

Resolving Disputes between the Chambers

Paper to Royal Commission

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Introduction

This paper focuses on the means by which the new second chamber and the House of Commons might reach agreement in the event of disputes over legislation. Although not explicitly in the terms of reference of the Royal Commission, the nature of the relationship between the two houses is likely to be affected by the role, functions and composition of the new chamber. It would therefore appear to be a valid subject for consideration.

Presently the system in the UK for resolving disputes between the House of Commons and House of Lords is largely the use of the 'suspensive veto' specified in the Parliament Acts 1911 and 1949. These provide, in summary, that an ordinary bill which originates in the House of Commons may receive Royal Assent without House of Lords consent if it is passed in two consecutive sessions by the lower house with an interval of at least a year between. There are exceptions to this. In particular 'money bills' (certified by the Speaker) are subject to only one month's delay; bills to extend the life of a parliament, and delegated legislation, are subject to an absolute veto by the House of Lords.

When the composition of the second chamber - and possibly its role and functions - are changed, the dynamic between the two houses is almost certain to change as well. For example, it is widely assumed that if the appointed and hereditary house were replaced by some form of elected house this will result in the second chamber using its powers to the full.¹ Indeed the transitional wholly-appointed house may already choose to use its powers more freely once the hereditary peers are removed. This factor has led some to suggest that the power of the second chamber to amend and delay bills might be reduced, to avoid deadlock. On the other hand it could be argued that a second chamber enjoying more democratic legitimacy should be given increased powers to influence legislation.

Either way the Parliament Act procedure may be seen as a rather blunt instrument for resolving such difficulties. It may be that a more consensual process whereby changes are negotiated between the two chambers could become appropriate as part of the new arrangements. Equally, new dispute resolution procedures might be considered for certain classes of legislation only. These might apply to existing categories of legislation - such as delegated legislation - or to new categories such as constitutional bills.² This might allow a more constructive and flexible procedure than a total veto on such forms of bills.

This paper considers some of the means of resolving disputes which are applied in other countries' parliamentary systems. In doing so it expands on information in the previous briefing to the Commission entitled *The 'Top 20' Second Chambers Overseas*. In total, six distinct methods of resolving differences are considered. However, some are given more

¹ Since 1949 the Parliament Act procedures have only run their full course on two occasions - over the War Crimes Act 1991 and the European Parliamentary Elections Act 1999.

² For a fuller discussion of the possibility of different treatment for constitutional bills see the previous briefing *Guardians of the Constitution and Protectors of Human Rights*.

detailed consideration than others. The suspensive veto, a form of which is currently used in the UK, is discussed relatively briefly for this reason. The endless shuttle, the dissolution of the chambers, joint sittings and referendums are also considered briefly as they are relatively unusual. The joint committee, or 'conference committee', which is in fairly common use in other countries but has no tradition in Britain, is given a more detailed treatment. The paper ends with some short conclusions.

The Suspensive Veto

The form of suspensive veto employed in the UK parliament is described in the introduction. Forms of suspensive veto are relatively common overseas. In all of these systems the lower house ultimately has the 'last word', but the upper house may cause disruption and delay which acts as an incentive for the lower house to accept reasonable amendments. However, on major issues of principle in particular the upper house has no ultimate power to force the lower house to accept its views. Nevertheless the delay caused may enable the press and public to focus on the issue concerned and this on occasion may force a change of heart on the government and lower house.

Suspensive veto systems may operate in a number of ways, with or without a formal time period by which legislation will be delayed. Factors which differ between countries include the following:

- **Specified period of delay**

The UK system whereby the lower house may override the will of the upper house after a specified time, and where a bill - in the case of ordinary legislation - must be reintroduced in a second parliamentary session, is very unusual. Specified delays in other countries more commonly refer to the time within which the upper house must consider a bill. In these cases there is generally no time limit on the consideration of a bill in the lower house, but if the upper house does not reach a position within a set period the bill is deemed to have passed automatically. Once the upper house has spoken the lower house has the right to override their view. Thus this delay period is the upper house's strongest weapon. Examples of this system are Poland, where the upper house has 30 days to review legislation, Belgium, where the upper house has 60 days, Austria, where it has eight weeks, and Ireland where it has 90 days.

- **Number of times the bill shuttles**

Another option is that the delay in consideration of a bill by the upper house is not be defined by a time limit, but simply by the time it takes to come onto the order paper and be considered in the upper house. This form of delay will obviously be amplified if the bill is required to shuttle back and forth between chambers in order to reach agreement. The benefits of such a shuttle is that it enables a form of negotiation to take place between the chambers and is thereby more flexible than simply allowing the lower house to overrule the upper house straight away. For example, the lower house might reject amendments from the upper house the first time the bill returns, but if the upper house insists on its amendments they may be accepted second time around to end the delay. The system applies in Britain where a bill may continue to shuttle between the houses until it ultimately falls at the end of the session. In some other countries the number of shuttles is fixed. In some cases such as France, where the bill shuttles three times, this procedure is coupled with a joint committee procedure.

- **Qualified majority in lower house**

A suspensive veto procedure may include the requirement of a qualified majority (eg. absolute majority, 2/3 or 3/4) in the lower house to override the upper house. This

applies in Japan, for example, where a 2/3 majority of the lower house may overrule amendments or rejection by the upper house. In Spain the qualified majority is linked to a further form of delay. An absolute majority of the lower house may overrule the upper house straight away, or after two months such a decision may be taken on a simple majority (ie. a majority of those voting) alone.

The Endless Shuttle

Whilst in some countries a bill will shuttle a specified number of times between the houses, or shuttle for a specified period, in others it may shuttle indefinitely with no means of resolving the dispute. This situation is quite unusual, and has little to recommend it. The most obvious example of the system is Italy. Here there is also no rule requiring a bill to fall at the end of a parliamentary session. Hence the shuttle may potentially continue for many years and the only solution is for the sponsor of the bill to withdraw it, or for the members of the houses to somehow finally agree. The latter solution does occur - for example a bill amending the law on rape was agreed in 1995 having shuttled for 17 years.

Dissolution of the Chambers

Another possible solution to disagreement is to dissolve both houses of parliament and call an election. That way the political control of the chambers may change, and it may be possible to pass the bill. The key example of this procedure is Australia. Here both chambers are directly elected, with members of the upper house serving six year terms whilst members of the lower house serve for three years. Normally half the Senate is elected at the same time as members of the lower house at a general election. However, in the case of a dispute both chambers may be dissolved and re-elected in full. This depends on certain conditions being met - the main one being that the legislation must be rejected twice by the Senate, after which three months must elapse before it is agreed again in the lower house and rejected again by the Senate. At this point the Prime Minister may request that the Governor General dissolve both chambers and call elections. After such elections if the Senate continues to block the legislation the final decision may be taken by a joint sitting, where lower house members outnumber Senators by two to one, so the legislation is likely to pass.

Such drastic action - which in the last resort could also be tried in Italy in order to resolve a dispute - has serious political consequences. It of course entails the cost and upheaval of an election, which the public may not welcome and which might damage the governing party and even cost them their majority. In Australia the stakes are raised by the fact that dissolving the Senate - and thus electing double the normal number of Senators - creates a more proportional result where the government is even less likely to be able to get future bills through the Senate. Nevertheless Australian governments have resorted to double dissolutions six times this century, the most recent being in 1987. In the cases where the same government has been returned, the Senate has tended to accept that it should now pass the bill/s concerned. In only one case has a joint sitting been necessary.

Referendum

The Clerk of the Australian Senate, Harry Evans, has recently suggested that the controversial double dissolution procedure be replaced by a referendum to resolve the matter of dispute.³ Thus the ultimate arbiter on the controversial bill would be the people. Such a system ought to be self-regulating as neither the government or the upper house

³ *The Bulletin*, 23 February 1999.

would want to risk aggravating the public with frequent referendums on unimportant matters. However, it would carry this potential risk.

In other countries the referendum may be used as a last resort procedure in the event of a disagreement. For example in Ireland, where the upper house has few powers to challenge the lower house (see above), a majority of Senators has the right to petition the President for a referendum on a bill of 'national importance' which has been passed against their will. However, this power has never been used. In several countries, including Italy and Spain, there is a procedure allowing parliament to initiate a referendum on constitutional bills where these have not gained a certain level of support.

Joint Session

As mentioned above, the double dissolution procedure in Australia may be coupled with a joint sitting of both houses to resolve a dispute. In other cases this process may be used alone. Such a sitting may offer the first opportunity for members of the two houses to engage together in a discussion on the merits of the bill. The key example of the use of this procedure is India. Here a joint session may be called if the houses disagree on a bill, or if the upper house has failed to pass a bill within six months. The decision in the joint sitting is by a simple majority. As in Australia - and in most other states except the UK - a joint sitting will tend to favour the lower house, as its members are more numerous.

Joint Committee

The use of a joint committee to resolve a dispute between the chambers - like a joint session - allows members of the two houses to engage directly in a discussion with each other over the bill, and potentially iron out difficulties. Taking this discussion off the floor of the house is likely to create a more constructive and less confrontational atmosphere in which to negotiate. Such committees are in common use overseas, sometimes for all legislation and sometimes for certain categories of legislation only. Examples of countries using joint committees (also often known as 'conference committees') are France, Germany, Japan, Russia, South Africa and USA.

The success of the joint committee in achieving genuine negotiation is, however, varied. The examples of France and Germany help to illustrate this fact.

- In **France** the joint committee is used to negotiate agreement on all bills apart from constitutional bills.⁴ A bill will have been considered three times by each chamber before the committee is called, or twice if it has been classified as 'urgent'. The committee is charged with devising a compromise position, which is then voted on by both chambers. However, if the chambers cannot agree the lower house has the last word. In the early years of the current parliamentary system the use of the joint committee was relatively rare, and the committee was expected to reach compromise which would be accepted. However, as time has gone on the joint committee has become an increasingly common part of the legislative process - for example in 1988-92 it was called on 39% of bills. It is also increasingly common for the committee to disagree, or for the last word to go to the lower house. In this same period the lower house had the last word on 18% of bills. In many cases the committee will meet for only a few minutes, agree to disagree and refer the matter to the lower house for decision. It is clear that the respect given to the joint committee, and the stigma attached to giving the lower house the last word, have

⁴ Constitutional bills and 'organic' bills are subject to agreement by both houses with a potentially endless shuttle.

disappeared. The committee is increasingly just an obstacle in what is effectively a suspensive veto system.

- In **Germany** a committee may be called on any bill where the houses disagree, and in practice is called on around 10% of bills. There are two main classes of legislation in Germany - that on which the upper house has a veto (affecting the jurisdiction of the states) and that where it does not. Thus the influence of the joint committee is different depending on the type of legislation. Once agreement is reached in the committee it is put to both chambers. In the case of ordinary legislation the lower house has the last word, but in the case of veto legislation both houses must agree the compromise position or the bill dies. In the German case the committee has retained its respect, with most committee decisions felt to include an element of genuine compromise.

There are many different variables in the design of joint committees to resolve disputes, and these factors help to determine their success. Some of these factors are considered in further detail below, with particular reference to the German, French and US systems.

- **Who can call the committee?**

The first indication of control over the conciliation process is who has the right to call the committee. In France this right lies with the government. A bill could continue to shuttle, but the government has the right to call the committee if it has done so the requisite number of times. Members of both houses must then co-operate in forming the committee. In the US the initiative is purely parliamentary - either chamber may call the committee. A bill may shuttle indefinitely until this happens. If one chamber requests the committee the other must consider the request and decide if it wants to consent. In Germany the power to call the committee is shared. The request will generally come from the upper house if they receive a draft bill they are unhappy with. However, it may also be made by the lower house or government in response to an upper house veto. Whoever requests the committee all parties are bound to co-operate.

- **Who are the members?**

In most cases a joint committee will be comprised of an equal number of members from each house. In France the committee comprises seven members from each house and in Germany 16 members from each house. In the US the number of members is not fixed, due to the decision making process of the committee (see below). The committee will normally be composed of members in proportion to party groups. This is the case for both chambers in France and for the lower house in Germany. However, the German upper house - which is comprised of members of state governments - is represented on the committee by one member from each of the 16 states. This will be a senior member of the state government. In the US the Speaker of each chamber is required to pick members so that a majority support the chamber's position on the bill. This need not be proportionate (again for reasons below). In the US and France the members of the joint committee will be members of the specialist committee which considered the bill during its passage. In the US they must be senior members of the committee - giving the committee gravitas and brokering power - but in France this need not be the case.

- **Temporary or permanent membership?**

The committee in Germany is not taken from specialist committees for each bill, but is a permanent committee set up at the start of each parliamentary session. This has the disadvantage that members may not be familiar with the bill's technicalities. However, it has the advantage that members of the committee - like those of other permanent committees - can develop relationships of trust and co-operation which are less likely on

ad-hoc committees. In Germany and the US the members of the committee are senior figures and in both cases this leads to the committee being dubbed the 'third chamber'. Such a view is notably lacking in the case of the French committee.

- **What can the committee discuss?**

The committee may be more or less restricted in the issues which it can discuss on the bill. In France and the US it is limited to the specific clauses of the bill which are in dispute. However, in Germany the committee is restricted only to the matters which are specified in the motion to convene it. These may be limited to the disputed clauses, or may be more general. This system has the advantage that it allows more scope for trading between different groups on the committee over amendments. The disadvantage is that it can breed resentment amongst other parliamentarians if issues which they believed were resolved are reopened and changed.⁵

- **How is the committee decision taken?**

Critical to the outcome of the committee deliberations are both the political balance of the committee and the means by which it reaches its decision. In both Germany and France the decision will be a majority vote of committee members. On pure party political grounds this would often tend to result in deadlock. Given that the government controlled lower house has the last word, this helps to explain why the French committee often results in failure. In Germany the arithmetic may not be so simple. In the joint committee the states have one representative each, but in the upper chamber states have different numbers of votes. Therefore the party balance of the representatives on the committee may be different from that of the chamber, and the committee will have to consider this. This is compounded by the fact that upper house members on the committee will tend to represent coalition governments from their states so voting patterns on the committee may vary on different issues. Another important aspect of the German committee is that it meets in private, with voting records not released until two parliamentary terms have elapsed. This enables members to behave more flexibly.

In the US a completely different system of decision making applies. Here the groups representing the two houses vote as two blocks with one vote each, meaning agreement depends on a majority amongst the representatives of each house. Where the houses are controlled by different majorities any agreement is thus a genuine compromise between the groups. It is interesting that the US committee, unlike the German one, meets in public. However, the negotiation preceding an agreement tends to take place in private pre-meetings.

- **Can committee proposals be amended?**

In order to maintain the integrity of the committee's proposals they can generally not be amended when they are discussed in either house. This is the case in France and the US and is usually the case in Germany, although the joint committee may decide otherwise if it wishes, on a case by case basis. In France, although the chambers may not amend the proposal of the committee the government can. If the committee proposes a solution the government is unhappy with, this is likely to be rejected in favour of the original bill, which will then be accepted by the lower house. This further undermines the status and

⁵ The scope of the committee to discuss additional issues was tested to the limits in the 1980s, when an agreement reached in the joint committee included the addition of a totally new clause on an issue not previously covered by the bill. This led to much controversy, and the decision was referred to the Constitutional Court who ruled in 1986 that the committee's action be upheld but that it was 'close to the limit of the legally acceptable'.

respect of the committee.

- **Who has the last word?**

As is seen from the French case, a crucial factor in the success of the committee is the status of their proposals at the end of the process. Because the lower house can ultimately decide, there is little incentive for representatives of the governing party to co-operate or compromise. The opposite tensions are in operation in the US and German cases. In the US all legislation must be agreed by both houses, and the outcome of the joint committee is subject to the same rule. If there is failure to agree this can only result in the death of the bill or in another committee being called. In Germany the process has a more clearly defined end point. In the case of a bill where the upper house has a veto, once the committee has been called once by the upper house and once by the government or lower house, its recommendations must be accepted or the bill dies. This creates a powerful incentive for members of the government side to compromise in committee. It is notable that on other bills, where the upper house could be overruled, the committee still tends to compromise (though to a lesser degree). Remembering that this is a permanent committee, this seems quite natural. After all if government were unco-operative on these matters this could simply fuel opposition on those bills where it badly need the other side to be reasonable.

Conclusion

The examples in this paper show that there are numerous ways in which disputes between the chamber in a bicameral system may be settled.

Suspensive veto systems are in fairly common use, although their exact design varies considerably. In general the use of suspensive veto alone - with no other system of dispute resolution - is a hallmark of a relatively weak chamber. In essence it means that the lower chamber can always override the wishes of the upper chamber, and in practice this generally means that a government-dominated chamber has the last word. Where such a system does apply there are merits in both a specified number of shuttles between the chambers and a relatively long period of delay. The former allows for negotiation to take place between the chambers as the bill shuttles back and forth. The latter - which may also allow for such a shuttle to take place - provides both an incentive for government to win the support of the upper house and an opportunity for reflection by external groups on the bill which may result in pressure on government to modify it. Seen in this context the system in the UK is a relatively good one. If the hand of the upper house were to be strengthened within this system the time limit could be extended, or the delay could be coupled with a qualified majority of the lower house required to override the upper house. This system is fairly common overseas.

In several countries which have stronger second chambers other systems apply. If the lower chamber cannot overrule the upper chamber this may result in an endless shuttle of bills. Whilst a shuttle in general provides an opportunity for negotiation, an endless shuttle may simply result in neither side ever backing down. In countries where the upper chamber can be dissolved, the last resort solution may be to call an election. An alternative solution - which seems particularly appropriate when applied to constitutional bills - is to put the disputed measure to a referendum unless it wins sufficient support in both chambers.

A compromise position between simple suspensive veto and equal powers for the upper house is the joint committee. This may create a more flexible and consensual environment for resolving disputes. However, the examples in this paper show that such a system must be carefully designed. One key danger is that the committee simply becomes a miniature

chamber, where the party which can garner a majority gets its way. Another is that if the lower house can reject the committee's proposals and get the last word, the committee process may be seen as pointless. There appear to be benefits in the US system of requiring the representatives of each chamber to vote as blocks. Equally the German system where the committee has a permanent membership of senior figures has much to recommend it. In general it seems crucial that such a system is designed to promote genuine compromise between different parties and between the two chambers.