Separation of powers and fusion of powers: the roles of speakers, presiding officers and non-elected members of assemblies in small jurisdictions

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Adrian Lee

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Introduction

It is often wrongly assumed that parliaments in small jurisdictions, particularly those with constitutions on the Westminster model, are simply in all respects miniature versions of the "Mother of Parliaments" herself. This assumption often encompasses not only their structure, but also their roles, operation, and procedures.

This short paper is intended to outline some of the problems accompanying these assumptions, focussing in particular on (a) the separation and fusion of powers; and (b) the roles of speakers or presiding officers in small jurisdictions worldwide, with some concluding consideration of the roles of non-elected or appointed members of assemblies. Most of the references are to the experience of jurisdictions whose structures derive from or are related to the Westminster model, primarily the Crown Dependencies and the British Overseas Territories. Some reference will be made to cases of comparable liberal-democratic parliamentary government outside the Commonwealth, such as that of the Faroes.

The central position of parliaments and assemblies

Across the world, liberal democratic constitutions attribute a central role to a directly elected parliament or assembly, elected through an open, free and fair electoral process. With some justification, such a body is seen as the central institution of a liberal democratic system – the institution to which the sovereign people give their mandate – and which represents or "re-presents" them and their views at the heart of government. Such parliaments and assemblies typically have four major roles following from this principle: (a) their primary representative function; (b) the primary role in law-making – legislation; (c) holding government accountable for its actions; and (d) in turn holding themselves accountable to the electorate.

Separation of powers or fusion of powers?

The doctrine of the separation of powers – legislative, executive and judicial – has come to be seen as a central tenet of liberal-democratic government. It finds its purest expression in those systems deriving from the model of the United States – with a strict separation between the three powers and the institutions identified with them. Small jurisdictions, such as American Samoa, with constitutions based on this model typically exhibit the features of (a) a directly elected executive – a president – who appoints the government, often with the advice and consent of (b) a directly elected legislature – whether unicameral or bicameral; and (c) a separate judiciary headed by a supreme court, whose members are appointed by executive nomination and with the "advice and consent" of the legislature. Among the fundamental tenets of such pure separation of powers systems are the principle that no person may hold office in more than one branch of government, that together the branches form a system of checks and balances, typically expressed in such devices as the overriding two-thirds majority, the presidential veto, or the ability of a supreme court to strike down legislation as unconstitutional. The constitution can only be amended through a special procedure, typically involving the need for a super majority, plus a referendum or super majority endorsement by other levels of government. Such amendment is rare. In practice, the constitution, as interpreted by a supreme court, is the point of the ultimate resolution of disputes between branches and levels of government.

The concept of the separation of powers, and some of the subsidiary principles that flow from it, frequently appear in political discussion in systems characterised by a fusion, rather than a separation of powers. These systems ultimately derive from mediaeval systems in which all three powers were combined in the authority of the monarch, and importantly, through the process by which monarchical

powers were reduced, constitutionalised, overthrown, or rendered merely ceremonial. Throughout Europe, nineteenth century constitutionalist movements sought the strict separation of the judicial power in particular, as a crucial device for limiting royal authority, limiting executive power, guaranteeing rights and liberties, and preserving the rule of law.

Modern European constitutionalist doctrine, exemplified by the construction of the postwar constitutions, (especially the West German *Grundgesetz*), was heavily influenced by the British example – or at least by interpretations of it. A similar influence can be detected in the central role ascribed to a parliament or legislative assembly from which the executive derived and on which it depended for its continued existence and to which it was therefore accountable.

These modern systems do not fuse all three powers, but to varying degrees, two of them. In the overwhelming majority of cases, save for those hybrid systems on the French Fifth Republic model, fusion of legislature and executive is commonplace. In such parliamentary systems, the executive typically is composed of elected members of the legislature, sits in the legislature, and only remains as the executive as long as it maintains the support of a majority of members of the legislature. Variations in the legislative-executive relationship may vary, but the overwhelming majority of these systems, whether in small or large jurisdictions, maintain a constitutionally-prescribed absolute separation between the executive-in-legislature on the one hand, and the judiciary on the other. The principle was simply expressed by Clothier:

> "........the principle of separation of powers rightly holds that no one who is involved in making the laws should also be involved judicially in a dispute based upon them."[1]

Expanding on this theme, the Report went on to note that:

> "What evolved in almost all democratic countries, however, including for all practical purposes the United Kingdom, was a fusion of the executive and legislative powers in membership of a national assembly, but with an independent judiciary."[2]

Parliamentary systems in small jurisdictions

Unsurprisingly, parliaments in small jurisdictions developed in similar ways and through many of the same conflicts experienced by their counterparts in larger political systems. Indeed, Tynwald in the Isle of Man (979) is one of the oldest parliaments in the world, and certainly the oldest in the British Isles. Bermuda's House of Assembly's central role dates from the 1620s, and the British export of parliamentary systems and independent judiciaries to some very small territories indeed long preceded the process of decolonisation with which it tends to be associated. Increasingly extensive grants of self-government through written constitutions with a central role for an elected assembly were made from the 1920s onwards (eg Malta) and peaked in the late 1960s-1970s. Those jurisdictions which eschewed the independence option in favour of remaining as British Dependent Territories (now British Overseas Territories) also saw significant reform, which intensified after 1998. The strengthening of the elective element and the reduction of the nominated element in parliaments, together with the progressive transfer of gubernatorial powers to elected governments were a central part of this reform. This process was not restricted to the remaining British Overseas Territories, and continues. In a number of instances, the devolution of powers and functions has played some part in dampening demands for independence: Aruba decided to maintain its *Status Aparte* in relation to the Netherlands (1995); Bermuda voted in a referendum against independence (1995), although it is still a goal of the ruling PLP; the Tokelau Islands voted for internal self-government and against independence from New Zealand (2006). On the other hand, full internal self-government since 1948

[1] States of Jersey, Report of the Review Panel on the Machinery of Government in Jersey (Clothier Report), States Greffe, St Helier, December 2000, s8.4, p32

[2] Ibid, s8.11, p34

has not prevented Faroese demands for independence and indeed full negotiation with Denmark – now in abeyance.

However, a relatively few small jurisdictions have experienced a more *sui generis* process of political development, with political institutions developing on paths parallel to those of larger jurisdictions or their metropolitan power. Early modern government in these cases was generally characterised by an almost complete fusion of powers which gradually separated out. Jersey provides a case in point, with some developments having an almost entirely insular origin, and others resulting from either direct intervention by the metropolitan power, or action by the States in response to external developments. The prolonged process of separation between the Royal Court and the States, culminating in the removal of the jurats from the States in 1948, the introduction of the 1771 "Code", the 1948 reform itself and more recently, the adoption of parts of the Clothier recommendations – all derive from combinations of these stimuli to change.[3] In contrast to the process of constitutional change in the British Overseas Territories over the past half century, that in the Crown Dependencies has been essentially ad hoc and particular, rather than systematic and comprehensive. None has had anything to compare with the constitutional conferences that have punctuated political developments in Bermuda, the Faroes, Aruba or the Åland Islands. Each of these latter jurisdictions, subject to different metropolitan powers, has an effective constitutional instrument – whether it is an act of the parliament of the metropolitan power, a constitution endorsed by referendum, or a constitutional expression following an international agreement.[4]

Although the process may have differed between small jurisdictions, the general direction of travel in the development of parliamentary systems of government has been largely the same. There are exceptions, but they are rare. Liechtenstein's 2003 referendum, in which electors dutifully voted to reduce the powers of the parliament and give the hereditary ruling prince equal status with the electorate, and *inter alia* the right to dissolve parliament, is probably unique. Whatever their origins and historical development, parliaments in small jurisdictions have become more important, playing a central role in political systems in exercising, through assembly-based executives, greater powers, and in turn holding those executives to account. The role of simply providing advice to an unaccountable executive – or an executive accountable to the metropolitan power – is now, in the British Overseas Territories at least, largely defunct. In fact, and in to some degree of contrast with the alleged decline of the power and influence of parliamentary assemblies in some larger states, it can be argued that parliaments in small jurisdictions have increased their influence and role in the political process.

As well as strengthening the position of parliaments and assemblies, these modern constitutional settlements have generally been used as an opportunity to strengthen further the separation of the judicial from the executive and legislative powers. At one extreme, the constitution completely separates the judiciary from the legislature and executive, but locates it externally, as in the case of the Faroes:

> "§1. With regard to matters under Faroese authority, legislative power is shared between the Løgting (Parliament) and the Løgma ur (Prime Minister). The Government (Landsstýri) has executive power. Judicial power resides with the Danish court system"[5]

[3] (a)Le Hérissier, R The development of the government of Jersey 1771-1972, States Greffe, St Helier, 1974; (b) Le Rendu, L, Jersey: independent dependency? The survival strategies of a microstate, ELSP, Bradford-on-Avon, 2004, pp28-52;

[4] (a)Kingdom of Denmark, Parliamentary Act No 103 from July 26 1994 on Home Rule in the Faroe Islands, Copenhagen & Torshavn, 1994; (b) United Kingdom, Bermuda Constitution Act, 1968, HMSO,London,1968; (c) Finland, Act on the Autonomy of Aland (1991/1144), Helsinki, 1991, www.finlex.fi/fi/laki/kaannokset/1991

[5] Ibid 4(a)

The judiciary is clearly separated from the other branches of government in almost every other democratic small jurisdiction, whether it be formally sovereign or dependent and almost irrespective of size. The French *Départements et Térritoires d'Outre Mer ("DOM-TOM")* provide a case similar to the Faroese. *Départements* such as Réunion, Guadeloupe and Martinique are regarded as integral parts of metropolitan France and are accordingly integrated into the French judicial system. The substantial devolution of power to assemblies and local governments in the *DOM-TOM* has left the judicial relationship largely untouched, and the judiciary therefore clearly separate from both legislature and executive. French law prevails, except in some aspects of traditional civil law in French Polynesia – and the recognition of polygamy in Mayotte.[6]

This separation of the judiciary is virtually world-wide, and operates irrespectively of the size of the jurisdiction concerned. As far as can be determined, only two democratic jurisdictions, whether large or small, now have a constitutional structure in which the head of the judiciary or a member of the judiciary presides over a legislative body – namely Jersey and Guernsey. The oft-quoted multiple roles of the Lord Chancellor in the United Kingdom, presiding over the upper house of the legislature, sitting as a member of the Cabinet and heading the judiciary are no more. Since the creation of the office of Lords Speaker and the subsequent establishment of the Supreme Court in 2009, the separation of judiciary from legislature is now complete.

At the other extreme, Jersey provides a prime example of the survival of a significant degree of fusion between the three branches of government, presently centred on the office of the Bailiff. In the modern period, two major changes have served to lessen the extent of this fusion, namely the 1948 removal of the jurats from the States, and their restriction to a purely judicial role, and more recently the post-Clothier reforms, which effectively transferred some of the Bailiff's role - eg as a channel of communication between ministers of the United Kingdom Government and the States – into the hands of the new Chief Minister. It should be noted that the Bailiff's separation from the executive is further signalled by the fact that the Bailiff is not a member of the Council of Ministers. While the Bailiff's role in relation to the executive may be now more clearly defined and restricted, the relationship of the office to the States Assembly remains unchanged. The Bailiff is the President of the States Assembly, and by extension the Deputy Bailiff and alternatively the States Greffier, and indeed the Deputy States Greffier may and do preside over meetings.

Implications

The principles underpinning the constitutional structure of modern liberal democratic parliamentary systems are familiar. Their implications for the structure, roles and operation of parliaments and assemblies have been recently codified by the Commonwealth Parliamentary Association, again making no distinction between small and larger jurisdictions.[7] These have since been adopted and developed by a number of small jurisdictions, particularly in the Pacific. Given our present concerns, one particular benchmark is crucial:

> "1.3.3. A legislator may not simultaneously serve in the judicial branch or as a civil servant of the executive branch."[8]

If a more extensive assessment of a parliament's role in a given political system is required, the Inter-Parliamentary Union's "Evaluating Parliament" exercise resulted in the production of a mechanism for the audit of parliamentary effectiveness.[9]

[6] Aldrich, R & Connell, J, The last colonies, Cambridge University Press, Cambridge, 1998, pp24-29

[7] Commonwealth Parliamentary Association (CPA), Recommended Benchmarks for Democratic Legislatures: a Study Group Report, CPA, London, 2006.

[8] ibid, p2

The central role of parliaments and assemblies discussed above has one further major implication. In order to sustain its independence of the judiciary and its position on the admittedly contested ground of assembly-executive relations, the assembly's rights to regulate its own proceedings, appoint its own officers, establish and enforce a code of practice for its members, and control the services necessary for it to perform its constitutional functions, are central.[10] Without these powers, the capacity of an assembly to perform the four major roles of: representation, law-making, holding government accountable for its actions; and in turn holding themselves accountable to the electorate, are severely compromised.

Speakers and presiding officers

As noted above, the major features of the move to self-government in Commonwealth small jurisdictions were (a) the restriction and reduction of gubernatorial powers; (b) a corresponding increase in the roles of a clearly-defined ministerial executive responsible to an assembly; (c) an increase in the role and independence of the assembly, and (d) the consolidation of a judiciary independent of both legislature and executive.[11] The elective principle was typically extended to almost the entire membership of the assembly, with a significant reduction in, or the abolition of, nominated or ex officio membership. Where such membership survives, the offices concerned typically have the right of audience in the assembly, but not the right to vote. It could be suggested, perhaps rather controversially, that legislatures in the British Overseas Territories have overtaken the States of Jersey and the Guernsey States of Deliberation in this respect. Jersey and Guernsey are unique: no other dependencies of similar size and with similar powers still have the speaker of their assembly appointed by their metropolitan power.

The advisory, rather than legislative, role played by a typical colonial assembly was expressed by the governor's chairing of the body. In every case, the new self-government constitutions of the latter part of the twentieth century all made provision for the assembly, no matter how small the jurisdiction, to elect their own speaker or presiding officer. In the latest example, and one of the smallest, the Falkland Islands Constitution of 2008, the Council chaired by the Governor became the Legislative Assembly electing its own Speaker.

The tradition that it is the fundamental right of an elected legislative assembly to set its own rules of procedure and elect its own presiding officer or speaker is probably one of the oldest features of constitutional government.[12] The CPA benchmarks simply state that:

> "2.2.1. The Legislature shall select or elect presiding officers pursuant to criteria and procedures clearly defined in the rules of procedure"[13],

The office stands as an expression of the representative nature of the assembly, and indeed may be seen as a feature distinguishing freely-elected representative assemblies from other types of advisory or consultative bodies – or even the sham parliaments of authoritarian regimes – which are presided over by appointees. The speaker or president speaks for the assembly, with its authority and for it alone, and therefore represents it both politically and ceremonially. There is one major exception to this rule, which has had an impact on the constitutions and political structures of one group of small jurisdictions, namely those that are or were overseas territories of the United States, such as Guam,

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[9] Inter-Parliamentary Union (IPU), Evaluating Parliament: a self-assessment toolkit for parliaments, IPU, Geneva, 2008

[10] CPA, op cit, pp3, 6-7, 10-11

[11] For a summary of these and other developments see "British Overseas Territories in the New Millennium", Speech by the parliamentary Under-Secretary of State, Baroness Symons, Royal Commonwealth Society, London, 21st May 1999 www.fco.gov.uk/en/news/latest-news/?view=Speech&id=2149331

[12] Finer, S E, The history of government from the earliest times, Vol II The intermediate ages, Oxford University Press, 1999, pp1024-1051

[13] CPA, op cit, p3

the Republic of Palau and American Samoa. With constitutions providing for a more or less strict separation of powers on the US model, American practice is followed. The speaker of the main elected house is usually selected by the majority party rather than the whole house, does not relinquish their party role, and while representing the house ceremonially, is a distinctly partisan figure, if not the actual leader of the majority party in the legislature. In bicameral systems, the upper house is normally presided over by a directly-elected executive figure, again following the US pattern, where the Vice-President presides over the Senate.

In parliamentary systems with a degree of fusion between executive and legislature, speakers are almost invariably chosen by the whole of the elected house, often through a procedure designed to achieve cross-party agreement, as in Gibraltar. The speaker is a neutral figure, and typically eschews any previous party allegiance on being elected to the office. He/she speaks only for the assembly, and for no other institution, in this regard preserving the status and autonomy of the assembly in relation to the other institutions of government and enabling it to discharge its functions effectively, particularly that of holding the executive to account. Consequently, and significantly, the speaker typically holds no other office, thus enabling the speakership to be "hedged about" with neutrality.

In the world of small jurisdictions, whether dependent or independent, the cases of Jersey and Guernsey are clearly outliers, as noted by Sir Cecil Clothier's Report made some trenchant observations on the Bailiff's multiple roles, particularly:

> "Indeed, it is only in Jersey and Guernsey that one finds this most unusual arrangement whereby the Speaker of the Island Assembly and the Chief Justice are one and the same person".[14]

Conventional views of the role of the speaker are largely derived from the influential model of the Speaker of the UK House of Commons, and the impact of this example on Commonwealth small jurisdictions is obvious, particularly in terms of the process of expanding self-government noted above.[15] Indeed, a cursory examination of debates in the States of Jersey following the publication of Clothier shows that discussion referred to the Westminster example rather than to the practice of other small jurisdictions, or was based on the mistaken assumption that the Report was advocating the adoption of an English local government model.

Not all of these speakerships are identical to the Westminster model, showing variations in the extent of the role, the processes for selection and appointment, and the duties attached to the office. Many of the variations stem from attempts to manage a linked set of problems, namely, managing the consequences of smallness, ensuring neutrality, guarding against conflicts of interest or the perception of them, ensuring the effectiveness of a small-scale assembly, and promoting the stability of the assembly and its proceedings.

Selection of a speaker/presiding officer

The rules for the selection of a speaker by the assembly vary considerably across small jurisdictions, both within and outside the Commonwealth. For example, the conventional pattern of selecting a speaker from the membership of the assembly obtains in Bermuda, the Isle of Man and the Faroes. Bermuda has a bicameral legislature comprising the directly elected House of Assembly and the nominated Senate. MPs elect the Speaker and Deputy Speaker by simple majority from among their number. By convention, both Speaker and Deputy Speaker relinquish their party allegiance on election. Both the current office holders were elected as members of the majority PLP. The Speaker

[14] Clothier report, op cit p34, s8.10

[15] For a basic summary of the role of the Speaker of the UK House of Commons see House of Commons Information Office, The Speaker, (Factsheet M2 Members Series), revised ed, House of Commons, October 2009.

has over 30 years experience as an MHA, and the Deputy Speaker was the PLP's first Prime Minister. The current President of the Senate sits as an Independent. In the Isle of Man, formally a bicameral system, in which Tynwald has two branches, the Legislative Council and the House of Keys, the President of Tynwald is elected by all members, and also serves as President of the Legislative Council. The Speaker of the House of Keys is elected by MHKs from among their number. In a practice common to nearly all parliamentary assemblies, the first constitutional duty of a newly-elected Faroese Løgting is to elect a Speaker and Deputy Speaker from among the members of the Løgting.

The election of a speaker and deputy speaker from among the members of the assembly can have unforeseen consequences. Firstly, in a small assembly elected on the basis of single-member districts the equality of representation of electors may be distorted – with one or possibly two constituencies being effectively unrepresented, or at least electors perceiving that they are, despite their votes, unrepresented. The argument can be mitigated to some extent if the assembly is elected on the basis of multi-member districts or constituencies. In a small 17 member assembly with an operating two party system, with all its members elected "at large", as is the case in Gibraltar, the consequences of selecting one member as Speaker would be dramatic. In a jurisdiction with a very small sized assembly, where parliamentary majorities are notoriously narrow, with the past three general elections returning governments with majorities of one – the election of a Speaker could in effect reverse a general election result. The 2006 Gibraltar Constitution therefore specifically bars an Elected Member of the Parliament from becoming Speaker. The Parliament appoints an eligible person, by simple majority, after consultation between the Chief Minister and the Leader of the Opposition.[16]

The Constitution of the Cayman Islands provides for more flexibility:

> "**65. –**(1) At the first sitting of the Legislative Assembly after a general election, and as soon as practicable after a vacancy occurs in the relevant office otherwise than on a dissolution of the Assembly, the elected members of the Assembly shall by a majority vote elect –
>
> (a) A speaker from among the elected members of the Assembly, or persons who are qualified to be elected as members of the Assembly, other than Ministers; and
> (b) A deputy Speaker from among the elected members of the assembly other than Ministers[17]

Again, this is a mechanism appropriate to a small assembly. The Cayman Islands Legislative Assembly has 15 members (to be increased to 18) and a two-party system. The 2009 elections saw The UDP returned to power with 9 seats, the PPM forming the opposition with 5 seats, and 1 Independent elected. The present Speaker and her recent predecessors have all been drawn from outside the Legislative Assembly, while the Deputy Speaker is currently a UDP elected member.

Security of tenure

In most jurisdictions, a speaker, once elected, is subject to specific security of tenure, usually for the term of the assembly or until its earlier dissolution. The Faroese Speaker and Deputy Speaker remain in office for the entire term of the Løgting, unless they voluntarily resign. They can only be removed if four-fifths of the members demand in writing that a new election for Speaker or Deputy Speaker is held.[18] In Gibraltar, a vote of no confidence passed by a two-thirds majority is required to remove the

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[16] United Kingdom, Gibraltar Constitution Order, 2006, p26,s26
[17] United Kingdom, Cayman islands Constitution Order, 2009, p37, s65(1)
[18] Kingdom of Denmark, Parliamentary Act No 103, op cit,§9

Speaker from office.[19] An identical provision is included in the Cayman Islands constitution, extended in this case to the Deputy Speaker.[20]

The now frequently-broken Westminster convention that a speaker elected from within the assembly is not opposed at a subsequent election has, as far as can be determined, followed in few small jurisdictions. No example in any small jurisdiction is as clear as that of Republic of Ireland, where the speaker of the Dail (Ceann Comhairle) although originally elected as an ordinary TD is automatically deemed to be re-elected for their original constituency if not retiring.

There are few recent examples of the removal of a speaker from office using these procedures. Those that have operated – or come near to operation - have usually been in systems where the assembly's choice of speaker from the members of the assembly is closely controlled by the majority party or coalition forming the government, rather than through agreement between parties, an assembly consensus, or a secret ballot. The Republic of Vanuatu provides a recent, if rather extreme, case in point, with a multi-party system, a 52 member-assembly, and a swift rotation of speakers, The last speaker but one was reinstated in January 2010 reinstated in place of the previous speaker – a former leader of the opposition - who as speaker had unsuccessfully attempted to oust the prime minister for non-attendance in the legislature and call a by-election.[21] This speaker resigned rather than face a vote of no-confidence.

Securing impartiality: presiding, participating and voting

The problem of securing impartiality - and the public's perception of impartiality – can be particularly difficult in a small-scale society and jurisdiction. Without rehearsing the whole argument concerning the political factors engendered by smallness, two particularly important factors can be identified: (a) the fact that in a small-scale society leading individuals are more likely to occupy multiple and overlapping social and political roles; and (b) the smaller the political unit the more likely it is that public conflict and political disputes are expressed and managed through informal mechanisms rather than formal political structures.[22] For these reasons, and although survey evidence is scarce, it is reasonable to assume that in a small jurisdiction public perception of the impartiality of particular office-holders, whether in legislature, executive or judiciary is inherently more difficult to achieve and maintain than in a larger one.

As noted above, most liberal-democratic constitutions and constitutional conventions provide a range of mechanisms to ensure that the speaker of an assembly is the servant of the assembly alone, and holds no other office. Separating the speaker from political controversy is also widely regarded as supremely important in maintaining both trust in the speaker's rulings and actions on the part of members of the assembly, between government and opposition or between government and backbenchers, and on the part of the electorate. A clear example, namely that of the Isle of Man in the 1960s, makes the point. Establishing the political neutrality of the Speaker of the House of Keys led to major political conflict. Briefly, in 1967 the Lieutenant Governor appointed the Speaker of the House of Keys to the then Executive Council, against the wishes of Tynwald. The active political role played by Speakers of Tynwald had been controversial for some years. In the 1966 general election campaign, the Speaker had actively campaigned for the policies of the government not only in his own constituency but across the island. As Kermode succinctly states:

[19] United Kingdom, Gibraltar Constitution Order, 2006, op cit, p26, s26

[20] United Kingdom, Cayman islands Constitution Order, op cit p38, s65(2)(f)

[21] Vainerere, T "Vanuatu Speaker claims Prime Minister Natapei has lost his seat for non-attendance", Secretariat of the Pacific Community Information Service, 30 November 2009, www.spc.int/fpocc/index.php

[22] Dahl, R A & Tufte, E R, Size and democracy, Stanford University Press/Oxford University Press, Stanford & London, 1974, pp95-97.

"For many candidates, such a role was incompatible with the traditional role of Speaker as defender of the interests of the House. Following the election, Tynwald decided that the Speaker should not be a chair or member of any board, thus depriving him of the necessary qualifications for election by Tynwald to the Executive Council. When in January 1967 the new Lieutenant-Governor proceeded to appoint the Speaker to the Executive council, MHKs asked the Speaker to resign and the Lieutenant-Governor to cancel the appointment; both refused".[23]

Retribution was swift, and had the effect of reinforcing the primacy of Tynwald in relation to other Manx political structures. A motion of no-confidence in the Speaker was carried by 14 votes to 9, but he still refused to resign. Kermode again:

"Tynwald reacted by removing the Lieutenant-Governor's powers of appointment to the Executive Council and by passing the Isle of Constitution (No.2) Act 1968 making the Speaker ineligible for membership of both the Executive Council and boards of Tynwald."[24]

The separation of the Speaker of the House of Keys from the executive was virtually complete. However, the Speaker still has a more active role in relation to the House than speakers customarily have in other jurisdictions. In addition to a casting vote, the Speaker is entitled to vote in divisions,

"and usually does so, although, reflecting the impartiality of his Office, unlike the other members present he may abstain. He is also entitled to participate in debate, but again in the interest of maintaining the impartiality of the Office of Speaker this right is rarely exercised".[25]

This striking, if 40 years old, example serves to demonstrate that a speaker who holds another office or who participates in public political controversy is unlikely to be able to act impartially or be seen to do so, either in the eyes of legislators or of the public. It might be concluded that the holding of another office alongside that of Speaker is liable to compromise one or other. Whether the Isle of Man case influenced Sir Cecil Clothier's thinking is unknown, but his elaboration of the principle was certainly congruent with this argument:

"The first is that no one should hold or exercise political power or influence unless elected by the people to do so. It is impossible for the Bailiff to be entirely non-political so long as he remains also Speaker of the States. A Speaker is the servant of an assembly, not its master and can be removed from office if unsatisfactory. The bailiff, appointed by the Queen's letters patent to a high and ancient office, should not hold a post subservient to the States"[26]

Authority, disciplinary powers and securing the rights of members

Impartiality allows a speaker to speak and act with the authority of the House and on behalf of all members. In virtually all small jurisdictions, the speaker represents the assembly on both political and ceremonial occasions.

As the servant of the house the speaker is invariably responsible for securing the rights and privileges of members, and in the larger small jurisdictions typically presides over a privileges committee or similar body responsible for the assembly's code of conduct. This body always comprises members of the house and is advised by the clerk of the house/counsel to the speaker (see below). The speaker's responsibility for interpreting and applying standing orders extends to the power to discipline members in line with the assembly's code of conduct for members.

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[23] Kermode, D G, Offshore island Politics: the constitutional and political development of the Isle of Man in the twentieth century, Centre for Manx Studies Monographs 3, Liverpool University Press, 2001, p203

[24] Ibid, p203

[25] Tynwald, Keys Presiding Officers, 2009, www.tynwald.org.im/keys/presiding-officers

[26] Clothier report, op cit, p32, s8.4

Securing the effectiveness and efficiency of the assembly

An interesting feature of the constitutions of many of the small jurisdictions discussed, even those which have relatively rigid party systems, lies in the responsibility given to the speaker to arrange the business of the assembly. Standing orders of these legislatures, particularly in British Overseas Territories, tend not to give the executive the extent of control over the parliamentary agenda that it possesses in larger jurisdictions operating on the Westminster model.

Beyond agenda setting and presiding over assembly debates, the speaker usually has the major role in ensuring the effectiveness and efficiency of the assembly as a whole, expressed as four major responsibilities:

1) Ruling on, applying and interpreting standing orders – for example over the admissibility of questions to ministers - and maintaining a record of proceedings. Most jurisdictions have a clerk to the house, often combined with the post of counsel to the speaker, responsible to the speaker for the provision of advice to both the speaker and the house as a whole, and for the parliamentary staff who maintain a record of the proceedings of the assembly.
2) Responsibility, although this varies considerably between jurisdictions, for a number of officers appointed by the assembly, such as the principal auditor heading the audit service, the ombudsman, the clerk to the house and the electoral commissioner. In some cases, such as Bermuda, the Speaker chairs the Election Commission.
3) Responsibility for the ensuring the establishment, membership and servicing of assembly committees, especially those which enable the assembly to fulfil its function of scrutinising the executive's actions and legislative proposals.[27] In discharging these functions, the speaker normally, except in the smallest assemblies, chairs and is advised by a Speaker's Committee/Council. These bodies vary in both composition and function. They are typically composed of senior members of the assembly, with a membership that reflects party strengths or balances party representation – where parties exist. Practice varies according to the degree of executive dominance in the assembly.
4) Responsibility for house administration, parliamentary staff and parliamentary services to members – which again vary considerably between jurisdictions.

Implications

The roles of speakers in small jurisdictions with parliamentary systems are remarkably similar, with what variation there is dependent on the size and powers of the assembly. Virtually all systems, whatever their origin and political and legal tradition, place a similar high value on the election or selection of the speaker by the assembly as a whole, on the speakership being a singular office not held with any other, and above all, on the impartiality of the speaker as the servant of the assembly and the defender of its role and privileges.

More widely than this, the range of functions ascribed to speakers by constitutions and assemblies' standing orders and that they routinely undertake are a reflection of the constitutional centrality of the legislature in the political system. They are a hallmark of a legislature that is competent rather than subordinate and ensure that they can effectively and efficiently discharge their responsibilities to their electorates. To return to the fusion of powers argument, they are designed to ensure that the legislative power does not depend on either the executive or the judiciary to perform its role in the political system.

As noted above, an important part of the process of the development of legislatures in small jurisdictions has been the development of an assembly in which directly elected, rather than

[27] CPA, op cit, p5 s3.2

nominated or ex officio, members form the overwhelming majority. Coupled with this a number of small jurisdictions (eg Bermuda, the Isle of Man) have a bicameral parliament, consisting of a directly elected lower house or assembly and a smaller upper house or legislative council composed of indirectly-elected and nominated members.

Now only one significant composite assembly, in which there are three categories of elected member Senators, Deputies and Constables together with nominated members sitting ex officio, remains – the States of Jersey. This complex composition, which has been notably immune to the broader developments of legislatures discussed above, raises a potential question if the States were to elect its own Speaker. Prima facie, it would be more difficult for Jersey than for Guernsey to select a Speaker from the elected membership of the States. Guernsey, apart from the two representatives from Alderney (now directly elected) has a single category of States member. In Jersey's composite legislature could the election of a speaker be legitimately restricted to a particular category or categories of States members? Conversely, what would be the grounds for excluding a particular category of member from eligibility for the speakership? As long as the States Assembly remains a composite body, the Gibraltarian solution of electing the Speaker from outside the membership would seem to be the only solution to this conundrum, apart from maintaining the status quo.

Ex-officio members of parliaments and assemblies

Despite the development of assemblies in which directly elected, rather than nominated or ex officio members form the overwhelming majority of members, many small jurisdiction parliaments have a minority non-elected or nominated members. There is considerable variation between jurisdictions in this respect, but many constitutions, particularly of British Overseas Territories make a clear distinction between "elected members" and "official members". For the purposes of the present discussion, an official member may be defined as the holder of an office who by virtue of that office has membership, usually qualified in some way, of an otherwise wholly elected assembly. For example, if official members have the right to speak in the assembly they invariably do not have the right to vote. Some variations may be found to this rule in bicameral systems, where official members of an upper house with restricted powers may have the right to both speak and vote. In small-scale bicameral systems, such as that of the Falkland Islands, there is typically a degree of overlap between the two bodies, but official members generally may only vote in the upper house or legislative council.

Within the definition, four categories of official member may be distinguished. Firstly, law officers usually have rights of audience but not the right to vote, unless otherwise qualified to do so by election. The Attorney General's role is now usually defined as the legal adviser to the Government and chief prosecutor.[28] In most dependencies, law officers – such as attorneys and solicitors general – are appointed by the government of the metropolitan power on the recommendation of a judicial services commission or similar body within the jurisdiction in question. Law officers in the Crown Dependencies are Crown appointments, in Jersey and Guernsey apparently made on advice from within the insular judicial structure. There are two posts in Jersey (Attorney General and Solicitor General), two in Guernsey (HM Procureur - or attorney general - and HM Comptroller – or solicitor general) and one in the Isle of Man (Attorney General). The establishment of judicial and public service appointments commissions has featured in a number of the new constitutions of British Overseas Territories since the 1990s. However in Bermuda Westminster parliament, the Minister of Justice, an elected member of the House of Assembly, is also the Attorney General.

In dependencies, the gradual transfer of power to elected assemblies and governments from governors or administrators appointed by the metropolitan power has led to a reduction in the number of governors or deputy governors who have a role in the elected assembly. Some survive – for example the Deputy Governor of the Cayman Islands sits in the Legislative Assembly, with the right to

[28] For an example see United Kingdom, Gibraltar Constitution Order, p43, s59

speak but not to vote. In Jersey, the Lieutenant Governor attends meetings of the States but has no vote, and by convention speaks only twice, once on taking up his office, and again upon relinquishing it. In a bicameral system the Governor may play a more significant role in the upper house or legislative council, often as presiding officer.

A third category of official members can be found in the legislatures of some, usually smaller, dependencies, namely civil servants or other public officials. For example, The Gibraltar Constitution of 2006, in which the old House of Assembly was reborn as a wholly-elected body, the Gibraltar Parliament, removed the Attorney General and the Finance and Development Secretary from their membership of the legislature.[29] . Perhaps the ultimate inclusion of official members is embodied in the new Constitution of the Falkland Islands, reflecting both smallness and the particular position of the islands.[30] There are two ex officio members of the Legislative Assembly, the Chief Executive and the Director of Corporate Resources. In addition, the Attorney General and the Commander British Forces South Atlantic Islands may attend and speak on any matter. In most cases, however, the transition from colonial style governance to responsible self-government has seen a reduction of cases of civil servants sitting as official members of legislatures.

A final category of non-elected ex officio members must be mentioned – in what could be described as a relict category. There are two known contemporary cases are Jersey and the Isle of Man. The postwar reform of the States of Jersey removed the twelve parish Rectors from the States, but left the Dean of Jersey as a member with a voice but no vote. In the Isle of Man, the Lord Bishop of Sodor and Man is a full member of the eleven-strong Legislative Council, with the right both to speak and to vote.

Implications

Perhaps the major potential point of controversy in a small jurisdiction is that which can arise if the status of ex officio members of an assembly is ill-defined, or widely believed to be so, in relation to that assembly. If the roles of the office holders themselves are multiple – and lines of responsibility are also ambiguous, then the possibilities of actual and the certainty of perceived conflicts of interest are themselves multiplied. In most of the examples cited above, the position and role of an Attorney-General is clear, with the primary governmental role being that of legal advisor to the elected government, as is the case in both Gibraltar and the Cayman Islands. Membership of the assembly and the right to speak carries the strong implication that the Attorney General advises the assembly by so doing. But to whom is the Attorney General responsible? In the Bermuda case it is relatively clear, where the Attorney General is also the Minister of Justice and is therefore responsible to the House of Assembly – even though as Attorney General he/she is not a member of the House of Assembly but of the Legislative Council. In the Crown Dependencies the Attorney General is a Crown officer, and in the case of Jersey has a wide range of functions – acting as legal adviser to the Crown (presumably including the Lieutenant-Governor, the Bailiff and the Deputy Bailiff as representing the Crown), the States Assembly, Ministers and Scrutiny Panels, as well as acting as the head of the prosecution service, and overseeing the Honorary Police. A possible interpretation is that this multiplicity of roles makes the Jersey Attorney General almost a “Minister of Justice” but without responsibility to the legislature or a seat on the Council of Ministers.[31]

[29] Ibid, 2006, op cit, p60, s4-(1)
[30] United Kingdom, Falkland Islands Constitution Order, 2008,
[31] For a more extended discussion of the roles, albeit predating the introduction of ministerial government, see Le Rendu, L, Jersey: independent dependency? The survival strategies of a microstate, ELSP, Bradford on Avon, 2004, pp 32-39.

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