *Non-Profit Corporations, Organizations, and Associations* by Distinguished Professor Howard L. Oleck of Cleveland State University College of Law, with the hope that it may be the beginning of a *uniform system of parliamentary procedure*.

But the development of this law goes on daily. For example, the doctrine of *lex majoris partis* is alive and well as a 1970 Iowa case shows.<sup>96</sup> Laymen writers are still active in the field of parliamentary procedure, with Robert's *Rules of Order*, being newly revised in 1970, and Sturgis', *Standard Code of Parliamentary Procedure* being revised in 1970.

However, the *lawyer-writers* are beginning to appear in the *Index of Legal Periodicals*, with articles on parliamentary problems of shareholders' meetings,<sup>97</sup> on parliamentary procedure as a tool for the successful lawyer,<sup>98</sup> on simplification of rules of order,<sup>99</sup> and with a survey of non-legislative procedure.<sup>100</sup> At last, some lawyer-like *legal* light is being shown on this blind spot in the law.

<sup>95</sup> T. JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES 14, (1874).

<sup>96</sup> Adams v. Fort Henry School Dist., 182 N.W.2d 132 (Iowa 1970).

<sup>97</sup> Dewolfe, *Problems at Shareholders Meetings*, 52 CHI. B. REC. 188 (1971).

<sup>98</sup> Karcher, *Essential Tool for the Successful Lawyer*, 43 FLA. B. J. 440 (1969).

<sup>99</sup> Bradley, *Toward Simplified Rules of Order*, 11 N.H.B.J. 195 (1969).

<sup>100</sup> Gannen, *Overview of American Non-Legislative Procedure*, 61 LAW LIB. J. 296 (1968).