


Tarun Khaitan: An Elected Second Chamber? Some Thoughts on the Brown Report

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One of the key recommendations of the Brown Commission is to replace the House of Lords with an elected second chamber called the Assembly of the Nations and Regions. The proposal has stimulated a broad debate. A key intervention in the debate was by the Speaker of the Commons, Lindsay Hoyle, who has argued against replacing the House of Lords with a second elected chamber because—he claims—doing so would threaten the supremacy of the Commons. In this post, I will draw upon my paper in defence of ‘moderated parliamentarism’ to argue that—if done right—this might be a welcome reform that could combine the benefits of creating a system that checks executive power better, but without being prone to US-style legislative deadlocks and governmental dysfunction. I will argue that a properly designed elected second chamber could make the quality of British democracy better, especially by doing a better job of holding the executive to account and improving the quality of legislation. To the extent that the details for this reform in the Brown Report are sketchy, and not exactly thought through, the objective of this blogpost is to provide a relatively more detailed proposal—if only to explain what is at stake and what kinds of questions need to be discussed and answered.



Whether or not readers agree with the precise proposal made here, the main take home point is that the nature of the second chamber is deeply connected not only with the overall scheme of separation of powers but also the nature of the party system one has and would like to have in the UK. Just as the devolution settlements significantly federalised the UK party system by giving access to considerable political power to national parties, the nature and scope of the upper house reform is likely to have meaningful impact on British politics, the party system, and the nature of British democracy. Anticipating at least some of the likely consequences of different models, based on comparative and theoretical constitutional studies literature, could make the current debate less parochial and more informed.

The general case for bicameralism

The general normative defence of bicameralism (for example, by Waldron) rests on its design being *incongruent*: i.e. where the two houses are structured such that their respective partisan make-up does not mirror the other's. There are many ways in which an incongruent second chamber can be designed, including through a system of appointments (as is largely the case with the House of Lords) or through direct or indirect elections. A bicameral system where both chambers are directly elected by the people is

hardly a novel proposal for constitutional design. Although more common in presidential systems such as the United States, two directly elected chambers have existed in parliamentary systems too, including in Japan, and in the federal and several provincial governments of Australia. In fact, two elected legislative chambers in a parliamentary system has recently been identified by Ganghof as a distinct form of separation of powers, viz *semi-parliamentarism*. Unlike semi-presidentialism, which splits the higher executive into a president and a prime minister, semi-parliamentarism insists on a split between the legislature into (at least) two directly-elected chambers. The following table explains how semi-parliamentarism sits with the other models of organising representative government (i.e. presidentialism, parliamentarism, and two versions of semi-presidentialism):

		Political Executive: United or Divided	Legislature: Unicameral or <u>Multicameral</u>	Who can fire the premier?
Presidentialism		United	Either	No premier exists
Parliamentarism		United	Either	Legislature (or part thereof)
Semi-presidentialism	Premier-presidentialism	Divided	Either	Legislature (or part thereof)
	President-parliamentarism	Divided	Either	President and Legislature (or part thereof)
Semi-parliamentarism		United	Bicameral	One (of two) legislative chambers

The case for semi-parliamentarism

Ganghof's main argument in favour of semi-parliamentary systems is that they combine the benefits of effective, big-tent, government (typical of parliamentary systems) with a meaningful accountability mechanism in an upper chamber independent of the government (akin to presidentialism). It also overcomes the accountability deficit in parliamentary systems with an absent or an insufficiently effective (because either unelected or congruent) second chamber, as well as the risk of executive personalism and dysfunction under presidential and semi-presidential systems. A semi-parliamentary system can also optimise the zero-sum benefits of a majoritarian electoral system and a proportional electoral system by constituting its two different chambers on some version of these systems respectively.

Before we move on, it is important to note that constitutional lawyers tend to obsess about institutional separation of powers, without considering the kind of party system it is likely to generate (i.e. how many parties, degree of ideological distance between main parties, factional or holistic parties and so on), and how the party system is likely to scramble institutional design (for example, US government works in entirely different modes depending on whether the Congress and the Presidency are controlled by the

same party or different parties). This relationship between state institutions and party systems is co-constitutive, and is mediated by the choice of electoral system, which is established by choices along four key dimensions:

1. the district magnitude (single-member, multi-member, or at large);
2. the object(s) of voter choice (candidate, party, or both);
3. the ballot structure (unranked or ranked); and
4. the electoral schedule (simultaneous or asynchronous, staggered or wholesale).

Choices in relation to all of these features interact in very complex ways with institutional structures, and one ought not to be examined in ignorance of or indifference to the other.

In defence of moderated parliamentarism

Placing institutional design issues alongside electoral system choice, I have made a theoretical case in [this paper](#) for an Australia-inspired model of semi-parliamentarism, viz *moderated parliamentarism*. It argues in favour of an asynchronous (i.e. elected for different terms), staggered, incongruous, proportionally-elected second chamber with broadly co-equal legislative powers with the function of checking the executive government and of making appointments to constitutional offices. Such a chamber could optimally complement a first (confidence and opposition) chamber, whose members are elected from territorial constituencies through a moderated majoritarian electoral system with a ranked-choice ballot (i.e. a ballot in which voters are allowed/required to rank their top two or three/all candidates in their order of preference). The ranked-choice/alternative vote system is moderated because the individual ballot requires parties vying for executive office to build broad coalitions and convince voters of other parties to at least tolerate them by ranking them second on their ballots; polarising ‘marmite’ parties tend to be a voter’s first or last choice, and will therefore not get into the first confidence chamber. The proportionally-elected upper chamber is also moderated by a high entry threshold.

Under moderated parliamentarism, the two chambers have broadly equal legislative powers (i.e. it is a system of *symmetric* bicameralism). Except confidence and supply, the upper chamber has the same legislative powers as the lower one. This is key to ensuring that the checks that the upper chamber imposes on the executive’s legislative agenda have bite. There is a robust deadlock resolution mechanism involving highly effective [German-type](#) joint conference committees, to obviate the risk of dysfunction that may arise because of the symmetric allocation of legislative powers. While the precise formula for deadlock resolution can vary, it is important that first, there is a deadlock resolution formula to avoid US-style dysfunction, and second, that the formula does not have an in-built bias in favour of the status quo.

Moderated parliamentarism marries institutional design ideas with insights on what makes a party system healthy for democracy. Political parties are essential to representative democracy because they lower four key democratic costs and keep them manageable (i.e. the citizen’s participation cost, the voter’s information cost, policy packaging cost, and ally prediction cost—see paper linked later in this para for detailed explanations). As

hybrid public-private institutions, political parties occupy an unstable regulatory zone in liberal constitutionalism. The latter tends to prefer a binary distinction between rights-holding private actors and the duty-bearing public institutions, and therefore ends up either regulating parties as if they were entirely public entities (as in Germany or South Africa) or more or less private bodies (something like in the UK)—both approaches miss the essential hybridity of parties. The argument in favour of moderated parliamentarism is that it combines the benefits of different regime types and electoral systems in a way that optimizes four key constitutional principles in relation to political parties:

- it protects the *purposive autonomy* of parties, which recognises their privateness by allowing them considerable autonomy and lowering the political costs of setting up new parties, but also regulates them (preferably through second order *indirect* regulation) to optimise their quintessentially public purpose of temporarily accessing a share in political power in periodic competitive elections;
- it serves the *party system optimality principle* by making it more likely that every salient voter type will have a party to represent it (and, therefore, not become an unspent political force, perhaps like UKIP did in the lead up to the Brexit referendum), but also distinguishes between governance parties (which are likely to dominate the confidence and opposition chamber) and influence parties (which will have a voice in the checking and appointing chamber);
- it aids the *party-state separation principle* by giving significant checking powers to smaller parties in the checking chamber, in turn organised in a manner that no single party is likely to dominate it; and
- it promotes the *anti-faction principle* by distinguishing between smaller influence parties that are polarizing marmite-like factions (such as the BNP or UKIP) from those—like the Greens—that are not factional (by allowing only the latter to trade their second choice votes with larger parties for policy concessions: for examples, it allows the Greens to advise their voters to put Labour as their second choice if Labour promises a key environmental policy in their manifesto).

A chamber for nations and regions

Moderated parliamentarism can easily be customised for a federal/multi-layered governmental system such that the upper chamber can also double up as a chamber for the regions and nations. In the context of the UK—given the dominance of a single nation—a strong overweighing of Scottish, Welsh, and Northern Irish representation (without necessarily making their representation equal to that of England) would be essential. Many second chambers that were designed to play the role of a chamber for regions have failed in *this* task because of strong party discipline (such as in [Brazil](#)). The UK, however, has witnessed an increasingly federal party system, with the rise of nation-specific parties in Scotland, Wales and Northern Ireland. Given this reality, the prospects of a second chamber doubling up as a chamber for the regions and nations are not hopeless.

Preserving the supremacy of the Commons

I will finally respond to Hoyle's main criticism, that a directly elected second chamber would challenge the supremacy of the Commons. Supremacy can, of course, mean legal or political supremacy. Despite the symmetry of moderated parliamentarism, the lower chamber is legally 'superior' because, despite co-equal legislative powers, it alone elects a government and can remove it from office by withholding supply (i.e. money) or confidence. This also makes it politically superior. However, one may ask, if both houses are elected, how can we ensure that the upper house will not compete with the lower house for democratic legitimacy and therefore seek a *de facto* increase in its powers?

First, asynchronous and staggered elections under moderated parliamentarism can be designed so as to ensure that the lower confidence chamber would always have the most recent mandate, thus justifying its superior claim to representation. Note that this design proposal is at considerable variance with the Brown Report, which seeks to ensure the primacy of the Commons by denying equal legislative powers to the new second chamber (indeed, it would seemingly have even weaker legislative powers in relation to the Commons than the currently appointed House of Lords has). This legislative weakening of the second chamber precisely when it will supposedly have greater democratic legitimacy is not only ironic, it is also unnecessary.

Second, the design of the second chamber is such that it will mainly invite politicians who do not have front-bench aspirations. Its proportional character is likely to populate it with smaller influence parties, who may be persuaded by the government or the main opposition party to supply or withhold support for particular legislative proposals on an issue-by-issue basis: this is likely to result in a membership that primarily sees its role as checking the government and improving public policy rather than being in government. Longer terms for the members can also help secure this. Further tweaks can reduce the political ambitions of the members of the upper house even more: for example, there can be a requirement of a cooling off period of a given period (say five years) before a member of one chamber is permitted to stand for an election to the other. This may also encourage at least the larger parties to nominate candidates to the upper house from walks of life other than politics, ensuring that the relative professional diversity we see in the House of Lords is preserved.

Needless to say, the proposals outlined above diverge significantly from the (relatively sparse) details the Brown Report gives for how it imagines the second chamber. Be that as it may, if designed properly, a fully elected second chamber has the potential to significantly improve the democratic deficit in the House of Lords (which has—on the whole—done a stellar job of holding the government to account and improving the quality of legislation in the last two decades, albeit not as effectively as it could were it an elected chamber), while preserving the exclusive competence of the Commons to supply confidence to the Government of the day. The proposals outlined here are not meant as *recommendations*—that would require broad political consultation and a much deeper study of the British context. Yet, I hope, they make some of the risks and the possibilities clearer.

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