

# Unit 4

## Legal Basis of Parliament

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### Overview

This unit examines the legal/constitutional basis of a parliament in a given jurisdiction, its composition, functions and relationships with other legislative assemblies. The last unit raised two issues with regard to the legal basis of parliament, specifically the impact a written constitution has on parliamentary authority and the number of chambers that comprise a parliament. In this unit we will examine these issues in more detail and also look at the functions of parliaments and the relationship of parliament to other legislatures in the same country.

### Learning Objectives

After you have completed this unit you should be able to achieve the following:

1. Discuss the role and significance of constitutional conventions and written constitutions.
2. Outline the role of the upper house in bicameral legislatures.
3. List the basic functions of legislatures.
4. Describe the relationships between legislatures in a single state.

### Commentary

#### Constitutional Conventions and Written Constitutions

As discussed above the presence of a written constitution dramatically affects the way a parliament acts. Constitutions can provide 'roadmaps' to explain where power lies in a particular system and to outline structures of government and the role of various actors. The Westminster model contains none of these features as Britain does not have a written constitution. The only written outline of institutions and actors is in various Acts of Parliament. This is, of course, the essence of parliamentary sovereignty, or as some prefer, parliamentary supremacy. With the British model the 'constitution' is based on precedents or what are termed 'conventions.' Conventions resemble British Common Law in that they are based on past practise and experience rather than legislation. Courts cannot enforce

conventions although they can identify whether a convention has been violated.

Many of the important elements of the Westminster model are based on conventions, such as the notion that a prime minister should be a member of parliament, that the Crown should call on the leader of the party with the most seats in the Commons to form a government and that a government should resign when it loses a vote of confidence in the Commons. These traditions have developed as Britain's parliament has evolved.

An unwritten constitution based on conventions has the advantage of being extremely adaptable or flexible. Since it is unwritten, it can be changed easily to deal with new situations. All that is necessary for the practices to be changed is for Parliament to agree that change is necessary. Old constitutional practices do not become 'millstones' that make it difficult to deal with changed circumstances.

This advantage also carries risks. If a constitution is to place limits on government or to set out the parameters within which governments must operate, then the fact that it can be adapted by government whim can be problematic. Earlier we noted Bagehot's warning words about parliamentary sovereignty, that on any matter "a new House of Commons can despotically and finally resolve." For example, some of the actions of the Thatcher government in the United Kingdom in the 1980s illustrate this principle. Among its actions in its efforts to deal with the Irish Republican Army (IRA) were modifications to the presumption of innocence and the right to remain silent when accused of criminal activity. These changes, implemented simply by parliamentary decision, may have made it easier for the government to deal with the problems of terrorism, but the price was a weakening of what many believed to be the basic rights of British subjects.

As we discussed above, the Canadian parliamentary tradition has moved sharply away from notions of parliamentary sovereignty or supremacy with a written constitution and judicial review. However, despite the existence of a written constitution, important actors like the prime minister and the cabinet remain based on unwritten conventions. This is not the case in every system that combines a written constitution and a parliamentary system. In Barbados, for instance, the constitution explicitly states that the prime minister will be the person who is best able "to command the confidence of a majority of the members of" the lower house. It gives the head of state the written authority to remove from office a prime minister who does not resign following a vote of non-confidence (Kurian, 1998: 50-51).

The ability of the Canadian Parliament to make final and binding decisions has been sharply reduced by the constitutional amendments of 1982. The role of Parliament versus that of the Court has subsequently become quite controversial in Canada, as courts have demonstrated a willingness to set aside parliamentary legislation they believe infringes on written (and to a degree unwritten) constitutional rights.

Critics of this new situation argue that courts should only interpret laws, not make them, and that it is dangerous to have such heavy responsibilities in the hands of un-elected judges rather than elected parliamentarians. Ontario Justice Rosalie Abella made one of the strongest defences of the changed role for the court. As she explains, the judiciary:

... is accountable less to the public's opinions and more to the public interest. It discharges that accountability by being principled, independent and impartial. Of all the public institutions responsible for delivering justice, the judiciary is the only one for whom justice is the exclusive mandate. This means that while legislatures respond of necessity to the urgings of the public... judges, on the other hand, serve only justice.

This position quite clearly illustrates the changed role of parliament and the judiciary created by a written constitution. It also indicates that parliament's definitive ability to make laws can disappear, with its both positive and negative consequences.

## Upper Houses

Another key feature with respect to the legal nature of parliament relates to the number of Chambers that make up Parliament. As indicated earlier, the Westminster model provides a bicameral legislature, but other parliaments have dispensed with the second chamber.

The British second chamber has historically been based on inherited position, leavened with a selection of 'life peers', who are individuals appointed to the House of Lords for the duration of their lives. In the future this chamber will likely be composed solely of these life members. The reform of the House of Lords Act of 1999 reduced the number of hereditary peers to 92. A number of other Commonwealth parliaments have upper chambers; among them Canada, The Bahamas, Barbados, Jamaica, Australia, South Africa, and India.

- In Canada the upper house, or Senate, is composed entirely of individuals appointed by the Governor General on the advice of the sitting Prime Minister, who hold their position until the age of 75.
- In many Caribbean systems, some appointments to the Upper House are made on the advice of the Prime Minister, while other members of the Upper House are nominated by the major opposition party. In The Bahamas, half plus 1 of the Senate seats are appointed by the Governor General on the advice of the prime minister; the remainder are made on the advice of the Leader of the Opposition and by the Prime Minister in consultation with the Leader of the Opposition.
- In India the Council of States or Rajya Sabha is largely composed of members chosen by the elected members of the state and territorial assemblies.
- In Australia the Senate is elected directly by the people.

In most countries with a bicameral parliament, the approval of both chambers is necessary for ordinary legislation to become law. In Britain, as we have seen, the House of Lords has only a veto to suspend and in the end cannot prevent decisions made by the House of Commons from going to the head of state for assent. The House of Lords was originally more powerful than the Commons, but, over time, had its powers reduced as a result of a number of factors as previously discussed. The corresponding reduction of the power of the second chamber has ensured Commons domination of Parliament. The House of Lords retains some influence. It revises or initiates legislation, scrutinizes government activities through oral and written

questions and debate, provides a forum of independent expertise, and acts as a final Court of Appeal. Birch has shown that on a number of occasions between 1969 and 1985, the chamber either rejected or modified a number of Commons bills it saw as “excessively doctrinaire” (1986: 53). He goes on to maintain that the House of Lords exerts “a moderating influence” and “works reasonably well and is reasonably popular” (1986: 54).

Similarly, in Barbados the Senate possesses only a suspensive veto. If the Lower House approves a bill in two successive parliamentary sessions, it can be forwarded to the head of state without the support of the Senate. In Jamaica, the Lower House can overcome Senate opposition on non-constitutional matters by passing a bill three times by an absolute majority of members. A joint sitting of both houses can overcome an impasse between the two houses of the Indian parliament. In such a sitting, the Lower House has a substantial numeric superiority.

The Canadian Senate was to some extent modelled on the House of Lords and was intended to act as a chamber of sober second thought. It would be free to introduce all non-money bills and its approval was required for all legislation. This power was entrenched in the 1867 constitution, which prevented future governments from bullying the Senate into reductions in its role. The Senate in 1981 voluntarily approved a constitutional amendment taking away its power to prevent future constitutional changes including the revision or elimination of the chamber itself. While prime ministerial appointments have undermined the public credibility of the Senate, the Senate continues to make a meaningful contribution to the work of parliament. This is evident in the fact that the House of Commons usually accepts the amendments proposed by the Senate.

Canada currently has no legal restrictions on access to abortion, a situation created when the Senate failed to approve legislation supported by the House of Commons. Similarly, the Senate forced an election to be held on the issue of Free Trade with the United States. It has been suggested that hearings it sponsored on a constitutional accord agreed to by the House of Commons and all provincial premiers played a role in the eventual defeat of the Meech Lake Accord. The Senate can place significant limits on the power of the House of Commons (at least when a different party controls each chamber). The requirement that provinces assent to Senate changes prevents national governments from unilaterally eliminating the chamber and sometimes forces the government to accede to Senate wishes.

The Australian Senate is the most powerful of the upper houses examined, a stature clearly enhanced by its elective nature. Although Canadian senators have indicated an unwillingness to defeat legislation for which the government had obtained public approval (in the sense of winning an election after mentioning the item in the campaign), Australian senators have fewer reservations. The fact that they, like the members of the Lower House, have been elected by the people provides them with a willingness to involve themselves more directly in the amendment and defeat of legislation emanating from the Lower House. Impasses between the upper and lower houses are not invariably resolved in the way the Lower House desires.

The presence of an independent bicameral legislature reduces the autonomy of parliamentary executives and provides them with another hurdle to clear. It may not make for more efficient parliamentary functioning, but it

provides something of a check on executive dominance. Similar checks are not available in systems with a unicameral parliament.

## Functions of Parliament

With this short introduction to the legal nature of parliaments in mind we will move on to discussing the functions of Parliaments. There are four basic functions of parliament.

1. To examine the proposal for new laws.
2. To provide, by voting on taxation, the means for carrying out the work of government.
3. To scrutinise government policy and administration, including proposals for expenditure.
4. To debate the major issues of the day.

These legislative functions can be summarised as the provision of legitimacy, legislation, supervision and investigation.

The first function, of providing legitimacy, is easily understood. The presence of an elected legislative assembly that provides formal approval for laws indicates to citizens that they have a role to play in the political system. Citizens can be deemed to consent to laws, to the degree that they participate in the selection of those that formally approve the laws.

Although the legitimisation function is obviously related to legislation, the legislative function transcends legitimisation. It is not simply the formal ratification of legislation, but the opportunity to express views on it in debates and to propose amendments to bills under consideration. Most parliamentary systems provide opportunities of this sort, although as we saw earlier, parliamentarians in France cannot force votes on amendments they support. Parliamentary systems generally distinguish between bills introduced by members of the executive (Government Bills) and those introduced by parliamentarians who are not part of the executive 'backbenchers' (Private Members' Bills). The ability of backbenchers to introduce legislation under the Westminster model is restricted in two ways. First, the amount of time available for the consideration of non-government bills means that the bulk of parliamentary time is devoted to the government's agenda, leaving little time for other issues. There is some variation among parliaments on this dimension with a few devoting more time to private members' bills. For example, the Legislative Assembly of Alberta has passed private members public bills since significant changes in standing orders were made in 1993. Second, the requirement that only members of the executive can introduce legislation that involves the spending of public monies reduces the range of issues that backbenchers can introduce. (The inability of backbenchers to introduce money bills is based on the fact that only the cabinet represents the Crown.)

As part of its legislative function the legislative assembly makes final decisions, disposes of public questions, and passes laws or refuses to pass laws. Nothing becomes law without being endorsed by the legislature. This

does not mean that the legislative assembly draws up bills or formulates them. In most cases the formulation of legislation is carried out elsewhere and then presented to the assembly.

Of more practical relevance than the introduction of legislation by backbenchers that will only rarely be approved, is the supervisory function. There are a number of elements involved in this area. The long tradition of parliamentary authorisation of spending and taxing is of great importance in the role of the assembly. Parliament has the right to both discuss and approve the cabinet's statements of how they will raise revenue and how that revenue will be spent. This function stems from one of the original powers obtained by the British Parliament and called the power of purse. (Many Kings were forced to summon Parliament because they needed money.) Money cannot be raised without the consent of the Commons and governments have no right to raise or spend public money without legislative approval.

Another part of Parliament's supervisory function involves not only the right to debate and make final decision on bills, but also the right to ascertain what people think of a bill, to determine what the government is planning to do with a bill, and to assess its probable and possible impact. To this end, legislative assemblies often hold parliamentary hearings on particular pieces of legislation. At these hearings citizens or interest groups have opportunities to present their views on the legislation and government officials explain the purpose and ramifications of the bill. Generally such hearings are not undertaken by whole legislative assemblies but by smaller 'committees' of the assemblies.

Such committees are composed of smaller groups of members who specialise in certain areas. Committee membership usually replicates that of the body as a whole, as parties are represented in the same proportion on committees as they are in the lower chamber. The influence of these committees is affected by a number of factors including the size of its budget, the availability of research staff, and the ability to summon participants, the permanence of membership, and the selection of the chairperson.

A relatively permanent membership allows parliamentarians to develop a level of expertise in a particular area. The overall size of the parliament is relevant as well. In a small parliament there may be only a handful of members as government backbenchers or in the opposition. They will have a heavy workload and not be able to supervise the executive as well as a larger committee (with a number of specialists serving on it) could. Permanence is also related to the turnover of members in elections. If a large proportion of MPs is defeated in each election, the opportunity to have long serving specialists on a committee is limited. (This may be one of the reasons why a number of governments call for reductions in the size of the legislature. Essentially, fewer members will make the performance of the 'watchdog' function more difficult.) Finally, if the committee can elect its own chairperson, it can choose someone who may be more willing to pursue inquiries that may embarrass the government than would a chair who has been placed in his or her position by the government.

One of the most interesting ways in which parliaments play a supervisory role is in directly questioning cabinet ministers and the prime minister. These opportunities are usually described as question times or question

periods. Question times are generally held every day parliament is in session. This period is one of the few portions of the parliamentary timetable in which the government is forced to respond to questions by other parliamentarians and defend actions they may have taken or not taken. In theory question time is an important event, but in reality it is sometimes more drama than substance. The focus of members opposed to the government is simply to make the government look weak or incompetent, while the ministers who respond may not actually answer the question but give a response that will reflect well on the government. The impact of the televising of parliament, especially the question period, is suggested to have had an impact on the value of this aspect of holding the government to account.

## Relations between Legislatures in the Same State

Before we conclude this section a brief commentary on the relationship of parliaments with other legislative assemblies in the same country is necessary. These relationships differ according to the federal nature of the country. Even in countries that are not federal, such as Britain, other legislatures often exist. These can take the form of municipal or city legislatures or of more formal legislatures in a particular region. The British experience demonstrates vividly the subordinate nature of these institutions. Under Margaret Thatcher, the British government eliminated a number of local councils and there was nothing these councils could do to prevent their own demise. Under Tony Blair, the British government has created regional legislatures in Wales and Scotland and created, suspended and reactivated a legislature for Northern Ireland. The authority of such legislatures is limited to the areas that parliament is willing to assign to them and parliament can eliminate them any time it wishes. These legislatures, like city councils, possess only devolved authority from parliament, which means that in the final analysis they have no real independence.

In federal systems the relationship is quite different. Other legislatures at regional levels are mentioned in the constitution and cannot be eliminated by fiat of the national parliament. The regional legislatures possess a fair degree of autonomy and the national parliament cannot review their every action.

Another characteristic of a federal parliamentary regime is the special representation in the national upper chamber. In Australia for instance, the states are all guaranteed equal representation in the Senate and have the ability to express regional views vociferously. In India the state assemblies choose those who will sit in the Upper House and these representatives can influence legislation.

As we noted earlier, the existence of a federal regime limits the authority of the national parliament and places restrictions on the activities of the executive. A non-federal regime allows the national parliament much wider latitude in decision making.

## Recommended Reading

Patterson, Samuel C., and Anthony Mughan. *Senates: Bicameralism in the Contemporary World*. Columbus: Ohio State University Press, 1999.

Shell, Donald R. "Second Chambers" in *World Encyclopedia of Parliaments and Legislatures*. George Thomas Kurian (ed). Washington: Congressional Quarterly.

Urquhart, Ian. "Constitutions" in *Critical Concepts: An Introduction to Politics and Government*. Scarborough, ON: Prentice Hall, 1999.

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## Study Questions

Based on your readings, see if you can answer the following questions. If not, read the commentary over again to find the answers.

1. What is the significance of constitutional conventions and written constitutions?
2. What is the role of upper houses in bicameral legislatures?
3. What are the basic functions of legislatures?
4. Describe the relationships between legislatures in a single state.



## Internet Resources

### Constitutions

The Magna Carta, 1215

<http://wwlia.org/uk-magna.htm>

<http://catalog.com/jamesd/magna.htm>

The English Bill of Rights, 1689

<http://wwlia.org/uk-billr.htm>

Privy Council. Intergovernmental Affairs. "A Constitutional File and the Unity File."

[http://www.pco-bcp.gc.ca/aia/](http://www.pco-bcp.gc.ca/aia/default.asp?Language=E&Page=consfile)

[default.asp?Language=E&Page=consfile](http://www.pco-bcp.gc.ca/aia/default.asp?Language=E&Page=consfile)

Matthew Hale: The History of the Common Law of England, 1713

<http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/hale/common>

Nelson Political Science: The Constitution of Canada

<http://polisci.nelson.com/constitution.html>

Maton, William F. "Canadian Constitutional Documents: A Legal History"

<http://www.solon.org/Constitutions/Canada/English/index.html>

Library of Parliament. Parliamentary Research Branch. "Constitutional Activity from Patriation to Charlottetown (1980-1992)"

<http://www.parl.gc.ca/information/library/PRBpubs/bp406-e.htm>

Constitutional Law in Australia

<http://www.constitutional-law.net/australia.html>

Constitutional Law in South Africa

<http://www.constitutional-law.net/safrica.html>

Web site on constitutions around the world

<http://www.uni-wuerzburg.de/law/index.html>

The Human Rights Directory: Commonwealth Constitutions

<http://www.echr.net/const/>

### Upper Houses

United Kingdom. "An Introduction to Parliament"

<http://www.parliament.uk/parliament/guide/parliament.htm>

The Parliament of Scotland

<http://www.scottish.parliament.uk/>

Legislation of Scotland

<http://www.scotland-legislation.hmso.gov.uk/>

The National Assembly for Wales

<http://www.wales.gov.uk/>

Legislation of Wales

<http://www.wales-legislation.hmso.gov.uk/>

Northern Ireland Assembly

<http://www.ni-assembly.gov.uk/>

Legislation of Northern Ireland

<http://www.northernireland-legislation.hmso.gov.uk/>

The Senate of the Bahamas

<http://www.senat.fr/senatsdumonde/english/bahamas.html>

Parliament in India: Rajya Sabha

<http://alfa.nic.in/>

Parliament of Australia: Senate

<http://www.aph.gov.au/senate/index.htm>