

# Adding Value?

## The Role of Second Chambers

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In the study of legislatures, little attention is given to the second chambers of bicameral parliaments. We know something about some second chambers, most notably the US Senate, but relatively little is known about second chambers as a particular species of institution. To some extent, this is attributable to their perceived subordinate status. They are *second* chambers.<sup>1</sup> In bicameral systems, reference to ‘the legislature’ is often taken as referring to the first chamber. In the United Kingdom, Parliament and the House of Commons are often taken as synonymous terms. The same applies in Ireland with the *Dail* and in India with the *Lok Sabha*. There is substantial literature on the US Senate, but literature on second chambers as such is relatively sparse.<sup>2</sup> Indeed, it is only in recent years that we have been able to get a clear idea of how pervasive, or scarce, second chambers are.

This paper addresses the purpose of second chambers. As we shall see, they are essentially a minority preference. That preference is marked in federal states. Most legislatures are unicameral. For any constitution-makers, especially in unitary states, what would be the benefit of crafting a bicameral legislature?

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<sup>1</sup> The case of the Netherlands is exceptional: there the elected chamber is referred to as the second chamber.

<sup>2</sup> The principal recent literature comprises S C Patterson and A C Mughan (eds), *Senates* (Columbus OH: Ohio State University Press, 1999), M Russell, *Reforming the House of Lords: Lessons from Overseas* (Oxford: Oxford University Press, 2000), and N D J Baldwin (ed), *Second Chambers* (Frank Cass, London, 2001). See also M Russell and M Sandford, ‘Why are Second Chambers so Difficult to Reform?’ (2002) 8 *The Journal of Legislative Studies* pp 79-89.

## How Prevalent Are They?

To know how many second chambers there are we need to know what they are. The definition of a second chamber is largely taken as given in the literature. I have defined legislatures as ‘constitutionally designated institutions for giving assent to binding measures of public policy, that assent being given on behalf of a political community that extends beyond the government elite responsible for formulating those measures’.<sup>3</sup> The institution that meets to give assent may be a single or a bicameral body. ‘Bicameralism’, according to Patterson and Mughan, ‘is an institutional design for a two-house representative assembly’.<sup>4</sup> As such, identifying a legislature as unicameral or bicameral may be deemed to be straightforward. A measure must be given approval by a single chamber (unicameral) or by two (bicameral) before being presented to the head of state for assent and for the measure to be the law of the land. In most cases, making a designation is straightforward. The US Congress is bicameral, as is the UK Parliament. However, there are legislatures where the designation is not that clear-cut. There is a distinction to be drawn between constitutional designation and institutional design. Some constitutions stipulate that the legislature is unicameral but create institutions that have the characteristics of a second chamber: that is, they create two bodies that have to deliberate on bills before they can be promulgated as law. Some constitutions stipulate that the legislature is bicameral but in practice no second chamber is created.

Examples falling in the first category include Botswana, Iran and the European Union.<sup>5</sup> The Constitution of Botswana stipulates that the legislature is unicameral. However, it also prescribes that certain measures placed before the parliament have, after first reading, to be referred to the Council of Chiefs. The Council is an institutionalised body that follows parliamentary procedures. It may recommend amendments to bills, though the Assembly may choose to ignore them. Similarly, Iran regards itself as having a unicameral legislature. The constitution stipulates that ‘The legislative power shall be exercised by the Islamic Consultative Assembly’. The constitution also creates a Guardian Council and provides that, with certain exceptions, no measure of the Assembly shall have legal validity without the support of the Council. The Council has responsibility for checking that all bills passed by the Assembly comply with the constitution and Islam. Its decisions, however, are not definitive. The Assembly may disagree with the Council and bills may be

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<sup>3</sup> P Norton, ‘General Introduction’, in P Norton (ed), *Legislatures* (Oxford: Oxford University Press, 1990), p 1.

<sup>4</sup> S C Patterson and A. Mughan, ‘Senates and The Theory of Bicameralism’, in Patterson and Mughan, *Senates*, p 1.

<sup>5</sup> P Norton, ‘How Many Bicameral Legislatures Are There?’ (2004) 10 *The Journal of Legislative Studies* pp 1-9.

subject to a navette, shuttling back and forth between the two bodies. The third example is the European Union. There is formally one parliament. However, under the co-decision procedure of the EU, for measures to become law they require the assent not only of the European Parliament but also the Council of Ministers. In the event of a conflict, there is a conciliation procedure and this has been likened to the conference procedure adopted to resolve disputes in bicameral legislatures.<sup>6</sup> The Council of Ministers has both executive and legislative functions and in its legislative capacity has been viewed as a second chamber. That is how it is seen by the European Parliament.

Cameroon and Comoros are examples of the second category, where the constitution stipulates that there shall be a bicameral legislature but where, as yet, no second chamber has been brought into being. There is also the unusual procedure in Norway, where a single parliament (the *Storting*) is elected, but once elected divides into two bodies, or *tings* — the *Lagting*, comprising one-quarter of the members, and the *Odelsting*, comprising the remaining three-quarters of the membership — for dealing with legislation. It can also meet in plenary session to resolve disputes.

The list is not necessarily exhaustive, but the cases cited are sufficient to demonstrate the need for caution in identifying precisely the number of bicameral legislatures that exist. What we can say is that we now have sufficient data to make two generalisations. The first is that bicameral legislatures are a minority taste. This is contrary to what was previously perceived to be the case. In 1980, for example, one political scientist wrote that ‘The countries of the world divide almost equally between those with unicameral legislatures and those with bicameral, or two-chamber, parliaments’.<sup>7</sup> More recently, drawing on a near-exhaustive study, Louis Massicotte has been able to conclude that ‘bicameral legislatures are vastly outnumbered by unicameral ones’.<sup>8</sup> His research allows us to make the second generalisation, that is, that unicameral legislatures outnumber bicameral legislatures by approximately two to one. Subject to the health warning we have given, approximately 64% of countries have unicameral legislatures.

These figures suggest we need to ask more critical questions than hitherto about the continued existence of second chambers. When they were perceived to be fairly extensive in number, it could be assumed that there must have been a widely held rationale for their existence. Now that that perception has been dispelled, the motivation to examine them critically is heightened.

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<sup>6</sup> See D Williamson [Lord Williamson of Horton], ‘Conciliation Procedure in the European Law-Making Process’ (2006) 12 *The Journal of Legislative Studies*, pp 1-7.

<sup>7</sup> D M Olson, *The Legislative Process: A Comparative Perspective* (New York: Harper & Row, 1980), p 21.

<sup>8</sup> L Massicotte, ‘Legislative Unicameralism: A Global Survey and a Few Case Studies’ (2001) 7 *The Journal of Legislative Studies*, p 151.

## Why Do They Exist?

What is the justification for a second chamber? In many, if not most, cases, the justification for having, or not having, one is prescription. That is, it is what has always existed. As Patterson and Mughan observe, ‘Institutions tend to be accepted at face value. Whether the legislature has one house or two is taken for granted by practitioners, observers and citizens’.<sup>9</sup> In other cases, rejection may be a reaction to past events. In Portugal, for example, a second chamber is associated with the authoritarian Salazar regime. Iran may have a Guardian Council, but it rejects the concept of a second chamber as such because it associates a senate with the reign of the Shah. Where arguments are advanced for a bicameral legislature, there is no single criterion universally employed to justify their existence. If we analyse nations with second chambers, it is possible to distinguish between function and capacity. The former comprises the reasons for their creation; the latter encompasses the resources by which they are able to do what is expected of them.

### *Function*

There is no single function ascribed to second chambers. The name may be taken to infer sequence (doing something after the first chamber) or subordination (the first chamber being the primary body). The functions that are given are not necessarily mutually exclusive. The two functions principally proffered, and the basis for their existence, are those of representation and reflection. Each may be separated into different elements, resulting in some complex combinations.

*Representation.* The term representation has come to be used in different ways. As Pitkin’s seminal work demonstrated, it is possible to identify four separate usages.<sup>10</sup> These are acting on behalf of some individual or group (defending or promoting the interests of those ‘represented’); being freely elected; replicating the typical characteristics of a group of class (as in a ‘representative’ sample); or acting a symbol (such as a monarch or flag standing for the unity of the nation). Though analytically separable, they are not necessarily mutually exclusive: a body may be freely elected for the purpose of defending or promoting the interests of electors. This combination is to be found in democracies and essentially defines the basis of first chambers. It justifies not only their existence but, in a bicameral system, their pre-eminence (the first chamber). Second chambers either replicate that combination, albeit with a different configuration in terms of electorates, electoral districts and terms, or lack that combination. It is possible for a second chamber, for example, to represent a particular group or class without being directly elected (as with a functional second chamber, as is primarily the case in Ireland). Some sections of society, or estates of the realm (the original basis of a bicameral parliament), may also have members appointed to speak for (‘represent’) their

<sup>9</sup> Patterson and Mughan, ‘Senates and The Theory of Bicameralism’, p 9.

<sup>10</sup> H Pitkin, *The Concept of Representation* (Berkeley CA: University of California Press, 1967).

interests. Clerics, for example, are appointed to the Iranian Guardian Council; there are 26 senior clerics (2 Archbishops and 24 Bishops) of the Church of England in the House of Lords. It is rare, but—as we shall see—not unknown, for a second chamber to have no representative base.

The prevalence of bicameral legislatures in federal states may be ascribed to the perceived need to ensure distinct representation for the different parts of the nation. Where a nation is divided into states or provinces, members are returned to the second chamber to pursue the interests of those distinct entities. Members of the first chamber are normally elected on the basis of the nation being divided into equal or roughly equal electoral districts, and members of the second elected (directly or indirectly) or appointed to speak for their provinces or states, which may not necessarily be of equal size. There may thus be equal representation of electors in the first chamber (one elector's vote being worth the same as that of an elector in another part of the country) but unequal representation in the second. Nor is there necessarily the same representative combination (pursuing interests *and* being freely elected) for the second chamber. The US Senate is elected, the German *Bundesrat* is indirectly elected, and the Canadian Senate is appointed. The critical representation is that of defending and pursuing the interests of the regions or states. It is the emphasis given to this that is taken to justify a disparity in the weight accorded the second chamber relative to its electorally disproportionate or unelected base. It is viewed as a means of holding together the different parts of the nation.

*Reflection.* Reflection refers to the second chamber deliberating, usually but not exclusively on what the first has done. This is sometimes known as the 'cooling' effect or what W S McKechnie in 1909 characterised as the principle of appeal 'from Philip drunk to Philip sober'.<sup>11</sup> Patterson and Mughan describe it, somewhat misleadingly, as the 'redundancy' effect.<sup>12</sup> The reflection may lead to the chamber exercising a power to persuade or to coerce the first. (We shall return to this distinction in the discussion on capacity.) The reflection may be reactive or proactive.

The reactive role is in relation to that which the first chamber does and may be seen as the predominant reason for having a second chamber. The second chamber checks, scrutinises and (as appropriate) recommends amendments to what the first chamber has proposed. The legislative process may be analogous to that of the first chamber. Reflection may encompass not only the proposals of the first chamber but also the actions and policies of the executive. The chamber may therefore have the function of administrative oversight<sup>13</sup> as a sub-set of its reflective role.

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<sup>11</sup> W S McKechnie, *The Reform of the House of Lords* (Glasgow: James MacLehose and Sons, 1909), p 8.

<sup>12</sup> Patterson and Mughan, 'Senates and the Theory of Bicameralism', pp 11-16.

<sup>13</sup> This function is identified, along with others, in R Packenham, 'Legislatures and Political Development', in A Kornberg and L D Musolf (eds), *Legislatures in Developmental Perspective* (Durham NC: Duke University Press, 1970).

The proactive role exists where the second chamber may not simply react to what the first chamber has proposed but propose measures of its own. Not all second chambers have a proactive role. Where they do, the extent of the role varies. The Bryce Commission report in 1918 on the reform of the second chamber in the UK identified as one of its four functions ‘the initiation of bills dealing with subjects of a practically non-controversial character’, justified in terms of reducing the burden on the first chamber.<sup>14</sup> This now takes the form of the government introducing some of its less contentious bills (or those dealing with matters for which the chamber is especially well suited, such as bills dealing with the legal system) in the House of Lords, thus helping spread the legislative load over the session. In the USA, the Senate may initiate bills on whatever subject it wishes, other than money bills.

Some second chambers may also have particular tasks accorded to them, deemed appropriate because of their particular nature. These may include, as in the USA, treaty ratification. In the UK, the House of Lords retains a judicial capacity, though exercised now through its appellate committee comprising senior judges (law lords) and others who have held high judicial office, though this role is to be hived off in 2009 (under the provisions of the Constitutional Reform Act 2005) to a supreme court. Second chambers may also have other functions deemed appropriate to a legislative chamber but not necessarily functions that derive from the fact that it is a second chamber. In some cases, members who are elected may engage, like members of the first chamber, in what has been termed errand running for constituents<sup>15</sup> (a particularly important task, for example, for senators in Belgium).<sup>16</sup> Functions thus vary, over and above the principal functions ascribed to them.

### *Capacity*

If the chamber is to fulfil the functions ascribed to it, it requires the capacity to do so. A chamber may be given responsibilities, but no power. Capacity encompasses formal powers, composition and political will.

The formal powers accorded to a second chamber vary considerably. Arend Lijphart has classified the powers of the two chambers in a bicameral system as being symmetrical or asymmetrical.<sup>17</sup> Less than a third of the countries with bicameral legislatures fall in the first category. Those that do have symmetry mostly

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<sup>14</sup> *Report of the Conference on the Reform of the Second Chamber*, Cmnd 9038 (London: Her Majesty’s Stationery Office, 1918).

<sup>15</sup> Packenham, ‘Legislatures and Political Development’ cited at note 13 above.

<sup>16</sup> See L de Winter, ‘Belgian MPs: Between Omnipotent Parties and Disenchanted Citizen-Clients’, in P Norton (ed), *Parliaments and Citizens in Western Europe* (London: Frank Cass, 2002), pp 99-100.

<sup>17</sup> A Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 1999), pp 206-207.

have a wholly elected second chamber.<sup>18</sup> However, not all elected second chambers have equal powers with the first—just over half do, but the rest do not<sup>19</sup>—and not all indirectly elected or appointed chambers have lesser powers than the first. Canada is a prime example of an appointed chamber but one which formally has the same powers as the elected House. Such a situation, though, is rare. Most second chambers which are not directly elected fall in the second of Lijphart's categories. Where second chambers have the same powers as the first, then their capacity to fulfil a reflective function may extend beyond cooling a proposal to freezing, in effect killing, it.

Power may take the form of persuasion or coercion. A second chamber may be able to persuade the first through advice, through having the capacity to request it to think again, or through threatening to use the formal capacity to negate a decision, but in such cases the first chamber has a choice as to whether to go along with the second chamber. A coercive capacity exists where the second chamber has the formal capacity to say no definitively to a decision. In such cases, the first chamber is not vested with a choice. In most cases, second chambers lack such a coercive capacity: the first chamber can either ignore them or after a certain period overrule them. The second chamber thus needs a notable persuasive capacity if it is to affect the outcomes of public policy.

Composition also affects the capacity of a second chamber to fulfil its functions. Lijphart classifies the composition as either congruent or incongruent with that of the first chamber.<sup>20</sup> This is based on the means by which the members are selected. The basis of the composition of the second chamber may relate to representation of region (as in federal systems) or to background. In some instances, the method of selection for the two chambers differ little or are identical. In other cases, different methods are employed. There may be requirements that members of the second chamber be drawn from, or at least speak for, a particular body other than electors in a particular geographic area. This is the case with Ireland's 'vocational' senate. There is also a difference in composition between the two Houses of the British Parliament. Membership of the House of Commons is determined by election in single-member constituencies. The imperatives of constituency service has meant that membership is a full-time job, with the membership being increasingly dominated by career politicians.<sup>21</sup> The House of Lords, on the other hand, is wholly appointed and has been characterised as a full-time House of part-time members. It is essentially a House of experience and expertise, members being appointed for being the leading figures in their field (the arts, sciences, academe) or because they

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<sup>18</sup> See Russell, note 2 above, p 42.

<sup>19</sup> *Ibid.*

<sup>20</sup> Lijphart, *Patterns of Democracy*, pp 207-208.

<sup>21</sup> A King, 'The Rise of the Career Politician in Britain—and its Consequences' (1981) 11 *British Journal of Political Science*, pp 249-285; P Riddell, *Honest Opportunism* (London: Hamish Hamilton, 1993).

have held high office in the government or other walks of public life (civil service, the military and so on). The membership is thus able to bring to bear a different perspective to that of members of the elected chamber. The appointment of members also has another consequence of relevance to our later discussion. Just under a third of those appointed to the House of Lords do not take a party whip: they sit as independents, or cross-benchers, in the House.

The third element is political will. Formal powers may be necessary but they are not sufficient if the second chamber is to affect the outcome of public policy. The political will has to exist to use those powers. The fact of election may be sufficient to induce the will necessary to challenge the first chamber to the extent that the chamber's powers allow. There are various senates, such as the American, Italian and Australian, where they are prepared to exercise the powers vested in them. Where a chamber is not elected, it may be reluctant to employ its powers. There is a mismatch, for example, between the powers vested in the Canadian Senate and the willingness of senators to employ those powers. The House of Lords in the 20th Century was seen as largely unwilling to utilise its (limited post-1911) powers because its membership was based principally on the principle of inherited seats, producing a politically-skewed membership. Since the removal of most hereditary peers in 1999, the House-comprising predominantly life peers, appointed primarily on individual merit-has proved more willing to challenge the first chamber.<sup>22</sup>

It is thus possible to identify various combinations of powers and relationships. Lijphart argues that 'strong' bicameralism exists if the two chambers are symmetrical in their powers and incongruent in their membership.<sup>23</sup> One can see the logic of this conclusion, but it rather avoids the question of just *how* effective one wishes a second chamber to be. That question is arguably most pertinent in the context of a unitary state.

## Second Chambers In Unitary States

The case for second chambers appears to be conceded in federal states and in those where there is a clear regional identity and heterogeneous population. The case appears less strong in unitary states, especially those with fairly homogeneous populations. In some cases, the absence of a second chamber can be justified on practical grounds. In nations with small populations, there may not be a perceived need for a second chamber. A single chamber may have time to engage in reflection on its own initial preferences with control exercised through the judicial process.

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<sup>22</sup> M Russell, 'Why Does the Government get defeated in the House of Lords?' paper presented at the Political Studies Association Conference, University of Reading, 2006.

<sup>23</sup> Lijphart, *Patterns of Democracy*, pp 211-213, cited at note 20 above.

In some developing countries, the rationale may also be one of cost: they cannot afford to create one. However, in terms of principle, it can be argued that the compelling argument for a unicameral legislature is the need to ensure accountability.

In a representative democracy, the people elect some among them to form the legislature and, either separately or through the legislature, to form the executive. Fundamental to a representative democracy is the concept of accountability. Those chosen to decide public policy are not only chosen by the people but must be answerable to them. This is usually achieved through regular elections. If those elected fail to deliver what electors wish them to deliver, then they may be removed at the next election. Electors, in short, have the means to call them to account. With the advent of mass democracy, that accountability is exercised principally through political parties. If a party, or coalition of parties, elected to government fail to deliver what electors wish for, then they may be replaced by another party or coalition of parties.

For the purposes of my argument, it is essential to distinguish between divided and undivided accountability. Divided accountability exists where an elector may vote for members of more than one body with responsibility for determining public policy. Divided accountability exists in nations where there is a presidential system and the citizen votes separately for the executive and for the legislature. In these systems, the bodies being elected are distinguishable in that they fulfil different functions. One also has divided accountability in a bicameral system where both chambers are elected. In this situation, an elector exists in two capacities. In a federal system, this dual capacity comprises being a citizen of the nation and a citizen of the state or region within that nation. However, in a unitary state, it may entail a dual capacity that is indistinguishable; that is, the citizen is acting as a citizen of the nation in elections to both the first and second chamber. This is a context in which the term redundancy is far more appropriate.

There is an argument for divided accountability in that it creates an opportunity to inject a constraint on the first chamber. It can therefore be justified in terms of negative constitutionalism, a concept to which we shall return. It limits an executive, chosen through elections to the first chamber, from becoming over-powerful. However, it can also be argued to limit accountability. In a unicameral parliamentary system, the executive is elected through elections to the parliament. The party, or coalition of parties, that emerges victorious in the election forms the executive and governs. Election confers the legitimacy to govern. Electors can withdraw that right to govern at a subsequent election. Electors know who is responsible for public policy: the party, or coalition, in government. That body cannot blame another body for its failings in office. If it enjoys an absolute majority in the legislature it cannot absolve itself of its responsibility for its programme. There thus exists what I have termed core accountability. Responsibility is unique to that body.

Consider the position then in a bicameral system with both chambers elected. If one party achieves a majority of seats in both chambers, then the second may be

deemed to be redundant. If control of the two chambers is divided, then the second—in the words of Abbé Siéyès—is mischievous<sup>24</sup> and it is mischievous because it challenges the accountability of the first. If the two chambers disagree and either fail to resolve their differences or resolve them through doing deals, who then do electors hold to account for the outcomes of public policy? In a unicameral system, especially a parliamentary majoritarian unicameral system, no such question arises.

The exemplar of divided accountability is the USA. The executive and legislature are elected separately as are the two Houses of Congress. One party may control the White House and both Houses of Congress, but 'control' is arguably too strong a term to employ: party is not sufficiently strong to overcome the institutional hurdles created by the Founding Fathers. Electors go the polls frequently to elect representatives to different bodies and on that basis the USA is held up as being a paragon of democracy. However, if one accepts that accountability is an intrinsic feature of representative democracy, it can be argued that it is anything but. Within the USA there is no one body that electors can hold responsible for the outputs of the policy-making process. There may be conflict not only between President and Congress but between the two chambers of Congress. Even if electors have knowledge sufficient to judge who is responsible within the system for a particular outcome—that is, understanding process as opposed to having a view on the outcome itself—it is difficult to make adjustments to each element in order to achieve the desired outcome. Where such manipulation takes place, it is usually strongest when exercised in a negative sense: that is, to oppose something. Translating the general will into positive outcomes is extremely difficult. The result in the USA is a mismatch between what Americans want and what Congress delivers.<sup>25</sup> At least in the USA, though, this divided accountability can be justified in terms of a federal system. In a unitary state, no such defence exists.

Is it possible then to justify a bicameral system in a unitary state? There is a practical argument in respect of large nations. Bicameral systems are most notable in large as well as federal nations. The legislative pressure is such as to deem two chambers necessary to carry the pressure. The first chamber does not have time to reflect on its own initial handiwork. However, there remains the problem of accountability. How does one avoid the danger of divided accountability (assuming it is deemed to be a problem) and redundancy?

### *Debating the Future of the House of Lords*

This leads me to discussion of reform of the second chamber in the United Kingdom. In the UK, there is considerable pressure for the appointed second chamber, the House of Lords, to be part-elected or replaced by an elected senate.

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<sup>24</sup> Quoted in Russell, *Reforming the House of Lords*, p 79. See note 18 above.

<sup>25</sup> See J R Hibbing and E Thiess-Morse, *Congress as Public Enemy* (Cambridge: Cambridge University Press, 1995).

Those arguing the case for reform essentially accept that the reflective functions of the second chamber are appropriate but regard it as inappropriate that the membership is not elected. They make the case for change therefore on representational grounds: they want the combination of freely elected members in order to defend and pursue the interests of those that elect them. Such a change is advanced on its own merits, though it is also justified in terms of adherence to the concept of negative constitutionalism. That is, the constitution is seen as a means of constraint, of enabling certain values to transcend the wishes of a transient regime. Constraints should therefore be built into the system—rather in the manner the Founding Fathers built constraints in to the US Constitution—and an elected second chamber is one means of constraint.

One can therefore see the force of the argument advanced by those articulating what they tend to characterise as the ‘democratic’ option. However, it fails to overcome the problems of accountability and redundancy. When viewed from the perspective of the former, it is open to the objection of being anything but democratic.

The case for the existing House of Lords is that it facilitates accountability while having a composition that enables it to fulfil a reflective function effectively. In short, the United Kingdom gets the benefits of a second chamber (incongruent membership, enabling it to fulfil functions in such a way as to add value to the political process) without the downside of divided accountability.

The nature of the membership of the House of Lords means that it is able to look at measures from a different perspective of the elected House of Commons. The experience and expertise of members, and the absence of election, helps reduce the impact of party considerations.<sup>26</sup> Members of the House of Commons are elected on the basis of competition between parties and operate in a highly partisan environment. Partisanship is the essential driver of behaviour. Any expertise on the part of members may be washed out by the imperatives of party need. In the House of Lords, members are able to operate in a less partisan environment. They do not sit as a result of having fought an election against the opposing party — nor have to face re-election — and are there largely because of what they have already achieved. The effect of experience and expertise is to limit the impact of unthinking party loyalty: members are less likely to go along with their party if they know that what it proposes runs counter to their own knowledge (or the knowledge of members they recognise as experts in the field). The draw of party is less marked in that parties in the Lords have no sanctions they can deploy against recalcitrant members. Members sit for life and cannot be expelled. They also receive no salaries (they receive only allowances to cover the cost of their attendance) and so have no paymaster to whom they feel beholden. Members choose what time to give to the

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<sup>26</sup> See Lord Norton of Louth, *House of Lords: Official Report (Hansard)*, 13 March 2007, Vol 690, col 707.

work of the House. Parties are thus dependent on their members to attend, but members are not usually dependent on their parties. And the concept of party is largely irrelevant in the context of the cross-benchers.

Recognising that the House does not have the electoral legitimacy accorded to the House of Commons—here the degree of asymmetry is beneficial in the context of accountability—it does not challenge the principle of measures approved by the elected chamber. By convention, it does not vote against any measure promised in the governing party's manifesto and, indeed, it is rare for it to vote against any government bill. Instead, it focuses on the detail of bills and considers ways in which they may be improved. This encompasses drafting amendments through to substantive issues. Its composition is intrinsically beneficial to this activity. Those with an expertise or some experience in the field covered by a bill will tend to contribute to debate. Operating in a less partisan environment than the Commons and one largely neglected by the mass media (interested more in the partisan clashes in the Commons), it is possible for members to engage in a constructive dialogue with government ministers.

The benefits of this dialogue are to be found in the extent of amendments made to bills. In a parliamentary session, usually between 2,000 and 3,000 amendments to government bills are secured in the House of Lords. In some sessions, the figure has been considerably higher: in 1999-2000, for example, it was 4,761.<sup>27</sup> Frequently, amendments are introduced by the government itself, often in the light of prompting from members or as a result of its own reflections. It is difficult empirically to compare the effect of the two Houses, but one estimate is that in terms of the detail of bills, the House of Lords makes twice as much difference as the House of Commons.<sup>28</sup> The Commons debates the issues of principle, but the government majority ensures that the government gets its way. The Lords focuses on detail and, in a House where no one party enjoys more than 30% of the membership, is able to achieve change.

Most change is achieved through agreement. When the House does vote, it votes along party lines,<sup>29</sup> but less than 2% of the amendments achieved in the House are as a result of a vote (division). When the House does vote, the task of the government is to persuade other parties, or the cross-benchers, to support it. It is also facilitated in its reflective role through not only incongruent membership but also incongruent procedures. Unlike in the House of Commons, the House of Lords does not have guillotine, or timetabling, motions to cut off debate on a bill,

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<sup>27</sup> P Norton, 'The House of Lords', in B Jones *et al*, *Politics UK* (6th ed, Harlow: Pearson Education, 2007), p 462.

<sup>28</sup> R Blackburn, 'The House of Lords', in R Blackburn and R Plant (eds), *Constitutional Reform: The Labour Government's Constitutional Reform Agenda* (London: Longman, 1999), p 27.

<sup>29</sup> P Norton, 'Cohesion Without Discipline: Party Voting in the House of Lords', (2003) 9 *The Journal of Legislative Studies*, pp 57-72.

nor does it limit itself to debating only a small number of amendments selected for debate by the chair: all amendments that are put down by members are debated. Members can thus ensure, in a way that MPs cannot, that issues they wish to discuss are discussed.

The House in dealing with legislation may thus be deemed to add value to the legislative process. In essence, it complements the Commons. It also regards its role as complementary in fulfilling other tasks associated with its reflective role. The House of Commons has select committees that cover government departments. The House of Lords has cross-cutting committees, covering broad issues that cut across departmental boundaries (notably science and technology, economic affairs, and the constitution). It also devotes itself to issues that fall outside the big areas of political conflict, having committees that deal with secondary legislation (delegated powers and regulatory reform committee, merits of statutory instruments committee) and European legislation. In the field of EU legislation, the Commons goes for breadth (examining every document submitted) and the Lords goes for depth (looking in detail at documents deemed to raise important issue, or focusing on broader issues affecting the EU).<sup>30</sup> The European Union Committee of the House of Lords operates through seven sub-committees. The result is that it has over seventy peers—roughly ten per cent of the membership—engaged in the examination of European legislation.

The House of Lords thus has a claim to add value to the political process. It fulfils effectively the reflective role. Opponents concede it does so, but argue that it is not a representative body. By this, they mean it is not elected and its members do not seek to defend or pursue the interests of particular groups or bodies. Indeed, no member can speak on behalf of anyone other than himself or herself. The writs of summons are personal. Even the clerics who sit by virtue of their positions in the Church of England do not formally represent the Church. They speak as individuals. They can disagree among themselves (and frequently do so). However, supporters of the existing House argue that, in a unitary state, there is no need for a representative role, at least not in terms of the first and second usages of the term adumbrated above. In terms of those usages, the representation is provided by the elected chamber. The composition of the second chamber ensures added value in a way that an elected second chamber cannot. An elected chamber, it is argued, will undermine if not destroy the core accountability at the heart of the British political system and introduce redundancy to the system. It also poses a potential threat to the House in a representational sense: an appointed chamber can deliver a more representative House, in terms of the third usage of the term, than an elected House.

Accountability is maintained within the British parliamentary system through having one elected chamber. Elections to the House of Commons determine which

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<sup>30</sup> See P Norton, 'National Parliaments and the European Union' (2003) 45 *Managerial Law*, pp 5-25.

party will form the government. A party secure in a majority of seats in the Commons forms the administration and that majority delivers the programme offered by the party at the general election. (Parties in the UK have a record of delivering most-sometimes up to 90 per cent—of the promises contained in their election manifestos.)<sup>31</sup> If it fails to produce what the electors want, they can remove it at the next general election. Knowing it can be removed at the next election delivers not only an accountable but also a responsive system. Governments are wary of ignoring the electorate between elections. Arrogance in office is viewed as an electorally damaging flaw. In the event of any disagreement between the two Houses, the Commons can ultimately impose its will on the Lords. This thus ensures the maintenance of a core accountability and it also encourages the second chamber to fulfil a complementary, rather than a conflicting, role to the first.

Were the second chamber to be elected, it would introduce the prospect of divided accountability and redundancy. Though the second chamber may not demand the same powers as the first, it would be difficult to deny it more powers than the existing unelected House.<sup>32</sup> The first chamber would also be powerless to prevent it destroying current conventions. Election it is argued would change the terms of trade and result in the sort of partisanship that characterises the House of Commons. It is also not clear how, with election, one could avoid a congruent membership. It would be difficult to deny parties access to the election process and there are no plans to impose particular hurdles that would distinguish candidates from those eligible to seek election to the first chamber. Indeed, government plans published in 2007 proposed that members elected to the second chamber serve a long single-term and then be barred from seeking election to the House of Commons for a number of years,<sup>33</sup> in effect conceding that those seeking election to the second chamber would be those who wished to be elected to the first. Opponents of an elected second chamber point out that one would end up with simply another body of elected — and presumably indistinguishable — politicians. Redundancy would thus become a feature of the system.

The final argument concerns representation. Those advocating a representative chamber have sometimes confused the different usages of the term. More often, they mean a freely-elected chamber with members returned to defend and pursue the interests of those who elect them. Some, however, mean it in terms of the background of the members: they want to see a chamber with a greater proportion of women and members drawn from ethnic minority backgrounds. This is the sense in which the Leader of the House of Commons, Jack Straw — the minister

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<sup>31</sup> See R Rose, *Do Parties Make a Difference?* (Expanded 2nd edn, Macmillan, London, 1984), pp 65-66.

<sup>32</sup> See the comments of Lord Plant of Highfield, *House of Lords: Official Report (Hansard)*, 12 March 2007, Vol 690, col 532-3.

<sup>33</sup> HM Government, *The House of Lords: Reform*, Cm 7027 (London: The Stationery Office, 2007), p 48.

in charge of the government's policy on Lords reform — used the term in 2006. However, as supporters of the Lords have pointed out, appointment is a more effective, and usually a quicker, means than popular election of delivering a membership that is more typical of the population. Though the House of Lords is not and never likely to be a socially typical chamber, it is more diverse in its membership than the House of Commons (with a greater proportion of members who are drawn from ethnic minority backgrounds and who are disabled and with more women in leading positions)<sup>34</sup> and with the potential to be more diverse through further appointment. The House of Commons continues to be dominated by white, middle class males.

The debate in the United Kingdom is thus rich and well enjoined. The House of Commons in March 2007 voted in favour of a largely or wholly elected second chamber.<sup>35</sup> The House of Lords voted by an overwhelming majority for an appointed second chamber.<sup>36</sup> The debate continues. It is not an isolated case. As Meg Russell noted in her comparative study of seven Western democracies, it is rare for a second chamber not to be the subject of contention.<sup>37</sup> In Ireland, an all-party parliamentary committee has explored different proposals for reform.<sup>38</sup> In Canada, the government is pressing to move to an elected second chamber. As our discussion illustrates, there is no universal agreement on the need for second chambers — most countries eschew having one — and where they exist no common ground in terms of what form they should take.

## Conclusion

The debate about Lords reform in the United Kingdom is variously at the level of the specific, but can also be seen as part of a wider debate about the nature of the political system appropriate to a particular society. Much depends on what one sees as the purpose of a constitution. Those who adhere to what has been termed negative constitutionalism see the constitution as a constraining mechanism, ensuring that certain fundamental values take precedence over the wishes of a transient popular majority.<sup>39</sup> Those who adhere to positive constitutionalism see it as a means of ensuring that the popular will prevails. The two are not necessarily mutually exclusive but they help shape the debate about the form a constitution

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<sup>34</sup> See Lord Selston, *Towards a Peerless Future*, unpublished manuscript, 2007.

<sup>35</sup> *House of Commons: Official Report (Hansard)*, 7 March 2007, Vol 457, cols 1601-35.

<sup>36</sup> *House of Lords: Official Report (Hansard)*, 14 March 2007, Vol 690, cols 742-59.

<sup>37</sup> Russell, *Reforming the House of Lords: Lessons from Overseas*, p 47. See note 18 above.

<sup>38</sup> The All-Party Oireachtas Committee on the Constitution, *Second Progress Report: Seanad Éireann* (Dublin: The Stationery Office, 1997).

<sup>39</sup> See D Ivison, 'Pluralism and the Hobbesian Logic of Negative Constitutionalism', (1999) 47 *Political Studies*, pp 83-99.

should take. Lijphart's conception of an effective second chamber falls primarily within the concept of negative constitutionalism. Divided accountability—fragmenting power—is a feature of a system where checks and balances are seen as desirable features. Where the emphasis is more on the people getting their way—not necessarily in undiluted form—then the preference is more likely to be for unicameralism or a system of asymmetrical bicameralism—one where the accountability of the first chamber is not threatened. The dominance of the general will may be subject to parliamentary debate, and indeed the reflection that is a feature of second chambers, but where it is paramount then it can be argued that it is a democratic system. The popular will is not constricted or overridden by other parts of the system. It is this respect that it can be argued that supporters of the existing House of Lords can claim as good, if not better, democratic credentials than those arguing for an elected second chamber.

What this article has sought to demonstrate is that there is no compelling case for either unicameralism or bicameralism or for a particular type of bicameral system. As we have seen, the combinations available are myriad and the result of what each country has done, largely driven by what is seen as its particular needs. In this, there is nothing peculiar: the creation of national parliaments in the new democracies of central and eastern Europe, for instance, owe more to their own national experiences than to borrowing from elsewhere.<sup>40</sup> It is, in essence, a case of horses for courses. The British second chamber is a creature of history—and English experience bequeathed the concept of bicameralism to the rest of the world—but it has evolved in such a way that it adds value to the political system without the attendant problems that may be associated with divided accountability. Others do not necessarily see it in the same way. However, as this article has sought to show, the arguments in favour of retaining the existing appointed House are as intellectually valid as those making the case for an elected senate. Our analysis also explains why some British MPs in March 2007 voted for the two options of an all-appointed House and unicameralism, and against all options favouring some element of election. They wished to retain the benefits of a second chamber but not if it was at the expense of undivided accountability. They were the ones adhering most closely to the concept of positive constitutionalism.

Second chambers will continue to be the subject of dispute. There is no clear trend either towards or away from bicameralism.<sup>41</sup> Where the debate about the future of second chambers is enjoined, then it is important that the debate is marked by light rather than heat. S E Finer concluded his work on lobbying in Great Britain with the words: 'Light! More light!'<sup>42</sup> They apply equally well to the debate on the nature and future of second chambers.

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<sup>40</sup> See D M Olson and P Norton (eds), *The New Parliaments of Central and Eastern Europe* (London: Frank Cass, 1996).

<sup>41</sup> Massicotte, note 8 above.

<sup>42</sup> S E Finer, *Anonymous Empire* (2nd edn, London: Pall Mall Press, 1966), p 145.