

First chamber franchise: A bicameralism fit for small democracies?

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Abstract: First chamber franchise, where a democratically elected first chamber, sitting as the first chamber, appoints members of the second chamber as part of their parliamentary business, is missing from taxonomies of bicameralism both descriptively and normatively. It has, however, operated in the Isle of Man for more than a century. Reflection on that experience contributes to the existing literature on both bicameralism, and small states, in particular at that intersection which is bicameralism in small democracies. The Manx experience shows that first chamber franchise can retain those key advantages of bicameralism most applicable to small democracies, while avoiding problems posed by alternative forms of appointment to the second chamber in such democracies. Doing so, however, needs to take account of the importance of treating the exercise of this franchise as a public duty, rather than a private right; recognising and minimising the danger of party capture of the second chamber; and being attentive to the importance of details of parliamentary procedure in implementation of first chamber franchise.

Key words: bicameralism, small states, small democracies, Isle of Man, Crown Dependencies.

Introduction.

Bicameralism is an enduring subject of scholarly and policy concern, particularly in relation to the role and composition of a second chamber.¹ Discussion has largely focussed on bicameralism in large democracies, with the Republic of Ireland being the smallest state commonly discussed. Bicameralism is, however, present in a number of small democracies. Study of the working out of global constitutional concerns in small democracies can provide insights into those concerns.² In the context of bicameralism, as this paper shows, smallness can however pose unusual challenges which may benefit from unusual responses.

The legislature of the Isle of Man, the Tynwald, has a unique structure whereby the overwhelming majority of the second chamber of this effectively bicameral legislature is appointed by the first chamber. This model, where a democratically elected first chamber, sitting as the first chamber, appoints members of the second chamber as part of their parliamentary business, is missing from taxonomies of bicameralism both descriptively and normatively. This article is the first study of this mode of composition, which I refer to as first chamber franchise. I identify key features of this model, drawing on more than a century of its operation in the Isle of Man, which show its value, uniquely, to small democracies.

The Isle of Man is an almost entirely self-governing Crown Dependency.³ It consists of a single populated island roughly equidistant from England, Scotland, Wales and Ireland. The

¹ See for instance M Russell, "House of Lords reform: navigating the obstacles" (2023) Bennett Institute for Public Policy Review of the UK Constitution: Guest Paper.

² W Veenendaal and J Corbett, "Why small states offer important answers to large questions", (2014) Comparative Political Studies 1.

³ D Torrance, *House of Commons Library Research Briefing CBP8611: The Crown Dependencies*, (Commons Library, 2022).

population of around 80,000 is evenly split between Manx born and non-Manx born residents. As a largely autonomous territory, the Isle of Man has a distinctive economy with financial services, online gaming, and registration of shipping, aircraft and spacecraft making a substantial contribution. This economy supports a high level of national wealth, with a per capita GDP significantly higher than the United Kingdom for instance.⁴ Although a residual authority is vested in the UK Crown and Parliament, the principal organ of governance in the Isle of Man is the Tynwald.

The dominant element of the modern, effectively bicameral, Tynwald is the democratically elected twenty-four member House of Keys ('the Keys'), which is capable of overriding the second chamber, the Legislative Council ('the Council'), in relation to legislation; and to which the Manx executive is accountable. This move towards a recognisable Westminster model took place during through the twentieth century, with the removal of the Council's absolute veto over legislation in 1961,⁵ and the introduction of government responsible to Tynwald developing between 1946 and 1990, and then responsible to the Keys alone since 2016. Additionally, and central to this paper, since 1919 the Keys have appointed members of the Council: initially a small minority, but since 1969 the majority of the Council. The Keys make these appointments to the Council as part of the normal parliamentary business of the Keys.

The Manx experience of first chamber franchise, then, is exceptionally deep, with more than a century of law and parliamentary practice. A mixed methods approach was essential to capture the complexity of the Manx experience over more than a century. The core of the Manx case study is a combination of constitutional legal history, primarily focussed on the period from 1919 to the present, and qualitative analysis of voting records and debates from Manx Hansard. I place this case study within a comparative constitutional frame. In making the case for the unique value of the Manx experience in understanding first chamber franchise, I identify a number of larger democracies which share some of this experience, either historically (Ireland under the Free State Constitution, and Northern Ireland until 1972), or today (Pakistan and Cambodia). Where appropriate I discuss these systems to illuminate my case study. In order to formulate the lessons which may be learnt from it, I place the Manx experience within analytical frames derived from two global bodies of scholarly work. Firstly, the global literature on bicameralism, primarily from political science and constitutional law. Secondly, the global literature on the constitutions and politics of small democracies.

As I show in my conclusion, reflection on the Manx experience benefits both bodies of work, in particular at that intersection which is bicameralism in small democracies. I argue that the Manx experience shows that first chamber franchise can retain those key advantages of bicameralism most applicable to small democracies, while avoiding problems posed by alternative forms of appointment to the second chamber in such democracies. Doing so, however, needs to take account of the importance of treating the exercise of this franchise as a

⁴ Distinguishing it from the Small Island Developing States discussed in, for instance, R Ramtohul, "Women's political representation in Small Island Developing States: A comparative analysis of Mauritius and Seychelles", (2020) 3(1) Small States and Territories 83.

⁵ Isle of Man Constitution Act 1961 s.10(1); Constitution (Amendment) Act 1978; Constitution Act 2006 s.1.

public duty, rather than a private right; recognising and minimising the danger of party capture of the second chamber; and being attentive to the importance of details of parliamentary procedure in implementation of first chamber franchise. I argue that small democracies wrestling with bicameralism should consider the century old Manx version as a possible, worked, alternative to better known forms of bicameralism.

First chamber franchise: The uniqueness of the Manx experience.

Before turning to the details of the Manx experience, I will show that it forms the leading example of a broader conceptual category – first chamber franchise. By first chamber franchise I mean where a democratically elected first chamber, sitting as the first chamber, appoints the to the second chamber as part of their parliamentary business.

The Inter-Parliamentary Union (IPU) recognises 190 parliaments globally.⁶ The IPU does not include non-sovereign national legislatures.⁷ I have accordingly supplemented the IPU data with a review of every dependent territory as of August 2022. Of the 190 legislatures of sovereign states, as of August 2022, 79 were bicameral.⁸ My review has identified a further 29 national legislatures of non-sovereign dependencies,⁹ of which only 5 are bicameral – 17% in contrast to the 42% found in sovereign states. Given, as I discuss below, that bicameralism is frequently a way of giving weight to subnational entities – either federal or regional – the comparative absence in the dependencies, all of which have low populations, is unsurprising. Appointment methods differ significantly cross these eighty-four. Leaving aside the Isle of Man for the moment, and the Chiefly second chamber of Lesotho entirely,¹⁰ I follow the IPU in breaking these down into three categories.

In 23 cases, the second chamber is principally composed of members appointed by a government officer. A pure form can be found in Antigua and Barbuda, where the Governor-General appoints all members of the Senate, but on the advice of either the Prime Minister or the Leader of the Opposition. To this can be added Bermuda, the only UK dependent territory

⁶ <https://www.ipu.org/national-parliaments> (accessed 9/6/2023).

⁷ An approach also adopted by studies such as that of M Russell, *The contemporary House of Lords: Bicameralism Revived*, (OUP, 2013).

⁸ But see P Norton, “How many bicameral legislatures are there?” (2004) 10(4) *Journal of Legislative Studies* 1.

⁹ The total number of dependent territories is larger than this, with “forty-odd non-sovereign island territories” identified by G Prinsen, A Lotti, A Worliczek, “‘Wallis and Futuna have never been a colony’: A non-sovereign Island territory negotiating primary education with Metropolitan France” (2022) 92(1) *Oceania* 133 at 134. I have, however, excluded dependent territories with no permanent population, no civilian government, or no distinct governmental structures within the dependent territory.

¹⁰ The IPU classifies one appointment process, that of Lesotho, as “Other”. The majority of members of the Lesotho Senate are present because of their status as Principal Chief – 22 of the 33 members are Principal Chiefs, with the remaining 11 being nominated by the King on the advice of the Council of State. The Principal Chiefs are hereditary tribal chiefs, with inheritance being limited to males only, as was affirmed by the Lesotho High Court in 2013.

apart from the Isle of Man to have a bicameral legislature.¹¹ In Bermuda all members of the second chamber, the Senate, are appointed by the Governor along party lines, with 5 being appointed to represent the governing party, 3 to represent the official opposition, and 3 as independents.

In 31 others, members are directly elected by the population, but frequently in different constituencies from the first chamber, or with a different cycle for elections. The three bicameral legislatures of US dependent territories fall within this category. Members of the Northern Marina Islands Senate, the Puerto Rico Senate, and the Senate of American Samoa are directly elected. The Northern Marina Islands and American Samoa are unusual in being small democracies – each around 50,000 population – with a directly elected second chamber; possibly as a result of their dependence upon the United States which has a similar structure.¹²

The remaining twenty-eight are classified by the IPU as “indirectly elected”. In twenty-seven of these twenty-eight, the second chamber of the national legislature is composed wholly or in part by nominees from assemblies representing a territorial component of the nation. That is, the nominees are being put forward by an electorate consisting of another assembly, not from within the national legislature itself. Ireland is the outlier here, with a distinctive approach prioritising vocational representation. The contemporary Seanad consists of 11 members nominated by the Taoiseach, 6 elected by university graduates of certain universities, and 43 elected by a mixed electorate, from panels of candidates representing specific vocational interests.

In relation to both regional representation and vocational representation, we can identify systems where members of the first chamber sit in the body which makes the indirect election, but although they sit because they are members of the first chamber, they do not sit as the first chamber – indeed, they constitute a small minority of the electorate. In Ireland, members of the incoming Dail, the outgoing Seanad, and county councils and city councils, totalling around 1000 voters (compared with the 160 members of the Dail), may vote in an election of panel members.¹³ The French Senate, to give an example of regional representation, is composed of members elected by an electoral college in each departement – members of the National Assembly for that departement sit in this electoral college, but more than 95% of the members are delegates from municipal councils in the departement.¹⁴

Across these twenty-eight comparators, then, even where members of the first chamber are involved in the indirect election, they generally do so as part of a different body, and one where

¹¹ See further N Barker, “‘I wouldn’t get unduly excited about it’: The impact of the European Convention on Human Rights on the British Overseas Territories. A case study on LGBT rights in Bermuda” [2016] Public Law 595.

¹² What Veenendaal characterises as “historical-institutional” arguments in relation to federalism in microstates – WP Veenendaal, “Origins and persistence of federalism and decentralization in microstates” (2015) *Publius: The Journal of Federalism* 1.

¹³ https://www.dlrcoco.ie/sites/default/files/atoms/files/how_the_seanad_is_elected_-_english.pdf (accessed 2/5/2023).

¹⁴ https://www.senat.fr/lng/en/senators/the_senatorial_elections.html (accessed 12/5/2023).

they are a very small minority of the electorate. In two of the twenty-eight, however, a small minority of second chamber seats are filled by a first chamber franchise.

In Pakistan, the majority of the 96-104 members of the Senate are elected by the four provincial assemblies, a not uncommon example of federal bicameralism.¹⁵ In relation to 8 seats, however, in the absence of a relevant provincial assembly for the Federally Administered Tribal Areas (FATA), election was until 2021 by those members of the National Assembly who represented the FATA. Another 4 members are chosen by the National Assembly as a whole to represent the federal capital Islamabad. The seats associated with the FATA are in the process of being eliminated as a consequence of the merger of the FATA with a province.¹⁶ By March 2024 they will no longer exist, and the Senate will consist of 96 members. The 4 Islamabad seats, elected by the National Assembly as a whole, will remain.¹⁷

In Cambodia,¹⁸ the sixty-two member Senate consists of 58 members elected by councillors of the 1621 Commune/Sangkat (with between 5 and 11 councillors in each Commune/Sangkat) together with members of the National Assembly, two appointed by the King, and two elected by the National Assembly – that is, by the directly elected first chamber of the national legislature.¹⁹

Although I draw on the experience of both Pakistan and Cambodia where relevant in my discussion - for instance in my discussion of the secret ballot - there are four important differences which emphasise the paramountcy of detailed study of the Manx experience to begin to understand first chamber franchise.

Firstly, neither Pakistan nor Cambodia qualify as small states: Pakistan has a population circa 230 million, and Cambodia circa 17 million. Although the specificity of the problems and challenges faced by small states is not universally acknowledged,²⁰ there is a substantial body

¹⁵ M Mushtaq and SM Khan, “Territorial role of second chamber in Parliamentary Federations: Evidence from Pakistan” (2018) 12 *FWU Journal of Social Sciences* 114.

¹⁶ See M Cheema, “Constitutionalizing a perpetual transition: The ‘integration’ of the Pashtun ‘tribal areas’ in Pakistan” (2020) 18(4) *International Journal of Constitution Law* 1405.

¹⁷ I am indebted to Dr Yasser Kureshi, of the University of Oxford, for his generous help in my understanding the key aspects of the constitution of Pakistan. All errors remain my own.

¹⁸ I am indebted to Dr Benjamin Lawrence, of the National University of Singapore, for his generous help in my understanding the key aspects of the constitution of Cambodia. All errors remain my own.

¹⁹ On the Cambodian Constitution more broadly see B Lawrence, “Authoritarian constitutional borrowing and convergence in Cambodia” (2021) 43(2) *Contemporary Southeast Asia* 321; B Lawrence, “Saffron Suffrage: Buddhist Monks and Constitutional Politics in Cambodia”, (2022) 37 *Journal of Law and Religion* 261 at 262-3.

²⁰ See for instance W Easterly and AC Kraay, “Small states, small problems? Income, growth and volatility in small states” (2000) 28(11) *World Development* 2013.

of scholarship that treats small states as a distinctive area of study.²¹ Small democracies face particular problems around capacity, intimacy and concentration of power which need to be addressed in constitution making and reform.²² Small democracy politics is also more personalised,²³ with much less importance given to political parties – an important point I return to below.

Secondly, both represent only a very small proportion of the second chamber: 3% for the Parliamentary Nominees of Cambodia, and 4% for the Islambad Members of Pakistan. It is fair to categorise the Manx situation as a second chamber appointed by the first chamber, while the other two are second chambers containing a very small minority of members appointed by the first chamber – so small, that this element may be overlooked even by the bodies themselves, for instance in the self-description of the Cambodian Senate as “the chamber representing the communal councils”.²⁴

Thirdly, in Pakistan, bicameralism was not introduced until 1973, following the secession of East Pakistan,²⁵ while in Cambodia Parliamentary Nominees were re-introduced by a 1999 amendment to the Cambodian Constitution of 1993,²⁶ but not appointed until 2006.²⁷ The Manx experience, stretching over more than a hundred years, gives a much deeper insight into the process of first chamber franchise.

Finally, Cambodia in particular is a very limited democracy. For instance, in 2017 the opposition Cambodian National Rescue Party was dissolved, leading to the ruling Cambodian People’s Party (CPP) winning all available seats in both chambers in 2018.²⁸ As Lawrence concludes in his 2022 analysis,

“the Cambodian Constitution’s promise of liberal, multiparty democracy seem further from reality than at any point since the document’s promulgation in 1993 ... [a]

²¹ For an overview, see W Veenendaal and J Corbett, “Why small states offer important answers to large questions”, (2014) *Comparative Political Studies* 1.

²² See further PW Edge, “Lisvane’s legacy? Constitutional reform in the Isle of Man”, (2020) 40(1) *Legal Studies* 22.

²³ See for instance W Veenendaal, “Does smallness enhance power sharing? Explaining Suriname’s multi-ethnic democracy” (2020) 19(1) *Ethnopolitics* 64.

²⁴ YAN Vaneluxe, *ibid*, at 148.

²⁵ T Mahmood, “A comparative analysis of the functioning of the Senate in USA and Pakistan”, (2015) 30(2) *South Asian Studies* 265

²⁶ Constitution of Cambodia 1993 art.100. Earlier bicameral constitutions did not make use of indirect election within the national parliament: YAN Vaneluxe, “The Senate of the Kingdom of Cambodia” in HOR Peng et al (eds), *Cambodian Constitutional Law*, (Konrad-Adenauer-Stiftung, 2016), at 141-144.

²⁷ See further B Lawrence, “Cambodia: The National Assembly and Senate of the Kingdom of Cambodia”, forthcoming, pp. 2-7

²⁸ B Lawrence, forthcoming, pp. 6.

retrenchment of hegemonic authoritarian rule by the CPP after thirty years of experimentation with flawed and restricted democratic competition”.²⁹

Pakistan, although regularly holding elections under a competitive multiparty political system, faces particular challenges posed by a powerful and influential military prepared to intervene in formally democratic processes.³⁰

By its very existence, then, first chamber franchise as practised in the Isle of Man challenges orthodox understandings of the range of second chamber composition; it is neither aristocratic bicameralism, moderate bicameralism, federal bicameralism, nor socio-professional bicameralism.³¹ It is a form of bicameralism which has been operating, and being refined as practical problems have been encountered, for more than a century yet unlike, for instance, composition by lot, has not been the subject of sustained consideration.³²

The Manx experience of first chamber franchise.

In 1911, following a petition by the Keys in 1907, a Departmental Committee produced the MacDonnell Report,³³ which recommended a mixed chamber with an element of indirect election, with the Keys constituting an electoral college. The recommendations of the MacDonnell Report were implemented by the Constitution Amendment Act 1919.

The 1919 Council was a radical departure from the historic Council. A number of ex officio members lost their seats in Council, to be replaced by two members appointed by the Lieutenant-Governor (“appointed members”) and four elected by the Keys (“elected members”). Both of the new types of members held their seats for a fixed period – initially eight years, with half of each category being elected every four years.³⁴ Over the course of the twentieth century, the other elements contributing to this mixed Council were reduced or eliminated. In 1919 the Council consisted of 45% ex officio members, 18% appointed, and 36% elected. By 1969, with the removal of all appointed and some ex officio members, elected members had become the majority, at 63% of the chamber. By 1980 it had reached its modern proportion: 27% ex officio members (one of the three being non-voting, another having only a

²⁹ B Lawrence, forthcoming, at p.19.

³⁰ See for instance A Shah, “Constraining consolidation: Military politics and democracy in Pakistan (2007-2013)”, (2014) 21(6) *Democratization* 1007; Y Kureshi, “Selective assertiveness and strategic deference: Explaining judicial contestation of military prerogatives in Pakistan” (2021) 28(3) *Democratization* 606; D Khan and AS Akhtar, “Transforming a praetorian polity: The political economy of democratization in Pakistan” (2022) 43(3) *Canadian Journal of Development Studies* 320.

³¹ O Duhamel and Y Meny, *Dictionnaire de droit constitutionnel*, (1992) PUF, 74-78.

³² On composition by lot see J Gastil and E Olin Wright (eds), *Legislature by lot: Transformative designs for deliberate governance*, (2019), particularly J Gastil and E Olin Wright, “Legislature by lot: Envisioning sortition within a bicameral system”; P-E Vandamme et al, “Intercameral relations in a bicameral elected and sortition legislature”.

³³ See DG Kermode, *Devolution at Work*, (1979), 79-93.

³⁴ Isle of Man Constitution Amendment Act 1919 s.10,11.

casting vote as President), and 72% elected. Today MLCs sit for a maximum of five years, although with the possibility of re-election, and elections are staggered so that there is no point when all seats are vacant.³⁵

The new category of “elected members” was defined as “Four members to be elected by the House from their own members or otherwise”.³⁶ Although women had been able to vote for MHKs since 1883,³⁷ and a 1919 Act extended the right to stand for the Keys to women, the new indirectly elected posts were not open to women.³⁸ It was not until 1961 that women became entitled to be considered for election.³⁹

This paper will not detail the changing procedure of the election process, governed by a combination of primary legislation, standing orders of the Keys, and individual motions, and complex to distil even for a given constitutional moment: as the Speaker observed in the 1962 election, precedents on the process could be “in complete contradiction to each other”.⁴⁰ There are, however, procedural elements which show potential problems with first chamber franchise, and how they have been resolved in the contemporary system.

In 2017 procedural reform of the process sought to address a particular problem – unacceptable delays in appointing to a vacancy. This problem was particularly pronounced after 1987 including, for instance, 19 rounds of voting in 2010 and 20 rounds of voting in 2015. After reforms made by 2017, the five elections since have involved only a single round of voting. What were the causes of these delays, and what were the reforms which addressed them?

Firstly, for nearly a century these posts required a positive vote by 13 of the 24 Keys, with each MHK having only as many votes as there were vacancies to be filled. This could pose a particular challenge when one or more MHKs was absent from the chamber. A candidate who had secured the support of the majority of the Keys present, but less than 13, was then required to secure a confirmatory vote of 13 – failure by the Speaker to call for this vote led to his needing to apologise for an unlawful, and so void, appointment in 1970.⁴¹ In 2017, the procedure was changed to allow a majority of those MHKs voting to fill a seat,⁴² and also to allow each MHK to vote for or against each candidate.⁴³ On a related procedural point, the number of MHKs who needed to support a candidate before they could be voted upon changed.

³⁵ For instance, 5 seats were elected to in 2018 (four normal elections, and one by-election); and four in 2020.

³⁶ Isle of Man Constitution Amendment Act 1919 s.7(a)(2)).

³⁷ House of Keys Election Act 1866.

³⁸ Isle of Man Constitution Amendment Act 1919 s.12.

³⁹ Isle of Man Constitution Act 1961 s.25.

⁴⁰ Manx Hansard, HK 30/10/1962 at 112.

⁴¹ Manx Hansard, HK 27/10/1970, Speaker’s apology in Manx Hansard, HK 3/11/1970.

⁴² House of Keys Standing Orders para.16.

⁴³ House of Keys Standing Orders 8.3(5).

Before 2017, every candidate required a proposer and a seconder – two MHKs. In 2017 the nomination process was changed so that every candidate required not only these, but two additional MHKs who supported the nomination.⁴⁴ I return to the importance of these reforms in relation to effectively making appointments below.

Secondly, before 2017 MHKs voted by secret ballot – a sharp contrast with the normal, albeit not invariable, open ballot of business in the Keys and in Tynwald. Whether first chamber franchise is exercised by secret or open ballot is key to its working. I return to this at length below.

Finally, the way in which information on candidates was made available to MHKs varied over time. For most of the twentieth century, nominations for vacant seats were put forward in debate, with the merits of the candidate being put forward by the MHKs proposing and seconding the candidate. By 2003 these were supplemented by proposals for candidates which were circulated in advance,⁴⁵ and following the 2017 reforms nomination was in writing – even proposers no longer spoke on their candidate.⁴⁶ Standing Orders set out the form of this written nomination.⁴⁷ This was supplemented by a duty upon the Speaker to organise “at least one joint meeting between candidates and Members To ensure that all candidates are known to the House ahead of the Election”.⁴⁸ Since 2017 all nominations have been in writing in advance, and have included the qualifications and experience of the candidate; why the proposer considers them to be suitable; the name of an MHK proposer, an MHK seconder, and at least two other MHKs who are supportive of the nomination; and contact details for the candidate. These changes recognised the increasing diversity of candidates being considered, in particular a key change: electing *to* Tynwald rather than *from* Tynwald.

In the twentieth century the only persons elected to the Legislative Council were either sitting MHKs, sitting MLCs or (much less commonly) former MHKs or MLCs. Before the 1980s, there is only one example of MHKs electing a former MHK and MLC. In the 1980s and 1990s there was an increased willingness to elect former members of Tynwald, although current members of Tynwald continued to be the overwhelming majority of those elected. In the 1980s, 13 sitting members of Tynwald were elected, as opposed to 3 former members. In the 1990s, 15 sitting members of Tynwald were elected, as opposed to 2 former members.

For much of the twentieth century, it is not simply that MHKs and former MHKs enjoyed a comparative advantage which led to them excluding non-MHKs from vacancies. With only one exception, it is not until the 1980s that a person without experience as an MHK was even nominated. The other 118 candidates considered between 1919 and 1980 were all sitting, or had previously sat, in Tynwald. Such an overwhelming predominance of practice could easily slip into a constitutional understanding that MLCs should be chosen from the Keys, requiring

⁴⁴ House of Keys Standing Orders 8.2(5)(c).

⁴⁵ Manx Hansard, HK 18/3/2003.

⁴⁶ Manx Hansard, HK 12/3/2018.

⁴⁷ House of Keys Standing Orders 8.2(5) (as amended 4 April 2017).

⁴⁸ House of Keys Standing Orders 3.1(3) (as amended, 4 April 2017).

Speakers and MHKs on a number of occasions to remind the House that they could appoint “from their own members or otherwise”.⁴⁹

The 1980s saw the first appearance of nominations of persons from outside Tynwald. 8% of the 39 candidates considered in that decade were not current or former members of Tynwald. Non-Tynwald candidates in the 1980s were, however, put forward in very particular circumstances – by-elections to the Council. An MHK who took a seat in Council as a result of a by-election inherited the remainder of the term of office of the MLC they replaced, which could be very short – effectively opting for a reduction in the period of their membership of Tynwald. Before the 1980s, it had been recognised that this could be dealt with by an understanding by the Keys that the person would be re-elected at the next normal election to Council.⁵⁰ By the 1980s, however, this approach had fallen into disuse, perhaps because it was seen as inappropriate to enter into understandings as to future votes. Instead, ex-MHKs, and non-MHKs, began to dominate by-election candidate lists.⁵¹

It was not until the 1990s that persons without experience of Tynwald began to be nominated for full-term seats. Overall 22% of candidates for seats in this decade were not current or former members of Tynwald. The 21st century saw a sustained transformation not only of the range of candidates, but of those successfully elected as MLCs. In the 2000s, 39% of the 67 candidates were not former members of Tynwald; in the 2010s, 59% of 58 candidates, and in the (truncated) 2020s, 78% of 27 candidates. There was a similar change in the profile of MLCs elected – in the 2000s, 16% of 18 appointments; in the 2010s, 37% of 19 appointments; and in the 2020s (so far), 50% of 10 appointments.

A key twenty-first century pivot, then, has been the switch from appointing MLCs *from* Tynwald to appointing MLCs *to* Tynwald. We have comparatively extensive records of why candidates were put forward by their nominating MHKs. This includes both successful candidates and – unusual in a global context – unsuccessful candidates. This public domain data allowed me to collate information on all 71 outside candidates considered since 1962. In doing so, I have focussed on the speeches (later letters) proposing a candidate, which allows identification of the factors that a proposer and seconder regarded as relevant and persuasive in the exercise of the first chamber franchise. Analysis of the seventy-one nominations brings out three important themes in how the Keys exercised their first chamber franchise.

Firstly, there is evidence that first chamber franchise can serve as a driver for diversity in the second chamber, but will not invariably do so.

In relation to gender, only 23 of the 71 nominees (32.5%) were women. When we focus on successful nominees, at 6 of the 14 (43%), the gap between women and men is more than halved. This is comparing two very small data sets however, and is one area where looking at the entire set of nominations together is misleading. As noted above, before 1961 women were not eligible to be elected. The first woman candidate, Betty Hanson MHK, was put forward in

⁴⁹ E.g. Mr Speaker, Manx Hansard HK 31/19/1950.

⁵⁰ See the discussion of F.S. Dalglish in Manx Hansard HK 17/11/1931; comments of Mr. Speaker in Manx Hansard HK 9/7/1935.

⁵¹ e.g. Manx Hansard HK 16/11/1987.

1978, becoming the first woman member of the Council in 1982. In the 1980s, 15% of candidates were women, 6% of those elected. In the 1990s, 5% of candidates were women, 12% of those elected. In the 2000s, 10% of candidates were women, 17% of those elected. There was a significant change in the 2010s, with 22% of candidates being women, 32% of those elected. Women were appointed to seats six times in the 2010s – the appointments between 2017 and 2020 being equal to the number of women appointed before 2010. Although there have only been three processes in the 2020s, a focus on them tentatively suggests that this increase in women being nominated and elected is continuing: 50% of the candidates in the 2020s processes were women.

In relation to class, however, there is not the same evidence of increasing diversity. Coding the work background of each candidate against the categories used by the most recent Manx Census,⁵² one category dominates. The very broad professional category of “Business, Media and Public Service Professionals” includes for instance legal professionals including judges, accountants and economists, architects, journalists and PR professions. Forty-one candidates fell into this category, constituting 58% of the total. To put this into context, in the 2021 Manx Census, just under 7% of the Manx working population were classed in this category.

Secondly, a recurrent theme in nominations is a history of public service. Public service is seen as about societal rather than self-interest, and close to civic mindedness. It is not, however, seen as incompatible with being paid for the activity, so we find the case for a nominee as a public servant built on a career as a police officer, for instance. An overwhelming majority of nominations referred to the public service of the nominee: all but 10 of the 71. The 86% of nominees whose nomination referred to public service had the case made through involvement in a wide range of activities, and it was common for a single nominee to be associated with multiple types of public service. The most common way of making a public service case was by reference to public sector employment, with this appearing in nearly 50% of nominations. This might risk creating a Legislative Council of public sector insiders. Looking at successful nominees, however, there is some evidence that public sector employment was a less compelling argument than proposers may have thought. Thirteen of the fourteen successful nominations included reference to public service, but only three of the fourteen, so 21%, referred to careers in the public sector outside the protective services.

Finally, as nominations of individuals, we frequently find reference to personality traits, with 85% of nominations making explicit reference to one or more personality trait. Even in large democracies with entrenched party politics personality traits are becoming increasingly important to voters decision making.⁵³ Personality has always been crucial to understanding

⁵² Cabinet Office, *2021 Isle of Man Census Report Part II*, GD 2022/0047.

⁵³ J Aichholzer and J Willman, “Desired personality traits in politicians: Similar to me but more of a leader” (2020) 88 *Journal of Research in Personality* 1. See also O Gorbaniuk et al, “Searching for a common methodological ground for the study of politicians’ perceived personality traits: A multilevel psycholexical approach” (2017) *Journal of Research in Personality* 27.

electoral success or failure in very small democracies such as the Isle of Man, whether or not a party system exists.⁵⁴

The explicit discussion of the personality traits required of an MLC typically emerged in relation to the understanding of the modern Legislative Council having a complementary, secondary, role to the Keys. The distinctive contribution of the Council meant that “it should not be an alternative House of Keys”,⁵⁵ and that being an MLC was “a role which is so different from that of being a Member of the House of Keys”.⁵⁶ This emphasis on the special role of the Council as complementary to, rather than duplicating, that of the Keys only increased as the Keys began to look outside Tynwald for MLCs. Numerous candidates were nominated in terms that stressed their critical skills. We find specific references to the candidates understanding of Legislative Council as “primarily a scrutiny chamber”,⁵⁷ needing “members qualified in the ... scrutiny of legislation”⁵⁸ with:

“the first and greatest responsibility as a Member of the Legislative Council [being] the scrutiny of legislation virtually line by line, and it needs an ability to concentrate, to be a clear thinker and understand how a Bill is constructed”.⁵⁹

It is possible however, based on the growing body of global literature on personality and politics, to draw out more detail on the desired personality of an MLC by the way they are recommended to the House by their proposer. I followed Aicholzer and Willman in coding the 71 nominations against the six categories of personality traits used in their analysis – what are commonly referred to as the Big Five (openness to experience, conscientiousness, extraversion, agreeableness, and neuroticism), supplemented by a trait from an alternative taxonomy, that of “honesty-humility”. They found that, at least in the groups they studied, voters preferred candidates with high levels of openness, conscientiousness, extraversion and honesty, but low levels of agreeableness and neuroticism. In only one significant area do the candidates put forward to MHKs differ from the voter preferences identified by Aicholzer and Willman; that of agreeableness. Broadly speaking, agreeable individuals value getting along with others, while low agreeableness individuals are often competitive or challenging people. 27 nominations described the nominee in ways consistent with high agreeableness (38%), while

⁵⁴ W Veenendaal, “Size and personalistic politics: Characteristics of political competition in four microstates” (2013) 103(3) *The Round Table* 245.

⁵⁵ Manx Hansard HK 7/3/1995 at K501.

⁵⁶ Manx Hansard HK 3/3/1998.

⁵⁷ Personal Statement of Conor Keenan, 23 November 2021, available online <https://www.tynwald.org.im/business/opqp/sittings/20212026/2021-PP-0203.pdf> (accessed 31 August 2022); Personal Statement of Kerry Sharpe, 12 March 2020, available online at <https://www.tynwald.org.im/business/opqp/sittings/20182021/2020-PP-0047.pdf> (accessed 31 August 2022); nomination of John Skinner by David Ashford, 12 March 2018, available online at <https://www.tynwald.org.im/business/opqp/sittings/Tynwald%2020162018/2018-PP-0042.pdf> (accessed 31 August 2022).

⁵⁸ Manx Hansard 18 March 2013 at 165.

⁵⁹ Manx Hansard 6 May 2015 at 58.

13 described the nominee in ways consistent with low agreeableness (18%). At times the nominating MHK described the same nominee in both ways.

The best explanation for this tension is that nominations reflect the complexity of the role of MLC. Being part of a small national legislature requires an ability to work constructively as part of a team for common goals, and recognition of the importance of the nation, and of society – requiring high agreeableness. At the same time, being an MLC, particularly when the emphasis is on the Legislative Council as a scrutiny body at times challenging an established point of view, requires scepticism, and a willingness to challenge – requiring low agreeableness. Nominations seek to portray the candidate as agreeable, but not *too* agreeable; and the opposite, but not *too* much so. If agreeableness is rated more highly by MHKs than by the voters in elections studied by Aicholzer and Willman, this could be seen as a pragmatic response to members of Tynwald appointing new members; members with whom they will have to work within the same legislature. As such, this is an important feature of first chamber franchise, which is unique in having members of the legislature appoint their fellow legislators.

Understanding first chamber franchise.

First chamber franchise can allow a second chamber in a small democracy's parliament to fulfil key functions of bicameralism.

In her seminal study of the contemporary House of Lords, Russell builds on earlier work by Patterson and Mughan to cluster possible functions of bicameralism into representation and redundancy.⁶⁰

The representation function allows opportunities “for different groups to be represented, which may benefit those who are absent from, or disadvantaged by, arrangements in the first chamber”.⁶¹ The elite model which allowed representation for a society’s traditionally powerful groups allowed them to be represented in a way which simple direct election to the first chamber would not; while the territorial model which allowed representation of territories within a state, allowed the same for regions, including in some models comparatively small regions. A second chamber may also represent “an alternative logic of representation”, such as that of Ireland discussed above; or in Australia where the first chamber uses first past the post electoral rules, while the second chamber uses proportional representation. Such alternative representation may be designed to impede the same political party enjoying a majority in both chambers.

The redundancy function refers to the duplication inherent in a two chamber system: “legislation is looked at not once, but twice”, with potential benefits for the quality of policy decisions, particularly where the second chamber is designed to bring a different perspective to bear. Additionally, the delay inherent in this duplication allows issues to be discussed beyond the first chamber, potentially involving a broader discussion in the nation.

Small democracies, while in some instances wealthy on a per capita basis, have restricted resources for governance. The costs inherent in the duplication which is not simply a bug, but

⁶⁰ cf M Russell, *The contemporary House of Lords: Bicameralism Revived*, (OUP, 2013), Ch. 3.

⁶¹ *ibid* p.44.

a feature, of bicameralism may explain the relative absence of bicameralism in small democracies, particularly those without strong links to a large bicameral state such as the US or the UK. Additionally, for small democracies representation of sub-units may not be a sufficiently pressing factor to justify the expense. Bicameralism is “[t]ypically associated with large, decentralised or federal states” so that, as Murphy observes, it is unusual to find it “within a centralized and unitary Irish state with a population of less than five million”.⁶² Bicameralism is, indeed, “often portrayed as the quintessential federal institution”.⁶³

If a small democracy can afford bicameralism, however, some of the functions identified by Russell will still apply. A second chamber may be designed to provide representation of different perspectives in the legislature – an argument with considerable more traction in the twenty-first century version of first chamber franchise in the Isle of Man than the twentieth century version. It may serve an important role in scrutinising legislation proposed by the first chamber – an argument made with increasing force in Tynwald from the 1960s. It may impede the speedy passing of at least some legislation, providing opportunities for reflection and public engagement with the proposed legal changes.

If a small democracy sees the advantages of bicameralism as meriting a departure from the more common unicameral form, then composition of the second chamber poses serious challenges. Direct election creates a quandary – if the second chamber is smaller than the first, members of the second chamber can point to a larger electoral mandate than members of the first; if it is the same size or larger, the size of the chamber is an added drain on the limited resources of a small democracy. In relation to regional representation, sub-units of the nation may not have a sufficient identity to justify representation in the national legislature, and if directly elected may similarly produce tensions of mandate and authority between the first and the second chamber. As this study has shown, first chamber franchise represents an alternative way of bringing members into the national legislature – one which has an element of legitimacy so long as directly elected members can be held accountable for these decisions.⁶⁴ Such members do not, however, have the authority of a direct electoral mandate, allowing for a dominant/subordinate chamber model – common in bicameral legislatures.

These advantages depend, however, upon escaping party capture.

First chamber franchise is vulnerable to party capture.

A key factor in understanding the Manx experience is the role which party politics has played in Manx politics more generally. The intimacy of small democracies means that, in many small democracies, a formal political party system is either absent, a minor theme in national politics,

⁶² MC Murphy, “Bicameralism in a unitary state”, in DM Farrell and N Hardiman, *The Oxford Handbook of Irish Politics*, 2021 at 330.

⁶³ J Poirer and A-G Gagnon, “Canadian Federalism: The impact of institutions on key political and societal actors”, in A-G Gagnon and J Poirer, *Canadian federalism and its future: Actors and Institutions*, (2020).

⁶⁴ For the importance of legitimacy in understanding a bicameral structure, see M Russell, “Rethinking bicameral strength: A three-dimensional approach” (2013) 19(3) *Journal of Legislative Studies* 370.

or functions in an attenuated form.⁶⁵ The absence of party politics is both a product, and a reinforcer, for the personalisation seen as characteristic of small democracies.⁶⁶ Where party politics is dominant in a democracy, however, there is the possibility of the use of party control of the appointing body to pack the second chamber with members loyal to that party; a situation I will refer to as party capture of the second chamber.

In the Manx context, political parties as a group have never dominated elections, let alone created a two party system. A consideration of candidates for the Keys in General elections shows the continued dominance of politics without parties in the Manx system.⁶⁷ In the twenty General elections to the House of Keys since 1919, there has never been an election where the majority of candidates, and then elected MHKs, have had a party affiliation. The closest was the election of 1951, where 20 independents contested the 24 seats with 18 party candidates, spread over 4 parties.

The absence of a party system in Manx politics has prevented party capture of the first chamber franchise. Indeed, given the overwhelming majority of MHKs are Independents, standing as a party nominee for the Legislative Council could constitute a positive disadvantage. There are very few legal or procedural barriers to such capture, however,⁶⁸ and, as the operation of vocational panels to the Irish Senate has shown, an indirect electorate composed of politicians elected within a party system can quickly capture an appointment system configured on non-partisan lines.⁶⁹ If the majority of MHKs were affiliated to a single party, that party would have

⁶⁵ See for instance L Paeniu, “How can Parliamentary democracy function more effectively in small Pacific island countries such as Tuvalu and Nauru?”, (2012) 14(2) *Journal of South Pacific Law* 6; WP Veenendaal, “How democracy functions without parties: The Republic of Palau”, (2013) *Party Politics* 1; W Veenendaal, “Size and personalistic politics: Characteristics of Political Competition in Four Microstates” (2013) *The Round Table: The Commonwealth Journal of International Affairs* 1; T Ahlbom, “On the rationality of Manx crabs”, (2014) 9(1) *Island Studies Journal* 123; J Corbett, “Small fish swimming in the shape of a shark: Why politicians join political parties in the Pacific Islands” (2015) 53(2) *Commonwealth and Comparative Politics* 130; ML Bishop, J Corbett, W Veenendaal, “Labour movements and party system development: Why does the Caribbean have stable two-party systems, but the Pacific does not” (2020) 126 *World Development*.

⁶⁶ See the reviews by W Veenendaal, “Monarchy and democracy in Small States: An ambiguous symbiosis” in S Wolf (ed, *State Size Matters* (2016) and “When things get personal: How informal and personalized politics produce regime stability in small states” (281) *Government and Opposition* 1.

⁶⁷ See further DG Kermode, *Devolution at work: A case study of the Isle of Man*, (1979); DG Kermode, *Offshore Island Politics: The Constitutional and Political Development of the Isle of Man in the Twentieth Century*, (2001); DG Kermode, *Ministerial government in the Isle of Man: The first Twenty Years 1986-2006*, (2007).

⁶⁸ In contrast to the three independent appointees to the Bermudan Senate, discussed above.

⁶⁹ See MC Murphy, “Bicameralism in a unitary state”, in DM Farrell and N Hardiman, *The Oxford Handbook of Irish Politics*, 2021; M O’Donoghue, “Vocational voices or puppets of

had the power in 2018, for instance, to appoint a slate of 5 MLCs affiliated with the same party. More realistically, but still very unlikely, if a number of parties together commanded 13 votes they could work together to appoint a slate representing their relative strengths in the Keys. The only mechanism in the Manx system which would have the effect of impeding party capture is the staggering of MLC appointments – a feature since 1919 – which would require a party to enjoy sustained domination of the Keys in order to completely capture the second chamber.

If the Manx model were considered by constitutional reformers elsewhere, this distinctive part of the context needs to be borne in mind. One possible response to party dominance in the political scene is to build parties into the constitutional arrangements, so that the dominance is at least constitutionalised. In the Cambodian system, for instance, all prospective candidates for indirect election to the Senate must be nominated by a recognised political party, and lose their mandate if they cease to be a member of the party for which they were nominated.⁷⁰ This resulted in 2001 in three Senators being removed after their membership of their nominating party was revoked following the Senate rejecting draft legislation.⁷¹

A better response would be to seek to impede party capture, on the basis that the more a second chamber resembles the first chamber on party lines, the less potent the bicameral benefits of diverse representation and duplication. In small democracies, whose characteristics impede strong party institutionalisation and stress the personal, parties may be so marginalised that this is not a significant concern. If this is a more significant concern, however, staggered appointment to the second chamber can ensure that general elections have refreshed the first chamber between appointments to the chamber. Another option is to allow members of the first chamber to vote by secret ballot, and so be able to escape party control. As I show in the next section, however, this is a route which cannot be justified.

First chamber franchise is a public duty which needs to be exercised openly.

It has been argued that intimacy is a key feature of small democracies, including the Isle of Man, which needs to be considered in both constitutional design and constitutional analysis.⁷² The intimacy of members of a small chamber such as the Keys risks indirect election being treated in at least some circumstances as a private matter between members, rather than a public duty. Additionally, the intimacy of a first chamber electing individuals to join them in the national legislature raises similar risks that private interests might be given inappropriate weight. The chronological depth of the Manx case study allows us to draw out not only instances when this danger materialised, but a reaction against it which has led to a reemphasising of the public duty.

the lower house? Irish senators 1938-1948” in N Biljevled et al (eds), *Reforming senates: Upper legislative houses in North Atlantic small powers. 1800-present*, 2020

⁷⁰ Law on Election of Members of the Senate, 2005 article 29.

⁷¹ B Lawrence, forthcoming, at p.5.

⁷² PW Edge, “Lisvane’s legacy? Constitutional reform in the Isle of Man” (2020) *Legal Studies* 40,22 at 38.

When MHKs selected from amongst their number for a remunerated seat in Tynwald, discussed above, there could always be an interpretation that MHKs who knew and worked with each other formed a distinct political class, and voted for other MHKs as a way of securing an important benefit for a colleague.⁷³ The undesirability of this practice was a key theme of the review of Lord Lisvane in 2016,⁷⁴ although as noted above, by 2016 this practice had already declined sharply from the twentieth century dominance. Lord Lisvane noted criticisms of the current arrangements as creating “a retirement ticket”, “a cushy retirement or safe havens for MHKs who have served the Government well over time”.⁷⁵ He shared concerns over “direct transfers” from the Keys to Legislative Council, and his recommendations including a number of measures to “make a clean break with a damaging perception, and with no hint of a revolving door”.⁷⁶ As well as the pattern of appointing colleagues to the second chamber, there are three other practices which seem best explained by an inappropriate emphasis on private interests.

Firstly, in debating the merits of different candidates, numerous members of the Keys have, particularly in the earlier part of the period, put “elevation” to the Council forward as a reward for long service in the Keys.⁷⁷ Secondly, and even more pointedly, what was seen as the less onerous demands of the Council were repeatedly put forward as a reason why an aging or unfirm MHK should be elected. Declining rapidly after the 1960s, the idea that becoming an MLC was a reward for contribution to the life of Tynwald, and a form of semi-retirement, last flickers in the election of 1978.⁷⁸ Thirdly, the earlier practice in relation to bye-elections to seats with short terms remaining was based both in concern for the interests of an MHK giving up their seat for a less certain place in Tynwald, and a willingness to work under a private agreement as to how those interests could be protected. As noted above, this approach was discarded in the 1980s, even while the norm was to elect an MHK, by electing from candidate lists composed disproportionately of ex-MHKs or non-MHKs.

If we see exercise of first chamber franchise as a public duty, the question arises of how members of the first chamber can be held to account for any failure in that duty. The obvious mechanism for holding a member of the first chamber to account is through the political process of their own direct election. It is possible to imagine a second chamber appointment so controversial that it could in itself damage the electoral performance of a first chamber member in a future contest. The more likely scenario - that it would be one of a myriad number of factors, events, and perceptions operating in the electorate - still requires that the electorate be able to know how the candidate for re-election exercised this power.

⁷³ See Mr Teare, Manx Hansard HK 18/3/1924 at 585.

⁷⁴ *Review of the Functioning of Tynwald*, GD 2016/0047 (hereafter the Lisvane Review).

⁷⁵ Lisvane Review at 29.

⁷⁶ *Ibid* at 32.

⁷⁷ For example, Mr Cain, Manx Hansard HK 25/11/1919 at 21.

⁷⁸ See Mr Kermeen, Manx Hansard HK 7/11/1978 at K75; Mr Radcliffe, Manx Hansard HK 7/11/1978 at K76; Mrs Quayle, Manx Hansard HK 7/11/1978 at K76.

Until 2017, voting for election to the Legislative Council was by secret ballot. In 2017, a Select Committee recommended that the ballot should remain secret,⁷⁹ although Mr Hooper published a memorandum of dissent where he stressed that MHKs:

“are exercising their judgment on a matter that can and likely will have significant impact on future policy and legislation. The electorate has a right to know how their elected representatives vote on any issue of policy or legislation, as they do with all such votes”.⁸⁰

The Keys followed the dissent, and the secret ballot was replaced with a public ballot.⁸¹ A theme of those who supported the amendment in debates was that MHKs exercised a public function in appointing MLCs, and must be accountable for such decisions.⁸² Accountability is the fundamental argument for open ballots in first chamber franchise.⁸³ What are the arguments for secret ballots?

Firstly, the secret ballot opens up strategies for an MHK to maintain good relationships in the intimate context of a small democracy – relationships with their peers, rejected candidates, and elected MLCs. The only MHK to speak in favour of retaining the secret ballot brought out elements of this:

“with a public vote you are not going to have much conversation out of your brother-in-law or your next door neighbour for the next five years because he has found out you have not voted for him and you have voted for the best person you considered for the job”.⁸⁴

Secondly, the secret ballot allowed MHKs to implement voting tactics that depended upon their own votes being unknown. The proposer of the open ballot believed that openness would result in ‘far less spoiling of papers, time wasting and underhand tactics’.⁸⁵ The nature of the secret ballot means that often one would not expect to find these tactics in the record. Two pieces of evidence suggest to me, however, that this occurred. In 2015 an outgoing MLC began his final speech in the Legislative Council by thanking “those who voted for me in 2005 – the 14 votes I got; thank you to the 20 people who said they voted for me! (laughter) And ditto in 2010”.⁸⁶

⁷⁹ Standing Orders Committee, Fourth Report 2016–2017, PP 2017/0063, p2.

⁸⁰ Ibid, p5.

⁸¹ Standing Orders of the House of Keys, 8.3(13), revised 4 April 2017.

⁸² E.g Mrs Corlett, at 755 K134 at 784–791

⁸³ The by-elections for hereditary peers in the House of Lords, which are carried out by secret ballot, lack the element of accountability by those who vote to a further electorate. See further Clerk of the Parliaments, *By-elections to replace five hereditary peers – revised arrangements*, 20 September 2022 p4.

⁸⁴ Manx Hansard HK 758 K134, Mr Malarkey at 954–980.

⁸⁵ Miss Bettison, at 754 K134 at 767–768.

⁸⁶ Manx Hansard, TC 18/2/2015 at 1278 T132.

This good humoured reference to deception as to voting was repeated, without disagreement, by an MHK in 2016.⁸⁷ Less concretely, because of issues of causation, the removal of the secret ballot was followed immediately, and consistently, by appointments to the Council requiring only a single round of voting. This suggests that, as anticipated in the Keys debates, open voting strategies would lead more quickly to a conclusion, perhaps because of the closing off of voting strategies depending upon the secretness of the ballot.

Thirdly, there is an argument from voting rights – normally a person electing a candidate to the national legislature will do so by secret ballot. This argument has recently been considered by the Supreme Court of Pakistan,⁸⁸ which found against a measure intended to turn the secret ballot for indirect election into an open ballot – that is, a measure analogous to the successful change in the Isle of Man in 2017. As noted above, the Pakistan constitution has indirect election to the Senate, mainly from outside the national legislature, but with a very small number of seats determined by the first chamber. Until 2017, these elections were by secret ballot, but in 2017 these were changed to open ballot.⁸⁹ The key question for the Supreme Court of Pakistan was whether this legislation was constitutionally permissible. In particular, Article 226 of the Constitution provided that “All elections under the Constitution, other than those of the Prime Minister and the Chief Minister, shall be by secret ballot”.⁹⁰ The court noted that the process for indirect election to the Senate, itself contained in the Constitution, used the term “elected” consistently,⁹¹ and that the term “election” in Article 226 could not be limited to direct election only.⁹² Accordingly, the Court found that Article 226 applied to elections to the Senate.⁹³

Given the wording of the Constitution of Pakistan, allowing an open ballot for the indirect elections to the Senate would have required “elections under the constitution” to be interpreted in a way which excluded these indirect elections, contrary to the way the same Constitution described them. This was not seriously discussed by the Court, which means the arguments of principle for applying the secret ballot to these sorts of indirect elections were not considered. Do general arguments for the secret ballot apply to indirect elections?

The normal arguments for the secret ballot take as their centre of gravity the need to “protect voters from the possibility of violence or other coercive action intended to influence their voting decision or to punish them for having voted in a particular way”.⁹⁴ A more minor theme

⁸⁷ Manx Hansard, TC 17/5/2016 at 1480 T133 per Mr Chris Thomas.

⁸⁸ Reference no.1 of 2020 (2020) Supreme Court of Pakistan; available at https://www.supremecourt.gov.pk/downloads_judgements/reference_1_2020.pdf (accessed 14/12/2022).

⁸⁹ Elections Act 2017 s.81.

⁹⁰ Constitution of Pakistan Art.226.

⁹¹ Reference no.1 of 2020 at 56.

⁹² Ibid at 65.

⁹³ Ibid at 73.

⁹⁴ Elklit and Maley 2019 at 65.

is the way in which a secret ballot makes it impossible for a buyer of a vote to verify performance of the voter in the way agreed.⁹⁵ The extent to which secret voting secures these advantages is contested.⁹⁶ These arguments are in any case much less applicable to elected members of a national legislature exercising first chamber franchise. In particular, ideas of accountability to their electorate recast action intended to influence their voting decision, or to punish them for having voted in a particular way, as legitimate accountability; and recast verification of statements as to voting intentions as openness, and provision of important information to the electorate in exercising their own franchise.⁹⁷

The Pakistan example, in context, may not be contrary to this principle that accountability to the electorate for first chamber franchise is best served by open ballots. The move towards open ballots was resisted primarily by parliamentarians who feared that open ballots would be used to pressure the national and regional political actors responsible for Senate appointments by military actors who sought a sufficient majority in the Senate to allow constitutional reform. The desire to keep secret ballots was not to insulate these members from their electorate, but from the undemocratic power of the military.

Combining lessons from the Manx and Pakistan contexts, then, suggests that the default for the exercise of first chamber franchise should be open ballot, to ensure accountability for their voting decisions by democratically elected members of the first chamber. The insulation from influence and accountability provided by the secret ballot should not be used to insulate elected politicians from the electorate. Nor should it be used to insulate politicians from awkward interactions with disappointed neighbours, or fellow legislators who bear a grudge – both situations which could be generated by voting on a range of legislative business. If, however, the broader constitutional context suggested that politicians need insulating from an extra-constitutional force, there may be truly exceptional arguments for such insulation – the “game playing” described in the Manx context might be read very differently if the games were being played to resist authoritarian pressure.

Procedural rules need to allow definitive, considered, electoral decisions.

As noted above, a significant problem in the elections to the Legislative Council until comparatively recently was the length of the process. A commonly expressed concern was that a cumbersome process could create a situation where “arguably, the delays and political games

⁹⁵ See DW Gingerich and D Medeiros, “Vote secrecy with diverse voters” (2020) *Comparative Political Studies* 53(3) 567 ;K Kamei, “Incomplete political contracts with secret ballots: Reciprocity as a force to enforce sustainable clientelistic relationships” (2021) *Journal of Law, Economics and Organizations* 32(7), 392. For a detailed case study showing the importance of tracking delivery of bought votes, see DR Gingerich, “Buying power: Electoral strategy before the secret vote”, (2020) *American Political Science Review* 114(4), 1086.

⁹⁶ See for instance the comparison between secret voting and collective voting in S Mueller et al “Democracy beyond secrecy: Assessing the promises and pitfalls of collective voting” (2021) *Swiss Political Science Review* 27(1), 61.

⁹⁷ Consider T Theuns, “Jeremy Bentham, John Stuart Mill and the Secret Ballot: Insights from Nineteenth Century Democratic Theory” (2017) *Australian Journal of Politics and History* 63(4) 493 at 497.

... have resulted in a loss of credibility and respect for Members of the Upper Chamber”.⁹⁸ The Lisvane Review described the process as “a reputational running sore”.⁹⁹

The Manx experience indicates that procedural reform can lead to more definitive electoral decisions. The 2017 report leading to changes to Standing Orders can provide a useful starting point for such a procedure, representing as it does the current end point of a century of working, and reforming, the process as problems are encountered. As well as the 2017 abolition of the secret ballot, discussed in the previous section, significant changes were made to filter out candidates who did not command at least modest support (by requiring four MHKs to formally support each nomination); and to allow MHKs to vote for as many candidates as they supported, rather than limiting their votes to the number of vacancies. The change to the nomination process, by requiring a candidate to have broader support to be nominated, may have helped to address the problem posed by an open ballot in a small jurisdiction – an MHK might preserve relationships with a would-be candidate by seeking, but failing, to secure the support of three other MHKs.

Moving from definitive to considered, once again the modern iteration of the Manx process has much to recommend it. The information available to MHKs has changed in the 21st century, with a shift away from formal speeches by MHKs, to a requirement that papers be circulated in advance for all candidates; and a requirement that a formal system of hustings be arranged to ensure the (small) electorate has a chance to assess each candidate.¹⁰⁰ The latter is of particular importance with the shift in election from/to Tynwald noted earlier. As the 2017 report on Standing Orders noted, mandatory hustings are “an acknowledgement that in future there may potentially be a much wider range of candidates from our community”.¹⁰¹

The content of nominations is now laid down by Standing Order, and includes the qualifications and experience of the candidate; and why the proposer considers them to be suitable. What is lacking from the current Manx system, however, is an agreed set of criteria against which individual applications might be evaluated by individual MHKs. The Lisvane Review, albeit within the context of his broader recommendation for a Nominations Commission to act as a preliminary filter before nominations were considered by the Keys, stressed the importance of this: “An early task would be to formulate a description of desirable skills, competences and experience, perhaps in consultation with the President of Tynwald and the Speaker of the Keys”.¹⁰² Analysis of the grounds in which appointments to Tynwald have been recommended, although descriptive rather than normative, could provide a good starting point for this formulation.

⁹⁸ Manx Hansard, HK 4/4/2017 at 832-833 per Mrs Caine.

⁹⁹ Lisvane Review, p31.

¹⁰⁰ Standing Orders of the House of Keys, 8.1(3) (amended 4 April 2017). This moved into the Keys national hustings which had already begun to be organised by Liberal Vannin (a political party) and the Positive Action Group (an NGO).

¹⁰¹ Mr Ashford, Keys Hansard, 753 K134 (4 April 2017).

¹⁰² Lisvane Review p32.

First chamber franchise can have a role in enhancing diversity in the absence of a party system. If the absence of a strong party system has allowed the Manx system to avoid the problems associated with party capture, it also means that a further set of opportunities are not available. In particular, a range of mechanisms used globally to address underrepresentation of particular groups within the legislature are dependent upon influencing or regulating political parties in their selection of candidates.¹⁰³ In the absence of party mediation, other mechanisms must be considered.¹⁰⁴

There is evidence that, once the filter of having previously served in Tynwald fell away, first chamber franchise in the Isle of Man has worked to improve diversity in Tynwald. We see this most clearly in relation to gender, with elections to the Legislative Council in 2018, following the Lisvane Review's criticism of the under-representation of women in Tynwald, transforming the gender composition of the Council. In relation to class, however, we see a notable lack of diversity. In the previous section, I argued for a reflection upon, and description of, the skills, competencies and experience required of a suitable candidate for the Legislative Council. Such an approach would also support MHKs in considering candidates with the relevant skills from across a range of professional and life course backgrounds.

Conclusions.

This in-depth study has shown that accepted descriptive taxonomies of second chambers in bicameral legislatures are lacking, through failing to take account of an actual second chamber – one with features uniquely pronounced in the Isle of Man. I have categorised this form of indirect election as first chamber franchise, and argued that the exemplar of this form of bicameralism is the Manx Tynwald.

One way of viewing the Manx experience is as an outlier, distinctive but of no greater importance than, say, the Chiefly house of Lesotho. I have argued, however, that the Manx experience needs to be put in the broader frame of small democracies. First chamber franchise can allow diversity of representation and duplication of parliamentary scrutiny in the absence of elite or regional distinctiveness. These benefits risk being lost, however, where strong parties are able to use their power in the first chamber to replicate the party shape in the second chamber. This largely rules out first chamber franchise in large states with established party systems, which in any case can draw upon alternative logics in the composition of a second chamber.

In small democracies, however, these benefits are particularly pronounced, and the significant weakness of parties within some of these democracies particularly attenuates the risk of party capture. Small democracies reconsidering their bicameralism should, therefore, look beyond the models established within large democracies, and consider the worked example of first chamber franchise from the Manx Tynwald. In doing so, they should take account of the lessons learnt in that century, and draw upon the later Manx experience which has benefited from a process of incremental constitutional reform to address problems in practice. In particular, the

¹⁰³ See K Celis and S Childs, *Feminist democratic representation*, (2020).

¹⁰⁴ See J Fraenkel, *A woman's place is in the House – The House of Parliament: The impact of electoral systems on women's representation in Pacific Parliaments*, (2007) Pacific Islands Forum Secretariat.

Manx experience shows the importance of parliamentary procedure in ensuring definitive and considered appointment decisions, and the importance of the open ballot in ensuring legitimacy for the indirect appointment of electors.