

THE OFFICE OF THE SPEAKER AND THE CONSTITUTION OF NIUE: A BRIEF COMPARATIVE ANALYSIS

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Following the recent discussions about the role of the Speaker in Niue and the paper by Alison Quentin-Baxter, Joel Colón-Ríos here places the matter in a comparative context.

I THE OFFICE OF THE SPEAKER

Almost all legislatures attribute to one of its members (and in some cases a non-member) the responsibility of presiding over plenary sessions and ensuring that the rules of procedure of the assembly are followed. This short note aims to discuss the Office of the Speaker in a comparative perspective, paying particular attention to the Speaker of the Niue Assembly. This is done in light of a proposal for a constitutional amendment to the Constitution of Niue that would allow the Speaker to remain a member of the Assembly even after his or her election as Speaker and to establish procedures for his or her dismissal. This paper maintains that any changes to the Office of the Speaker should be based on the conviction that the impartiality and independence of the office would not be negatively affected or made more difficult to achieve.

II THE NEUTRAL AND PARTISAN SPEAKER MODELS

The Office of the Speaker can be generally organised according to two main models (even though the way the office works under different national constitutions would tend to fall somewhere in-between): the 'neutral' Speaker and the 'partisan' Speaker.¹ As will be seen below, the Office of the Speaker of the Niue Assembly exhibits many characteristics typical of the 'neutral' Speaker model, and the Speaker's neutrality seems to be a logical result of the functions (beyond presiding over parliamentary debates) the Constitution of Niue attributes to it. The

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1 See Stanley Bach *The Office of Speaker in a Comparative Perspective* (1999) 5 *The Journal of Legislative Studies* 209-254.

'neutral' and 'partisan' Speaker models, exemplified in the English House of Commons and the United States House of Representatives are discussed below.

According to the 'neutral' Speaker model, the Speaker is seen as a non-partisan officer, whose main functions are presiding over legislative debates and ensuring that the standing orders are strictly followed. Whatever his or her political views, they must be put aside once the Speaker assumes office. According to the partisan Speaker model, the speaker is an openly political officer, usually being the leader of the majority party. Under this model, the Speaker is not only called to maintain order during parliamentary debates, but to play a key role in implementing the government's legislative programme. Nevertheless, when presiding over debate and enforcing the standing orders, the Speaker is required to act as a neutral officer.

Although in the context of the United States and the United Kingdom both models find their origins in the Westminster tradition, the way they conceive the office is a result of the different histories of the relationship between parliament and the Crown in North America and England. This is important since it suggests that the Office of the Speaker should not be designed in the abstract, but only by paying close attention to the particularities of the constitutional system at issue and to the functions it attributes to the Speaker beyond being charged with organising debate and maintaining order.

III THE SPEAKER IN THE WESTMINSTER SYSTEM OF GOVERNMENT

In England, the Speaker of the House of Commons was originally appointed by the monarch to act as the agent of the Crown in Parliament. In the 17th century that tradition was broken, when the Speaker identified himself as a servant of the House of Commons and not of the Crown. Today, the Speaker is elected from among the members of the House. Although elected under a political party, the Speaker is expected to be a fully impartial official. To achieve that objective, the Speaker withdraws from any involvement in his or her political party.

In accordance with the 'neutral' Speaker model, beyond chairing the sessions of the House of Commons, the Speaker does not take part of the debate and only votes in the event of a tie (ie has a casting, not a deliberative vote). According to constitutional convention, this casting vote will always be to continue the debate or to maintain the status quo (for example, if the vote is to amend a particular Bill, the Speaker will vote to maintain the Bill in its original form).²

2 For a brief discussion, see "Presiding Officers: Speakers and Presidents of Legislatures" *National Democratic Institute, Legislative Research Paper #1*. See also Margaret A. Banks *The Chair's Casting Vote: Some Inconsistencies and Problems*, (1977) 16 U. W. Ontario L. Rev. 197.

IV THE SPEAKER IN THE US SYSTEM OF GOVERNMENT

In the United States, the Speaker not only maintains order in the debate but is also the elected leader of the majority party in the House of Representatives. The partisan character of the Speaker is a direct result of US colonial history, in which the colonial legislatures often presented themselves as a site of resistance to the decisions of the royal governor. In this context, the Speakers of the colonial legislatures were seen as openly political individuals, the leaders of the opposition against the Crown. After independence, the role of the Speaker changed to that of the leader of the majority faction in the legislature.³ The US Constitution (Art 1, Sec 2) does not require the Speaker to be a member of the Assembly, but historically only elected members have been elected as Speakers.

Under this 'partisan' model, the Speaker plays an important role in controlling the legislative agenda in the House. For example, he or she meets daily with party leaders to discuss the party votes on Bills. Since these political activities occupy an important part of the Speaker's time, he or she frequently appoints junior members of Congress to chair plenary sessions. If the Speaker is chairing a session (a role in which he or she must act in a non-partisan and neutral way) and wishes to participate in the debate (which only happens in exceptional circumstances) she or he must step down from the chair and be replaced by another member.⁴ The Speaker has a deliberative vote, but normally abstains unless there is a tie.

V WHO CAN BE ELECTED AS A SPEAKER

As in the English House of Commons and the US House of Representatives, most legislatures around the world elect one of its own members as their presiding officers. According to a study published in Geneva in 1997, this is the case of almost 95 per cent of the world's national legislatures.⁵ After the Speaker is elected, he or she normally maintains his or her status as a member of the assembly, even though his or her voting rights are usually limited. There are some exceptions to the general rule stated above. Under the new Constitution of Kenya, for example, the Speaker must be elected "from among persons who are qualified to be elected as members of Parliament but are not such members".⁶ In some countries there is the possibility for the Speaker to be selected either from outside

3 At 7-8.

4 At 9.

5 Georges Bergougous, *Presiding Officers of National Parliamentary Assemblies: A World Comparative Study* (Inter-Parliamentary Union, Geneva, 1997) at 6.

6 Constitution of 2010 (Kenya), Article 106(1)(a).

or within the assembly provided he or she meets the election criteria of a member. This is the case in countries like Belize⁷ and Malta.⁸

Some constitutions, like that of Grenada, allow a person who is not a member of the assembly to be elected Speaker but, by virtue of holding that office, that person becomes a member.⁹ Although not very common, other Constitutions, like that of Niue, allow the Speaker to be selected from among the members of the assembly but require him or her to resign as a member and a by-election then to take place to elect a new member. Interestingly, that was also the case in the draft Constitution of Kenya, whose Article 116(2) stated: "If a member of the Assembly is elected Speaker, he or she shall resign from the Assembly and a by-election shall be held to fill the vacancy".¹⁰

The 'neutral' Speaker model is consistent with both a Speaker that is a member of the Assembly as well as with those systems in which the Speaker is a non-member. Nevertheless, those systems which require the Speaker to be a non-member would normally rely on an attempt to protect the impartiality and independence of the office and therefore be consistent with a stricter version of the 'neutral' model.

VI VOTING RIGHTS OF THE SPEAKER

The general rule is that if the Speaker is considered a member of the assembly, he or she will be able to exercise some variant of the right to vote.¹¹ An exception is the Constitution of Finland (under which the Speaker is a member of the Assembly), which establishes that "(3) The Speaker does not participate in debates

7 Constitution of 1981 (Belize), Article 60(2): "The Speaker shall be above the age of thirty years and may be elected either from among the members of the House of Representatives who are not Ministers or from among persons who are not members of either House; Provided that a person who is not a member of either House shall not be elected as Speaker if: (a) he is not a citizen of Belize; or (b) he is a person disqualified for election as a member of the House of Representatives by virtue of section 58(1) of this Constitution".

8 Constitution of 1964 (Malta), Article 59 (2): "The Speaker may be elected either: (a) from among persons who are members of the House of Representatives, but are not Ministers or Parliamentary Secretaries, or (b) from among persons who are not members of the House of Representatives and are qualified for election as members thereof."

9 Constitution of 1973 (Grenada), Article 29(2): "If a person who is not a member of the House of Representatives is elected to be Speaker of the House he shall, by virtue of holding the office of Speaker, be a member of the House."

10 Working Documents for the National Constitutional Conference, *Document III: An Annotated Version of the Draft Bill* (Volume II of the Commission's Report), Prepared by the Commission Upon Receipt of Views of the Public and Experts in Response to the Draft Bill and Approved for Issue at a Special Commission Meeting Held on 17th April 2003.

11 Bergounous, above n 5, at 84.

or votes in plenary sessions."¹² If the Speaker has been chosen from among persons not members of the assembly (or has been required to resign as a member), he or she will normally not be allowed to vote. This is exemplified in the Constitution of Singapore, which establishes that "If the Speaker has been elected from among persons who are not Members of Parliament, he shall not vote..."¹³.

Nevertheless, in the more common situation that the Speaker remains a member of the assembly even after his or her election as a Speaker, he or she is normally allowed to exercise some voting rights. In some constitutional systems, like that of the United Kingdom (mentioned above), the Speaker will vote last, only if there is a tie, and according to certain accepted conventions. In other countries, like New Zealand, the Speaker retains a deliberative vote but not a casting vote. The previously quoted provision of the Constitution of Singapore provides an example of this approach "If the Speaker has been elected from among persons who are not Members of Parliament, he shall not vote, but subject to this provision, the Speaker or other person presiding shall have an original vote but no casting vote".¹⁴ Conversely, the Constitution of Ireland maintains that "The Chairman or presiding member shall have and exercise a casting vote in the case of an equality of votes."¹⁵

Limiting the Speaker's voting rights is a way of promoting his or her impartiality. Those systems that allow the Speaker to exercise only a casting vote, or that deny the Speaker the right to vote (which would normally follow from a system in which the Speaker is not a member of the Assembly), would seem to lean more towards the stricter version of the 'neutral' model. Nevertheless, this is not always the case, as can be seen in the example of the partisan Speaker of the US House of Representatives (who has a deliberative vote but normally abstains) and in the neutral Speaker of the New Zealand House of Representatives (who retains a deliberative vote but does not take part in the debate).

VII ROLE IN THE PROMULGATION OF THE LAWS

In most countries, the Head of State is charged with the responsibility of endorsing and promulgating the laws before their entry into force. In constitutional monarchies this function rests with the Monarch or her representative, and in republics with the President. In presidential regimes like the United States, where

12 Constitution of 1999 (Finland), Article 42(3).

13 Constitution of 1963 (Singapore), Article 57(2).

14 Constitution of 1963 (Singapore), Article 57(2).

15 Constitution of 1937 (Ireland), Article 15(11.2).

the Head of State is an elected officer, he or she may serve as a check on the legislature's power and exercise the right of *veto* of proposed legislation. When the Head of State is not elected, the Monarch or its representative will rarely, if ever, deny assent to a proposed Bill.

Normally, the Speaker's only role in the promulgation of the laws will be to put his or her signature on a proposed Bill in order to alert the Head of State that a Bill has been approved by the legislature.¹⁶ Some countries, such as Lithuania¹⁷ allow the Speaker to promulgate a law in the event the President of the Republic does not do so in the time set down in the constitution. Nevertheless, when the Speaker's functions also include that of ensuring that the legislature has complied with the relevant constitutional provisions, he or she will be seen as performing an important constitutional role.¹⁸ These additional constitutional functions sometimes extend to verifying not only that the correct legislative process is followed and to determining whether a Bill should be certified as a Money Bill (as occurs in many countries)¹⁹, but to verifying the constitutionality of the substance of proposed legislation. The latter is the case, for example, of the Constitution of Finland, which allows the Speaker to refuse to put to vote a proposal he or she considers unconstitutional.²⁰

When the Speaker plays an important role in the promulgation of the laws (for example, by verifying their constitutionality), the institutional consequence will normally be to protect the independence of the office by designing it in accordance with the neutral model. For example, it is not surprising that in Finland, where the Speaker may refuse to put to vote a potentially unconstitutional Bill, the Speaker is

16 Bergounous, above n 5, at 88.

17 Constitution of 1992 (Lithuania), Article 71: "Within ten days of receiving a law adopted by the Seimas, the President of the Republic shall either sign and officially promulgate the law, or shall refer it back to the Seimas together with relevant reasons for reconsideration. If the law adopted by the Seimas is not referred back and is not signed by the President of the Republic within the specified period, the law shall come into force after it is signed and officially promulgated by the Speaker of the Seimas."

18 Bergounous, above n 5, at 88.

19 See for example Constitution of 1937 (Ireland), Article 22(2.1): The Chairman of the House of Representatives shall certify any Bill which, in his opinion, is a Money Bill to be a Money Bill, and his certificate shall, subject to the subsequent provisions of this section, be final and conclusive."

20 Constitution of 1999 (Finland), Article 42(2): "The Speaker shall not refuse to include a matter on the agenda or a motion in a vote, unless he or she considers it to be contrary to the Constitution, another Act or a prior decision of the Parliament. In this event, the Speaker shall explain the reasons for the refusal. If the Parliament does not accept the decision of the Speaker, the matter is referred to the Constitutional Law Committee, which shall without delay rule whether the action of the Speaker has been correct."

deprived of the right to vote. Nevertheless, as noted earlier, under the Constitution of Finland the Speaker is a member of the assembly (although Speakers are elected each year).²¹ As this example shows, there are various institutional means for guaranteeing the Speaker's impartiality, and the 'neutral' and 'partisan' models are only ideal types that are rarely fully present in actual constitutional practice.

VIII DISMISSAL OF THE SPEAKER

Many constitutions do not contain a procedure for the dismissal of the Speaker. Accordingly, the Speaker remains in office until his or her term ends and is only required to vacate if certain conditions are met (such as being disqualified as a member of the assembly, becoming a Minister, or if a new Parliament meets).²² However, some countries allow for the removal of the Speaker through a motion of no confidence. This is the case of the Constitution of Australia, which states that the Speaker "may be removed from office by a vote of the House".²³ Other constitutions require a super-majority for the removal of the Speaker, such as the Constitution of Tuvalu, which establishes that that Office of the Speaker shall become vacant "if Parliament so resolves by resolution supported by the votes of two thirds of the total membership."²⁴ In the Council of the Russian Federation, only a commission may request the dismissal of the presiding officer and the final decision on his or her dismissal must be taken by the Supreme Court.²⁵

The fact that many constitutions do not contain a procedure for the removal of the Speaker should be understood as an additional means to guaranteeing the impartiality and independence of the office. It would be expected that those constitutions which attribute to the Speaker major constitutional roles would also tend to provide the Speaker with security of tenure.

IX THE 'TYPICAL SPEAKER'

In his study *Presiding Officers of National Parliamentary Assemblies: A World Comparative Study*, Georges Bergougous described the 'typical' Speaker as a person, "with long experience of parliamentary life, elected by the Assembly he presides for Parliament's term, with no possibility of dismissal, belonging to the majority but acting with impartiality, respecting and ensuring respect for the rights

21 Constitution of 1999 (Finland), Article 34(1): "The Parliament elects from among its members a Speaker and two Deputy Speakers for each parliamentary session".
<<http://web.eduskunta.fi/Resource.phx/parliament/>>.

22 Bergougous, above n 5, at 34.

23 Constitution of 1900 (Australia), Article 35.

24 Constitution of 1986 (Tuvalu), Article 105(g).

25 Bergougous, above n 5, at 34.

of the opposition. His role primarily focuses on the chairing of public sittings, a task he may temporarily hand over to a replacement, appointed or elected for this purpose. During the sitting, he maintains order and discipline, ensures respect for the rules of procedure by interpreting its provisions if need be, gives the floor or withdraws the right to speak, and initiates the voting procedure. On the other hand, he refrains from taking the floor during debates, gives up his right to propose legislation and only votes in exceptional circumstances".²⁶

As Bergougous himself recognises, the above description should not obscure the fact that in designing the Office of the Speaker, the specific features on the particular assembly (and constitutional system) at issue should be considered. That is, it "should not obscure the many special features of each particular Parliament, derived from the traditions enshrined in each House, continual practice, and also the daily establishment of working relationships -and relations of powers- within the Assembly".²⁷ These are the type of issues that should be taken into account when assessing any potential changes to the Office of the Speaker in the Constitution of Niue, which this paper briefly discusses below.

X THE SPEAKER OF THE NIUE ASSEMBLY

According to Article 20 of the Constitution of Niue, the Speaker of the Niue Assembly is not a member of the Niue Assembly. That Article establishes in its relevant part: "(1) The Speaker of the Niue Assembly shall be elected to that office by an absolute majority of the members present and voting at a meeting of the Niue Assembly; (2) Only a person who is qualified for election as a member of the Niue Assembly may be elected as Speaker; (3) If any person elected as Speaker is, at the time of that election, a member of the Niue Assembly, he shall vacate his office as a member when he enters upon the duties of the office of Speaker."

Moreover, the Constitution of Niue does not establish any procedure for removing the Speaker. Section (6) of Article 20 states that the Speaker shall vacate office: "(a) On the entry into office of a new Speaker elected when the Assembly first meets after a general election; or (b) If he ceases to be qualified for election as a member of the Assembly; or (c) If he becomes a candidate at any election of a member or members of the Assembly". Article 22(5) states that "The Speaker or other presiding officer shall not have a casting vote and the Speaker shall not have a deliberative vote, but a member presiding in place of the Speaker shall have a deliberative vote".

26 At 115.

27 At 116.

In light of these provisions, it is evident that the drafters of the Constitution of Niue intended to design the Office of the Speaker according to what was identified above as the 'neutral' Speaker model. Moreover, by not providing a procedure for the dismissal of the Speaker, they seem to have intended to protect the impartiality and independence of the office by allowing the Speaker to act without fear of being dismissed by the parliamentary majority. In order to understand why the drafters adopted that approach, it is necessary to look at some of the functions that, in addition to that of acting as a neutral arbiter of the legislative debate, the Constitution of Niue attributes to the Speaker.

One of the most important of those additional functions is that of ensuring that the law making process is consistent with the Constitution. For example, Article 34 of the Constitution establishes that a Bill becomes law when:

- (a) It has been passed by the Niue Assembly; and
- (b) The Speaker, being satisfied that it has been passed in accordance with this Constitution and with the Standing Orders of the Assembly, has endorsed on a copy of the Bill a certificate of compliance with the requirements of this Article, and has, in the presence of the Clerk of the Niue Assembly, signed that certificate and sealed that copy with the Seal of Niue, and inscribed thereon the date of that signing and sealing; and
- (c) The Clerk of the Niue Assembly has, in the presence of the Speaker, countersigned the certificate on that copy of the Bill.

A similar requirement is established by Article 35(c) with respect to Bills amending the Constitution. Arguably, this means that the Speaker has the responsibility of ensuring that the correct procedure of constitutional amendment is used depending of the nature of the Bill at issue (as Article 35 establishes a separate procedure for amendments altering Articles 1 or 69 of the Constitution, Sections 2 to 9 of the Niue Constitution Act 1974, or Article 35 itself). In a similar way, the Speaker could be seen as having the responsibility of not endorsing a Bill that technically amends the Constitution but the Assembly is attempting to pass through the ordinary law-making process. Article 22(1) also attributes the Speaker with an important function that seeks to protect the rights of the minority in the Assembly, allowing "4 or more members of the Assembly who are not Ministers" to request the Speaker to call a meeting and requiring the Speaker to call a meeting if so requested.

As can be seen, the Speaker of the Niue Assembly has the responsibility of enforcing constitutional provisions, ensuring that the Assembly legislates according to the established procedures and that the rights of members are

respected. The Speaker is thus attributed with a major constitutional role not attributed to the Speaker in New Zealand or the United Kingdom. However, since the Governor-General does not play a role in the executive and legislative branches of Niue's system of government, the Speaker also performs tasks similar to those of the Head of State in a constitutional monarchy (these are discussed in detail in Alison Quentin-Baxter's article in this Yearbook).

Given the Speaker's role as a constitutional safeguard, his or her role in the promulgation of the laws, and the tasks he or she performs, it is not surprising that the Constitution requires the Speaker not to be a member. This was the natural institutional means for securing his or her impartiality and independence in carrying out these responsibilities. In this sense, the drafters of the Constitution of Niue opted for what can be described as a strict version of the 'neutral' Speaker model: the Speaker is not a member of the Assembly, does not have the right to vote, and cannot be removed from office unless certain specific conditions are met (eg ceasing to be qualified for election as a member of the Assembly; or becoming a candidate for being a member of the Assembly).

Notwithstanding the above, there might be some advantages to moving to a Speaker-member model related to the democratic legitimacy of the office. Considering the major constitutional roles given by the Constitution to the Speaker, it may be seen appropriate that the person occupying the office has been previously elected by the people as a parliamentarian. On the other hand, it could be argued that since some of these constitutional functions require the Speaker to act as a 'check' on the Assembly (eg ensuring that the Assembly legislates following the relevant constitutional procedures), it might be appropriate for the Speaker to maintain an important degree of independence from this body (which might be seen as inconsistent with the idea of a member-Speaker, that is, with a Speaker that participates in the very decisions he or she will then have to assess to ensure compliance with the procedures established in the Constitution).

It might also be seen as more democratic to create a procedure for the dismissal of the Speaker. After all, if the Speaker is elected by a majority, why should not he or she be removable by a majority as well? As suggested earlier, one disadvantage of having a dismissal procedure in place is that, by taking away the Speaker's security of office, one might indirectly affect its impartiality and independence. In other words, particularly in the context of highly controversial issues, a Speaker may feel pressured to decide in favour of the majority or otherwise risk his or her removal from office. This may in turn negatively affect the rights of any opposition, which would normally not be able to gain sufficient votes to remove from office a Speaker who has lost their confidence.

Now, it must be noted that (aside from performing the functions normally attributed to the Governor-General) most of the differences between the role the Speaker plays in New Zealand (and the United Kingdom) and in the Niue Assembly stem from the fact that Niue has a written Constitution. That is to say, these additional functions are directly connected to ensuring that the law making process complies with the provisions of a supreme law (including those provisions that set specific requirements for the adoption of different types of Bills), a concern not present in countries with an unwritten or statutory constitution. In the United States, the Speaker does not normally play the role of ensuring compliance with the Constitution, but the Head of State has the power to veto any law that he considers unconstitutional (or for any other reason).

The need for a truly neutral Speaker would be partially ameliorated if the courts were always available to correct any mistakes of the Speaker in the performance of his or her constitutional roles, but this is not the case. For example, article 24(1) of the Constitution of Niue states that "the validity of any certificate duly given by the Speaker under article 34 or article 35 of this Constitution shall not be questioned in any Court". This means that the Speaker will normally be the final arbiter of the validity of the laws, and of the procedures that need to be used for Bills that amend the Constitution. This is not the case in most countries with written constitutions, which normally attribute that function to the courts. In this respect, it is not surprising that the Constitution of Niue put in place institutional means that seek to allow the Speaker to effectively act as a neutral assessor of the compliance of the law-making process with constitutional norms.

This does not mean that these institutional means will always be successful in achieving a truly neutral Speaker, but they are more likely to promote that goal than to act as obstacles to it. The question is whether moving somewhat away from the strict 'neutral' Speaker model set by the drafters of the Constitution of Niue (for example, by requiring the Speaker to be a member of the Assembly, and allowing the Speaker a deliberative vote) would necessarily run counter to an impartial and independent Speaker's office. It seems that this question must be answered in the negative, since it is certainly possible for a Speaker-member (even in a small Assembly like that of Niue) to act with the utmost respect to the Constitution and in the most impartial and independent way possible.

However, what the Constitution does is it provides a framework that attempts to make that ideal situation more likely. Whether the premises on which that framework rests (ie that a non-member, non-removable Speaker will be able to perform his or her constitutional duties in a more impartial and independent manner) are correct is a question that cannot be answered in the abstract but only by those involved in the day to day practice of the Niue Assembly.

