Bicameralism at the end of the Second Millennium

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I. Summary

This article examines bicameralism at the turn of the millennium. Bicameralism is, for the purpose of this article, 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. For the purposes of this article, the common need for assent to legislation by the head of state,[1] or some official acting on their behalf[2] or its scrutiny for constitutionality[3] is not seen as constituting an extra chamber. Bicameralism is compared, mostly with unicameralism, but also to a limited degree with the much rarer phenomenon of legislative bodies having three or more chambers. Also, some analysis of the historical process of evolution of bicameralism is attempted. However, a detailed analysis of the vast amount of writing on the theories of mixed government in the ancient world and the Middle Ages is beyond the scope of an article of the length expected in this journal. Only genuine legislative bodies having discretion independent of the executive government are considered.[4] In the interest of the article not being overlengthy, the examples of bicameralism considered in detail are largely confined to Western Europe, North America and Australasia.

II. Emergence Of Parliaments

1. Emergence of a council

Some explanation may be thought necessary as to why bicameralism exists at all, as there is no natural reason why it should have emerged in the first place. The emergence of a parliament can be explained comparatively simply. At the dawn of history, human society consisted of small groups or larger tribes, in which two forms of rule could theoretically operate: the single ruler or a group of rulers forming a council. Similar considerations operated in the more sophisticated groupings of the earliest towns and cities. The latter led naturally to a form of parliament as civilisation progressed, although there would always be a leader in the sense of someone being chosen to preside over meetings of the council and to implement its decisions. In the former, the leader would tend to call together an assembly if only as the most efficient means of propagating the leaders wishes more widely. Once in existence, the assembly would tend to be seen also as a source of advice

1 Who may be a monarch, who acts on the advice of a prime minister, as in the United Kingdom and most other constitutional monarchies, or also 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. Although 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.

2 For example, the respective Governors-General assent to legislation on behalf of the Queen in Australia (*Constitution*, ss 1, 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.

3 In France there is a Constitutional Council which performs this role, French Constitution, Art 56–63.

4 A parliament such as that of an absolutist state such as Iraq does not form part of the purview of this article.

and consultation. However, these processes might be though to lead naturally only to a unicameral parliament.[5]

2. Choosing leaders

Furthermore, in monarchical systems the leader had to be originally chosen by some means. While the leader commonly held office for life, a concept probably favoured because it is the most convenient method of reducing the frequency of disputes over succession, the periodic need to choose a new leader was inevitable. A widespread concept of choosing a leader for a fixed term comes late in constitutional development at least as far as leadership of a whole country is concerned. There are very few examples before the formulation of the United States Constitution in 1787. By contrast the concept of fixed term office was widespread in parliaments or municipal councils at a much earlier stage.

3. Use of council to choose leader

Barring force of arms, conquest, or the operation of a hereditary principle, some sort of assembly of persons would be needed to make the choice of leader. This could range from all citizens capable of bearing arms in Switzerland[6] through assemblies of the greater nobles the *Witenagemot* of pre-Norman England[7] to the Diet which chose the Holy Roman Emperor in which rulers of the subordinate territories each had one vote.[8] Succession to the Papacy was also formalised into choice by a conclave of Cardinals, the hereditary element being ruled out by celibacy of the clergy. The method of selecting the Pope by democratic election by a two-thirds +1 majority of cardinals has remained essentially unchanged since it was instituted by Pope Gregory in the 11th century. This procedure was reputedly imposed largely to counter nepotism in the Church. The system of choice by an assembly of the great nobles or magnates seems to have been preferred to the hereditary principle earlier in many places.[9] This was probably because the non-hereditary method gave the aristocracy greater influence. Indeed it was a desire on the part of influential non-aristocratic elements to limit the power of the aristocracy in Denmark which led to the monarchy becoming hereditary in 1661.

4. Hereditary principle

The hereditary principle became well established in later medieval Europe at least at the level of the nation state. This also extended to membership of parliaments where nobles sat by hereditary rights. In the United Kingdom the hereditary element in the British House of Lords has proved durable. A recent attempt at abolition by a government elected with this policy as part of their platform resulted in a compromise whereby the hereditary element continues to be represented by ninety of their number that they elect.[10]

III. Origins Of Bicameralism

1. Ancient world

All the examples given above are of unicameral bodies. However, assemblies consisting of two or more chambers developed even in the ancient world. In Sparta legislative powers

5 The word *Parliament* itself is derived form Norman French meaning discussion, so that in the Middle Ages the English Parliament was for a long time seen as calling representatives together for a discussion rather than as an institution.

6 From 1291, which still exists as the annual meeting in a few Cantons.

7 Traces of the original elective procedure are still to be found in the modern coronation ceremony.

8 Hence the use of the term Elector to describe the rules of the many German States. An example of how the system operated was that following the Peace of Westphalia in 1648, the King of Sweden enjoyed three votes in the diet based on the Swedish possessions in Pomerania gained in the preceding 30 years war.

9 For example, in Sweden the monarchy did not become hereditary until 1544, and in Denmark not until 1661.

10 *House of Lords Act 1999* (UK), s 2.

were exercised by the *Monarchy*, *Senate* and *Ephorate*; perhaps, the first bicameral model. In republican Rome, as well as the Senate, composed of the aristocracy, there were the popular assemblies: the *Comitia Centuriata* and the *Comitia Tributa* (or *Consiulum Plebis*). Both are an example of multicameralism and of the separate representation of the major groups in society, this is the precursor of the multicameral assemblies of several *estates* that emerged in medieval Europe.

2. Theories of mixed government

Bicameralism also draws support from the opinions of the greatest political thinkers of the ancient world, who evolved theories of mixed government.[11] Plato emphasised the belief in moderation and compromise, which is the basis of that theory, and warned of the dangers of too much power being concentrated in one place.[12] He advocated the combination of monarchy and democracy as the two forms of states from which others are derived.[13] Aristotle criticised this formulation, believing in the combination of more than two elements.[14] He advocated the combination of democracy and oligarchy.[15] However, the degeneration of the Roman Government into the despotism of the empire meant that there was no continuous thread of parliamentarianism from the ancient world to the modern. The ideas current in the ancient world influenced the development of modern institutions both directly and indirectly. One of the major reasons for the adoption of bicameralism in the Constitution of the United States was the reduction of the power of the legislature, which was seen as potentially the most powerful branch of government.[16]

3. Origins of present day bicameralism

The seeds of present day bicameralism are found in three places, one specific, the other of more general application. The first is the division of the English Parliament into the Lords and the Commons; the second the medieval notion that society consisted of well-defined groups or classes who should be represented separately. The third is the constitution of Venice in the later Middle Ages, under which rule was by the *Doge*, Senate, and *Consiglio Maggiore*. This bicameral model was later copied by Florence and other city states.

a. Multicameralism in France

Thus 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. In one of the great co-incidences of history, this was merely a matter of days after George Washington had been inaugurated as the first President of the United States on 30 April 1789.

b. Multicameralism in Sweden

In Sweden there were four estates in the Riksdag, *Nobility*, *Clergy*, *Burghers* and *Peasants*. Periods of greater *Riksdag* influence alternated with monarchical despotism until the final

11 This theory of mixed government figured principally in the work of Aristotle, Plato and Polybius. See the discussion in Vile: *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford 1967) pp 35–37. The theory was questioned from time to time as by Sir Robert Filmer in *Patriarcha* where he argued that all forms of government other than monarchy were illegal. See *Patriarcha and other Political Works* (Basil Blackwell Oxford 1949 edited by Peter Laslett).

12 *Laws*, III, *The Dialogues of Plato*, translated by B Jowett, 3rd edition, Oxford, 1892, V, 72.

13 *Laws*, III, *The Dialogues of Plato*, translated by B Jowett, 3rd edition, Oxford, 1892, V, 75.

14 *Politics*, II, 6, pp 60–61.

15 *Politics*, IV, 9, p 178.

16 Alexander Hamilton: Federalist Papers No 51 (8 February 1788). See also the discussion in Vile: *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford 1967) in Chapter VI.

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, which was itself replaced by a single chamber parliament in 1970.

IV. Subsequent Failures Of Multicameralism and Bicameralism

However, Sweden's example of multi-chamber medieval parliament evolving into a bi-cameral legislature is very much the exception. Most medieval institutions of a parliamentary nature were abolished or fell into disuse in the era which saw the rise of nation states under absolutist rulers, fuelled by the evolution by the late medieval scholars of the Renaissance of the doctrine of the *divine right of kings*.[17] An example is the failure of the States-General to meet after 1614. The same is true of the medieval bicameralism of the city-states such as Venice and Florence.

1. Survival of English bicameralism

Consequently, it is the unique and largely accidental English route to bicameralism, which has proved to be the main model and inspiration for almost all the bicameral legislatures of today, either directly or indirectly. The United States copied Britain and many other countries, particularly in the Americas, copied the United States.

That the English Parliament itself did not succumb to the pressures to 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 arguable that bicameralism of the legislature played a fundamental role in this. The division into Lords and Commons, by concentrating those sympathetic to authoritarian rule into the upper house[18] was probably crucial in enabling the Commons on behalf of parliament as a whole, to effectively challenge royal power in the 17th century. 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.
2. Geographic isolation meant that authoritarianism could not be effectively imposed from outside. For example, the failure of the Spanish Armada in 1588, which had been designed to return England to the catholic fold, the success of which would have meant the demise of parliamentary independence.[19]
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 often extreme measures he chose to follow an entirely constitutional path, obtaining parliamentary sanction for all his measures. The mere fact that Parliament should at the behest of such a powerful sovereign be called upon *inter alia* to:
    1. formalise the break with Rome;
    2. declare the King Supreme Head of the Church of England;[20]
    3. drastically reform property law;[21] and

17 See Figgis: *The Divine Right of Kings* (Thoemmes Press 1994, reprint of 1914 edition) ISBN 1 85506 349 2.

18 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 selected as the house to which the executive government is primarily answerable where there is no separately elected executive, or the one which initiates finance legislation or which is directly elected or elected most closely in accordance with population.

19 See also the explanations given for the development of democracy in some countries rather than others by James Q Wilson in *Democracy for All?* Commentary, 109(3) (March 2000) http://www.Commentarymagazine.com.

20 *Act of Supremacy 1534.*

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

4. change the succession to the Crown three times, finally giving him power to determine the succession to the Crown by his will;[22]

was bound to increase the standing and stature of Parliament immensely.

V. Emergence Of Bicameralism In England

1. Origins of the English Parliament

England, unlike most continental European countries, did not develop parliamentary institutions along the lines of three or more estates in 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*,[23] 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 the inferior clergy who also gained representation in that part of the composition of Parliament that eventually became the Commons.

2. Initial meeting arrangements of the English Parliament

Accordingly, representation was based on much 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 each of their respective memberships,[24] 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, which 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.

3. Origin of bicameralism in England

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.[25] 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 Parliament is of a session in 1332.[26] However, the division into the House of Lords and the House of Commons, may be regarded as permanent from 1339.[27]

22 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 exclude in favour of the junior Suffolk Line, see *Taswell-Langmead's Constitutional History*, 11th edition (1960) at 330.

23 *Tenants in Chief* were those who held land directly of the King under the feudal system, for practical reasons their assembly probably only ever met in 1086 and 1116, see *Taswell-Langmead's Constitutional History*, 11th edition (1960) at 127–128.

24 See *Taswell-Langmead's Constitutional History*, 11th edition (1960) at 142.

25 GM Trevelyan: *History of England* Longmans, Green & Co Ltd 1926, at 194.

26 *Rotuli Parliamentorum*, ii, 66 No 3 (EC Lodge & GA Thornton, *English Constitutional Documents*, 1307–1495, 1320).

27 *Taswell-Langmead's Constitutional History*, 11th edition (1960) at 151.

4. Role of the clergy

The clergy were reluctant attenders at 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.[28] 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. 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.[29]

5. Reasons for survival of bicameralism in England

It was not enough for bicameralism to arise initially; it also had to maintain itself to survive to the present day. 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. For the House of Lords contained only the higher nobility, the major magnates.[30] 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.

6. Limited privileges of nobility in England

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 exemption from taxation found in 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. A 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.

VI. The Influence Of English Bicameralism

1. Spread of English bicameralism

English (and later British) bicameralism has spread in two ways. Firstly, 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. Secondly, many countries copied British constitutional arrangements, because, particularly after the 1688 Constitutional Settlement had endured very successfully into the 18th and 19th centuries, they were seen as the world's best practice.

28 By 25 Hen 8 c 19 Convocation was forbidden to enact constitutions or canons without the king's licence.

29 *Taswell-Langmead's Constitutional History*, 11th edition (1960) at 151.

30 GM Trevelyan: *History of England* Longmans, Green & Co Ltd 1926, at 195; *Taswell-Langmead's Constitutional History*, 11th edition (1960) at 152–3.

2. Ways in which British arrangements were reproduced

This reproduction of British arrangements applied in three ways. Countries setting up constitutional democracy for the first time looked to Britain as the exemplar. Former British colonies seemed to copy Britain's arrangements, at the time that their constitutions were formulated, particularly closely.[31] Finally, the most prominent of these former colonies, the United States, once its independent democracy became firmly established, itself became a leading model for other countries to emulate.[32] The United States had itself closely reproduced the British model, in the form that it existed at the time that the United States Constitution was drawn, in the organisation of its legislature, save the exclusion of the executive from the legislature.[33] As a cumulative result of all these forms of influence bicameralism spread far and wide.

3. Multicameralism in the modern era

By contrast, very few legislatures divided into three or more chambers after the end of the Middle Ages. The only recent example of a tricameral legislature is that which operated in the 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.

4. Mixed systems

Occasionally, a system has some degree of admixture in that in an essentially bicameral system the two chambers meet jointly for some purposes. Largely ceremonial joint sittings to be addressed by the chief executive, such as the President's annual State of the Union address in the United States, or a distinguished person are not regarded as bringing about this classification. For example, in Switzerland the Federal Executive and Federal Judges are elected at a joint session.[34] Joint sessions also determine jurisdictional disputes between federal authorities and issue of pardons.[35] The possibility of a joint sitting of both House in Australia is discussed below.

a. Norway

Norway has the most genuinely mixed system, adopted on 17 May 1814 and is still in force. The Norwegian people exercise Legislative Power through the Parliament (*Storting*), which consists of two departments, the Permanent Chamber (*Lagting*) and the General Chamber (*Odelsting*).[36] However, the *Storting* is elected as a single chamber.

After each quadrennial election the *Storting* nominates from among its members one fourth to constitute the *Lagting* and the remaining three fourths to constitute the

31 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 a contribution entitled: *The British Influence on the Australian Constitution* to the book: *Republic or Monarchy? Legal and Constitutional Issue* 1994, University of Queensland Press particularly at 138–143.

32 The United States Constitution and experience were forever in the forefront of the minds of the framer of the Australian Constitution. See Hunt: *American Precedents in Australian Federation* (Columbia University Press 1930).

33 See *The British Influence on the Australian Constitution* in the book: *Republic or Monarchy? Legal and Constitutional Issue* 1994, University of Queensland Press particularly at 138–143.

34 *Swiss Constitution*, Art 157(1), 168, 175.

35 *Swiss Constitution*, Art 157(1).

36 *Norwegian Constitution*, Art 49.

Odelsting.[37] Each Chamber holds its meetings separately and nominates its own President and Secretary.[38] The *Odelsting* and *Lagting* then operate in most respects as lower and upper houses of parliament respectively for most purposes.

Every Bill must originate in the *Odelsting*.[39] If the Bill is passed, it is sent to the *Lagting*, which either approves or rejects it, and in the latter case returns it with appended comments. These are taken into consideration by the *Odelsting*, which either shelves the bill or again sends it to the *Lagting*, with or without alteration.[40] When a Bill from the *Odelsting* has twice been presented to *Lagting* and has been returned a second time as rejected, the bill is then considered by a joint session where it can be passed by a majority of two thirds of its votes.[41] Between each such deliberation there shall be an interval of at least three days.[42]

VII. Bicameralism In Federal Systems

1. Role of bicameralism in federal compacts

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, this is achieved by the component units enjoying equal representation in the upper house, as in Australia, Switzerland and the United States.[43] This is also the case in the European Union if the Council of Ministers is seen as the Upper House.[44]

2. Role in protecting constituent units of federation

The United States and Australia protect the equal representation of each State in the Senate from reduction by constitutional amendment, without the consent of the State concerned or its electors, respectively.[45]

Even where representation is unequal it is usually weighted in some degree towards the smaller members of the federation. In Germany representation of Lander in the Bundesrat varies from three to six;[46] this ratio of two-to-one between the largest and smallest is far less than the ration of population. In Canada, the largest provinces of Quebec and Ontario have twenty-four Senators, but the smallest have at least six, apart from Price Edward Island which has only four. There is an extensive desire outside Quebec and Ontario for equal representation in the Canadian Senate.

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

37 *Norwegian Constitution*, Art 73(1).
38 *Norwegian Constitution*, Art 73(2).
39 *Norwegian Constitution*, Art 76(1).
40 *Norwegian Constitution*, Art 76(2).
41 *Norwegian Constitution*, Art 76(3).
42 *Norwegian Constitution*, Art 76(4).
43 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 by N Aroney in *Federal Representation in the Australian Constitution*, one of a collection of essays entitled *Constitutional and International Law Perspectives* University of Queensland Press, 2000, particularly at p 30, where he cites Freeman EA: *The Growth of the English Constitution from the Earliest Times*, Macmillan & Co London 1898 at 9–10, and 37, 60, 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.'
44 See the discussion of this issue by the author in: *The European Economic Community — International Organisation or Federal State*, University of Queensland Law Journal, (75th Anniversary edition) Vol 14, No 1, pp 78–93, 1986.
45 Australian Constitution, s 128; US Constitution, art 5.
46 *Basic Law*, Art 52(2).

and Senators were originally chosen directly by State Legislatures in the United States.[47] Switzerland leaves the method of choice of members of the upper house purely to the Cantons.[48]

3. Bicameralism in the members of a federation

Outside of Australia and the United States and the European Union, the legislatures of the constituent members are generally unicameral.[49] In both Australia and the United States all entered the federal system with bicameral legislatures and in each case only one State has since abolished the upper house.[50]

VIII. Opposition To Bicameralism

Opposition to bicameralism has a number of sources.

1. Radical opposition

Radicals, of whatever political persuasion, tend to oppose bicameralism because they wish to impose radical legislative agendas, and implementation of such a program is inevitably more difficult where the legislature is bicameral. This is particularly so where they are motivated by a political philosophy different from that which is reflected in the *status quo*. Any obstacle, or hurdle to the passage of legislation, such as a second legislative chamber or upper house is seen by such elements as undesirable.

Of course, there are exceptions. Radical parties may support an existing house because the method of election enables them to achieve election given their level of support. This happens in Australia where upper houses are often elected by proportional representation, thus allowing small parties to secure representation, while lower houses usually are not. The Australian Green Party has been supportive of upper house where so elected but has recently called for the abolition of the Tasmanian Upper house which is not elected by proportional representation while the lower house there is so elected.

2. Authoritarian opposition

Authoritarians and those that believe in strong executive power or favour political philosophies such as collectivism, which favour strong government power, will also tend to oppose the existence of upper houses as they are a capable of being some form of check on executive power. Very commonly those in power in government wish to expand their existing power by removing such a check or reducing its efficacy.

3. Reduction of powers as an alternative to abolition

Opponents may seek abolition of the second chamber or upper house, or may compromise by seeking to reduce its powers, or making it a nominated rather than elected or independent body. This happened to the House of Lords both gradually through the appointment of more and more life peers by the Government of the day under the *Life Peerages Act 1958*, more suddenly the recent reduction in voting hereditary peers to 90 by the *House of Lords Act 1999*. In the two years before the passage of the latter legislation the Government made an unprecedented number of appointments of life peers who were mostly its supporters. The drastic reduction of the powers of the House of Lords by the *Parliament Act 1911* is discussed below in the context of a general discussion of reduction of powers of upper houses.

47 Until the 17th Amendment to the Constitution provided for direct election by the people of each State in 1913.
48 *Swiss Constitution*, Art 150. Each full Canton selects two members and each half canton one member.
49 For example, Canada, Germany.
50 Queensland in 1922 and Nebraska in 1934 respectively.

4. Failure to adopt bicameralism

Also, opponents of an upper house may influence the choice in the direction of unicameralism when a new constitution is being drawn up for a newly independent territory, the product(s) of the division of a State or where a tyrannical regime has recently been overthrown.

IX. Abolition Of Upper Houses

Upper houses have been abolished in favour of unicameralism in a number of countries, and in the Australian and American States of Queensland and Nebraska, respectively.[51]

1. Nebraska

Nebraska's unique (in the US context) unicameral legislative body is composed of 49 nonpartisan senators. The unicameral system has safeguards against hasty legislation in that most bills must get a public hearing; five days must elapse between a bill's introduction and its passage; and bills can contain only one subject.[52] Nebraska voters approved a one-House Legislature in 1934 after years of effort by George Norris, a populist who served in the U.S. House and Senate for a combined 40 years.

2. Queensland

In Queensland the Legislative Council was abolished in 1922 by ordinary legislation.[53] In 1934 this abolition was entrenched, again by ordinary legislation, against its reversal without a state referendum.[54]

3. Process of abolition with consent of the upper house

Abolition may involve securing the consent of the members of the upper house to the abolition of their own positions. Consequently, abolition of a legislative body in this way often has in the past involved some very dubious activity sometimes, even amounting to massive bribery! The abolition of the Irish Parliament by its own vote in 1800 to effectuate the union with Great Britain was reputedly achieved by massive bribery. This was on such a scale that it was unprecedented even in the 18th century when spending large amounts of money to obtain a majority to back the Government in the House of Commons was commonplace.

4. Abolition without consent of the upper house

Sometimes the constitution allows for some route to abolition not involving the concurrence of the body to be abolished. For example, in Australia it might be argued that the Senate could be abolished without its own consent as s 128 of the *Constitution* allows a proposed amendment to be put to the people in same cases which has been passed by only one House. This might be challenged as an indirect way of evading the requirement that the equal representation of a State in the Senate cannot be reduced without the consent of the people of that State. Alternatively, this might simply mean that the proposal would need a majority at referendum in every State to pass.

The security of the Australian Senate lies largely in its largely equal legislative powers and the refusal, since federation, of the electors to countenance any constitutional

51 As mentioned in the previous paragraph.

52 See http://www.unicam.state.ne.us/uni/nebraska.htm.

53 *Constitution Act Amendment Act 1922* (Qld), s 2.

54 *Constitution Act Amendment Act 1934* (Qld), s 3. This double-entrenchment [see s 3(6)] was carried out in reliance on the manner and form provisions of the *Colonial Laws Validity Act 1865* (UK), s 5. The effectiveness of this form of entrenchment was confirmed in *Attorney-General for New South Wales v Trethowan* [1932] AA 526; and see also *Taylor v Attorney-General for Queensland* (1917) 23 CLR 457.

amendments, even indirectly limiting its status. In New South Wales the provision for resolving deadlocks by referendum could be used to dispense with the consent of the Upper House.[55] Also, in Switzerland the constitution can be amended by the procedure of initiative and referendum without the consent of either house of Parliament.[56]

5. Upper houses at State level in Australia and the United States

In Australia, three of the other five States have in recent decades reconstituted their upper houses so as to be elected on a more proportional basis. This has reduced tension with state Governments commanding lower house majorities and appears generally to have been well received. It followed the adoption of a system of election by proportional representation for the Australian Senate in 1949. There seems to be strong support in Australia for the combination of a lower house of single member electorates elected by the single transferable vote and an upper house elected by proportional representation.

Accordingly none of the other Australian and American States seem particularly likely to follow the examples of Queensland and Nebraska in the near future, although the issue has recently been canvassed in the neighbouring State of Minnesota by the maverick Governor Jesse Ventura.[57] Also, Victoria came close to abolishing its Legislative Council in 1982 when a Government was elected on a policy of abolition. The drama of the situation was increased when the Government and Opposition tied 22-22 all for seats in the Upper House.[58]

6. Abolition in other countries

New Zealand abolished its upper house, the Legislative Council, in 1950, Sweden in 1970, and Denmark had done so in 1953.

7. Lack of creation of new upper houses

There seem to have been comparatively few bicameral legislatures included in constitutions drawn up for a newly independent territories, the product(s) of the division of a State or where a tyrannical regime has recently been overthrown, except where there has been a tradition of bicameralism. For example, when military rulers have stood down in favour of a civilian government in South America, for example Chile in 1990. Usually, in these cases it has been a simple restoration or reactivation of the machinery in existence before the military takeover. Russia, however, has an upper house, although Russia is a federation, which almost always have upper houses. However, there have been recent moves by President Putin to reduce the power and influence of the upper house, and he has had success in ejecting provincial leaders from it.

8. Changing trends — constitutions of former colonies and where powers devolved

For example, until the 1950's constitutions drawn up in Britain for colonies or dependent territories, either during the colonial period or at independence, normally provided for a bicameral legislature, such as Australia, Canada,[59] New Zealand, South Africa, India, unless the territory was very small.[60] However, almost all[61] of the numerous grants of independence in the 1950's and later provided for single chamber parliaments.

55 *Constitution Act 1902* (NSW), s 5B(2).

56 See *Swiss Constitution*, Art 193, 194.

57 A poll in late 1999 showed Minnesotans almost evenly divided on the issue. Ventura, a former professional wrestler, won the gubernatorial race in 1998 as an independent furnishing a major upset. Some of the arguments he has advanced are discussed below.

58 This was after a by-election was won by the opposition in one seat, Nunawading, had been necessitated by a tie in the general election.

59 Canadian provinces have unicameral legislatures.

61 Such as Caribbean Islands.

61 Malaysia has an upper house, but this is to be expected in a federation.

An illuminating illustration of the changing trends is that Northern Ireland was granted a bicameral legislature in 1920,[62] but a unicameral one in 1998.[63] The desolved assemblies proposed for Scotland and Wales and defeated at referendum in 1979, but implemented in 1998, also were only ever countenanced as single chamber bodies.[64] This would be expected in the Welsh case, as the Assembly has no legislative powers except to make regulations, but this reasoning does not apply to the Scottish Parliament. Almost all the recently formed or democratised countries in Europe have also established unicameral legislatures.[65]

X. Reduction In Powers Of Upper Houses

Powers of upper houses have sometimes been reduced. Examples of reduction of upper house powers are furnished by what happened to the House of Lords by virtue of the *Parliament Acts* 1911 and 1949, and to the Canadian Senate as part of the constitutional changes adopted in 1982. Both now effectively enjoy only delaying powers of 1 year and 180 days respectively.

1. United Kingdom House of Lords

The powers of the House of Lords were reduced in 1911 from near equality[66] with the House of Commons to delaying powers of approximately two years generally[67] and one month in relation to financial legislation.[68] The general delaying power was further reduced to approximately one year in 1949.[69]

2. Canadian Senate

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.[70] 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, when the limit of delay is one month.[71]

3. Insecurity of some upper houses

Clearly, an upper house is insecure if its powers can be reduced or it can be abolished or its composition changed without its own consent. Changing the composition of the Senate, which was not an entrenched provision of the *South Africa Act 1909* (UK), was the method ultimately employed by the South African Government to obtain the necessary two-thirds majority at a joint sitting necessary to remove the 'Cape Coloureds' from the common voting roll after the Courts had rejected other subterfuges.[72]

62 Abolished in February 1972 when direct rule from Westminster was imposed. The Republic of Ireland also has a bicameral Parliament, see *Irish Free State (Agreement) Act 1922 & Irish Free State Constitution Act 1922.*

63 Compare *Government of Ireland Act 1920, Northern Ireland Act 1998.*

64 See *Government of Wales Act* 1998, *Scotland Act* 1998.

65 Russia is an exception.

66 The only respect in which it was thought to be inferior was that there was a convention that it could not amend, although it might reject, a budget, and could not originate taxation or appropriation legislation. Prior to the 1909 budget rejection which led to the reduction in powers, it had not exercised the power to reject a budget for over 200 years.

67 *Parliament Act 1911* (UK), s 1. This is subject to an exception for provisions extending the maximum duration of Parliament beyond 5 years.

68 *Parliament Act 1911* (UK), s 1.

69 *Parliament Act 1949* (UK), s 1.

70 *Constitution Act 1982*, (Canada) s 47.

71 *Constitution Act 1902*, s 5A, (New South Wales) inserted in 1933.

72 See *Harris v Minister of the Interior* (1952) 2 SA 428; *Minister of the Interior v Harris* (1952) 4 SA 769; *Collins v Minister of the Interior* (1957) 1 SA 552.

XI. Relative Powers Of Lower And Upper Houses And Resolution Of Deadlocks

1. Relative powers of upper and lower houses

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 as in some States in the US and Australia. For example, in Tasmania the upper house is only limited[74] to not originating money bills,[75] or amending appropriations for the ordinary annual services of government,[76] or any other bill so as to impose or increase a financial impost or involving income tax or rating.[77] Even then they can request amendment.[78] The powers are the same as those of the Australian Senate, but without the procedures for resolving deadlocks discussed below.

a. United States

For example, in the United States the only restriction on the Senate is that bills raising revenue must originate in the House of Representatives.[79] The United States Senate is more than compensated for this by the president's need to obtain its consent to treaties by a two-thirds majority and to major appointments including those of the Cabinet members and Judges of the Supreme Court.[80] Deadlocks are usually resolved by conference committees of delegations from each House.

b. 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 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.[81] Tacking of other provisions into appropriation[82] or tax[83] bills is not permitted.

(i) Deadlock procedure in Australia

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.[84] 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. The Constitution provides for the House of Representatives to be

73 *Swiss Constitution* Art 156. This is also the case in some States in the US.
74 *Constitution Act 1934* (Tasmania), ss 44, 45.
75 *Constitution Act 1934* (Tasmania), s 37.
76 *Constitution Act 1934* (Tasmania), s 42.
77 *Constitution Act 1934* (Tasmania), s 42.
78 *Constitution Act 1934* (Tasmania), s 43.
79 US Constitution, Art 1(7).
80 US Constitution, Art 2(2).
81 Australian Constitution, s 53.
82 Australian Constitution, s 54.
83 Australian Constitution, s 55.
84 Australian Constitution, s 57.

twice as numerous as the Senate.[85] Political factors have also militated in favour of the House of Representatives 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. Consequently, its majority in the House of Representatives, where there are single member electorates and lack of proportional representation, almost always tend to outweigh its minority in the Senate.

Fear of the uncertain outcome of a double dissolution tends to lead to compromises. Consequently, irreconcilable disagreements bringing one about are comparatively rare, despite the government of the day having mostly lacked a Senate Majority since proportional representation was introduced. No Government has enjoyed a Senate Majority since June 1981. Such a majority is 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. This means that each major party has needed over 57% of the vote to elect a majority of senators from a State since the change as opposite to just over 50% previously.

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.

c. France

In France, the National Assembly can ultimately prevail over the Senate in case of disagreement provide the Government is on the side of the National Assembly.[86] 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.[87]

d. Germany

In Germany the *Bundesrat* must consent to certain legislation, mostly involving the Lander, and also to Constitutional amendments by a two-thirds majority.[88] 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.[89]

XII. Advantages Of Bicameralism

1. Reduction in the power of the legislature

It was argued at the time of the adoption of the United States Constitution that as the legislature is the most powerful arm of government its power needs to be checked by its division into two houses, elected by different methods and for different terms of office.[90]

85 Australian Constitution, s 24.
86 1958 French Constitution, Art 45.
87 1958 French Constitution, Art 49.
88 *Basic Law* Art 79, there must be a similar majority in the *Bundestag*.
89 *Basic Law* Art 77, 78.
90 Alexander Hamilton: Federalist Papers No 51 (8 February 1788).

2. 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.

3. 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. In particular, an upper house can play an important role in maintaining the independence of the judiciary, as often they are the only body involved in the process of dismissal of judges not under the effective control of the executive government. In the late 1980's the Queensland Government succeeded in persuading its single chamber parliament to concur in the dismissal of Mr Justice Vasta. In contrast, a recent attempt to dismiss a judge in New South Wales failed in the Upper House.

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

5. 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.[91]

Mostly lower houses are elected either by some form of proportional representation[92] or by single member electorates of approximately equal population where the voting either first past the post[93] or by single transferable vote.[94] Sometimes proportional representation has a lower limit for representation,[95] consists of single member electorates with additional members to achieve proportionality,[96] or consists of a single transferable vote operating in

91 For example, the 1958 French Constitution 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.

92 Most European countries, Japan and some South American countries. 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!

93 UK, US, Canada, Malaysia and their States and Provinces, some South American countries NZ changed to proportional representation in 1996.

94 Australia and its States.

95 For example, 4% in Sweden, 5% in Germany.

96 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.

multi-member constituencies.[97] Terms range from two[98] to five[99] years although four is most common.[100]

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[101] sometimes by ordinary law as in the United Kingdom. It may be partly appointed and partly hereditary as in United Kingdom. It may be wholly appointed by the federal government as in Canada, partly by the federal government and partly by the States, as in Malaysia. It may be representative of the various aspects of cultural life of the nation as in Ireland.

In federations, election by the people of each member of the federation is common: in the United States, by first past the post; in Australia, by proportional representation. It may consist of delegations of governments of the constituent units, as in Germany and the European Union, or be left to the individual units to determine the method of election, as in Switzerland.[102] 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[103] or one third[104] 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[105] or vice versa.[106]

6. 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.

XIII. Disadvantages Of Bicameralism[107]

Some of the disadvantages have already been effectively canvassed above.

1. Cost and confusion

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 — are 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 that a bill will die elsewhere.' 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

97 Ireland.
98 US House of Representatives.
99 For example: UK, Canada, France, European Union.
100 For example: Germany, Switzerland, Sweden.
101 As in the US Constitution, Art 1(3).
102 *Swiss Constitution*, Art 150(3).
103 This happens in Australia with 6 year terms for Senators, also in some States, for example, Victoria, terms of 4 and 8 years.
104 This happens in the United States with 6 year terms for senators, variations exist at State level.
105 New South Wales, South Australia, Western Australia.
106 Tasmania.
107 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 that State.

the 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, he said.

The cost argument: that by abolishing one house savings are made 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 90 members and a system with a lower house of 60 members and an upper house of 30 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.

2. Perceived conflict with the principles of responsible government

It is argued that a system of responsible government, where the executive is responsible to the legislature, the system works best (or only works properly) where this responsibility is only to the lower house of the legislature. Consequently, upper houses, particularly if they have significant powers, at best complicate the issue and at worst are a gloss on the system best avoided. The events of 1975 in Australia, which led to the dismissal of the government by the Governor-General are often cited as the ultimate proof of this thesis. There had been an impasse of the passing of appropriation bills for the ordinary annual services of government between an opposition controlled Senate and the Government who had a majority in the House of Representatives. This argument may then be developed to advise the confinement of upper houses to constitutional systems such as those of the United States and its followers in Latin America where the executive is elected independently of the legislature.

However, the problem may lie in a failure to recognise that there is no one model of responsible government, the 'Westminster' system to others must conform, but rather a range of systems. For example, in Switzerland, at the federal level the powers of the houses are equal, but there is no separate election of the executive. The executive of seven is elected at the start of each four year legislative term for that period of four years.[108] Upper house powers, as has been explained range from co-equal with the lower house in Switzerland to minimal in the United Kingdom. Where an upper house does enjoy substantial powers as in Australia, it maybe better to regard the executive as being in some degree at least responsible to that upper house as well. For example, for much of the post war period in Italy it was the common practice for their many governments, on being commissioned by the President, to submit to votes of confidence in both the Chamber of Deputies and the Senate.

These are really matters of convention rather than strict constitutional law. Australian, Canadian, New Zealand and United Kingdom Governments do not routinely submit to votes of confidence on taking office as do some European counterparts. Just as there is a convention in the United States that Congress does not pass resolutions censuring the President. There is a convention that resignation or the calling of an election should follow a vote of no-confidence, but a government can only ultimately be prevented from governing by the loss of ability to pass supply. Conventions are really only enforceable by the person or body who commissions the Government such as the Governor-General or State Governors in Australia. For example, in Queensland in 1998 a Minister remained in office despite the Legislative Assembly having passed a motion to reduce his salary. This is the traditional way of expressing lack of confidence in a Minister. However, the independent whose vote passed this motion made it clear that she was not going to support an opposition motion showing general lack of confidence in the government.

Financial appropriations problems are not unique to Australia; they regularly occur in the United States as part of haggling over the budget between the President and Congress.

108 *Swiss Constitution*, Art 175. There is no constitutional provision for removal during that term.

XIV. Conclusion

Despite its important role in theories of mixed and balanced government, the bicameralism that exists in the world today seems to be very much the product of a combination of accidental circumstances existing in the England of the 14th century. It later spread widely through copying of the English model. Consequently the advantages which it has brought to government in some countries over the past few centuries are attributable to its spontaneous formation in England where it was able to grow as a result of a uniquely fluid social structure. Attacks on bicameralism in England, which began with the Chartists in the late 1830's and made significant headway only in the 20th century, came too late to prevent this happening. The Parliament of Westminster has been described as the 'Mother of Parliaments' because it has given birth to so many. Perhaps, it is even truer that its bicameral system has been the mother of present day bicameralism.