Bicameralism in the New Zealand context

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In 1985, the newly elected Labour Government issued a White Paper proposing a Bill of Rights for New Zealand. One of the arguments in favour of the proposal is that New Zealand has only a one chamber Parliament and as a consequence there is less control over the executive than is desirable. The upper house, the Legislative Council, was abolished in 1951 and, despite various enquiries, has never been replaced. In this article, the writer calls for a reappraisal of the need for a second chamber. He argues that a second chamber could be one means among others of limiting the power of government. It is essential that a second chamber be independent, self-confident and sufficiently free of party politics.

I. AN INTRODUCTION TO BICAMERALISM

In 1950, the New Zealand Parliament, in the manner and form it was then constituted, altered its own composition.

The legislative branch of government in New Zealand had hitherto been bicameral in nature, consisting of an upper chamber, the Legislative Council, and a lower chamber, the House of Representatives.[1] Some ninety-eight years after its inception[2] however, the New Zealand legislature became unicameral. The Legislative Council Abolition Act 1950, passed by both chambers, did as its name implied, and abolished the Legislative Council as on 1 January 1951.

What was perhaps most remarkable about this transformation from bicameral to unicameral government was the almost casual manner in which it occurred. The abolition bill was carried on a voice vote in the House of Representatives; very little excitement or concern was caused among the populace at large; and government as a whole seemed to continue quite normally. To the disinterested observer at the time, the change hardly appeared revolutionary.[3]

Bicameralism, it may be thought, was of relatively little importance or concern to New Zealanders. Most people may have known the Legislative Council existed,

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1 In theory the Crown is also part of the legislative branch of government in New Zealand, its assent being necessary to enact legislation. New Zealand Constitution Act 1852 (U.K.), ss. 32 and 56. See also Constitution Bill (1986), cls. 14 and 16.

2 New Zealand Constitution Act 1852 (U.K.), s.32.

3 In a number of other countries, moves to unicameralism have taken place amid circumstances of substantial change and upheaval, as, for example, in France in 1790, Turkey in 1923, and Egypt in 1953.

but few had heard much about it, and when it was abolished even fewer mourned its demise. Government continued as normal, and there has never since been any great popular outcry for a return to bicameralism. Some politicians and lawyers may have occasionally argued over the matter in the 1950s and early 1960s, but since then the question has not really been raised even at this level. It might consequently be thought that in 1986 bicameralism is something of a "dead duck", if indeed it ever was an issue or of importance in New Zealand at all.

Such at least is the first impression raised by bicameralism. Who really cares, what does it really matter, are often the first responses given by those seeking to dismiss the concept.[4] The public is not really interested, the Constitutional Reform Committee noted in its 1964 report to the House of Representatives.[5] First impressions can however be deceptive and superficial in that they do not reveal the entire picture. One must look closer.

A. A Current Constitutional Issue

Admittedly bicameralism is not a cause espoused by the public, or even by a vocal pressure group,[6] but then neither is the vast majority of constitutional issues. Proposals to expand the House of Representatives, to strengthen select committees, to introduce a bill of rights, are largely raised and discussed by only a few — the politicians, lawyers and political scientists — those with an interest or concern in this area. Constitutional arrangements may indeed be fundamental, in that "they concern the framework of rules within which our whole community must function",[7] but on the whole, providing discrepancies do not become too apparent, or the threat of tyranny too omnipresent, the majority of the populace remains more concerned with matters directly affecting them (such as employment and their standards of living) and with matters brought more directly to their attention by interest groups and the media (homosexual law reform and sporting contacts with South Africa being but two recent examples).

Whilst the question of bicameralism may not be a pressing one in the minds of the public at large, it nevertheless has been and still remains an issue for those members of the community interested in constitutional matters and concerned about New Zealand's governmental machinery.

Bicameralism and the form it should take was an important issue when the New Zealand Constitution Act of 1852 (U.K.) was drafted, and it was raised often and consistently up until 1950.

4 Infra n.76. One Canadian senator is reputed to have said that bicameralism does little more than furnish "those seeking intellectual exercise with a topic of conversation." See also S. A. de Smith *Constitutional and Administrative Law* (4 ed, Penguin, Harmondsworth, 1981) 313-314.

5 *Report of the Constitutional Reform Committee,* Appendix to the Journals of the House of Representatives, 1964, Vol. 4, 1-14.

6 This has not always been the case. The Constitutional Society vigorously advocated bicameralism in the early 1960s. There was also a Legislature Reform League.

7 Geoffrey Palmer *Unbridled Power?* (Oxford University Press, Wellington, 1979) 1.

The abolition of the Legislative Council failed to still questioning about the merits of bicameralism. The abolition was effected in an ad hoc manner for reasons of practical politics, and as a result New Zealand never squarely faced the question of whether it wanted to adopt a unicameral system, or why. This has meant that bicameralism, rather than being discarded once and for all, has remained in the background of constitutional discussions since. It has come to the forefront a number of times, in particular during the early 1950s and early 1960s, but has never been banished, remaining a background issue which continues to resurface quite regularly.

There appear to be two interrelated reasons for bicameralism remaining an issue. Firstly, there appears to exist an unease among many with New Zealand's present constitutional arrangements, a feeling that society is less protected than in a unicameral system. Secondly and conversely, there also appears to exist a belief among many that a bicameral system could provide some measure of protection against executive failings, be these at the level of inadequately considered laws, or at that of tendencies towards despotism. One only need note the comment of the late Professor Quentin-Baxter that New Zealanders "live more dangerously than the British. . . . We have dispensed with the precaution of an upper house of Parliament, which at least ensured that the general public would have a little more time to consider the implications of fast-track legislation."[8]

B. The Bill of Rights Debate

The continuing debate on the government proposal that a bill of rights be introduced in New Zealand quite clearly illustrates that bicameralism remains a current constitutional issue and reinforces the background reasons for this.

The Government White Paper on the bill of rights[9] itself reflects a feeling of slight unease with a unicameral system, a feeling that New Zealand is living more dangerously than it would under a bicameral system:[10]

> The power of the Government, alone and through Parliament, without the restraint or even the delay which would come from a second chamber, is enormous.

The Deputy Prime Minister, Mr Palmer, on the first page of his introduction to the White Paper notes:[11]

> We have no second House of Parliament. . . . We are lacking in most of the safeguards which many other countries take for granted.

The debate on the proposed bill of rights provides illustration of the belief that a bicameral system could help serve to protect rights in New Zealand. In his first reported statement on the bill of rights,[12] the then Deputy Leader of the

8 R. Q. Quentin-Baxter "Themes of Constitutional Development: The Need for a Favourable Climate of Discussion" (1985) 15 V.U.W.L.R. 12, 19.

9 *A Bill of Rights for New Zealand* (Government Printer, Wellington, 1985).

10 Ibid. 27.

11 Ibid. 5.

12 See *The Evening Post,* Wellington, 8 April 1985, 15. Mr Bolger is reported as saying that "serious thought should be given to the setting up of a second chamber in Parliament which has potentially more to offer than the proposed bill of rights".

Opposition, Mr Bolger, put forward the suggestion that an upper house might be an alternative and probably more effective means of ensuring the protection of individual rights. Several academic commentators have similarly drawn attention to the protection bicameralism could offer New Zealand society. Dr Paul Harris has noted[13] its potential as a complementary means for achieving the same goals as a bill of rights, and Professor Whatarangi Winiata has suggested[14] that a move away from unicameralism might better protect and advance the rights of the Maori people.

The bill of rights debate draws attention to bicameralism as an issue. It points to the existence of some considerable unease with present unicameral arrangements, and to the existence of a certain amount of belief that a second chamber in Parliament could serve as a check upon government.

C. The Paucity of Detailed Analysis

The bill of rights debate also draws attention to the lack of any substantial analysis of bicameralism.

The Government White Paper points to the dangers of unicameralism, but leaves it at that. The draft bill of rights itself is quite explicitly framed in terms of the present unicameral system of government.[15] There appears to be an assumption that despite the dangers pointed to, unicameralism is the only feasible legislative system for New Zealand. The follow-up question, "why", is simply not addressed. Given the specific focus of the White Paper, this can be understood. It is perhaps also however a reflection of the way in which unicameralism has been established in New Zealand. There was never any conscious decision to move from bicameralism to unicameralism — it just happened, and an ad hoc measure has in time evolved into a settled pattern of government. Circumstance rather than rationality dictated the decisions both of 1852 and of 1950 — in the one case a desire to model New Zealand after Great Britain; in the other a desire to exploit a party political advantage. As such there has never been any real attempt to weigh up the merits of the alternative legislative systems and to determine which would be the more appropriate for the specific needs of New Zealand.

13 Transcript of a seminar on the bill of rights, held 10 May 1985 (New Zealand Section of the International Commission of Jurists, Wellington, 1985) 11.

14 Ibid. 67-68. Professor Winiata argues that the principle of one person, one vote has worked to the disadvantage of the Maori people as the caucasian population has rapidly increased. He proposes that the principle of one people, one vote should be recognized by establishing a legislature consisting of three chambers — a general chamber of eighty five members, a Maori chamber of fifteen Maori members, and a senate of ten Maori and ten non-Maori members with the specialist function of ensuring that all legislation conforms with the Treaty of Waitangi. To a very limited extent, the proposal bears a similarity to the tricameral legislative system of South Africa, where there exists separate chambers for whites, Indians and Coloureds.

15 The electoral rights provided in article 5 of the draft bill of rights relate only to the House of Representatives. Cf. Canadian Charter of Rights and Freedoms 1982, article 3.

If those who have confined their thinking to the status quo — unicameralism — have never properly explained why this system is to be preferred, neither have those who have raised the possibility of bicameralism done any better. The bill of rights debate illustrates the tendency to raise the concept and then leave it, relying on some general impression that bicameralism may serve to check government without considering if it could do this any better than the present unicameral system, what disadvantages might thereby be entailed, or more importantly, how a workable bicameral system could be constituted in New Zealand.

Some attempt has been made to consider the applicability of bicameralism to the New Zealand political context.[16] By and large this attempt has been insufficient and the general lack of reasoning given by supporters of unicameralism or proponents of bicameralism for New Zealand reflects the paucity of this consideration. Three select committees have examined the issue of bicameralism in New Zealand since 1950. The report of the 1961 committee[17] was contained in one line — that it had no recommendation to make on the matter. The 1952 committee[18] viewed its task primarily in terms of formulating a proposal for an upper chamber. It did give some reasons in support of bicameralism, but regarded the concept's merits as fairly self-obvious. The 1963 committee[19] took the opposite approach. More accustomed to a unicameral system by the time it met, it could see no obvious reason for changing the new status quo.

It is, as a somewhat rudimentary attempt to reconsider these conclusions — to confront squarely the question of whether a bicameral system could be at all advantageous to New Zealand — that this analysis is directed.

II. THE INCIDENCE OF BICAMERALISM

One way of approaching the larger question — that of determining whether bicameralism could be worthwhile in the New Zealand context — is to begin by considering the practice of other states, in particular states similar to New Zealand, for example in terms of size, population, level of education, democratic traditions or social organization. Does any pattern exist with regard to legislative chambers? If the preponderance of states, or at least those comparable to New Zealand, were to possess the same legislative system, this might be thought to raise a presumption in favour of such a system.

One group of states with which New Zealand is often compared is the so-called "senior" members of the British Commonwealth, the old dominions of the Empire. And here New Zealand does stand out. New Zealand is often described as possessing

16 See for example two excellent articles on the Legislative Council: R. M. Algie "The Second Chamber in New Zealand" (1961) 42 The Parliamentarian 203; W. K. Jackson "The Failure and Abolition of the New Zealand Legislative Council" (1973) 54 The Parliamentarian 17.

17 *Report of the Public Petitions M to Z Committee,* Appendix to the Journals of the House of Representatives, 1961, Vol. 4, 1-2A.

18 *Report of the Constitutional Reform Committee,* Appendix to the Journals of the House of Representatives, 1952, Vol. 4, 1-18.

19 Supra n.5.

parliamentary or "Westminster" system of government. One distinguishing feature of the Westminster system has, however, traditionally been its basis in bicameralism. The British Parliament historically evolved to consist of the Crown and two houses of parliament — the Lords and the Commons. This system has been used as a model for legislative institutions in the British colonies. Both Canada and Australia retain second chambers today. New Zealand stands alone among the old dominions for having departed from this Westminster tradition, and having become unicameral.

The presidential system of government also has a basis in bicameralism. The legislature of the United States was specifically constituted so as to include two houses of Congress — the Senate and the House of Representatives. Unicameralism, at least at first sight, would appear out of step with the traditions of both the parliamentary and the presidential systems of government.

A number of commentators[20] have sought to explain and justify this departure from tradition by arguing that bicameralism has only been a traditional form of government for two specific reasons. Bicameralism has primarily been used in two types of situations: firstly, as a means of providing representation for different social classes, as in medieval European parliaments and, to an extent, the present British system; secondly, as a means of providing representation for states or provinces within a federal structure of government, as in the case of the senates of the United States and Australia. Neither of these two functions is required in a number of states today, and this, it is argued, explains an increasing trend towards unicameralism among states becoming independent or revising their constitutions in the post-war era.

This analysis fails however to provide a full or complete justification for accepting or rejecting bicameralism. It is not sufficient to argue that bicameralism has no relevance simply because class representation is outmoded and New Zealand is not a federal state. A large number of unitary (i.e. non-federal) systems do have second chambers. Of the Australian states, only Queensland lacks a bicameral system. In the United States, Nebraska is the only state to have one chamber. Admittedly the Canadian provinces are more comparable to New Zealand in that all except British Columbia originally possessed bicameral systems, and all have since abolished their upper chambers. Nevertheless the conclusion remains. Bicameralism is not solely a by-product of federalism. It can and does exist in unitary systems.

Overall the empirical evidence must be regarded as somewhat mixed. There exists no pattern showing either one or two chambers to be favoured among a preponderance of states.[21] Nor is unicameralism shown to be a necessary corequisite of a unitary system. A number of states similar to New Zealand do have unicameral systems of government, examples being Finland, Denmark and Sweden. A number of other similar states, however, have bicameral systems. New Zealand stands out in particular among the old dominions for having departed from the Westminster tradition of two houses of Parliament. New Zealand is also note-

20 See e.g. David Olson *The Legislative Process* (Harper and Row, New York, 1980) 21-22.
21 Idem.

worthy for having been one of the first countries to move towards unicameralism. A large number of states have done so since, upon independence or as part and parcel of revising their constitutional arrangements. At the time however, New Zealand's abolition of its upper chamber had relatively few precedents.

New Zealand's departure from the Westminster tradition of bicameralism, at a comparatively early stage, but reinforces the underlying question. Could a bicameral system be of value to New Zealand today? Has political expediency resulted in it being too easily cast aside, and subsequently ignored?

III. THE THEORY OF BICAMERALISM

It becomes necessary at this juncture to consider what exactly a second chamber could do. What are its purported functions? More particularly, what benefits could it offer, and what costs might it involve?

A. The Federal System

In a federal system a second chamber generally has the function of providing representation for the constituent states which comprise the federation. Each state has two representatives in the United States Senate irrespective of the size of its population. The second chamber is seen as providing a means for the individual states to ensure that their interests are heeded and protected. The lower chamber, representing the populace as a whole, might otherwise ignore the interests of states possessing only small populations, and thus minor electoral significance.

This justification has been criticized in a number of respects. It has been argued that when, as usually occurs, the separateness of constituent states declines over time, and the population as a whole becomes more homogeneous, a separate "states' house" ceases to have any real purpose.[22] Critics also question whether the system can work in practice today when state representatives are also members of a political party, and tight party discipline generally ensures that they vote with their party rather than necessarily in the interests of their state.

B. Checks and Balances

The function of state representation is unique to a federal system of government. More important for New Zealand however are the functions a second chamber is purported to perform in a unitary system. Three distinct classes of function can be differentiated. These are sometimes generically described as the "checks and balances function". Second chambers in a federal state also usually possess these functions. The Senate in the United States was established both as a "states' house" and a "checks and balances house", as was that in Australia. Second chambers in

22 See e.g. Colin Howard *The Constitution, Power and Politics* (Fontana, Melbourne, 1980). This is accentuated when the states' representatives are chosen by popular election rather than by the state government or legislature.

unitary states sometimes have a specific representative role, as in Ireland,[23] but are usually limited to serving as a "checks and balances house".

1. *Advantages*

This checks and balances role can be differentiated into three specific types of function.

(a) *Technical functionalism*

Firstly, it is claimed that a second chamber can perform several technical services which improve the legislative process.

An upper house can act as a revising chamber, to carefully examine and revise bills passed by the lower assembly: "[A] second house can do all the things a single house can do, but do them again".[24] A second appraisal is claimed to be beneficial in that it may enable more flaws in legislation to be detected. Technical errors in drafting could be searched for. The clarity and presentation of the law could be improved. A second appraisal would also act as a brake on the lower assembly, slowing down the passage of hasty legislation, checking any carelessness. As Bagehot noted:[25]

> if we had an ideal House of Commons . . . it is certain we should not need a higher chamber . . . [but as we have not], a revising and leisured legislature is extremely useful, if not quite necessary.

The 1918 Bryce Report on the reform of the House of Lords[26] notes that besides acting as a revising chamber, an upper house can perform a second technical service — that of acting to initiate bills of a non-controversial nature. It could deal with a large amount of private legislation which could then be easily approved by the lower house, assured that it had already been fully discussed and well-considered. It is argued that given the heavy workload a lower chamber usually faces, an upper house is beneficial both for sorting out any tangles in its legislation, and for expediting some of the more routine and non-controversial work a lower house would otherwise have to deal with.

(b) *A discussion forum*

The second type of function it is claimed a second chamber could perform is that of a discussion forum.

A second chamber, the Bryce report argued, would allow "full and free discussion of large and important issues."[27] The lower house, it is argued, often lacks

23 The upper house in Ireland is specifically constituted so as to provide "corporate representation" — i.e. to represent various sectors of Irish society such as the church and trade unions.

24 Supra n.7, 141-142.

25 Quoted in F. A. Kunz *The Modern Senate of Canada 1925-1963* (University of Toronto Press, Toronto, 1965) 5.

26 *Conference on the Reform of the Second Chamber,* Letter from Lord Bryce to the British Prime Minister, G.B.P.P., 1918, Cmd 9038.

27 Quoted in H. B. Lees-Smith *Second Chambers in Theory and Practice* (George Allen and Unwin, London, 1923) 33.

the time to fully debate issues of current national importance. A second chamber, it is claimed, would have more free time to discuss issues as and when they arose. It could follow this up by organising investigatory committees to examine particular issues or social concerns. This could relieve the government of the need to appoint so many royal commissions.

(c) *Limiting government*

Thirdly, it is claimed that a second chamber could serve to limit government. F. A. Kunz[28] refers to this as its "substantive role".[29]

A second chamber could serve to limit government in a variety of situations, ranging from the mundane to the serious. Given its lesser workload, members would have more time to sit on committees which could investigate areas of government activity. Geoffrey Palmer has suggested[30] that an upper house could profitably review the annual reports of government departments and the activities of quangos in New Zealand. At a more important level, an upper house could provide some oversight and regular inspection of civil liberties and human rights within the country. And during emergency situations, it could serve to limit a popular government which might seek to go too far too fast, and threaten the rights of minorities or society as a whole. D. J. Riddiford saw a second chamber as "a necessary safeguard against a single assembly seizing excessive power, and against the future danger of an ambitious politician, through his dominance over his party, virtually becoming a dictator."[31] An upper house could limit government across a wide spectrum.

Kunz argues that this function of limiting government is the substantive justification for an upper house.[32] He quotes Herman Finer as having said that:[33]

> all second chambers have been instituted . . . not from disinterested love of mature deliberation, but because there is something their makers wished to defend against.

Kunz argues that the theoretical role of an upper house has changed over the past century — the things an upper house is to defend against are now different. He claims that upper houses originally served as a check against democracy and progress. The House of Lords in the nineteenth century primarily sought to protect inherited possessions and status — it became, as he puts it, "an institutional embodiment of conservative ambitions to check a self-willed democratic assembly".[34] Montesquieu similarly described an upper house as a means for balancing the judgment of the representatives of the masses with that of the representatives of

28 Supra n.25.
29 Ibid. 3. This function of a second chamber — to limit government — is closely linked to the separation of powers doctrine: that the concentration of power in one institution may be potentially dangerous.
30 Supra n.7, 145.
31 D. J. Riddiford "A Reformed Second Chamber" (1951) 3 Political Science 23.
32 Supra n.25, 3.
33 Ibid. 6.
34 Ibid. 8.

the wealthy and aristocratic elements in society.[35]

With the acceptance of democracy however, Kunz argues that the theoretical role of second chambers has been altered. No longer do they serve to check the people or to arrest democratic aspirations, but they instead seek to prevent the government from acting in a manner which might abrogate democratic rights. In other words, an upper house now acts not in opposition to but on behalf of, the people and the concept of popular sovereignty. It is argued that the growth of the bureaucracy, the advent of stringent party discipline, and the primacy of the executive over lower chambers in parliamentary systems, legitimate this role for an upper house. A second chamber, it is claimed, is justified in delaying legislation for which the government has no mandate and which threatens the constitution or individual liberties or on which the country is divided. By delay, the second house can thus allow time for the opposition, the media, and the public to fully consider the proposed legislation, and bring pressure to bear on the government. Kunz argues that "once a stumbling block to democratic progress, second chambers, in their new role, may well become one of the institutional pillars of constitutional democracy."[36]

(d) *Consequential benefits*

In addition to the three functions outlined, it has been argued that a second chamber provides several consequential benefits for government. If a nominated chamber, appointments can be a useful means of bestowing government patronage. Talented M.P.s can be retained in Parliament once they have left the lower chamber. Distinguished citizens and those with experience in the public sector can be appointed and utilized. A greater pool for Cabinet is thereby made available. J. S. Mill argues that while members of a lower house generally represent popular feeling, an upper house can "represent personal merit, tested and guaranteed by actual public service, and fortified by practical experience."[37] By making better use of those with experience, it is claimed that the standard of discussion of national issues and of legislation can be improved.

2. *Disadvantages*

Against these purported functions and benefits of a second chamber must be weighed the arguments of those who claim an upper house to be disadvantageous. Three main arguments are raised.

(a) *Failure to perform functions*

First, it is claimed that second chambers are in fact generally unable to perform the functions their proponents ascribe to them.

If the chamber is nominated, its members generally tend to feel they lack a mandate to oppose the popularly elected house on anything important, and the

35 Noted in Kunz, supra n.25, 12.
36 Supra n.25, 23.
37 J. S. Mill *On Representative Government* (Everyman, London, 1910) 328.

government can therefore usually force its measures through. Party politics tends to be reflected in the appointment of members, and this in turn can reduce the chamber's usefulness, divisions taking place not on the merit of legislation, as intended, but along party lines. It can also lower the general respect and esteem for the second house, too often seen as no more than a repository for party patronage.

If however the chamber is elected, its members, believing that they also possess a mandate from the people, can become excessively obstructive towards the lower house. A struggle between two elective chambers can develop. Again, party politics usually plays a role, as members of the second house will be elected with party affiliations. If the same party controls both houses, the government's legislation will not be properly checked or limited at all; if a different party controls each house, a situation of obstruction and deadlock may often set in.

It is thus argued that a second chamber generally conforms to one of two extremes — it is either ineffective in checking the government (due to a feeling it lacks a mandate, or due to the government party having a majority in it) or it becomes overly zealous in checking the government (due to a feeling it has an electoral mandate, or due to a non-government party having a majority in it). If ineffective it serves no purpose and is a costly burden upon the state; if zealous or obstructive, it is dangerous and threatens to impede proper government. The Abbé Sièyes' famous albeit somewhat superficial dictum is often cited in this respect: "If the Upper House agrees with the lower, it is superfluous; if it disagrees, it ought to be abolished."[38]

(b) *Practical difficulties*

Second, it is argued that establishing a second chamber which might be workable raises what are fairly well insoluble practical difficulties, in particular with regard to determining its powers and composition.

(c) *Better alternatives*

Third, it is claimed that there exist alternative and better means for securing the benefits which are alleged to accrue from bicameralism: for checking faulty legislation, providing a forum for the discussion of important issues, and limiting government and its tendencies towards despotism. Suggested means include expanding the lower chamber and further strengthening the select committee structure.

(d) *Consequential costs*

In addition to these arguments, it is claimed that second chambers impose several consequential defects upon government. It is argued that slowing down legislation is not necessarily beneficial, but can quite often be an impediment. Bentham regarded delay in legislation as "needless, useless, worse than useless".[39]

38 Quoted in Kunz, supra n.25, 14.
39 Ibid. 5.

A second chamber, especially when nominated, is often said to become conservative and anti-democratic by its very nature, having to safeguard its members' positions and to check a democratically elected chamber. An upper house, it is argued, can dilute government responsibility, by enabling it to blame legislation or the lack thereof on the second chamber. It is also claimed that in a small country a second chamber can clutter up the government machinery, destroying its simplicity and clarity of responsibility, imposing too many politicians upon too small a nation.

Before evaluating the purported costs and benefits of bicameralism and its application to New Zealand, it is perhaps instructive to first examine in greater detail the way in which it has functioned in practice.

IV. THE PRACTICE OF BICAMERALISM

A. The New Zealand Experience

The history of New Zealand's Legislative Council[40] points quite clearly to the problems inherent in a nominated second chamber, and draws attention to the need to resolve these if a similar body were to function effectively. It is also illustrative of New Zealand's constitutional development in general. The Council was established and retained largely because of a somewhat superficial belief in form as opposed to substance. It was disposed of, not so much because it had failed — and of that there was no doubt — but for reasons of pragmatic party politics. Despite an underlying and persistent belief in the benefits of a system of bicameralism, no real attempt was ever made to translate this into a realistic or effective system in practice. New Zealand became unicameral by default, without ever really intending or deciding to do so.

1. *Establishment of the Council*

The New Zealand Constitution Act 1852 (U.K.) provided for a bicameral legislature, the members of the upper chamber to be appointed for life by the Governor. It came to be recognized by constitutional convention that such appointments would be made upon the recommendation of the Prime Minister.

The decision to establish a nominated chamber in New Zealand in 1852 was itself something of a last minute decision. The Colonial Secretary, Earl Grey, had developed considerable doubts about implementing bicameralism in colonies where it was not desired. For this reason he was particularly sceptical of nominated upper chambers, and felt that an elective chamber might be more acceptable. In 1852 his government lost office however, and the new Colonial Secretary, Sir John Pakington, decided to establish a nominated upper chamber in New Zealand. This decision was taken in relative haste, and the new Colonial Secretary essentially stayed with the form of government he knew best — the British model — and attempted to approximate it in New Zealand as nearly as possible. Bicameralism was believed to be necessary to ensure social stability and good government, as it

40 See in particular W. K. Jackson *The New Zealand Legislative Council* (University of Otago Press, Dunedin, 1972).

was thought to have done in Britain. Pakington had witnessed the problems caused by proposals for an elective second chamber in the Cape. He felt a nominated second chamber better accorded to the British model, and would provide some permanence in government, given that members were to be appointed for life. New Zealand and the form of its society received relatively little consideration. Nomineeism was unpopular in the new colony, but was accepted as part and parcel of a fairly liberal constitution.

2. *Functioning of the Council*

The period from 1854 to 1891 quite clearly demonstrated the problems of imposing a nominated chamber outside of Britain. The Council had no clearly defined role. Nor did there exist a natural aristocracy from which to appoint its members. The politically active or talented were not interested in the Council, seeking election instead to the lower chamber with which power rested. For a system of life membership there was a relatively high turnover of personnel, more than one quarter of the Council's members not serving for more than four years. As a nominated chamber, the Council lacked prestige, and when it did oppose the government on a number of issues in the 1870s, was accused of being self-serving. When it did undertake some solid work in the 1860s its failed to capture the attention of either the press or the public. As a result, the Council began to be used primarily for purposes of political patronage. More and more retired and defeated M.P.s were appointed to the Council, further diminishing its prestige.

Two changes made to the Council accelerated this development. In 1862 the limit on the number of Councillors hitherto contained in the Royal Instructions was removed. This meant that no government needed to fear being blocked by the Council. Informal restraints upon swamping an upper house did not exist to the same degree as in Britain. In 1891 the new Liberal Government further reformed the Council by abolishing life tenure and instead substituting seven year appointments which could be renewed. This but served to increase the subservience of Councillors who were now dependent upon the government for reappointment.

> Successive Prime Ministers continued to use the Council for political patronage:[41] The long decline continued and, more and more, New Zealand's Legislative Council became largely a pensioning-off place for party supporters, lacking form or function.

In the period 1891 to 1935, fifty three per cent of all appointees to the Council had previously sat in the lower house, and a further thirty eight per cent had held local government or trade union office.[42]

3. *Limited uses of the Council*

The Legislative Council can be said to have had two very limited uses. Firstly, it did provide a mechanism for rewarding party stalwarts, and removing them from the lower house to make way for new talent. Secondly, at least in its early years, it enabled the government to divert pressure from interest groups by passing bills in the Representatives which it could be sure would be killed off in the

41 Ibid. 69.
42 Ibid. 131.

upper house. Professor Keith Jackson argues[43] that Seddon, whilst publicly supportive of women's suffrage, may have sought its frustration through the Legislative Council. He was certainly outraged when the measure actually passed the upper house:[44]

> There was a tradition in Parliament buildings that on hearing the news, a drunken Seddon vented his rage on the Leader of the Council, seizing him by the throat in the corridors of the house.

4. *Failure of the Council*

More important however was the failure of the Legislative Council to perform any of the main functions of an upper house adequately.

The Council performed best as a revising chamber, but here too it rapidly became ineffective. Over the course of its history it amended some thirty four per cent of all bills initiated by the House of Representatives. This figure fails however to reveal the complete picture. Whereas the Council amended some fifty per cent of all bills in the period 1854 to 1890, by the time of the period 1936 to 1950 this had dropped to a mere nine per cent.[45] Neither succeeding governments nor the House of Representatives ever fully accepted the Council as a revising chamber. Party discipline and the Prime Minister's ability to swamp the Council inhibited it from displaying any real independence. Parliamentary practice meant that the vast majority of bills only came up from the Representatives at the end of each session and were consequently forced through the Council at breakneck speed without adequate consideration.

In terms of initiating legislation the Council performed even more dismally. Fewer and fewer public statutes emanated from the Council over the years. In the period 1911 to 1935 only five per cent of public acts originated in the Council. In the period 1936 to 1950 none did.[46] The government insisted upon introducing its legislation in the House where ministers could personally supervise its progress. Nor was the Council expected to play a role in initiating private legislation, or in dealing with petitions.

Neither press nor public took any real notice of the Council and the standard of its membership meant that it similarly failed to perform the function of a forum for debate.

The Council was signally unsuccessful in limiting government in any way. During the early 1860s and early 1890s the Council did obstruct the government on a number of issues, but only did so to protect the vested interests of its members at that time. A number of the early measures proposed by the Liberal Government were defeated. However, the ability of the Prime Minister to swamp the Council with his own nominees, and the development of party discipline, effectively rendered the Council permanently subservient. In the 1870s the Council had

43 Ibid. 134.
44 Ibid. 135.
45 Ibid. 95 and 239.
46 Ibid. 238.

rejected some twelve per cent of all bills sent up from the House; after 1900 it only rejected two per cent, and after 1932 no bill which had been passed by the Representatives was lost in the upper house.[47]

Given the Legislative Council's all-round failure it is perhaps not surprising that attempts to reform it were made consistently throughout its history. In 1914 an Act was passed to make the Council an elective chamber, but this was suspended during the war and never revived,[48] governments preferring to continue to make use of the Council for patronage.

5. *Abolition of the Council*

Abolition had similarly been proposed for some time, but had never become widely popular nor been taken very seriously, most people continuing to believe in the merits of bicameralism and the status quo, despite its obvious shortcomings upon examination.

In the end it was a conservative rather than an innovatory government which achieved abolition. Sidney Holland, the National Party leader, whilst in opposition, seized upon the upper house as a convenient issue upon which to embarrass the Labour Government. After the 1946 election, Labour's majority had been reduced to four seats. Two government M.P.s were known to favour abolition, others were likely to sympathise. Holland saw abolition as a convenient stick with which to hit a flagging government. The majority of his own party supported bicameralism, but he was able to keep the party united by claiming that he only sought to abolish the upper house "as it was presently constituted". A number of leading bicameralists such as R. M. Algie were brought to rationalize that abolition of a failed house was a necessary precondition for establishing a successful bicameral system in its place. The Labour Government opposed Holland's abolition bills from a desire to retain the Council as a means of patronage and so as not to be seen to concede to the National Party leader. Upon becoming Prime Minister, Holland again proposed the abolition of the Council. The Labour Opposition argued that this should be postponed until either a suitable alternative was found or a decision taken to become a unicameral state. By appointing twenty five new Legislative Councillors, Holland was able to secure the Council's abolition.

The abolition was proposed and carried through essentially for reasons of party politics. The National Opposition sought to embarrass the government and in so doing became committed to the proposal. Labour's opposition also turned upon pragmatic grounds — not giving in to National and retaining a source of patronage. Tight party discipline was maintained on the issue throughout its entire proceedings before Parliament.

What is perhaps most remarkable in retrospect is not so much the role played by party politics and the consequent lack of reasoned discussion of the issues, but rather Holland's ability to keep abolition and unicameralism distinct. The vast

47 Ibid. 111.

48 The Legislative Council Act 1914 was, in the end, indefinitely suspended by the Legislative Council Amendment Act 1920.

majority of his own party and the preponderance of public opinion seemed to favour bicameralism.[49] Yet despite this New Zealand became and has remained a unicameral state. The irony perhaps is that no decision was ever made for New Zealand to become unicameral. It just happened.

6. *Consequences of abolition*

The abolition of the Legislative Council resulted in a sense of unease among many politicians and lawyers. Constitutional arrangements were felt to be too loose and poorly protected. Moves to re-establish bicameralism continued throughout the 1950s, particularly within the National Party. A select committee proposed an upper chamber in 1952,[50] but the details of its particular proposal failed to garner any enthusiastic support and its report was shelved. Professor Jackson argues that continuing pressure for bicameralism and constitutional safeguards was largely responsible for the enactment of the Electoral Act 1956 and its entrenched provisions.[51] In the early 1960s two select committees examined proposals by the Constitutional Society, a pressure group which supported bicameralism and had drawn up plans for a written constitution including a second chamber. The 1964 report of the Constitutional Reform Committee[52] firmly rejected both proposals. The sense of unease with New Zealand's constitutional arrangements has however persisted:[53]

> Hence, if the Legislative Council's moribund existence led to an unhealthy overconfidence in constitutional matters, its abolition . . . contributed directly to a new interest in constitutional improvement and parliamentary efficiency.

B. The British House of Lords

The New Zealand experience quite clearly points to problems which can arise in a nominated upper house where members lack prestige or a sense of purpose, where party discipline prevails, and where the government can quite easily impose its will by swamping the chamber. How then does this compare to the situation in the United Kingdom?

The House of Lords is in part a nominated chamber. Admittedly the bulk of its members are hereditary peers. Since 1958, however, the government of the day has been able to recommend the creation of life peerages.[54] In 1981 this latter category comprised some thirty per cent of the Lords' total membership. Given also that a large proportion of hereditary peers never attend the house, or but seldom, the importance of nominated members is substantially increased. The Lords' powers differ from those of the Legislative Council in that the Lords can

49 Supra n.40, 194. Professor Jackson notes that the majority of newspaper editorials at the time opposed the Legislative Council but were in favour of bicameralism. Eighteen of the major newspapers favoured bicameralism; only four sought a change to unicameralism.

50 Supra n.18.

51 Supra n.40, 202. See also G. A. Wood "New Zealand's Single Chamber Parliament: An Argument for an Impotent Upper House?" (1983) 36 Parliamentary Affairs 334, 337.

52 Supra n.5.

53 Supra n.40, 211.

54 Life Peerages Act 1958 (U.K.).

only delay legislation — money bills for one month, other public bills for one year.[55]

The House of Lords is impaired from functioning as an effective second chamber by a number of factors. Its aristocratic basis is often criticized. To those who favour meritocracy, membership of the legislature by right of birth alone raises immense problems of equity. The Lords are also criticised as tending to be conservative.[56] This impression weakens their public influence. Combined with the fact that they hold no elective mandate, it tends to make the Lords somewhat reluctant to exercise their suspensory powers, especially against a Labour government when they are most likely to be attacked as self-serving. This enables the government to behave high-handedly towards the Lords without too great a fear of electoral repercussion. The Lords also tends to be seen in part as a retirement home for political hacks and ministers no longer capable of running their departments.

A number of the problems faced by the Lords are thus quite similar to those encountered by the Legislative Council. On the whole, however, the Lords presents a much more robust picture. Its members have a much greater confidence in themselves and in the Lords as an institution, than did the Legislative Councillors. Although political patronage has at times been embarrassing, the House of Lords as a whole appears less tarnished than did the Council. The quality of members and speeches in the Lords is high, and a wide range of expertise is displayed on topics debated.

The Lords have in fact been able to perform the functions of an upper chamber to a much greater degree than did the Council in New Zealand. Technical amendments to bills sent up from the Commons are quite regular and are, by and large, readily accepted when remitted to the Commons. The government itself often uses the Lords to make amendments to bills. The Lords has remained reasonably active in initiating legislation. The government will often initiate complex legislation in the Lords where it can be fully considered before going to the Commons. Since 1945 a quarter of all government bills have had their first hearing in the Lords. A wide range of social and penal legislation has originated in the Lords.[57]

The Lords has retained quite a high reputation as a debating forum for important issues. It has not, however, had as much success in following up issues as it could have. Publicity has been one problem faced.

The Lords has been partially successful as a check on government. It has used its delaying power sparingly, but has been quite effective when it has done so, attracting media and public attention and forcing the government to reconsider its stance. In 1969 the Lords rejected a government bill freeing the Home Secre-

55 Parliament Act 1911 (U.K.), as amended by the Parliament Act 1949 (U.K.). These provisions do not apply to an attempt by the Commons to extend the term of Parliament.

56 A criticism which is largely true. The vast majority of hereditary peers are died-in-the-wool Tories; Conservative governments have appointed life peers; even a number of Labour government appointees would appear to become more conservative the longer they sit in the Lords.

57 See e.g. the Sexual Offences Act 1967 (U.K.).

tary from a legal obligation to table the Electoral Boundaries Commission report before Parliament, it being felt the government was seeking to sidestep its duties through a desire to fight the next election on outdated boundaries. Recently, it was able to at least delay moves by the Thatcher Government to abolish the greater metropolitan councils.[58] (The Legislative Council assented to the abolition of provincial government with relatively little fuss.) On the whole the Lords has however been unable to check administration at the more mundane level of its day-to-day activities, not having been able to establish a strong enough committee structure.

All in all, the Lords whilst no perfect or model second chamber, does retain a vitality and coherence that was lacking in the Legislative Council. The House of Lords is in part successful in performing the functions of an upper chamber.

C. The Canadian Senate

The Canadian Senate, like the Legislative Council, has coequal powers with its lower chamber. Its members are appointed until they reach the age of seventy five, by the Governor-General upon the recommendation of the Prime Minister. Generally, the Senate appears to face many of the same problems which beset the Legislative Council.[59] The appointment of senators usually takes the form of patronage, party stalwarts being offered a senate position as a reward at the end of their politically useful lives. The Senate is, as a result, seen to be partisan and lacks prestige. Usually only one government minister is appointed from the Senate,[60] and government bills are seldom introduced there. Overall the Senate has very little respect, power or influence, and is largely ignored. It rarely seems to revise or initiate legislation effectively,[61] to discuss major issues or to check the government. It has obstructed the government on several rare occasions, but lacking a popular mandate or self-confidence, it is, by and large, reluctant to do so. In 1973 it substantially amended a wire-tapping bill, but when the Commons repassed the original measure, the Senate conceded on the issue.

The Senate's committee structure is perhaps its main redeeming feature. Senate committees have been relatively active and useful. Committees have investigated a number of social and political problems.[62] The Banking, Trade and Commerce Committee has had a particularly active tradition, often considering legislation while it is still in the Commons in order to be able to "launch a pre-emptive

58 De Smith, supra n.4, at 305 and 309, notes several other occasions when the Lords has delayed, and even substantially altered, government legislation.

59 See generally Richard Van Loon *The Canadian Political System* (McGraw-Hill Ryerson Ltd., Toronto, 1976). Cf. Kunz, supra n.25, who argues that the Canadian Senate is an effective second chamber.

60 The Government Leader in the Senate.

61 The Senate appears to amend approximately ten per cent of legislation forwarded from the Commons. Kunz, supra n.25, contends the Senate is effective as a revising chamber. Despite this, the Senate almost never rejects a government bill.

62 For example a Senate committee carried out a thorough study of the mass media in 1970-1971.

strike".[63] Its 1979 report on the proposed Bank Act caused the Finance Minister to withdraw the bill from the Commons while the committee's recommendations were considered. The committees have also appropriated a role for themselves in hearing petitions. Whilst the Senate as an institution is largely failing to perform the functions of an upper house, the Senate committees seem much more confident in their roles, and are consequently helping to revise legislation and to check government administration.

D. The Australian Senate

Having considered the problems accruing to nominated second chambers, what can be said of the performance of elective upper houses in a parliamentary as distinct from a presidential system of government?

The Senate in Australia functions primarily along party lines. Party discipline is relatively strict. This has somewhat restricted the Senate's ability to carry out the functions of a second chamber impartially. When controlled by the government party the Senate tends to have a relatively minimal effect as either a revising or limiting chamber. When not able to be controlled by the government (quite often a possibility given the proportional representation system of election to the Senate, which enables small parties unrepresented in the House to obtain seats in the Senate) the Senate at times tends to become an obstruction to government, purely upon party political grounds. The 1975 deadlock between the two houses was but an extreme manifestation of this tendency. The opposition (Liberal Party) controlled Senate refused to grant supply to the Labour Government which controlled the lower house unless elections were called for the House of Representatives, claiming that "reprehensible circumstances" justified this departure from convention. The Senate's stranglehold over supply enabled it to go beyond a situation of limiting government to one in which it could threaten to bring it down.

The Senate's committee system does perform some valuable work. A more comprehensive committee system has been developed since 1967 enabling a number of areas of government administration to be reviewed.[64] The standing committee which examines delegated legislation has been particularly active, establishing a relatively uniform system for evaluating regulations and being quite effective in moderating their use.[65]

E. Upper Chambers in the Australian States

Hugh Emy argues[66] that the upper chambers in the Australian states have signally failed in performing their functions. He claims that they fail as houses of review and lack any developed committee structure to check state administration.

63 See Robert Jackson and Michael Atkinson *The Canadian Legislative System* (2 ed., Macmillan, Toronto, 1980).

64 For example, Senate committees on road safety, family law, and national compensation policies, are argued to have been especially effective. See Graham Maddox *Australian Democracy in Theory and Practice* (Longman Cheshire, Melbourne, 1985).

65 See Palmer, supra n.7, 107.

66 Hugh Emy *The Politics of Australian Democracy* (2 ed., Macmillan, Melbourne, 1978).

In terms of limiting government, he regards that they are, on the whole, quite expressly partisan, and serve generally to support conservative parties and to obstruct Labour state governments. This is in part a result of their composition. The upper chambers of Victoria and Western Australia, for example, retain quite specific rural weighting mechanisms for elections. In 1978 Labour had never held a majority in the upper houses of Victoria, Tasmania, Western or South Australia. Emy notes that the Victoria upper house has consistently obstructed Labour government social and industrial legislation, and points to a similar trend in South Australia.

V. AN EVALUATION OF BICAMERALISM

To revert to the original question posed — could a bicameral system be at all advantageous in the New Zealand political context? Having examined the ways in which bicameralism does and does not work in practice, it becomes necessary to consider what light the practice brings to bear on the theory of bicameralism. In what ways does it support the arguments of the proponents and the detractors of bicameralism? How in the end are the purported benefits and costs of bicameralism to be weighed? As with any evaluation or weighing of the scales, a certain degree of subjectivity is inevitable.

A. The Need for a Second Chamber

Bicameralism is said to perform both a technical function of revising legislation and a substantive function of limiting the government. The first question to be asked is whether either of these functions is already being adequately performed in New Zealand today. Is legislation being adequately revised? Is government adequately checked? If so, there would seem to exist no need for bicameralism.

It can, however, be strongly argued that there does exist a need to better perform these functions. Geoffrey Palmer points to the manifest defects of too much law being passed too quickly in New Zealand recently.[67] Quite often legislation is badly drafted and presented and is almost incomprehensible, he argues. Quite often serious flaws necessitate subsequent amending legislation. The House of Representatives would appear to be seriously overworked both under the present and former governments. A chamber which had the time to revise legislation and to initiate and consider a number of detailed legislative proposals before remitting them to the House, could serve to alleviate some of these problems.

Geoffrey Palmer similarly points to a need for the government to be better checked than it is at present.[68] He points to the executive's dominance over the House of Representatives and argues that government currently has too much power and erosions in individual liberties are consequently threatened.

67 Supra n.7, 77-94.

68 Ibid. 167. Mr Palmer's conclusion in 1979 — that there were insufficient limits on government power — remains true in 1986. See e.g. the White Paper on the bill of rights, supra n.9, 5.

B. The Problems of a Second Chamber

If it is admitted that there does exist a need to better revise legislation and to better limit the government's power in New Zealand, the second question is whether a bicameral system could meet these needs. It is here that the advocates and detractors of bicameralism part company, its proponents claiming that a bicameral system can perform these functions, its opponents arguing that a bicameral system is unable to do so.

This latter group argues that a nominated second chamber is ineffective as it lacks an elective mandate (and is thus reluctant to oppose the government) and is used as a means of political patronage (thus further lowering its prestige and causing it to be dominated by party politics). Both the New Zealand Legislative Council and the Canadian Senate illustrate that this can indeed occur. But the question arises, need this occur? In the British House of Lords, these tendencies, whilst present, are not as marked. The Lords appear more confident in themselves and their role. Could this self-confidence be duplicated elsewhere? The possibility does exist. It is possessed by some of the committees of the Canadian Senate. It is however somewhat more difficult to instil in a nominated chamber as a whole, in particular given the method of appointment to such chambers and the manner in which it is generally exercised, and the lack of strong traditions of independence, such as that which prevails in the Lords.

Detractors of bicameralism argue that an elected chamber is no better as it too becomes dominated by party politics, and for purely partisan reasons will either completely fail to check or will be overassertive in checking the government of the day. The Australian Senate and the upper houses in the various Australian states would appear to evidence this argument. Only with respect to the Senate committees has this partisanship been able to be successfully diminished, and some effective role thus fulfilled.

From the practice of bicameralism examined, it appears that its opponents have the better side of the argument. Nominated second chambers are plagued by a lack of independence and self-confidence, elective second chambers by an overemphasis upon party politics. Nevertheless, at the same time the practice of bicameralism points to the theory possessing distinct possibilities. The traditions of the House of Lords have enabled it to minimize the problems faced by other nominated chambers. The committees of both the Canadian and the Australian senates have also been able to partially sidestep these problems.

The question for the proponent of bicameralism therefore becomes one of whether these possibilities in the theory can be enhanced and the problems in it alleviated.

In response to the question of whether a bicameral system could perform the functions of revising legislation and limiting the government in New Zealand, my answer would therefore have to be "possibly", conditional upon whether a second chamber could be established which was sufficiently independent, self-confident, and sufficiently able to minimize party politics, that it would be enabled to perform these functions credibly and thoroughly.

C. The Viability of a Second Chamber

The third question which thus arises is whether such a chamber could be established. Opponents of bicameralism have argued that attempting to create a workable second chamber raises insoluble practical difficulties.[69]

Alternative second chambers have been proposed for New Zealand upon several occasions. In 1914 it was proposed that forty members be elected to an upper house for a term double that of an ordinary M.P. The upper house could delay money bills for one month and reject other bills.[70] In 1952 the Constitutional Reform Committee[71] proposed that a Senate be established with a delaying power only. Members were to be appointed by the leaders of the political parties represented in the House of Representatives in proportion to their strength in that house. In 1961 the Constitutional Society proposed a mixture of the two systems, twenty senators to be elected by proportional representation, sixteen to be appointed by the same method as proposed in 1952.[72]

All three proposals raise a number of difficulties. Are they however so insoluble that no workable bicameral system could ever be implemented? Following upon the conclusions drawn above, I would test the feasibility of a proposed second chamber by examining to what extent the chamber would be likely to foster independence, self-confidence, and the minimizing of party politics among its members.

The 1952 proposal, in my opinion, would be unlikely to meet these ends. As members of a nominated chamber, legislators are likely to lack confidence in their role or mandate to act. Appointment by political party leaders would render senators dependent upon the party nominating them. The chamber as a whole would not be independent of the government as it would be controlled by the same party or parties controlling the House of Representatives. Party politics would be reinforced, not diminished. Maurice Joel overexaggerates but slightly when he declares that "in all the history of man there can rarely have been proposed an institution so utterly powerless."[73]

In contrast, the 1914 proposal has greater potential. By making the second chamber elective, members are likely to have more confidence in their role. Similarly they are not rendered dependent upon the government for their appointment. Legislators would, however, in all likelihood be elected upon party tickets, and party politics would thus play a considerable role in the chamber. The effect of this could be diminished by providing that an upper house could only delay supply

69 The editorial of *The Dominion,* Wellington, 9 July 1964, goes perhaps to the opposite extreme. It is stated there that "the goal of an effective second chamber must not be lost sight of". Optimistically, it is concluded that: "However elusive a satisfactory formula may be, it should not be beyond the genius of New Zealanders eventually to develop one."

70 Legislative Council Act 1914.

71 Supra n.18.

72 See the report of the Constitutional Reform Committee, supra n.5.

73 Maurice Joel "Plan for a Senate: Report of the Constitutional Reform Committee" (1952) 28 N.Z.L.J. 217.

(thus preventing a crisis similar to that in Australia in 1975) and by providing supplementary mechanisms for the case of a deadlock on the passage of other legislation. (For example, providing for a joint sitting of the two chambers.) Such mechanisms help reduce the potentiality of an overly obstructive chamber as in the Australian examples.[74]

Party politics would still however determine the approach of the upper chamber to most issues. This could be detrimental in that it would render the upper house ineffective as a check upon a lower house controlled by the same party. It also reduces the legislator's independence of thought when revising legislation and seeking to limit the government. Party discipline is, in my opinion, particularly inappropriate for a second chamber. It may arguably be beneficial in the lower house in that it provides a strong government and opposition, enables coherent policies to be pursued, and provides a clear delineation of responsibility to the electorate. The same arguments do not however carry over into an upper house, whose functions are necessarily quite different and distinct from those of a lower chamber. Party discipline stifles the impartiality of judgment and independence of thought which are crucial for a "checks and balances" house.

In order for a second chamber to be effective and workable, to promote independence, self-confidence, and to minimize party politics among its members, several factors require to be considered when it is constituted.

First, the purpose of the upper house should be clearly and specifically spelt out. Its members should be made explicitly aware of its role. It simply was not good enough to have a second chamber just because Mother England had one. The New Zealand Legislative Council was never really recognized as having a specific or defined role in government.

Second, consideration must be given to the powers the second chamber is to possess. The Australian Senate example clearly shows the danger of allowing it to be able to veto supply. For its purposes, a delaying power as possessed by the House of Lords would be sufficient — a delaying power forces government to reconsider its action and provides time for second thoughts and the mustering of public opinion on the issue. Any greater powers possess the commensurate danger that they might only serve to obstruct government. They would be no more effective against a determined dictatorship than would delaying powers. If the upper house were given the power to reject legislation, provision for specific procedures to avoid deadlock, as in the 1914 proposal, similarly help reduce the danger of a second chamber stepping beyond the limitations of its own functions.

Third, it is necessary to make a conscious attempt to reduce the role of party politics in the upper house. Party politics has been reduced by tradition in the Lords, and by convention in the committees of the Canadian and Australian senates. If party politics were to be diminished and kept to a minimum in a New Zealand bicameral system, this would require a conscious decision by the political elite

74 Lees-Smith, supra n.27, stresses the importance of upper houses only having delaying powers.

to do so, recognizing the advantages which would accrue therefrom. Judges in New Zealand are currently appointed in a non-political manner, as are the officers of Parliament, the ombudsmen and the Auditor-General. If a similar convention could be established for appointing members of an upper house, which the government could not swamp, a nominated chamber would succeed.[75] An elective chamber would however be more advantageous, in that it avoids there being any dependence on patrons, which sometimes arises in a nominated house, and provides legislators with a feeling of elective mandate, and consequently a greater self-confidence to act. An elective chamber could similarly realize its possibilities if political parties were to consciously refrain from becomng involved in elections for the upper house or the backing of candidates, and those elected were thus able to regard themselves as independent of party politics.

A quite tremendous act of political will would be required. If this were possible and sustained, it is my opinion that a bicameral system could improve New Zealand's governmental arrangements.

D. Alternatives to a Second Chamber

A fourth and final question does however deserve brief consideration. Some writers have questioned whether, even if a bicameral system could serve to revise legislation and to limit government, there might not be other and more easily attainable means of achieving these ends:[76]

> The sensible and practical thing to do is to improve the existing machinery of parliament, and not to play around with talk of second chambers and various other expedients which are simply playthings for lawyers.

Geoffrey Palmer questions whether the functions bicameralism could perform are "tasks which justify the creation of a second house".[77] He points to alternative methods of performing these functions.

One such method, it is argued, is enlarging the House of Representatives. This could help reduce the workload of members in the House, and could thus provide members with more time to revise legislation thoroughly before it was enacted. The technical aspects of legislation could thereby be improved. Government could also be limited in that Cabinet would be less able to dominate a larger house. Members would have more time to undertake investigations into aspects of government administration, for example through select committees. In addition, a wider pool of talent would be available for Cabinet.

A second method pointed to is the strengthening of the select committee system. This system is already well-established in New Zealand, enabling bills before the House to be considered in detail and amendments to be proposed in a com-

75 Wood, supra n.51, favours the establishment of an upper house which is nominated and lacks power to reject legislation. This, he argues, will prevent it being a threat to the lower house, but will enable it to have an advisory capacity in which it could investigate, criticise and publicise government failings.

76 Mr Keating, New Zealand Parliamentary Debates, Vol. 323, 1960: 1234.

77 Supra n.7, 145.

paratively bipartisan atmosphere. A number of committees have, in addition, examined areas of social and political concern (for example, women's rights and constitutional reform) and some have investigated particular areas of government administration. The present government has, in the last year, taken some steps towards further strengthening the select committee system. It has made the referral of government bills mandatory[78] and has sought to upgrade the staff and clerical assistance available to committees.

A number of other proposals have been put forward to "improve the machinery of parliament". The government, at the lead of the Deputy Prime Minister, Mr Palmer, has made some attempt to rationalize the parliamentary timetable, and new standing orders were brought into force in August 1985.

Improving the machinery of Parliament has in no way been completed however. The government has made a beginning in this direction, but complaints that Parliament is overworked, that government continues to make heavy use of the urgency provisions in standing orders, and that members and select committees lack adequate time to thoroughly review government administration,[79] have by no means abated. Much remains to be done if the House of Representatives is to be reformed.

Once completed, it is argued that such reform will better enable the House to perform the functions of revising legislation and limiting government.

Enlarging the House of Representatives, strengthening the select committee system, and improving parliamentary procedure, are thus alternative means for achieving the same goals as bicameralism. I agree that these proposals deserve priority. The first essential constitutional task is, as Geoffrey Palmer has stated,[80] the reform of the House of Representatives itself, before any superstructures are added to it. The House must be strengthened, its procedure tidied up, its electoral system considered and perhaps reformed, before all else.

In my opinion, this does not however mean that once this is completed, the process of constitutional adjustment should necessarily stop there. If the House were to become better able to revise its own legislation and to act to limit the government, this does not mean that a second chamber would necessarily be redundant. An additional check and balance could further extend the protection afforded the individual citizen and New Zealand society.[81]

There are indeed limits as to how far a reform of the House of Representatives could go. Even if the House were enlarged and its procedure improved, the strength of party discipline in New Zealand is such that the dominance of the executive

78 See Standing Order 209 of the House of Representatives.

79 The lack of time available to select committees arguably evidences a need either to enlarge the House of Representatives or to establish a second chamber of Parliament. For example, it may be questioned whether the new Regulations Review Committee might lack sufficient time to be as effective as the corresponding Australian Senate committee.

80 Supra n.7, 73.

81 The proposed bill of rights is yet another way of seeking to further limit the powers of government.

in the House would in all likelihood continue.

There are limits too upon the strength and independence of select committees. Party discipline remains and is likely to continue to remain a potent force in their operations.[82] Government M.P.s are likely to be hesitant at criticizing their own ministers or revealing too many problems in their departments. Stephen Levine argues[83] that as cabinet and caucus committees have become more important over the past decade, the role of select committees is beginning to decline, making them less influential in affecting the content of legislation or the actions of the executive.

Reform of the House of Representatives and the establishment of a second chamber of Parliament deserve not to be considered as mutually exclusive, but rather as complementary means by which to achieve the same political and constitutional goals.

VI. CONCLUSION

Efforts have been made in recent years, both under the present and former governments,[84] to tidy up and better rationalize New Zealand's constitutional arrangements. In doing so, there seems to have been a general assumption that New Zealand will continue to have a unicameral legislature. It is in keeping with the current revision of New Zealand's unwritten constitution that this assumption should be challenged.

New Zealand never made a conscious decision to move from a bicameral to a unicameral system of government. This happened by default. Like much of New Zealand's constitutional development, fundamental change resulted from what was only intended to be an ad hoc measure.[85] Now is perhaps an opportune time at which to pause and give full consideration to whether unicameralism is in fact best suited to the needs of New Zealand. The Legislative Council certainly failed. But does this mean that no second house could succeed?

Much has been heard in recent years of the unbridled power wielded by Cabinet through a single-chambered legislature.[86] It has been argued that a bill of rights and reform of the House of Representatives might at least place some limits upon an otherwise unfettered parliament. A second chamber has been suggested as another way of achieving the same objective. It is a suggestion that has yet to be properly dealt with.

82 See e.g. Wood, supra n.51, 336.

83 Stephen Levine *The New Zealand Political System* (George Allen and Unwin, Auckland, 1979) 48.

84 See for example the Letters Patent Constituting the Office of Governor-General of New Zealand, S.R. 1983/225, and the Constitution Bill 1986.

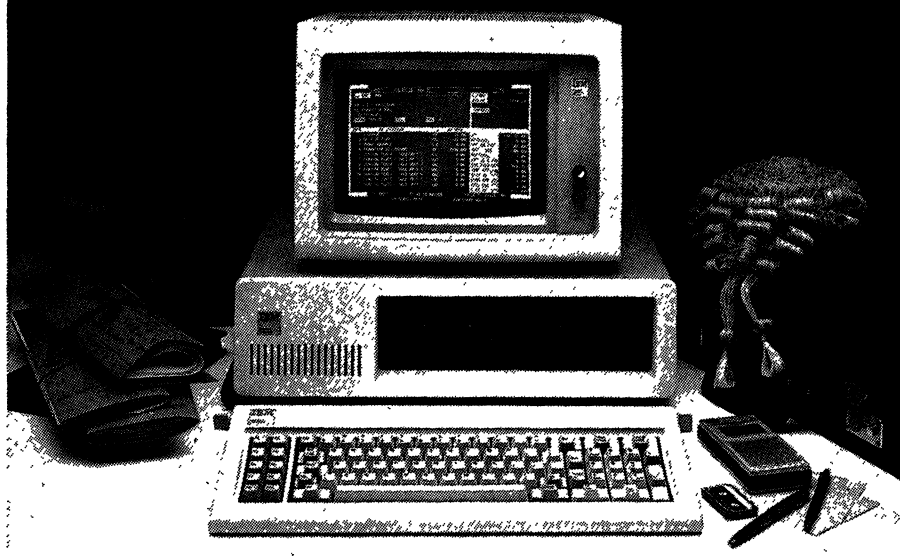
85 Another, and even more scandalous example, is that of Maori representation in Parliament. See e.g. Keith Jackson *New Zealand Politics of Change* (Reed, Wellington, 1973) 67-81.

86 Government power is unbridled in the sense that it is excessive and not adequately controlled, not in the sense that there are no limits whatsoever. There are a number, and they are important. My contention is that they should and can be supplemented. See generally Palmer, supra n.7.

Although bicameralism has remained an issue among those concerned with constitutional arrangements for some considerable time, all too often it has been supported or attacked without any detailed reasoning and without any real consideration as to the needs of New Zealand.

In my opinion, bicameralism could possibly serve as a means of limiting government in New Zealand. It could never become the most important means of doing so — an independent judiciary, a strong opposition, a free media, and an informed public opinion are of much greater consequence. Bicameralism could however serve as *one* means of limiting government. As such, it is deserving of more detailed consideration than it received either in 1852 or in 1950, or indeed has generally received since.

Partner-in-law



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