

# Parliamentary Procedure as an Inventory of Disputes: A Comparison between Jeremy Bentham and Thomas Erskine May

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## ABSTRACT

Parliamentary politics is inherently procedural. The parliament debates and decides only questions that have been put on its agenda. Two famous tracts on the British parliamentary procedure, Jeremy Bentham's *Essay on Political Tactics* and Thomas Erskine May's *A Treatise upon the Law, Privileges, Proceedings and Usage of Parliament* provide an inventory of controversies for competent parliamentarians. Both tracts regard parliamentary procedure itself as controversial, and both discuss how to deal with the controversies in a fair manner. The tracts differ in style: Bentham, relying on his own parliamentary imagination, is able to identify possible items of dispute, whereas May's interpretation of parliamentary procedure includes the history of parliamentary controversies. For both, playing with time is an inherent part of the Westminster procedure, based on a combination of spending and saving time, in linking the parliamentary itinerary of the motions to the parliamentary calendar. Both strongly defend the Parliament as an exemplary deliberative assembly. May, however, thematises the increase of agenda items and the increasing scarcity of parliamentary time as well as ways of preventing parliamentary paralysis due to obstruction. This leads May to revise the fair play principle to include the fair distribution of parliamentary time.

## KEYWORDS

Parliamentary procedure, parliamentary debate, parliamentary time, Jeremy Bentham, Thomas Erskine May.

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## THE PROCEDURALISM OF PARLIAMENTARY POLITICS

Parliamentary politics is not just politics that takes place in parliament, but politics conducted in a parliamentary manner, in accordance with the rules and practices of parliamentary procedure. It is not the distinction between parliamentary and extra-parliamentary politics, but that between parliamentary and unparliamentary modes of politics which is decisive. Parliaments have the power to sanction members for “unparliamentary” language and conduct, and meetings, associations, organisations and assemblies may follow the model of parliamentary politics to a greater or lesser degree. Parliamentary politics is inherently procedural: it relies on the fair play principle.

The first parliament to have constructed its own procedure is, of course, the Westminster Parliament, above all the House of Commons. The first tracts on the Westminster procedure were written in the late sixteenth century by three former members, Sir Thomas Smith, John Hooker and William Lambarde. The procedures were regularised during the struggle of Parliament with the Stuart kings in the first half of seventeenth century, with tracts written by MP William Hakewill and two Clerks of the Parliament, Henry Elsynge Sr and Henry Scobell (for these early tracts, see Redlich 1905, Strateman 1937 and Champion 1958). These tracts were replaced by Clerk of the Parliament John Hatsell’s great four-volume codification, *Precedents of Proceedings in the House of Commons: with Observations* (1779-1796, re-edited in 1818).

I shall discuss the next two major works on British parliamentary procedure that followed, Jeremy Bentham’s *Essay on Political Tactics* and Erskine May’s *Treatise upon the Law, Privileges, Proceedings and Usage of the Parliament*. Bentham offered parts of his *Essay* originally for the French revolutionary assemblies of 1789. Fragments were published privately in 1791, and a French edition translated by Dumont in 1816. I quote from the first complete English edition, in the *Works* of 1843, which is a translation of Dumont’s work and the basis for the 1999 critical edition. May’s book was first published in 1844 and re-edited eight times by May, until 1883. I use May’s first and the ninth edition. I read the tracts on parliamentary procedure as contributions to parliamentarism viewed as a regime that celebrates controversies.

For both authors parliamentary politics is distinguished by its procedures. Members of Parliament take a stand only on questions that have been put on the parliamentary agenda in a due procedural manner, after which the questions are treated as distinct items according to the specifically parliamentary manner of debating and voting. The procedural tracts offer an inventory of the types of questions that can be presented on the parliamentary agenda as well as historical examples of controversies over the interpretation of parliamentary procedure itself.

In form, the extensive tracts of Bentham and May resemble advice books to lay readers or to parliamentary novices. However, I am reading them as I imagine that competent parliamentarians of the time would have read them. Their main political point lies in *presenting the main items of parliamentary procedure that not only regulate political controversies, but also make the procedure itself appear contestable and controversial*. Both authors were well aware of the possibility that presenting a catalogue of types of dispute concerning parliamentary procedures may help competent politicians to identify controversies and to discuss their significance in parliamentary politics. How did Bentham and May identify and discuss the main topics of parliamentary controversies?

#### IDENTIFYING DISPUTES IN PARLIAMENTARY PROCEDURE

The styles of the tracts are different. This goes back, in part, to the elementary point that Jeremy Bentham was a parliamentary outsider, while Thomas Erskine May was an insider, a parliamentary official, starting as Assistant librarian and ending his career as the Clerk of the Parliament. This difference is reflected in their different approaches. For this reason a short discussion of their different methods of discussing procedures and of thematising parliamentary disputes will first be compared.

In *Tactics* Bentham extends the parliamentary procedure, taking up questions never discussed extensively before him. Beyond identifying a number of *topoi* of parliamentary procedure, Bentham provides arguments that relate these to the general conditions of parliamentary politics. He never explicates his ‘method’, but his political imagination, operating on an abstract level, constructs an exhaustive set of possible courses of action, which he relates to historical cases when commenting on the items on his list.

The existence of well-established procedures for Westminster has provided the necessary condition for Bentham’s project of extending parliamentary procedures to political assemblies in general. He wants to proceed with “singling out, and laying before the reader at one view, the essential points upon which the due conduct of the business seemed principally to turn; suggesting at the same time such regulations as the dictates of utility seemed to prescribe in relation to those points” (Bentham 1843, VI.1). A professional parliamentarian might not be convinced of the “dictates of utility”, but remain interested in the “essential points” of the procedure.

The claim that “all the inconveniences before enumerated, resolve themselves into this by lines more or less direct” (Bentham 1843, I.2) refers to a systematisation and classification of parliamentary disputes. The procedures should be oriented to counter typical parliamentary “evils”, of which Bentham presents the following list:

1. Inaction. 2. Useless decision. 3. Indecision. 4. Delays. 5. Surprise or precipitation. 6. Fluctuations in measures. 7. Quarrels. 8. Falsehoods. 9. Decisions, vicious on account of form. 10. Decisions, vicious in respect of their foundation (Bentham 1843, I.2).

The heuristic value of such a list of typical parliamentary disputes is evident if we understand ‘evils’ rhetorically to refer to *topoi* that MPs can at virtually any time plausibly turn against opponents in debate. Instead of confining himself to existing procedural regulations, Bentham invokes certain formal principles of debating in the Parliament as the abstract conditions of parliamentary activity itself. The first six items on his list refer to the important insight that parliamentary politics is always a politics of timing. Bentham’s point is that the timing of parliamentary decisions cannot be answered in any absolute terms, and his list helps us to understand that any debate can be regarded as too short or too long, the decision following it premature or too late.

In the sixth chapter, published by Bentham himself in 1791, he defends certain procedural points to be followed in parliamentary politics in general terms.

1. Identity of the terms of the proposition with those of the act proposed. 2. Fixation of the terms of the proposition by writing. 3. Unity of the subject of debate kept inviolate. 4. Distinctness of the process of debating from that of voting. 5. In debating, no fixed order of preaudience. 6. The votes given not one after another, but all at once (Bentham 1843, VI.2).

The first three points reformulate well-known Westminster procedural principles. An MP must always conclude a speech in Parliament by taking a stand on the matter under debate, the terms of the question must be made more precise by writing, and the member can only speak to the question under debate, for example, only to a proposal of adjournment and not to the matter that would thereby be adjourned. The procedures of pre-revolutionary French provincial assemblies, in contrast, were unable to separate items strictly from each other, as illustrated in particular by points 4 to 6. For example, they did not clearly differentiate between *opinion* and *avis*, and thus could not enable a strict separation between debating and voting (Bentham 1843, VI.5). By analytically separating these types of items in parliamentary procedure, Bentham gains a critical distance from which to view existing practices, occasionally also those of Westminster.

May's *Treatise* provides a comprehensive and updated handbook on the Westminster procedure, with different method than the precedent-based approach of Hatsell.

The arrangement of the work has been designed with a view to advance from the more general to the particular and distinct proceedings of Parliament, to avoid repetition, and to prevent any confusion of separate classes of proceedings: and each subject has been treated, by itself, so as to present, first, the rules or principles; secondly, the authorities, if any be applicable; and, thirdly, the particular precedents in illustration of the practice (May 1844, vi).

May classifies topics from the general to the particular and invokes "the authorities" as an intermediate narrative stage: "The proceedings [...] will be followed in the order which appears the best adapted for rendering them intelligible, without repetition, and apart from any presumption of previous knowledge" (May 1844, 133). He facilitates reading of parliamentary proceedings by proceeding from the simplest to the more complicated cases, from motions to bills: "All the rules in relation to questions and amendments are applicable to the passing of bills" (May 1844, 269).

In the 1883 edition May remarks: "An ingenious orator may break through any rules, in spirit, and yet observe them to the letter" (May 1883, 367-8). This is a strong sign that he well understood how Members of Parliament might read the *Treatise*. The proceduralism of parliamentary politics means regulating the debates and the calendar by the existing rules, not by making moral appeals to internalise them. It is a vain task to enact rules that nobody could possibly misuse for their own advantage; the political purpose of the procedure is to reduce the occasions for such misuse and to empower the Speaker or the majority of Parliament to prevent pernicious forms of political misuse.

For the "ingenious orator", the Table of Contents of the *Treatise* is an introduction to the types of items that have been debated in the history of the British Parliament. May's presentation of the historical cases illustrates well how parliamentary procedure consists of items that are recurrently disputed. The 1883 edition provides politically literate parliamentarians with updated material for identifying procedural disputes and for recognising them as an inherent part of the parliamentary game.

May also offers us lists of items when describing the different ways in which a question can be evaded: "The modes of evading or superseding a question are, 1, by adjournment of the house; 2, by motion 'that the orders of the day be read'; 3, by moving the previous question; and 4, by amendment"

(May 1844, 172; 1883, 300). The four modes serve as the main parliamentary instruments for avoiding debate on a present question, and all have played a major role in the obstruction debates and the attempts to revise the parliamentary calendar. The political point is that such evasion enables members to avoid taking a stand for or against a motion, which might bring different majorities than evading the question. Some members might dispense with taking a stand at all on a substantial issue; others might move another question forward on the agenda; while government supporters are not obliged to vote for an opposition motion or vice versa.

May's insider approach has better insight than Bentham's for understanding that a single rule frequently carries less weight in a debate than opposing different parts of the procedure to each other. In other words, for preventing a motion from advancing parliamentarians have several legitimate options available, some more appropriate to the situation than others and some with better chances to obtain a majority than others.

#### THE POLITICS OF PARLIAMENTARY TIME

The politics of time is an inherent subtext of parliamentary procedure. The earliest tracts on the Westminster procedure already had insights on the curious politics of parliamentary time. The parliamentary debating and the multi-phase itinerary of motions operate with spending enough time for the deliberations, both in the debates themselves as well as between them, as a condition for the thorough parliamentary mode of deliberating *pro et contra*. Parliament has, however, always been aware that the time available for debates is limited due to the sheer exhaustion of members and the urgency of decisions. For this purpose they developed procedures for limiting the ways parliamentary time can be spent. The most prominent rule is that a member can speak only once in the plenum of the House, but as often as wanted in committee, including the Committee of the whole House, thus enabling real debates and exchanges of replies to take place.

Pressures on parliamentary time were already arising in the eighteenth century, but for Bentham, the main problem was still the politics of timing under the old practices. After the 1832 Parliamentary Reform, the scarcity of and need to allocate parliamentary time became a major topic of controversy on the parliamentary agenda. For May, the misuse and obstruction of parliamentary time and its redistribution became a crucial subject of disputes.

Bentham, however, still played with the symmetry between spending and saving parliamentary time. As we have seen in his first list, a Member of Parliament has no external criteria for determining the *kairos*, the appropriate timing of parliamentary decisions. He – to use the pronoun of Bentham's time

– can always accuse adversaries of bad timing and be subject to similar objections. The debate on the appropriate time to end a debate and on the procedure to make such decision was for him a major topic of procedural disputes.

Bentham's critique of French provincial assemblies also concerned their use of the time, compared to the Westminster procedure, which separates parliamentary agenda items in a time-ordered sequence as well as the steps and stages of parliamentary motions and bills. He identifies twelve steps on the way from a motion to a vote, which provide the parliamentarian an overview of the points of possible intervention in a debate (Bentham 1843, XI.4). In contrast, in the French practice "no difference was as yet described between original motion, motion in amendment, argument, and vote" (Bentham 1843, XI.4). Bentham makes a point also of defending simultaneous voting as a method to ensure the equality of Members, as opposed to the hierarchical voting order of the French provincial assemblies.

He accepts the government's priority in parliamentary agenda-setting, but is against it becoming a monopoly. "This obligatory initiative naturally belongs to those who convoke a political assembly, and who are best acquainted with the wants of the state. The general distribution of labour is the duty of the administration: the ministers should propose – the assembly deliberate and resolve" (Bentham 1843, VII). Despite this, Bentham claims "each member ought equally to possess" the right to initiative. The first reason is that such equality would make full use of the political intelligence of the members:

There is as good a chance for obtaining the best advice from one party as from the other. To limit the right of proposing, is to renounce everything which might be expected from those who are excluded: it is to institute a monopoly mischievous in every respect, both because it extinguishes the emulation of those whom it reduces to merely a negative part, and because it may retain the greatest talents in a state of inaction (Bentham 1843, VII).

Bentham also points out: "If the right of proposing belong only to the administration, those abuses which are favourable to it would be perpetual: the assembly would have no direct method of causing them to cease" (Bentham 1843, VII). Finally, if the assembly merely had the power to reject motions, it would tend to misuse it: "The assembly which should possess the power of rejecting alone, would be tempted to abuse it; that is to say, to reject good measures, either from a feeling of pride, that it might show that it was not a mere nullity, that it might exercise its authority, or that it might constrain the hand of government, and lead it to concede one point that it may obtain another" (Bentham 1843, VII). Here we can identify another *topos* of Bentham.

His discussion of procedures provides argument for both sides, as he tries to discuss the possible consequences of certain measures and offers arguments concerning where and how limits to the measures could and should be drawn. Behind this is the idea of fair play, a tacit principle of all parliamentary politics.

May's *Treatise* focuses on the increasing scarcity of parliamentary time, due to both the expansion of items on the parliamentary agenda and the new expectation that every Member of Parliament shall speak in the plenum (see Redlich 1905, 99-105). Several parliamentary committees proposed measures to change the allotment of time on the parliamentary calendar. A few Irish members around Charles Parnell started an obstruction campaign around 1877 that dramatised the scarcity of parliamentary time. The Speaker's urgency rule in February 1881 and Gladstone's project to overhaul the entire parliamentary procedure, resulting in new Standing Orders in November 1882, were drastic measures to prevent complete parliamentary paralysis (Redlich 1905, 199-220). May's 1883 edition is shaped by this campaign and by Parliament's and the government's response to it.

Unlike the US Congress, May does not want to reduce the length of the speeches, but proposes revisions in the secondary debates and votes. "An unnecessary division is a great evil; it occupies much time, and causes considerable inconvenience to the members; and the more unequal the parties, the longer is the time consumed in the division, and the more irksome the process of dividing to the majority" (May 1844, 216). The point is that the majorities in the Parliament tend as a rule to be clear without taking a division, and the demand to take a division in cases of obvious majority has been used as an obstructive tactic by intransigent minorities.

The plenum rule against second speeches and replies was loosened in the course of the nineteenth century. May accepts that explanations, second speeches and replies no longer need be regarded as illegitimate uses of parliamentary time since more effective means of delay exist and are also more difficult to restrict (May 1883, 360).

The procedural rules depend on the Parliament itself: "The forms commonly observed [...] are not absolutely binding. They are founded upon long parliamentary usage, indeed; but either house may vary its own peculiar forms, without question elsewhere, and without affecting the validity of any Act which has received, in proper form, the ultimate sanction of the three branches of the legislature" (May 1844, 295). The Parliament must interpret and adapt the rules of procedure to the parliamentary agenda and calendar. A main point of parliamentary procedure is the priority of the questions of order and privilege, but the disputes of the nineteenth century increasingly concerned the conflict over what possible rules are to be applied in specific cases.



The temporal dimension of parliamentary politics is not fixed on any single principles of an existing procedure, but reflects a broader view of the political conditions for fair parliamentary debate.

#### PARLIAMENT AS A DELIBERATIVE ASSEMBLY

Procedure is at the core of the politics of parliamentary debate, since it draws a distinction first of all between *what is parliamentary and what is not*, distinguishing procedural from other types of deliberation. For both Bentham and May, the procedural style of politics is what defines the “parliamentary”, though they do not state this very explicitly.

Although Bentham, in accordance with his utilitarian philosophy, is mainly interested in the results of parliamentary votes, he nonetheless also celebrates the Parliament as a deliberative assembly and distinguishes “political assembly” from “a society of academicians”:

That the principal advantage of a national senate, and of public discussion, arises from that activity of mind, from that energy of feeling, from that abundance of resources, which results from a large assembly of enlightened men who animate and excite each other, who attack without sparing each other, and who, feeling themselves pressed by all the forces of their antagonists, display in their defence powers which were before unknown to themselves (Bentham 1843, XI.4).

This is an eloquent defence of the creative powers of debate, of the antagonisms and the productive energies of the debates. Besides refining the standpoints and activating unknown potentials in the participants, debate can enhance improvisational spontaneity and enthusiasm as well as “dramatic interest” (Bentham 1843, XI.4). Accordingly, Bentham opposes the rote reading of parliamentary speeches in favour of oral proceedings: “It may [...] easily happen, that a man does not understand the subject upon which he has written; but he must always understand his subject, if he will speak well upon it” (Bentham 1843, XI.4).

May also strongly supports the rhetorical view of Parliament as an exemplary deliberative assembly, and praises the freedom of debate in the Westminster Parliament.

The rules of Parliament are designed to afford every legitimate opportunity of discussion, to ensure reasonable delays in the passing of important measures, and to guard the rights of minorities. In the

observance of these rules, both houses have displayed a generous regard for the liberty of individual members, and of political parties. Freedom of debate has been respected with rare patience and self-denial. Nowhere have the principles of liberty and toleration been more conspicuously illustrated than within the walls of Parliament (May 1883, 380).

However, many time-saving measures were felt to be oppositional to the idea of Parliament as an exemplary deliberative assembly. For May, with the Standing Orders from 1882 “the house clearly aimed at the correction and restraint of acknowledged abuses, without interfering with fair debate, or legitimate methods of opposition. A serious attempt has been made to rescue parliamentary government from its threatened paralysis” (May 1883, 384-5). May still sees many occasions where debate might be used for obstruction, but he acknowledges that it is impossible to sanction all misuses of the spirit of the rules simply by holding to their letter.

Both tracts recognise that parliamentary procedure itself is always controversial. The members can at any time interrupt the debate by crying “*Order! Order!*”, prompting a question to the Speaker about whether the deliberations are duly in line with existing procedures. The procedure tracts help them to identify such occasions in the parliamentary game as well as to realise that there is no point of view superior to this game. The best that Parliament can do is ensure that the game is played in a spirit of fair play. May’s work illustrates how this concept was reinterpreted in the nineteenth century to include a fair distribution of parliamentary time.

My study of parliamentary procedure can also be read as a polemic against currently fashionable theories of “deliberative democracy”, which tend either to neglect parliaments altogether or to see them in terms of electoral and party politics. Furthermore, they tend to reduce “deliberation” to a consensual search for the “best argument”, as opposed to the rhetorical view of debating *pro et contra*, for which the proceduralism of parliamentary politics offers the primary historical model.

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