UPPER HOUSES AND FINANCIAL LEGISLATION

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ABSTRACT

This article examines and compares the relationship between the two houses in selected bicameral legislatures in relation to financial matters. The examination extends from countries with a long democratic tradition that still retain bicameral systems, to subordinate bicameral legislatures where they exist in federal systems such as Australia and the United States, and the historical development of these relationships with particular reference to England and the United Kingdom. The countries examined, as well as those already mentioned, include Switzerland and Germany.

The different systems examined range from that of the United States, where both houses have essentially equal legislative powers and the President must also concur, except where the presidential veto is overridden and where refusal of supply is not a device to remove the government, to systems such as in Australia where an acute government crisis can arise from denial of supply. Others such as those in the United Kingdom and New South Wales give the lower house the final say in financial and/or appropriation matters. The concentration is on the relative powers of the upper and lower houses in financial matters and constitutional provisions for resolving deadlocks are a particular focus of attention, as well as any constitutional conventions or practical matters of relevance.

INTRODUCTION

Upper houses of parliament only exist today in the context of a two-chamber or bicameral legislature. Although multicameral legislatures containing three or more chambers existed at certain times in the past, such as in France and Sweden and more recently in South Africa[1], there are no significant examples remaining today.

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1 In the final period of the apartheid regime (the 1980s), the two chamber system originating in the *South Africa Act 1909* (UK) had been abandoned in favour of the tri-cameral legislature, representing respectively the Whites, the Coloureds and the Indians. The Africans were unrepresented on the basis that they had independent homelands. However, this was largely a device for giving a greater appearance of democracy while enabling the white minority to retain control.

In France the States-General consisted of three estates, the First Estate consisting of the Nobility, the Second Estate consisting of the Clergy and the Third Estate consisting of representatives of everyone else. The States-General did not meet after 1614 until summoned in desperation by Louis XIV in early May 1789. This led to the revolution that resulted in its abolition.

In Sweden there were four estates in the *Riksdag*; the *Nobility, Clergy, Burghers and Peasants*. Periods of greater *Riksdag* influence alternated with monarchical despotism until the final triumph of democracy as a result of a military revolt in 1809. This system survived until its replacement by a two-chamber parliament in 1866. This was itself replaced by a single chamber parliament in 1970.

Bicameralism is, for the purpose of this paper, defined as that system of organisation of the legislative arm of the state into a deliberative body having two chambers, which generally deliberate and vote upon proposed legislation separately.[2] For the purposes of this paper, the common need for assent to legislation by the Head of State[3] or some official acting on their behalf[4], or its scrutiny for constitutionality[5] is not seen as constituting an extra chamber. Only genuine legislative bodies having discretion independent of the executive government are considered.[6] In the interest of the paper not being overly lengthy, the examples of bicameralism considered in detail are confined largely to Western Europe, North America and Australasia.

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2 Provisions for joint sittings for special purposes, as in Australia under the *Commonwealth of Australia Constitution Act 1901* (Cth) ('Commonwealth Constitution') s57, or in Norway under the Norwegian Constitution 1914 Art 76(3), for resolving deadlocks between the two houses, or in Switzerland under the Swedish Constitution 1975 Art 157, for special purposes including the election of the federal executive, are not regarded as removing a parliament from being classified as bicameral.

3 Who may be a monarch acting on the advice of a Prime Minister, as in the United Kingdom and most other constitutional monarchies, or the executive head of government, as in the United States, and many other States in Central and South America. Many republics also confer only formal executive power on the President who by constitutional convention signs legislation into law at the behest of the executive government, for example, Germany. In others, the President, although not personally the head of the executive government, has a limited discretion to return legislation to parliament, as in Turkey, or refer it to the Supreme Court regarding its constitutionality, as in Ireland.

4 For example, the respective Governors-General assent to legislation on behalf of the Queen in Australia (Commonwealth Constitution ss1, 2), Canada and New Zealand as well as other Commonwealth countries in which the Queen is Head of State, and Governors assent to legislation in the Australian States.

5 In France there is a Constitutional Council, which performs this role: the French Constitution 1958 Arts 56-63.

6 A parliament that usually exists as 'window-dressing', such as that of an absolutist State like Iraq, does not form part of the purview of this article.

CLASSIFICATION OF HOUSES OF PARLIAMENT AS *UPPER AND LOWER*

Some comment is necessary as to why the two parliamentary chambers have come to be described as *upper* and *lower* in bicameral systems. An explanation requires analysis of the origins of today's bicameral legislative systems. The seeds of bicameralism are found in two places, one specific, the other of more general application. The former is the division of the English Parliament into the Lords and the Commons, the latter the medieval notion that society consisted of well-defined groups or classes who should be represented separately. The latter concept has its origins in theories of balanced constitutions dating back to Aristotle[7] and other political philosophers of the ancient world. However, Sweden's example of a multi-chamber medieval parliament evolving into a bicameral legislature is very much the exception.[8] Most medieval institutions of a parliamentary nature were abolished or fell into disuse in the era that saw the rise of nation States under absolutist rulers, fuelled by the evolution of the late medieval scholars of the Renaissance in the doctrine of the *divine right of kings*.[9] An interesting exception is that of Jersey, one of the Channel Islands. As part of the original Duchy of Normandy these islands have been linked to the English (and later British) Crown since the Norman Conquest of 1066. In Jersey a three-estate legislature evolved in the medieval period, consisting of *jurats* (a form of judge), the clergy and representatives of the general population. This multicameral body survived until the end of the 18th century when the latter two elements combined, making the legislature bicameral. This gradually evolved into unicameralism.[10]

Consequently, it is the unique and largely accidental English route to bicameralism that has proved to be the model and inspiration for almost all the bicameral legislatures of today, either directly or indirectly.[11] As a result the origin of most of the differences in powers and particularly financial powers between the two chambers in bicameral systems can be traced back in some way to the development of the relationship between the House of Commons and House of Lords in medieval England.

Similarly, the characterisation of one chamber as the *upper* and the other the *lower* house is largely derived from use of this terminology in relation to the English Parliament. There it is probably attributable to

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7 See discussion in Aristotle. *The Politics.* London: W.M. Heinemann Ltd, 1932.

8 When the system of four estates was replaced in Sweden by a bicameral parliament in 1866, it essentially copied the model derived from the British model and its imitators.

9 For example, the failure of the States-General to meet after 1614.

10 See Bois, F. *A Constitutional History of Jersey.* St. Helier: The States of Jersey, 1972.

11 The United States copied Britain, and many other countries, particularly in the

the fact that the House of Lords was composed exclusively of the *upper* echelons of society, the most elevated sections of the aristocracy and the higher clergy. Many other widespread distinctions follow the English pattern. In many bicameral legislatures the furnishings are green in the lower house and red in the upper house.[12]

In bicameral systems the two chambers are usually referred to nowadays as the upper and lower houses. It is, of course, purely a matter of classification, but the lower house is for such purposes generally selected as the house to which the executive government is primarily answerable; where the executive is responsible to Parliament. Although, which house is the one to which the executive government is answerable is sometimes a matter involving constitutional convention. Where there is a separately elected executive, as in the United States, or the executive is otherwise not directly responsible to Parliament, as in Switzerland[13], the lower house is regarded as one which initiates finance legislation, as in the United States[14], or which is directly elected or elected most closely in accordance with population or most numerous.[15] Frequently, as in the United States, the *lower* house satisfies more than one or all of these criteria.

Although the lower house enjoys some form of superior constitutional status or powers in most bicameral systems, this is not invariably the case. In Switzerland the powers of both houses are formally equal, both houses being required to consent to legislation[16] after separate deliberation.[17] However, superior numbers would give the lower house greater say in practice in such matters as the election of the federal executive, which are determined by a joint sitting of both houses.[18] In the United States, the Senate has superior power in enjoying longer terms of office[19], having the sole say in ratifying treaties and approving major Presidential appointments[20], as well as the sole power to try

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Americas, copied the United States.

12 Australia and its States are an example.

13 Where the Seven Member Executive of the Federal Government is elected by joint session of both houses when Parliament meets after each quadrennial election for the lower house: The Swiss Constitution 1999 Art 175(2).

14 The United States of America Constitution 1788 Art 1(7).

15 As in Swiss Constitution 1999 Art 149(2) and the United States of America Constitution 1788 Art 1, s2(3); and the reference to the 'most numerous branch of the State Legislature' in Art 1, s2(1) presupposes a similar basis of classification of State legislatures into upper and lower houses.

16 The Swiss Constitution 1999 Art 156(2).

17 The Swiss Constitution 1999 Art 156(1).

18 The Swiss Constitution 1999 Arts 157(1)(a), 175(2). The lower house has 200 members and the upper house 46; Swiss Constitution 1999 Arts 149, 150.

19 Six years as opposed to two years for the House of Representatives, The United States of America Constitution 1788 Art 1, s3(1).

20 The United States of America Constitution 1788 Art 2, s2(2).

impeachments.[21] The only advantages over the formal equality of legislative power[22] that the House of Representatives has is the sole right to initiate bills raising revenue[23] and impeachments and the right to choose the President where no candidate has a majority of electoral votes.[24] In these circumstances the Senate has the corresponding right to choose the Vice President, where no candidate for Vice President has a majority of electoral votes.[25]

The superior numbers of the House of Representatives[26] furnish no advantage as no decisions are taken by joint deliberation in the United States.[27] Consequently, the Senate is significantly more powerful than the House of Representatives in the United States. This is even truer of individual senators as compared to members of the House of Representatives. They enjoy greater influence through having to campaign for re-election only once every six years as opposed to every two, and through sharing their chamber's power with only ninety-nine other persons as opposed to 434.

Origins of Difference in Financial Powers Between the Two Houses

That the English Parliament itself did not succumb to the pressures of absolutism at the end of the Middle Ages is the result of a number of special factors.

1. Parliamentary institutions had become stronger in England than elsewhere. It is likely that bicameralism of the legislature played a

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21 The United States of America Constitution 1788 Art 1, s3(6).

22 The United States of America Constitution 1788 Art 1, s7.

23 The United States of America Constitution 1788 Art 1, s7(1).

24 The United States of America Constitution 1788 Art 2, s1(2), as amended by Amendment XII.

25 The United States of America Constitution 1788 Art 2, s1(2), as amended by Amendment XII.

26 Currently 435 compared to 100 Senators (2 from each of the 50 States).

27 The Supreme Court has made it quite clear that the bicameral nature of the legislature under the United States of America Constitution 1788 Art 1, s7, requiring both Houses' assent to legislation is fundamental and permits no evasion: *Chadha v Immigration and Naturalization Service* (1983) 462 US 919, which held unconstitutional a one-house legislative veto provision under which Congress asserted the power to overturn an executive branch decision to suspend the deportation of an alien. The only constitutional provision requiring a joint session is Amendment XII which requires a newly elected Congress to meet as such on 6 January every 4 years after each presidential election to formally count the electors' votes cast for President and Vice President in the Electoral College. However, it seems the House of Representatives and Senate would still vote separately on any decision required to be taken in this session, such as not to certify the results. Joint sessions for the delivery of the State of the Union address by the President or for addresses by other dignitaries are not decision-taking sessions. Such sessions can by authorised by the two Houses under their powers to determine individually their methods of proceeding under Art 1, s5.

fundamental role in this. The division into Lords and Commons, by concentrating those sympathetic to authoritarian rule into the upper house, was probably crucial in enabling the Commons, on behalf of Parliament as a whole, to effectively challenge royal power in the 17th century.[28]

2. Geographic isolation meant that authoritarianism could not be effectively imposed from outside.[29]
3. The peculiar character and wide education of Henry VIII, who was the English Monarch best placed to follow the authoritarian road, meant that despite his extreme measures he chose to follow an entirely constitutional path, obtaining parliamentary sanction for all his measures. During his reign, Parliament at his behest was called upon, *inter alia*, to formalise the break with Rome, declare the King Supreme Head of the Church of England[30], drastically reform property law[31] and change the succession to the Crown three times.[32] Although Parliament was largely subservient to Henry VIII during his reign[33], its passage of legislation making such fundamental constitutional changes was bound to increase in the longer term the standing and stature of Parliament to a huge degree. Furthermore, the very extravagance of Henry VIII brought about an increase in parliamentary influence, with the consequential need to summon it more regularly to vote on taxes, or raise money for the King by other legislative means.

Emergence Of Bicameralism In England

England, unlike most continental European countries, did not develop parliamentary institutions along the lines of three or more estates in

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28 In 1642, when Charles I raised his standard at Nottingham to presage the start of the Civil War he was joined by approximately one third of the Commons and two thirds of the Lords.

29 For example, the failure of the Spanish Armada in 1588, which had been designed to return England to the Catholic fold which, incidentally, would have meant the demise of parliamentary independence. See also the explanations given for the development of democracy in some countries rather than others by Wilson, J. 'Democracy for All?' (2000) 109(3) *Commentary*, available at <http://www.commentarymagazine.com>.

30 *Act of Supremacy 1534* (26 Hen VIII c 1) (Eng).

31 See *Statute of Uses 1535*, *Wills Act 1540*, and legislation paving the way for dissolution of the monasteries, which greatly reduced Church landholdings from as much as one third of the Land in England to about a tenth.

32 Finally, giving him power to determine the succession to the Crown by his will. The final part of his will was ignored in 1603 when James I acceded in spite of Henry VIII's stipulation that his line be excluded in favour of the junior Suffolk Line. See Taswell-Langmead, T. *Taswell-Langmead's Constitutional History*. 11th ed. London: Sweet & Maxwell, 1960, 330.

33 However, there was reluctance to pass some legislation, notably the *Statute of Uses* in 1535.

the medieval period. This was because the English Parliament emerged in the 13th century, from earlier assemblies such as the *Witenagemot* and assemblies of major barons or *tenants in chief*[34], as a single assembly. The origin of the English Parliament is usually dated as 1265, that being the year of the Parliament summoned by Simon de Montfort, which for the first time included two elected representatives of each of the boroughs and cities. This was in addition to the two representatives of each of the shires, the major nobles and the higher clergy. Representatives of the shires had also been summoned previously in 1213 and 1254 while the major barons and higher clergy had always been part of national councils. In 1295 there was a further development in that the inferior clergy also gained representation in that part of the composition of Parliament that eventually became the Commons.

Accordingly, representation was based on the same principles as the three estates of France or the four of Sweden mentioned above. The crucial difference was that, after some initial division for the purposes of voting taxation on their respective membership[35], they met as one body and continued to do so until the division into Lords and Commons occurred. The adoption of this procedure was strongly facilitated by the English Kings' long standing practice of holding plenary sessions of earlier assemblies that his council, the magnates and prelates attended. When they were joined by the *knights of the shires* and *burgesses* these stood at the lower end of the hall, the layout being almost exactly as occurs today in the State Opening of Parliament in the United Kingdom.

The origin of bicameralism lay in unofficial meetings of the representatives of the shires, boroughs and cities, discussing what collective right of reply they should make to some difficult question or demand with which they had been confronted by the higher powers represented in the Parliament.[36] A 'speaker' would be chosen to convey their views in the full Parliament, as they would not speak individually in the presence of their betters. Initially those attending these meetings were careful to keep no written records. The first record of a separate session of the Commons, as this group came to be known, in the Rolls of

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34 *Tenants in Chief* were those who held land directly of the King under the feudal system. For practical reasons they probably only ever met in 1086 and 1116. See Taswell-Langmead, T. *Taswell-Langmead's Constitutional History*. 11th ed. London: Sweet & Maxwell, 1960, 127-128.

35 See Taswell-Langmead, T. *Taswell-Langmead's Constitutional History*. 11th ed. London: Sweet & Maxwell, 1960, 142.

36 Trevelyan, G. *History of England*. London: Longmans, Green & Co. Ltd, 1926, 194.

37 *Rotuli Parliamentorum,* ii, 66, no. 3 (Lodge, E. and Thornton, G. *English Constitutional Documents, 1307-1495*. London: Octagon Books, 1972, 1320).

Parliament is of a session in 1332.[37] However, the division into the House of Lords and the House of Commons may be regarded as permanent from 1339.[38]

Early Relationship Between the Two Houses

Initially the House of Lords was immeasurably the more powerful house. Early in the reign of Edward II, dissatisfaction with his conduct of the government led to the *Ordinances* of 1311. These asserted, *inter alia*, that the King should not leave the Kingdom or levy war without the consent of the baronage in Parliament. In the case of such absence with consent, a guardian of the realm should be chosen by the common assent of the baronage in Parliament. Similarly, the counsel and assent of the barons in Parliament should chose the Chancellor, two chief justices, treasurer and other great officers of the Crown. Only the House of Lords was to have a say in these matters. A fascinating link to the present is the similarity of the latter provision regarding appointments to the need for Senate confirmation of major presidential appointments in the United States.[39]

The right of the House of Commons to concur in legislation of national importance was affirmed by the *Statute of York* in 1322.[40]

Absence of the Clergy from Decisions Regarding Taxation

The clergy reluctantly attended these Parliaments, preferring to tax themselves separately in their convocations of Canterbury and York. In the 14th Century they ceased to attend entirely for two hundred years until forced back in as Lords Spiritual at the Reformation, when their right to tax themselves in Convocation was abolished.[41] The accidental circumstance of the absence of the clergy during this crucial formative period appears to have been essential to the evolution of a bicameral legislature as it removed one of the three estates.[42]

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38 Taswell-Langmead, T. *Taswell-Langmead's Constitutional History*. 11th ed. London: Sweet & Maxwell, 1960, 151.

39 The United States of America Constitution 1788 Art 2, s2(2).

40 *Statute of York* 15 Edw II (1322).

41 By 25 Hen VIII C19, Convocation was forbidden to enact constitutions or canons without the King's licence.

42 Virtually all other European constitutions evolved systems based on three or more estates. Even in England there was at one time the possibility that lawyers and merchants would have formed two separate sub-estates: Taswell-Langmead, T. *Taswell-Langmead's Constitutional History*. 11th ed. London: Sweet & Maxwell,

Origin of Greater Powers of the House of Commons in Relation to Finance

This clerical absence was also very significant in bringing about the origination of the House of Commons' predominance in finance matters. This was because their absence from taxation deliberations, when combined with the main source of taxation of the great lords lying in their automatic direct feudal obligations to the Crown as *tenants in chief*[43], left little for the House of Lords to do in the field of finance. For example, in 1344, after the permanent division of Parliament into the House of Lords and House of Commons in 1339, the knights and burgesses made separate grants of taxation to fund the war against France, while the Lords merely promised to follow the King in person and granted nothing.[44]

As early as 1309, prompted by the weakness and unpopularity of Edward II, the House of Commons had granted the King a subsidy conditional upon redress of grievances.[45] The establishment and development of this principle, that grant of taxation was to be conditional on redress of grievances, also tended to cement the dominant role of the House of Commons in financial matters. As the House of Commons was the only representative body, the House of Lords consisting not of representatives of members who sat in their own right *ex officio* as leading magnates or prelates, it could not act as effectively in transmitting demands for redress. Once upper houses become elected representative bodies, this argument for predominance of lower houses in control of finance ceases to operate.[46]

Initially grants of taxation were made without condition as to how the money would be spent. The first unequivocal instance of an appropriation of supplies occurred in 1353, when a tax on wool was granted to be applied solely for the purposes of the war.[47] By the 17th century the principle that the House of Lords should not even amend

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1960, 151.

43 Persons who held land directly from the Crown as Lord, rather than from some lesser lord.

44 Taswell-Langmead, T. *Taswell-Langmead's Constitutional History*. 11th ed. London: Sweet & Maxwell, 1960, 152.

45 Taswell-Langmead, T. *Taswell-Langmead's Constitutional History*. 11th ed. London: Sweet & Maxwell, 1960, 155.

46 This argument has recently been advanced by Lord Sattchi when introducing a private members bill to change the rule in the *Parliament Act 1911* that the House of Lords may not amend financial measures. See *The Times*, 20 February 2001. This has occurred little more than a year after the drastic reduction of the hereditary element in that House.

47 Taswell-Langmead, T. *Taswell-Langmead's Constitutional History*. 11th ed. London:

financial legislation was so well established that in 1671 the House of Commons declared by resolution that, according to their *ancient rights and privileges*, the House of Lords should never be granted such a right. In 1678 the Commons were even firmer, declaring that the grant of all aids and supplies to the Crown were the sole gift of the Commons and bills granting such should not be altered or changed by the Lords. Of particular significance was the fact that these resolutions were passed by the Cavalier Parliament (1661-1679), elected at the Restoration and probably the most conservative body in temper regarding the powers of the Commons elected in many centuries.

While conditional grants were important in the early phase of assertion and development of parliamentary control of finance, in more recent times it has been the practice in the United Kingdom to legislate separately for the grant of taxation and appropriation of expenditure. Australia has entrenched this distinction in its Constitution.[48] This eliminates the procedure of 'tacking' unrelated items into finance measures, which is a major part of the political process in the United States. There, in recent years, Presidents and those among the state Governors who do not already enjoy this privilege have earnestly desired a line item veto, in addition to their general powers of veto, which would enable them to defeat 'pork-barrelling' measures tacked into budgetary measures.

Reasons for the Survival of Bicameralism

It was not enough for bicameralism to initially arise; it also had to maintain itself to survive in the present. Its survival is attributable to other unique features of the English social and legal landscape at this time.

One of the features of the division of Parliament into two Houses in England, which proved essential to its long survival, was the division of the nobility between the two Houses. The House of Lords contained only the higher nobility; the major magnates.[49] The lesser nobility were represented in the House of Commons as the *knights of the shires*. This strengthened the Commons so that it gained a significant voice as early as the mid to late 14th century, and made it strong enough to win the Civil War of the 17th century.

Another factor was the confinement of the privilege of nobility in two ways. Firstly, the only privilege was a seat in the House of Lords. There was none of the unjust exemptions from taxation found in

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Sweet & Maxwell, 1960, 160, quoting *Rotuli Parliamentorum*, ii, 252, no 35.

48 Section 54 provides that an act appropriating monies shall contain no other provision.

49 Trevelyan, G. *History of England*. London: Longmans, Green & Co. Ltd, 1926, 195; Taswell-Langmead, T. *Taswell-Langmead's Constitutional History*. 11th ed. London:

countries such as France. All freemen were entitled to marry anyone or to aspire to any office in the land. Secondly, the privilege was confined to the actual holder of the noble title. Baron's sons were commoners. Even the eldest son, who was heir to the title under primogeniture, was a commoner until and unless he succeeded his father. Increasingly, sons of members of the House of Lords would be members of the House of Commons, so that political alliances tended to form between members of both Houses. This is essential for successful bicameralism, which cannot succeed or operate efficiently if the two houses are structurally destined to be at enmity.

The Influence of English Bicameralism

English bicameralism has spread in two ways:

1. English and later British settlement overseas and colonisation carried with them this tradition. As a result, for example, the American colonies established two house legislatures from the time of the 17th century settlement. Later, in Australia, the British Government firstly set up Legislative Councils to advise the Governors of the various Colonies in most cases, then granted responsible government through a Legislative Assembly.
2. Many countries copied British constitutional arrangements because, particularly after the 1688 Constitutional Settlement endured very successfully well into the 18th century, they were seen as the world's best practice.

This reproduction of British arrangements applied in three ways:

1. Countries setting up constitutional democracy for the first time looked to Britain as the exemplar.
2. Former British colonies seemed to copy Britain's arrangements, at the time that their constitutions were formulated, particularly closely.[50]
3. Finally, the most prominent of these former colonies, the United States, itself became a leading model for other countries to emulate once its independent democracy became firmly established.

As a result of all these forms of influence bicameralism spread far and wide. By contrast, very few legislatures that were divided into three or

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Sweet & Maxwell, 1960, 152-153.

50 This 'snapshot' theory has been expounded in more detail by the author in relation to Australia, New South Wales, Canada and the United States in Preece, A. 'The British Influence on the Australian Constitution'. IN *Republic or Monarchy? Legal and Constitutional Issue*. St Lucia: University of Queensland Press, 1994, particularly at 138-143.

51 The only recent example of a tricameral legislature is that which operated in the

more chambers emerged after the end of the Middle Ages.[51]

Copying of the relationship between the two houses in regard to financial measures was also frequent.[52] For example, the constitutional requirement in the United States that all 'Bills for raising Revenue' should originate in the lower house was adopted[53], this being understood to be the constitutional position in Britain in the late 18th century.[54] Another example is the limitation in Australia of the Senate's powers to reject financial legislation, with provision for the calling of an election to resolve differences.[55]

BICAMERALISM IN FEDERAL SYSTEMS

In federations, bicameralism at the federal level is extremely common. The upper house is usually seen as a fundamental part of the federal compact in giving some special protection or representation to the constituent units. Frequently, the component units enjoying equal representation in the upper house, as in Australia, Switzerland and the United States, achieve this.[56] This is also the case in the European Union if the Council of Ministers is seen as the Upper House.[57] The United States and Australia also protect the equal voice of each State in the Senate from reduction by constitutional amendment, without the consent of the State concerned or its electors, respectively.[58] Even

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Republic of South Africa in the 1980's. This replaced the bicameral legislature set up in 1909 under the *South Africa Act 1909* (UK), and itself gave way to a single chamber legislature, which was elected in 1994 after the dismantling of *apartheid*. Many would question whether this was a genuine attempt at democracy as opposed to a last desperate attempt by the leaders of the white minority to cling to power. There was a chamber each for the Whites, Coloured and Indians respectively. However, matters were so organised that the Whites had ultimate control.

52 Discussed in detail by the author in Preece, A. 'The British Influence on the Australian Constitution'. IN *Republic or Monarchy? Legal and Constitutional Issue*. St Lucia: University of Queensland Press, 1994.

53 The United States of America Constitution 1788 Art 1, s7.

54 The United States did not adopt the limitations on upper house powers declared in the resolutions of 1671 and 1678 of the Commons mentioned above, but this may have been because sufficient colonial legislatures has been established in the mid 17th Century and different traditions had been established.

55 Commonwealth Constitution ss53, 57.

56 Even this aspect has its origins in the early English arrangements whereby two members – *knights of the shires* – were summoned to Parliament from each English County. See the extensive discussion on this issue: Aroney, N. 'Federal Representation in the Australian Constitution'. IN Moens, G. (ed.) *Constitutional and International Law Perspectives*. St Lucia: University of Queensland Press, 2000, particularly at 30, where he cites Freeman, E. *The Growth of the English Constitution from the Earliest Times*. London: Macmillan & Co., 1898, 9-10, and 37, 60 and 66, to the effect that: 'the English system of representative government grew out of a union of constituent political units, from *mark* to *hundred* to *shire*', a progression suggesting that the English Parliament is constituted more like federal Switzerland than majoritarian France.

57 See the discussion of this issue by the author in Preece, A. 'The European Economic Community - International Organisation or Federal State' (1986) 14(1) *UQLJ*, 78.

where representation is unequal it is usually weighted in some degree towards the smaller members of the federation as in Germany[59] and Canada.[60] Constitution of the upper house as direct representation of the legislature or executive of the members of the federation is also common as in Germany and the European Union and Senators were originally chosen directly by State Legislatures in the United States.[61] Switzerland leaves the method of choice of members of the upper house purely to the Cantons.[62]

Outside of Australia, the United States and the European Union, the legislatures of the constituent members are generally unicameral.[63] In both Australia and the United States all States entered the federal system with bicameral legislatures and in each case only one State has since abolished the upper house.[64]

Special Financial Arrangements in Federal Systems

Special arrangements are often made regarding the allocation of financial powers between the constituent units of a federation. While these are often included in the constitution, only in Germany do they have a major impact on relations between the two chambers of the legislature. This is because the upper house, the *Bundesrat*, has to consent to all legislation involving the States, or *Lander*. Since the Constitution provides for the sharing of major taxes between the federal government and the states, this brings about an upper house say in virtually all financial matters.

In Australia, the major constitutional limitation on the States is that they may not impose customs or excise taxes.[65] However, court decisions have given the federal authorities priority in income tax.[66] Federal taxation must be non-discriminatory as between States or parts of States.[67] Such non-discrimination provisions are common in federations. In the United States it is achieved by a requirement that 'all duties,

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58 Commonwealth Constitution s128; The United States of America Constitution 1788 Art 5.

59 Representation of *Lander* in the *Bundesrat* varies from 3 to 6, *Basic Law* (The Israeli Constitution) Art 52(2).

60 In Canada the largest provinces of Quebec and Ontario have 24 Senators, but the smallest have at least 6, apart from Prince Edward Island, which has only 4. There is an extensive desire for equal representation in the Canadian Senate.

61 Until the 17th Amendment to the Constitution provided for direct election by the people of each State in 1913.

62 The Swiss Constitution 1999 Art 150: each full Canton selects two members and each half Canton one member.

63 For example, Canada and Germany.

64 Queensland in 1922 and Nebraska in 1934, respectively.

65 Commonwealth Constitution s90.

66 *South Australia v Commonwealth (First Uniform Tax Case)* (1942) 65 CLR 373; *Victoria v Commonwealth (Second Uniform Tax Case)* (1957) 99 CLR 575.

imposts and excises shall be uniform throughout the United States'[68], and by a requirement that direct taxes be apportioned among the several States with regard to the census.[69]

Reduction in Powers of Upper Houses

Powers of upper houses have sometimes been reduced. Not infrequently this has focussed on financial powers, or has been triggered by a refusal by the upper house to pass financial legislation. This happened in the United Kingdom where the legislative powers of the House of Lords were reduced to an effective delaying power of a maximum[70] of two years and one year, respectively, by virtue of the *Parliament Acts* (UK) of 1911 and 1949. The Canadian Senate suffered a reduction in powers as part of the constitutional changes adopted in 1982, where its ability to block constitutional amendments, including those reducing its own powers, were limited to delaying powers of 180 days.[71] A similar provision exists in New South Wales in relation to any Bill 'appropriating revenue or moneys for the ordinary annual services of the Government' only passed by the Legislative Assembly, where the limit of delay is one month.[72]

Relative Powers of Lower and Upper Houses and Resolution of Deadlocks

Usually the legislative powers of the lower house are in some way superior to that of the upper house. In some countries the difference in powers is non-existent, as in Switzerland[73], or is minimal, or the upper house is the stronger as in the United States. In the United States, at both Federal and State level, conference committees of delegations from each House usually resolve deadlocks.

Australia

In Australia the powers of the Senate are only slightly more restricted. Proposed laws appropriating revenue or moneys, or imposing taxation, may not originate in the Senate. Also, the Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government

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67 Commonwealth Constitution s51(ii).
68 The United States of America Constitution 1788 Art 1, s8.
69 The United States of America Constitution 1788 Art 1, s9. This provision brought about the need for Amendment XVI to authorise a federal income tax.
70 The limit is one month for money bills, *Parliament Acts 1911* (UK) s1.
71 *Constitution Act 1982* (Canada), s47.
72 *Constitution Act 1902* (NSW) s5A, inserted in 1933.

and may not amend any proposed law so as to increase any proposed charge or burden on the people. However, the Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein.[74] Tacking of other provisions into appropriation[75] or tax[76] bills is not permitted.

The Senate's powers may also be seen as slightly inferior in practice through the operation of the procedure for resolving deadlocks between the two houses.[77] This provides for the dissolution of both Houses if the Senate fails to pass legislation passed by the House of Representatives twice with a minimum interval of three months. If, after the election, the Senate again fails to pass the legislation, there is provision for a joint sitting at which the legislation must be passed by an absolute majority of the membership of both Houses. The superior numbers of the House of Representatives can usually be expected to prevail in this situation.[78] The Constitution provides for the House of Representatives to be twice as numerous as the Senate.[79] Fear of the uncertain outcome of a double dissolution tends to lead to compromises, so that irreconcilable disagreements bringing one about are comparatively rare[80], despite the government of the day having generally lacked a Senate Majority since proportional representation was introduced.[81]

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73 This is also the case in some States in the United States and Australia, see for example, Tasmania.

74 Commonwealth Constitution s53.

75 Commonwealth Constitution s54. This provision also avoids disputes as to whether the Senate has power to amend a bill, which would otherwise arise in relation to hybrid bills containing appropriation(s) and other measure(s). Section 55 performs the same function in relation to proposed laws imposing taxation. Section 56 also makes the passage of appropriation measures conditional upon their recommendation to the House of Representatives by the Governor-General in the same session.

76 Commonwealth Constitution s55.

77 Commonwealth Constitution s57.

78 Political factors have also militated in favour of the House of Representative since 1949 when proportional representation was introduced for elections to the Senate. This means that although the government is mostly in the minority in the Senate, the minority is usually small and less than its majority in the House of Representatives, where single member electorates and lack of proportional representation, almost always tend to outweigh its minority in the Senate.

79 Commonwealth Constitution s24.

80 There has only ever been one joint sitting, in July 1974 following the May 1974 'double-dissolution' election. After the 1914, 1951 and 1975 double dissolutions the Government enjoyed a Senate majority. In 1983 it lost office. In 1987, as in 1974, it held onto office but without a Senate majority. The trigger here was its plan to introduce a national identity card. However, there was a huge upsurge of public opposition and it was discovered that even if the legislation were passed it could not be implemented without the Senate approving necessary regulations. So the issue died quietly.

81 No Government has enjoyed a Senate Majority since June 1981. Such a majority is

Australian States

At State level[82], the final say of the Lower House with regard to appropriation of moneys in New South Wales has already been mentioned. In the other four States that have upper houses, the Legislative Councils have essentially the same powers in relation to financial measures as the Australian Senate.[83]

Victoria

In Victoria, deadlocks are resolved by a 'staggered' double dissolution, with the Lower House being dissolved first.[84] The Legislative Council is dissolved if it rejects the legislation again when the newly-elected Legislative Assembly repasses it. Continuing deadlock after the re-election of the Legislative Council results in a joint sitting, where an absolute majority of the overall membership of both houses is necessary for passage.[85] There are very tight time limits governing the procedure.[86] Overall, the greater difficulty of this double-dissolution procedure compared to the equivalent at federal level makes the Victorian Legislative Council more powerful.

South Australia

The South Australian provision for resolving deadlocks[87] resembles that of Victoria except that the second stage involves a double dissolution election rather than one for the Legislative Council only. Furthermore, there is no provision for a joint sitting, and on the second occasion an absolute majority of the House of Assembly must pass the legislation.

Tasmania and Western Australia

In Tasmania and Western Australia there are no provisions for resolving deadlocks.

United Kingdom and Canada

The reduction of powers of the British House of Lords and Canadian

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even less likely since the size of both houses was increased in 1983, which means that 6 rather than 5 Senators are elected from each State at a normal triennial half-Senate election.

82 For a general discussion of the Constitutions of the Australian States, see Lumb, R. *The Constitutions of the Australian States*. 4th ed. St Lucia: University of Queensland Press, 1977.

83 *Constitution Act 1975* (Vic) ss62-65; *Constitution Act 1934* (SA) ss60-64; *Constitution Acts Amendment Act 1899* (WA) s46; *Constitution Act 1934* (Tas) ss37-45.

84 *Constitution Act 1975* (Vic) s66; the bill must have been rejected twice, and s66(1)(c) must have been submitted to the Legislative Council on the second occasion

Senate has already been mentioned. The distribution of powers between the two houses set out in the *South Africa Act 1909* (UK) is particularly interesting. This is because that legislation was passed during the tumult over the House of Lords' rejection of the 1909 Budget, which precipitated the radical surgery of the House of Lords' powers in 1911. The distribution of financial powers between the House of Assembly and the Senate closely followed that in the Australian Constitution passed in Westminster less than a decade earlier.[88] Deadlocks were generally to be resolved by a joint sitting in the next session after the House of Assembly had repassed the legislation.[89] However, in the case of appropriation bills the joint session could take place in the same session.[90]

France

In France, the National Assembly can ultimately prevail over the Senate in case of disagreement provided the Government is on the side of the National Assembly.[91] There is also provision for the Government to pledge its responsibility to the National Assembly in relation to a legislative text. In this case the text becomes law unless a motion of censure in the Government is filed in the succeeding 24 hours and later passed by an absolute majority of the members of the National Assembly. The Senate plays no part in this procedure.[92]

Germany

In Germany the *Bundesrat* must consent to certain legislation, mostly involving the *Lander*, and also to Constitutional amendments by a two-thirds majority.[93] Otherwise it has effective power to block legislation only where it rejects it by a two-thirds majority, for then the *Bundestag* has to muster a two-thirds majority itself to override the veto.[94] The specification of legislation to which the *Bundesrat* must consent is somewhat complex but, in practice, means that its consent is necessary for most budgetary measures. This is because any legislation regarding financial matters involving the *Lander* requires *Bundesrat* consent, and income and corporation taxes are shared with the *Lander*.[95]

Norway

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endorsed with a resolution of the Legislative Assembly declaring it to be of special importance.

85 *Constitution Act 1975* (Vic) s66.
86 *Constitution Act 1975* (Vic) s66(1)(d).
87 *Constitution Act 1934* (SA) s41.
88 *South Africa Act 1909* (UK) ss60-62.
89 *South Africa Act 1909* (UK) s63.
90 *South Africa Act 1909* (UK) s63.
91 The French Constitution 1958 Art 45.

In Norway financial legislation is treated in the same way as other legislation. Only the General Chamber (*Odelsting*) has the power to initiate any legislation.[96] Where there is a deadlock between it and the Permanent Chamber (*Lagting*), the matter is eventually resolved in a joint session, where a two-thirds majority is required for passage.[97] The influence of the *Odelsting* will be greater than the *Lagting* in this situation as it has triple the membership.[98]

ADVANTAGES OF BICAMERALISM

Greater scrutiny of proposed legislation

Errors in and disadvantages of proposed legislation are far more likely to be exposed where it is subject to independent scrutiny by two bodies. Legislation is such a fundamental activity affecting people's rights and opportunities that it may be argued that it should only take place after maximum scrutiny. The existence of two houses may also reduce the amount of legislation passed, which may be seen as good in an age of legislative excess. Legislation implementing flawed policies is less likely to reach the Statute book and economically and socially costly cycles of repeated passage and repeal of legislation by the alternation in office of opposing political parties are far more likely to be avoided.

Greater scrutiny of other proposals

Upper houses also furnish an independent forum for scrutiny of or participation in other measures and activities, such as approval or disallowance of subordinate legislation, constitutional amendments, appointment of judges or even other executive officers or the head of state, impeachment or removal of judges, or ratification of treaties.

Investigative roles

Upper houses, which the government does not control, can operate as a very healthy check on executive excess by investigating government activities. Where the system is unicameral the Government is almost invariably in a position to prevent or stymie such investigations. Where there is an executive independent of the legislature, as in the United

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92 The French Constitution 1958 Art 49.

93 *Basic Law* (The Israeli Constitution) Art 79, there must be a similar majority in the *Bundestag*.

States and to a lesser degree in France and Switzerland, this role operates in both houses.

Allowing broader representation in the legislature

Little is gained by the upper house being an exact replica of the lower so it is usual for the composition of the two houses to be different.[99]

Most lower houses are elected either by some form of proportional representation[100] or by single member electorates of approximately equal population where the voting is either by first past the post,[101] or by single transferable vote.[102] Sometimes proportional representation has a lower limit for representation[103], consists of single member electorates with additional members to achieve proportionality[104], or consists of a single transferable vote operating in multi-member constituencies.[105] Terms range from two[106] to five[107] years although four is most common.[108]

The composition of upper houses is almost always determined in a manner that is in some ways different to the lower house. Sometimes this is fixed by the constitution as in the United States[109], sometimes by ordinary law as in the United Kingdom. It may be partly appointed and partly hereditary[110], wholly appointed by the federal government[111], partly by the federal government and partly by the States[112], representative of the various aspects of cultural life of the nation[113] and

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94 *Basic Law* (The Israeli Constitution) Arts 77, 78.

95 See *Basic Law* (The Israeli Constitution) Arts 104a-109, particularly Art 105(3).

96 The Norwegian Constitution 1914 Art 76(1).

97 The Norwegian Constitution 1914 Art 76(3).

98 The Norwegian Constitution 1914 Art 73(1).

99 For example, the French Constitution 1958 provides in Art 24 that the National Assembly is to be elected directly by the people, but that the Senate is to be elected indirectly and is to represent the territorial units republic and French persons living outside France. The method of election is determined by ordinary law Art 34.

100 Most European countries, Japan and some South American countries elect lower houses in this way. France has in recent years alternated between this and single member electorates, apparently depending on whether the government of the day thinks it has a better chance at the next election under either system!

101 The United Kingdom, the United States, Canada, Malaysia and their States and Provinces, some South American countries and New Zealand changed to proportional representation in 1996.

102 Australia and its States elect their upper houses in this manner.

103 For example, 4 per cent in Sweden, 5 per cent in Germany.

104 Germany and New Zealand have a two vote system, one for the member and another for the party. Sweden has the same system but with a single vote and multi-member electorates.

105 For example, Ireland.

106 For example, in the United States House of Representatives.

107 For example, the United Kingdom, Canada, France and the European Union.

108 For example, Germany, Switzerland and Sweden.

109 The United States of America Constitution 1788 Art 1(3).

110 For example, the United Kingdom system.

111 For example, Canada.

it may have *ex officio* members.[114] In federations, election by the people of each member of the federation is common[115], or it may consist of delegations of governments of the constituent units[116], or be left to the individual units to determine as in Switzerland.[117] Where the upper house is elected it is common for the term of office to be twice or thrice that of the lower house so that one half[118] or one third[119] of the upper house is elected at each lower house election. Or there may be proportional representation in the upper house to contrast with single member electorates in the lower house[120] or vice versa.[121]

Checking abuse of power by the executive

Virtually all the above arguments can be summed up in the single objective of acting as a check on the abuse of power by other elements of government: to counter the vice to which Lord Acton referred in his famous statement that 'power tends to corrupt and absolute power corrupts absolutely.' Even where the Government has a majority in the upper house, internal dynamics within the governing party or coalition may act as a check.

DISADVANTAGES OF BICAMERALISM[122]

In his recent push for a single chamber legislature in Minnesota, Governor Jesse Ventura has said that a change would save the State money and make the system more accountable, accessible and efficient. He argued bills would follow a shorter, more understandable path if conference committees – which work out differences between the chambers – were eliminated. He claimed that such committees give a handful of lawmakers too much power. He also expressed dislike of the gamesmanship that he saw in the two-chamber system, which can let 'lawmakers cast politically correct votes secure in the knowledge a bill will die elsewhere'.[123]

The cost argument, that by abolishing one house savings are made in

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112 For example, Malaysia.
113 For example, Ireland.
114 For example, United Kingdom Law Lords and former Heads of State of Chile.
115 United States: first past the post; Australia: proportional representation; Switzerland: at the discretion of Cantons.
116 For example, Germany and the European Union.
117 The Swiss Constitution 1999 Art 150(3).
118 This happens in Australia with 6 year terms for Senators, and in some States, for example, Victoria, with terms of 4 and 8 years.
119 This happens in the United States with 6 year terms for senators. Variations exist at State level.
120 For example, New South Wales, South Australia and Western Australia.
121 For example, Tasmania.
122 The Nebraska legislature has a web site <http://www.unicam.state.ne.us/uni/nebraska.htm> promoting unicameralism and explaining the history of the change in

salary and support costs by reducing the numbers of politicians, is often advanced. However, the total number of politicians can be the same under either system. For example, a unicameral legislature of ninety members and a system with a lower house of sixty members and an upper house of thirty members would cost approximately the same to run. Evasion of responsibility in a political system can operate in other ways even if the legislature is unicameral.

The Governor's attempt to obtain a referendum on this issue at the 2000 elections was unsuccessful.

There was considerable dispute between lower and upper houses in Australia, particularly during the early decades of the 20th century. Only in Queensland did the push for abolition succeed in 1922. One attempt in New South Wales, in 1929, to evade the referendum requirement was overturned in the Courts.[124] A sequel to this was the reduction in the financial powers of the Legislative Council mentioned above. Another attempt, in 1959, failed at the referendum stage. In recent decades, in Australia the pattern of coexistence of a lower house elected by single transferable vote (that is, preferential voting) with an upper house elected by proportional representation has become somewhat of a norm. It has operated at the Federal level since 1949, in New South Wales and South Australia since the 1970's and was introduced more recently in Western Australia. Tasmania has the reverse combination.

Application of these Arguments in Relation to Financial Powers

The arguments set out above for and against the existence of an upper house naturally can be equally employed in relation to powers over financial legislation. After all, parliamentary control of finance is at the heart of responsible government. However, it has often been argued that there is no proper place for an upper house in controlling finance in a system of government where the executive is responsible to Parliament.[125] Particularly, it is said this is true where the system is a so-called *Westminster* system derived from the British model. This argument is inspired by the effective removal of the powers of the House of Lords to delay or reject financial measures in 1911, which in turn inspired similar provisions in New South Wales, as mentioned above.

The Australian 'Supply Crisis' of 1975

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that State.

123 Some of his arguments were questioned by Steven Smith, a professor of political science at the University of Minnesota, who pointed out that deadlock between the

Such arguments have a committed band of adherents in Australia as a result of the 'supply crisis' of late 1975, when a Senate controlled by the Opposition failed to pass appropriation bills in an opposition bid to force an early election. When the Prime Minister refused, attempting to call the Opposition's bluff during October 1975, the crisis progressively became more acute. Ultimately, with the Government's appropriations running out, he announced a plan whereby the banks would be expected to advance amounts to public servants equal to their salaries once the government could not pay them. At this stage, the Governor-General, with the aid of legal advice from the Chief Justice, identified this as an attempt to evade the constitutional provisions governing appropriations, which were designed to prevent a government continuing in office without supply.[126] With the approach of further deadlines imposed by the time required to call an election, which could be held before the Christmas and summer holidays looming, the Governor-General felt that he had no alternative other than to dismiss the government. This he did on 11 November 1975. He commissioned the Leader of the Opposition to form a 'caretaker' government, as he could secure passage of the appropriation bills through the Senate (they having already passed through the House of Representatives). The relevant conditions appertaining to finance attaching to such appointment were that he would secure such passage and then immediately advise dissolution of both Houses of Parliament (a so-called double dissolution).

Unfortunately, the Governor-General bore much odium from certain quarters for this decision. However, it is difficult to see what alternative he had once matters had reached the impasse they had by 11 November 1975. Rather, blame should be apportioned in some appropriate measure between a stubborn and power hungry Prime Minister and an Opposition leader with similar attributes. The former was prepared to defy the convention that no government can rule without supply in a system of government involving parliamentary responsibility. This was in a massive attempt to bluff the Opposition into backing down, rather than risk losing office by calling an election when he was seriously behind in the opinion polls. He has later frequently argued that if the Governor-General had delayed a few more days before acting, the opposition to supply would have crumbled.[127] Conversely, the latter was prepared to engage in a similar bluff to force the Government to an early election. While such action might be justified in extreme circumstances where removal of a government was essential in the

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two houses had not been a problem: 'There wasn't a fiscal meltdown in the state from deadlock. To the contrary, things went smoothly' in the 1999 Legislature.

124 *Trethowan v A-G for New South Wales* [1932] AC 526.

125 For example, Ward, A. *The Irish Constitutional Tradition*. Washington, D.C.:

national interest, it is unclear whether this was so at that time. The lack of radical action to reverse most of the supposed iniquities of the previous administration by the new Prime Minister once he was confirmed in office by an election which gave him substantial majorities in both Houses of Parliament seems also to belie this claim.

The Nature of Responsibility of Government to Parliament

In the aftermath of these traumatic events, claims have been made that a system of responsible government cannot operate if the upper house has powers to block supply. This may be refuted by the operation of such systems without major crisis in most of the Australian States, and in several European countries, such as Germany and Italy in the period since World War II. It has to be recognised that there is no 'one Westminster' model of responsible government whereby the government is only responsible to the lower house. Rather systems of government should be divided into systems of responsible government, where the government depends on a day-to-day parliamentary majority and those where the Government is not so responsible, as in Switzerland and the United States.

In a system of responsible government, responsibility is to Parliament as a whole and not only to the lower house. In practice this means 'responsible' to those parliamentary organs whose consent is necessary to the conduct of government. As the main essential to the conduct of government is securing of finance, effective responsibility is to those who control the purse strings. In the United Kingdom or New South Wales where supply can be obtained without the consent of the upper house, or where there is no upper house as in, for example, Queensland, Denmark and Sweden, responsibility is effectively to the lower house alone. However, where the upper house has powers to block supply, there is an element of responsibility to that house as well. They require a particular degree of co-operation for their smooth operation, but so do all systems. A government lacking an upper house majority, although having the option of forming a coalition or less formal arrangement with sufficient upper house members to secure a majority for its supply legislation, can resign or call an election where the constitution so allows. In Italy for much of the post-war period it was common practice for each new government, of which there were very many, to obtain a vote of confidence from the Senate as well as from the Chamber of Deputies.

Catholic University of America Press, 1994, 4.

126 Commonwealth Constitution s83 provides that no money shall be drawn from the Commonwealth Treasury except under appropriation made by law.

127 For a recent example see news reports in *The Australian* newspaper, 11 November

In the United States, the responsibility of the President to Congress at most is limited to cases of impeachment[128] for, and conviction[129] of, treason, bribery or other high crimes and misdemeanours.[130] As these provisions are in the United States Constitution, the ultimate arbiter of the meaning of these words describing various forms of wrongdoing is the Supreme Court. This would appear to rule out impeachment purely on the basis of political disagreement, so there can be no political responsibility of the executive government to the legislature in the United States. Although the Senate must concur in many government appointments, this does not involve political responsibility of those appointees to the Senate. The Senate has no power to remove them from office but the President can do so without Senate concurrence.[131]

Constitutional Conventions

Constitutions do not operate in a vacuum but rather in real life where certain conventions are followed. As these conventions do not have the force of law there is no legal sanction for their violation, only the consequences in terms of adverse reaction. Once violated a convention may be abandoned.

Analysing the events of late 1975 in Australia in these terms, it has been argued that those in control of the Senate violated a convention that the Senate should not block financial, or perhaps just budgetary or appropriation, bills where the government has the confidence of the House of Representatives. The existence of such a convention is dubious given that motions to oppose financial measures had very frequently been moved previously in the history of the Senate. It was probably derived from the fact that such blocking did not occur in the United Kingdom, but this was because of the drastic curtailment of the relevant powers of the House of Lords in 1911. What actually triggered the crisis in 1975 was that the majority of the Senate was in favour of deferring supply. In contrast, it could be argued that the problem was caused by the failure of the Prime Minister to adhere to the convention that where the government cannot obtain supply in a system involving parliamentary responsibility, the prime minister must either tender the government's resignation or advise an election. The Prime Minister had adopted the latter course in 1974 when also facing a deferral of supply bills.

2000.

128 By a majority of the House of Representatives, The United States of America Constitution 1788 Art 1, s2.

129 By a two-thirds majority of the Senate, The United States of America Constitution 1788 Art 1, s3.

130 The United States of America Constitution 1788 Art 2, s4.

The main potential difficulty in Australia is that the procedure for resolving deadlocks requires a three month delay before a double dissolution election can be called.[132] However, this problem did not complicate the situation in late 1975 as the trigger for a double dissolution was already in existence. The trauma associated with the events of 1975 means that all reasonable participants in Australian politics will, it is suggested, seek to avoid any kind of repeat performance. The capacity for constitutional conventions to develop and evolve over time has been demonstrated by the acceptance of the ability of the Senate to compel changes in the budget during the 1990's.

Negotiation of Supply Where the Executive Government is not Responsible to the Legislature

Neither Switzerland nor the United States have express provisions in their constitutions for resolving disputes over the financing of government between the executive and the legislature. Switzerland has for over a century operated on a consensus model where all major parties represented in the Parliament are also represented in the Executive Government so the problem has not arisen. However, in the United States disputes have been common in recent years. Frequently, the President's party does not control either or both houses of Congress. Moreover, even if it does, the very loose party discipline in the United States means that there can still be major problems in agreeing on the budget.

Increasingly, in recent decades, Presidents have sought to restrict government expenditure, in contrast to Congress, which is notorious for 'pork-barrelling'; that is, the voting of appropriations for pet projects in the home states or districts of individual legislators. The degree of brinkmanship involved in this process means that the process has increasingly not been completed by the deadline date of 1 October. Consequently, temporary spending resolutions are passed to allow the government to continue to function until agreement is reached. Several times during the 1980s, President Reagan carried the matter to the point where there was partial shutdown of the Government for a few days to save funds, in order to put further pressure on Congress.

Recently, there was the unprecedented situation where, agreement not having been reached, the Government was being funded under a temporary continuing resolution over the 2000 Presidential election[133]

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131 So long as Congress has not qualified this power in relation to agencies whose powers are derived solely from Congress. These agencies are often required to proceed in a semi-judicial manner: *Humphrey v US* (1935) 295 US 602.

132 Commonwealth Constitution s57.

133 It is most unlikely that this would have happened if the President were standing for

period. Congress adjourned very late to campaign and returned for a 'lame duck'[134] session within days of the election. It had originally planned to sit for some time to resolve the budget issue. However, deadlock in the extremely close Presidential election and the acute controversy surrounding certain aspects of its conduct and counting caused Congress to pass a continuing finance resolution and adjourn for several weeks to early December 2000. It was felt that the highly partisan atmosphere engendered by legal wrangling over the presidential count would make the reaching of agreement over the budget unduly difficult.

Lame-duck appears to be on the increase. There have been six lame-duck sessions since 1971 and three in the past six years. In 2000 there were complaints from some legislators that democracy was sacrificed in a rush to adjourn to campaign for the election. To some extent the complaints were not new. The minority party makes them often when the majority party starts making deals with the President and the Presidential advisers, regardless of which party is in office there, outside the purview of the normal congressional procedures.[135]

What brings out these complaints is the failure of Congress to pass its annual spending bills in a timely fashion, forcing a crisis around the beginning of each fiscal year on 1 October. The result is late-night, closed-door talks between unelected administration and congressional staff aides who can decide how hundreds of billions of dollars will be spent.[136]

The normal process calls for the House of Representatives and Senate to draw up and pass thirteen separate spending bills for the coming fiscal year. The legislators with a major say in that process are the House of Representatives and Senate Appropriations Committee and subcommittee chairmen and senior members of the minority party. The relevant conference committees then meet to work out the differences in the bills passed by the two chambers, usually adding millions of dollars on their own to the packages. The compromise bill then receives the endorsement of the full House of Representatives and Senate and is sent to the President for signature or veto.

Since 1990, however, Congress and the President and his staff have only twice fully completed their budget work by the 1 October start of

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re-election.

134 So called because some of the members of the Congress, elected in 1998 in the case of the House of Representatives, and in 1994 in the case of the Senate, and whose terms end at noon on 3 January 2001, will have failed to secure re-election.

135 On 2 October 2000, it was reported in CNN that Rep. David Obey of Wisconsin, the senior Democrat on the House Appropriations Committee had complained of 'institutional chaos, no discipline, no real understanding of what the rules are'.

136 Rep. Maurice Hinchey, a Democrat from New York and another House of Representatives Appropriations Committee member, complained that the normal

the new fiscal year. Over the past 11 years, there have been forty-three short-term funding extensions to keep federal operations running while Congress scrambled to complete the funding bills. In the winter of 1995-96, a confrontation between the White House and Republicans resulted in two crippling government shutdowns. As a final desperate measure the unfinished bills often are thrown together to create an 'omnibus' measure.[137]

Normally, the discipline of having to campaign brought about a more speedy resolution of the matter in an election year, but not so in 2000. By the 1 October deadline only two of the thirteen spending bills had been signed into law.[138] Since the 1994 congressional election, there has been the combination of the Democratic President and Republican control of both Houses of Congress. Democrats, who have tended in this situation to get left on the outside when the White House deals directly with Republican congressional leaders on the budget, said in 2000 that the process had been short-circuited to the point where even the pretence of open House-Senate conferences to iron out differences had been abandoned.[139]

Ross Baker, a specialist on Congress at Rutgers University, argues that the omnibus phenomenon became prevalent in the 1980's during the administrations of President Reagan, when it was a Republican White House and a Democratic-led Congress in end-of-session face-offs. The failure to pass spending bills on time has been a 'bipartisan transgression' that is unlikely to change, Baker said, because lawmakers have found the must-pass bills an optimum vehicle for attaching money for projects in their districts.[140]

Senator Robert Byrd, a Democrat from West Virginia, who in 42 years in

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lawmaking process was abandoned at these times 'and in its place we have people who are in some cases faceless and unknown making decisions that affect the constituencies of virtually every member in this House'.

137 The 1997 end-of-session package was a 4,000-page, 20 pound behemoth that combined eight spending bills totalling over US$500 billion. The following year, the House of Representatives minority leader, Richard Gephardt, displayed the omnibus as a 40cm high package tied in rope.

138 Holding up progress were the usual divisions between President Clinton's White House and congressional Republicans over spending priorities and election-year distractions – battles over tax cuts and health care – that kept Congress from its budgetary responsibilities.

139 For example, an agriculture spending bill passed both chambers over two months before the deadline. However, only a few days before the deadline, with negotiations almost completed, did the House of Representatives appoint its members of the conference committee. Even then, a chagrined Thad Cochran, a Mississippi Republican and chairman of the Senate Agriculture Appropriations Subcommittee, had to tell reporters he had not even seen, much less signed off on, a deal on food sales to Cuba that aides had touted as done.

the Senate had become a fierce defender of its constitutional rights and traditions, warned that under this kind of legislating the United States is 'in danger of becoming an oligarchy disguised as a republic'. As the senior minority member on the Senate Appropriations Committee and its former chairman, he was supposed to be one of the kings in the process as preached in American civics textbooks.[141]

The impasse continued after Election Day. It was further complicated by the month long uncertainty over the presidential election result. Congress met almost immediately after the election for a lame-duck session but quickly adjourned for three weeks. There were continuing problems later.[142]

CONCLUSION

Supply Crisis in the United States and Australia Compared

There are three players in the game in the United States: the President and each House of Congress. In the United Kingdom 'Westminster System' there is effectively only one, the Government, dominating the only House of Parliament that has an effective say in the process. However, under the Australian 'Washminster' system there have since 1950[143] usually been two players, since the Government dominates the House of Representatives but usually does not control the Senate. However, a major crisis has occurred only once. The lesson having been learned, it is suggested that it is comparatively unlikely to be revisited.

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140 'If people were really offended, there would be a rebellion in the ranks', Baker said. 'But when you produce a colossal package the size of several telephone books, it doesn't invite scrutiny' when that local dam or highway gets included.

141 In September 2000 Senator Byrd declared himself 'gravely concerned that, if the practices of the recent past as they relate to enactment of massive, monstrous, omnibus appropriations bills are not reversed, senators will be reduced to nothing more than legislative automatons'.

142 On 28 November 2000, it was reported that President Clinton did not plan to sign legislation to keep federal spending at current levels until 20 January, Inauguration Day, which would have left Congress' unresolved issues to the next President to handle. Congress was due to return the next week to wrap up the year's business. 'There is a cost to putting off work until next year', said Presidential-aide Siewert, noting that a yet-to-be-agreed education plan provided for new student loans. He continued: 'We essentially punt on a decision, and leave a lot of people without those benefits. And that's really not an acceptable choice. … We certainly hope that when Congress returns we can at least focus on the achievable, on an education budget, on some of the key funding measures that are before Congress, where there's a great deal of bipartisan agreement', Siewert said. A wait until the following year would have increased the possibility that some of the Democrats' programs might have to be approved by Texas Gov. George Bush, the Republican presidential candidate, who could then modify or cancel them. 'Some things will have to be laid aside,' Siewert said. He continued: 'There are obviously some very difficult issues that proved very

In the United States the Government cannot be brought down by refusing to pass supply as the President has a fixed term, elections have fixed dates, so only comparatively minor political advantages can be gained by brinkmanship over supply. In a system of Government responsible to Parliament, however, the stakes are higher, since an opposition may be tempted to try to bring down the Government and/or force an early election. However, it is too simplistic to pin the blame for supply crises on upper houses having financial powers. Only the Commonwealth of Australia in 1975 has suffered a significant crisis of this nature, while many other countries and a majority of Australian States, have lived with such systems. Where the constitution makes it difficult to remove a government during the parliamentary term, as in Germany[144], or there is no advantage in early election, as in Sweden where another election must be held in such a case at the end of the normal term anyway[145], these may be more effective in preventing government instability.

Abolition of the upper house or drastic reduction in its powers does not seem to have resulted in better economic performance. The United Kingdom, since 1911, New Zealand, since 1950, Sweden, since 1970, and Canada, since 1982, have performed significantly worse economically as compared to broadly similarly advanced economies, than they did before those dates.[146] Meanwhile, countries with powerful bicameral arrangements have consistently been close to the top of the economic ladder: notably the United States, Switzerland, Australia, France, and, since 1945, Germany and Japan.

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divisive and made it difficult to wrap up before we left, … And we may need to set some of those aside in order to achieve consensus before we leave'.

143 When the method of Senate election was changed to proportional representation.

144 The *Bundestag* can only remove the Chancellor by electing a successor by an absolute majority; *Basic Law* (The Israeli Constitution) Art 67. Also, early elections are not easy as they can only be held under Art 68, at the discretion of the President.

145 The Swedish Constitution 1975 Art 3, s4(1).

146 It is difficult to make a worthwhile comparison for Denmark, which abolished its