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THE ROLE OF THE SECOND CHAMBER IN EUROPEAN STATES

LE ROLE DE LA DEUXIEME CHAMBRE DANS LES ETATS EUROPEENS

CONTRIBUTIONS BY VENICE COMMISSION MEMBERS

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TABLE OF CONTENTS

TABLE DES MATIERES

Page

THE SECOND CHAMBERS OF PARLIAMENT, by Christoph Grabenwarter, Constitutional Court, Vienna, Substitute Member, Austria

I. Introduction

Austria is a federal State composed of nine *Laender (Laender).* They are represented at federal level by the second chamber of the Austrian Parliament, the Federal Council *(Bundesrat)*.

II. Composition

Each *Land* is represented by a certain number of members. This number is determined by the Federal President after each census, which is taken every ten years. The Land with the largest number of citizens has twelve seats, each of the other *Laender* as many members as corresponds to the ratio of the number of its citizens to that of the most populous *Land*, the minimum of seats being three. The Federal Council thus has no permanently fixed number of members. Currently it is composed of 62 members.

In exercising their mandate the members of the Federal Council are free from outside influences. Like the members of the first chamber (National Council – *Nationalrat*), they hold what is called a "free mandate". They cannot be recalled by their provincial Diet (*Landtag*, provincial legislature) before the end of that Diet's legislative period.

III. Election of Members

The members of the Federal Council and their alternates are elected by the Diets on the basis of proportional representation.

At least one seat must be given to the party having the second largest number of seats in the Diet or, if two or more parties hold an identical number of seats, to the party that won the second largest number of votes in the last provincial election.

The members of the Federal Council need not belong to the Diet which delegates them; they must however be eligible for that Diet. The term of office is the same as that of the provincial legislature, i.e. 5 to 6 years, depending on the *Land*.

The Diets elect a substitute member for each member delegated by them to the Federal Council. This substitute becomes the member's *ex lege* successor upon the member's seat becoming vacant, by his resignation, death or for any other reason.

IV. Sessions

The Federal Council is permanently in session. Membership of its members is partially renewed at different times on the basis of the returns of the elections to the provincial Diets. Accordingly, the legislative activities of the Federal Council are not broken down into session or legislative periods.

Chairmanship in the Federal Council changes every six months in the alphabetical order of the names of the *Laender*. In each case, the Federal Council is chaired by the delegate placed first on the list of members of the largest party representing the Diet of the *Land* entitled to

chairmanship. Following disputed statements of a member due to take the chair in the second half of 2005 this rule was slightly changed. Now the Diet may decide that the Federal Council is chaired by a different representative of that Land holding a seat of the same party. The person chairing the deliberations is President of the Federal Council. Every six months, the Council elects from among its members two Vice-Presidents, at least two secretaries and two whips, who, together with the President himself, form the Presidium of the Federal Council.

Like the National Council, the Federal Council has standing committees entrusted with preliminary deliberations on the subject matters before the Council. Members of the Federal Council that belong to the same political party may join forces to form a parliamentary group, the minimum number required for recognition being five members. Members not belonging to the same political party may form a parliamentary group only with the approval of the Federal Council.

The President and the Vice-Presidents of the Federal Council as well as the chairmen of the parliamentary groups form the Conference of Presidents of the Federal Council, which assists the Presidents in an advisory capacity. The President convokes the session of the Federal Council after consultations with the Conference of Presidents. On demand of a qualified minority of the members of the Federal Council or on demand of the Federal Government however, the President is obliged to convoke a session.

Members of the Federal Government are authorised to take part in any of the Federal Council's deliberations along with their committees. They have the right to be heard in the Federal Council whenever they request it.

The heads of government of the *Länder* have the right to take part in Federal Council debates. They have at their request the right to be heard each time with regard to issues relating to their *Land*.

V. The Competencies of the Federal Council

1. Legislative initiative

The Federal Council has the right to introduce the proposal of a bill in the National Council. However, such proposals are very rare in practice.

2. Legislative procedure

In general, the position of the Federal Council is not very strong. It may postpone the promulgation of a bill for a few weeks. However, it may, leaving aside a few exceptions, not hinder the adoption of laws on federal level. It does however not have a right of amendment.
Every enactment of the National Council shall without delay be conveyed to the Federal Council. In the standard case the Federal Council must convey an objection to the National Council in writing within eight weeks of the enactments arrival. If the National Council in the presence of at least half its members once more repeats its original vote, this shall be authenticated and published. If the Federal Council resolves not to raise any objection or if no reasoned objection is raised within the deadline of eight weeks , the enactment shall be authenticated and published.

The Federal Council has no claim to participation in certain matters relating to budgetary or financial affairs such as the Federal finance law or the disposal of Federal property. Constitutional laws (or constitutional provisions contained in simple laws) restricting the legislative or executive competence of the *Laender* require the approval of the Federal Council which must be imparted in the presence of at least half the members and by a two thirds majority of the votes cast. The same applies to constitutional amendments affecting the Federal Council.

A partial revision of the Constitution shall upon conclusion of the parliamentary process be submitted to a referendum if one third of the members of the Federal Council so demands. Such a demand has never been submitted so far..

The bulk of the parliamentary work in the Federal Council is undertaken by committees, whose composition reflects that of the Federal Council as a whole. A government bill is examined by a committee prior to examination in plenary sitting. Discussion in the plenary takes place 24 hours or more after distribution of the committee's report, except for urgent cases.

3. The power of scrutiny

The Federal and the National Councils are authorised to scrutinise the federal Government's conduct of affairs, to question its members with regard to all subjects of executive competence, to request any information and to communicate their wishes with regard to the exercise of federal power. The National Council may also formulate its wishes with regard to the exercise of executive power in the form of a resolution.

A right of scrutiny also exists with regard to the federal Government and its members concerning companies in which the State holds at least 50 % of the share, start-up or equity capital, and which are subject to the control of the Court of Auditors. A dominant position in a company by other financial, economic or structural means is considered to be equivalent to such financial participation.

Members of the Federal Council may put written questions to Government members, who must provide a written or verbal response within two months, unless there is a justifiable reason why they should not. Under certain circumstances, a short debate may take place following their response.

The Federal Council (like the National Council) and its committees may request the presence of members of the federal Government and request them to undertake certain inquiries.

4. European issues

In course of Austria´s accession to the European Union, the Parliament and the Länder were accorded rights of imformation and rights of participation in European affairs. Whereas the rights of the Länder are exercised by the heads of provincial governments, the Federal Council has a limited right of participation which corresponds to its competencies with respect to constitutional law in internal law. The federal Government has to inform the Federal Council of proposals received for appointment of members of the Commission, the Court of Justice, the Court of the First Instance, the Court of Auditors, the board of directors of the European Investment Bank, the Economic and Social Council and the Committee of the Regions. The federal Government must immediately inform the Federal Council (and the National Council) of proposed European acts and invite them to give an opinion. In the event that the Federal Council

submits an opinion to the federal Government concerning a proposed European act that has to be implemented by a federal law requiring the Federal Council's approval, this opinion is binding upon the federal Government in negotiations and votes within the European Union. It may only deviate from this opinion for compelling reasons of European and foreign policy.

5. Referral of federal laws to the Constitutional Court

A federal law may be referred to the Constitutional Court by one of the members of the Federal Council (along with a Land government or one third of the members of the National Council) for the purpose of examination of the conformity of the law with the constitution.

VI. Discussion of Reform

In the years 2003-2005 a broad discussion on constitutional reform took place in the framework of an "Austrian Convention" established for this purpose. Various proposals to strengthen the position of the Federal Council have been made. It was also proposed to change the composition of the Federal Council, e.g. to provide for the membership of the heads or members of governments of the *Laender*. Radical proposals even suggest the abolition of the Federal Council. However, none of these proposals has been agreed on among the major political parties.

LE SENAT DE BELGIQUE, par Jean-Claude Scholsem, Université de Liège, Membre, Belgique

Introduction

La Belgique connaît un système bicaméral.

La configuration du Sénat a été profondément remaniée lors de la réforme de l'Etat de 1993. La Belgique a alors abandonné le système bicaméral parfait qui prévalait jusque là.

Le rôle du Sénat a été modifié pour en faire, selon l'expression consacrée, une « chambre de réflexion » et un lieu de rencontre entre les représentants des différentes composantes du pays[1].

I. Composition

Le Sénat comprend actuellement 71 membres ainsi que 3 sénateurs de droit.

A l'exception des sénateurs de droit (dont l'influence sur la vie politique est marginale), les sénateurs disposent en principe d'un mandat de quatre ans (article 70, al. 1er Const.). Le renouvellement du Sénat coïncide avec celui de la Chambre des représentants (article 70, al. 2 Const.).

On distingue (article 67 Const.) :

a. Les sénateurs élus directement (40 sénateurs)

Quarante sénateurs sont élus directement. Vingt-cinq le sont par le collège électoral néerlandais et quinze par le collège électoral français.

Il existe trois circonscriptions électorales, définies par l'article 87bis du Code électoral : la circonscription flamande (qui comprend le territoire de la région flamande à l'exception de l'arrondissement de Hal-Vilvorde) dont les électeurs appartiennent au collège néerlandais[2], la circonscription wallonne (qui recouvre le territoire de la région wallonne) dont les électeurs appartiennent au collège français[3] et la circonscription de Bruxelles-Hal-Vilvorde dont les électeurs choisissent à quel collège ils appartiennent par le vote qu'ils émettent en faveur de telle ou telle liste.

La taille des circonscriptions permet aux « ténors » politiques de tester leur popularité auprès d'un large électorat. En dépit de son rôle politique diminué, le Sénat conserve donc un certain attrait.

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[1] *Les entités fédérées belges sont les « Communautés » (flamande, française et germanophone) et les « Régions » (flamande, wallonne et bruxelloise) dont les parlements respectifs peuvent adopter des normes équipollentes à la loi. Il est toutefois à remarquer que les institutions de la Communauté flamande exercent les compétences de la Région flamande de sorte que celle-ci ne dispose pas d'institutions propres.*

[2] *Les électeurs inscrits sur la liste des électeurs de la commune de Fourons-commune administrativement rattachée à la province flamande du Limbourg- peuvent toutefois choisir de voter à Aubel et d'ainsi appartenir au collège électoral français (voy. art. 87bis et 89bis du Code électoral).*

[3] *Les électeurs inscrits sur la liste des électeurs de la commune de Commines-Warneton –commune administrativement rattachée à la province wallonne du Hainaut- peuvent toutefois choisir de voter à Heuvelland et d'ainsi appartenir au collège électoral néerlandais (voy. art. 87bis et 89bis du Code électoral).*

b. Les sénateurs de Communauté (21 sénateurs)

Les Sénateurs de communauté sont choisis par et parmi les membres des parlements des Communautés.

Le Parlement de la Communauté française et le Parlement flamand désignent chacun en leur sein dix sénateurs de communauté, tandis que le Parlement de la Communauté germanophone en désigne un.

En ce qui concerne les sénateurs communautaires francophones et flamands, la répartition des mandats entre les différents groupes politiques s'effectue sur la base des résultats des élections des sénateurs élus directement [4].

De plus, la Constitution prévoit que pour la désignation des sénateurs de communauté, sont uniquement prises en considération les listes sur lesquelles au moins un sénateur est élu directement et pour autant qu'un nombre suffisant de membres élus sur ces listes siège, selon le cas, au sein du Parlement flamand ou du Parlement de la Communauté française.

Le sénateur de communauté germanophone est quant à lui désigné par son Parlement de Communauté à la majorité absolue des suffrages exprimés (article 67, § 3, al. 3 Const.[5]).

En outre, comme les parlements fédérés sont renouvelés tous les cinq ans alors que la durée des législatures fédérales est de quatre ans, le Constituant a été amené à envisager l'hypothèse où un sénateur de communauté perdrait son mandat communautaire en cours de législature (fédérale). Dans ce cas, il est prévu que le sénateur conserve son mandat jusqu'à l'ouverture de la première session qui suit le renouvellement du parlement communautaire dont il était issu.

c. Les sénateurs cooptés (10 sénateurs)

Les sénateurs élus directement par le collège électoral néerlandais et les sénateurs désignés par le Parlement flamand cooptent six sénateurs.

Les sénateurs élus directement par le collège électoral français et les sénateurs désignés par le Parlement de la Communauté française cooptent quant à eux quatre sénateurs.

Ces sièges sont également dévolus en fonction des résultats obtenus par les différentes formations politiques lors de l'élection directe des sénateurs[6].

d. Les sénateurs de droit (3 sénateurs)

Les enfants du Roi ou, à leur défaut, les descendants belges de la branche de la famille royale appelée à régner, sont de droit sénateurs à l'âge de 18 ans mais ne disposent d'une voix délibérative qu'à partir de l'âge de vingt et un ans[7]. Ils ne sont pas pris en compte dans le calcul du quorum des présences (article 72 Const.).

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[4] Voy. article 68, § 1er, et § 3, Const. et article 211 du Code électoral.
[5] Voy. ég. article 212 du Code électoral.
[6] Voy. article 68 § 1er et § 3, Const. et article 218 et sv.. du Code électoral.
[7] Les autres sénateurs doivent être âgés de vingt et un ans pour être élus ou désignés (article 69, 3° Constit.).

Actuellement, les trois enfants du Roi Albert II ont prêté le serment de sénateur. Leur participation occasionnelle aux travaux du Sénat est plus symbolique que politique.

Remarque : représentation bruxelloise

Le constituant a veillé à ce que le Sénat comprenne un nombre minimal de membres domiciliés dans la Région bilingue de Bruxelles-capitale (six francophones et un néerlandophone). Cette règle illustre que la notion de « Région » est également prise en considération dans la composition du Sénat même si le caractère fédéral de la composition de celui-ci résulte d'abord d'une représentation des Communautés.

II. Fonctions

a. Exercice différencié de la fonction législative

La compétence du Sénat est différente selon le type de loi dont il s'agit. La Constitution distingue trois hypothèses.

a. Le Sénat n'intervient pas du tout. Les lois sont votées par la seule Chambre des représentants. Ces matières sont visées à l'article 74 de la Constitution. Ainsi, par exemple, le Sénat s'est vu retirer toutes prérogatives en matière budgétaire[8] et de contrôle des comptes.

b. Le Sénat est placé sur le même pied que la Chambre des représentants. Il dispose du droit d'initiative, les projets (émanant du Roi) sont indifféremment déposés sur le bureau de l'une ou l'autre chambre[9] et les textes doivent être votés en termes identiques par les deux chambres du Parlement. Ces hypothèses sont également limitativement énumérées (article 77 Const.).

Outre les lois d'organisation judiciaire, celles relatives au Conseil d'Etat et les lois portant assentiment aux traités internationaux, cette énumération porte essentiellement sur les matières qui touchent à la structure de l'Etat et est intrinsèquement liée à sa forme fédérale, ce qui ce conçoit aisément au vu de la composition de la Haute assemblée.

Les deux assemblées sont également compétentes sur un pied d'égalité lors des différentes phases de la procédure de révision constitutionnelle.

Notons qu'une loi spéciale (recueillant deux tiers des voix dans chaque chambre et la majorité dans chaque groupe linguistique, article 4 Const.) pourrait étendre cette liste. Jusqu'à présent, une telle loi n'est pas intervenue et n'est pas à l'ordre du jour.

a) Une troisième catégorie, résiduaire, englobe la majeure partie de l'activité législative. Si le Sénat conserve son droit d'initiative, les projets gouvernementaux sont d'abord déposés à la Chambre des représentants. Le Sénat dispose du droit d'évoquer les textes soumis à la Chambre des représentants et d'y apporter des amendements mais sans disposer d'un pouvoir déterminant dans le processus législatif dont la Chambre des représentants conserve *in fine* la maîtrise (voy., articles 78 à 81 Const.).

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[8] *Le Sénat ne conserve que le pouvoir de voter sa propre dotation (article 174, al. 1er Const.).*

[9] *A l'exception de ceux portant assentiment à un traité international, déposés prioritairement au Sénat (article 75, al. 3 Const.).*

Le rôle de la section de législation du Conseil d'Etat, appelée rendre des avis sur certains textes législatifs en préparation, est renforcé en ce qui concerne le respect de ces règles de compétence des deux assemblées[10].

b. Compétence en matière de conflits d'intérêts

L'article 143 § 2 de la Constitution dispose que le Sénat se prononce par voie d'avis motivés sur les conflits d'intérêts qui peuvent survenir entre les différents législateurs de la Belgique fédérale. Ce rôle illustre le lien qui existe entre le fédéralisme et l'institution du Sénat.

Lorsqu'une assemblée estime qu'elle peut être gravement lésée par un texte de rang législatif débattu devant une autre assemblée, elle peut – à une majorité particulière – exiger que la procédure soit suspendue pendant un délai de soixante jours en vue d'une concertation. Si cette dernière n'aboutit pas à une solution dans ce délai, le Sénat est saisi du litige et rend un avis motivé au Comité de concertation[11] qui décide selon la procédure du consensus[12].
Les résultats de cette procédure faisant intervenir le Sénat ne paraissent pas très probants.

c. Contrôle du Gouvernement fédéral

Le Gouvernement n'est responsable que devant la Chambre des représentants (articles 46, 96 et 101, al. 1er, Const.).

Le Sénat exerce toutefois un contrôle – moins contraignant – par le biais des questions parlementaires, en utilisant son droit de requérir la présence d'un ministre lors de la discussion de certains projets ou propositions de loi (article 100 al. 2 Const.), ainsi que par l'exercice de son droit d'enquête (article 56 Const.).

d. Intervention dans la nomination à certaines fonctions

Le Sénat joue un rôle plus ou moins direct dans la nomination à certaines fonctions publiques éminentes.

Ainsi, il nomme les membres non-magistrats du Conseil Supérieur de la Justice[13], présente à la nomination royale (en alternance avec la Chambre des représentants)[14] les juges à la Cour d'arbitrage et intervient dans la procédure de nomination des Conseillers d'Etat[15].

III. Perspectives

Le rôle du Sénat de Belgique a été profondément redéfini il y a une dizaine d'années. Sa configuration demeure un sujet de débat constant qui nourrit la vie politique.

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[10] Voy. articles 2 et 3 des lois coordonnées sur le Conseil d'Etat. Le Conseil d'Etat examine d'office le respect de ces règles (article 2, § 1) et celui-ci est vérifié même en cas d'urgence (article 3, § 2).
[11] Cet organe est organisé par l'article 31 de la loi du 9 août 1980. Il comprend des représentants des différents gouvernements dans le respect de la parité linguistique et d'une égale représentation de l'Etat fédéral et des entités fédérées.
[12] Article 32 de la loi du 9 août 1980.
[13] Article 151, § 2, al. 2, Const. et article 259bis-2, § 2 du Code judiciaire.
[14] Article 32 de la Loi spéciale sur la Cour d'arbitrage.
[15] Article 70 des lois coordonnées sur le Conseil d'Etat.

La réforme de 1993 semble avoir constamment hésité entre deux fonctions du Sénat : celle d'un Sénat chambre de réflexion et celle d'un Sénat véritablement fédéral.

Les règles organisant la composition du Sénat sont d'une grande complexité et peu transparentes. Malgré l'égale représentation des deux grandes communautés au niveau des sénateurs de communauté, la composition globale du Sénat reflète l'importance relative des deux grands groupes linguistiques du pays. Elle ne correspond donc pas, sur ce point, aux schémas fédéraux habituels.

Les domaines législatifs où le Sénat garde une position d'égalité par rapport à la Chambre des représentants restent relativement importants. Ceci peut conduire à des situations complexes où un texte doit être divisé en deux parties, en fonction de la compétence du Sénat (compétence pleine et entière ou droit d'évocation).

Différentes suggestions ont été avancées en fonction des thèses de chacun : réduction de ses prérogatives, participation accrue des entités fédérées et égalité entre celles-ci, suppression pure et simple. La plupart des dispositions constitutionnelles concernant le Sénat sont d'ailleurs actuellement ouvertes à révision[16].

Le sujet reste d'actualité sans qu'à ce jour ne se dégage une solution qui pourrait paraître définitive.

[16] *Déclaration de révision de la Constitution, 9 avr. 2003, M.B., 10 avr. 2003. Le droit belge ne permet la révision de dispositions constitutionnelles que si elles ont été désignées comme « ouvertes à révision » par les deux chambres législatives fédérales et par le Roi préalablement à la dissolution du Parlement (article 195 Const.).*

ROLE OF THE SECOND HOUSE OF THE PARLIAMENTARY ASSEMBLY OF BOSNIA AND HERZEGOVINA, by Cazim Sadikovic, University of Sarajevo, Member, Bosnia and Herzegovina

The role of the Upper House in the European countries, applying the principle of bicameralism, represents significant issue of the parliament organization but also the issue of the political system as a whole. Bosnia and Herzegovina is one of the countries that applies bicameralism principle in the organization and functioning of the Parliamentary Assembly as the central legislative body in the country. According to the Constitution from 1995 - which is in fact Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina – Parliamentary Assembly consists of House of Representatives and House of Peoples as the second or "Upper" House.

House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, just like all other most important constitutional institutions of this country, distinguishes itself largely from the equivalent body in other countries.

In most of the European parliamentary states, the Upper House, in addition to the House of Representatives or Lower House which is formed on the basis of the general direct elections of all citizens and that as such, expresses general interests of the nation, represents the institution which dedicates itself to certain interests of the nation which could not be successfully protected within the functioning of the uniform legislative body. Second House is most often understood as the way for finding certain particular requirements, that could otherwise be neglected and thus at the same time the way in which the functioning of the house of representatives as the whole is made all the more efficient, more complete as well as all-inclusive.

In fact, reasons that certain countries applying bicameralism, give as reasons for existence of "second" house in an eminently democratic body, such as a parliament, are quite different. Viewed from the historical aspect, second house has appeared for the first time as institution in which the representatives of certain traditional and particularly aristocratic circles, such as is the case with the House of the Lords in Great Britain, found themselves present in the functioning of the parliament.

Indeed, very often, the Upper House was formed in the way that the head of the state elected the members of that house according to their wealth, acquired positions, etc., such as it was the case with the senate in France, Italy, Turkey, Spain, Japan etc. Finally, the upper house, as a rule, has its place in the parliament of those states with federal system of government, with clear purpose that the specific interests of the particular state- members of the federation find their place within the entire legislative function.

Generally seen, the existence of the upper house in Europe today is substantiated with crucial democratic reasons. Thus, the functioning of the upper house represents one of the ways in which certain elements are added to the house of representatives, which develops on the basis of "general will or general interests of the citizens" and which will make the work of the parliament more successful in creation of the laws as expression of the true interests of the people.

The goal of the upper house is not primarily to defend certain interests at any cost, which would be opposite to the general interest of the state as a whole, but rather that the general interests are supplemented with certain requirements which would improve the basic function of the state.

There are opinions that the function of the upper house is indispensably needed to the democratically elected lower house, in order to remove bad effects of the "democratic density of the Lower House". (H. Laski).

From the practical point of view, bicameral decision-making in the process of creation and application of the laws should represent a form „brake pedal" to every more radical class or other similar radical attempt to have the state engaged in economic and social life of the state. The function of the second house is reflected in the stabilization of the functioning of the parliament in creation of the law and other vital decisions. In connection with this, the intention of the framer of the constitution is to remove, as much as possible, the damaging fluctuations in realization of the economic and social function which characterizes almost all of the European countries- members of the Council of Europe. Indeed, that role of the upper house which today means one of the more present attempts to achieve principle of checks and balances, in the manner which is adjusted to the democratic functioning of the contemporary parliament, is not insignificant.

Second house, by its position and competencies, which are usually more modest with respect to the competencies of the lower house, allows to have the will of the citizens and generally public opinion expressed more fully in terms of setting up of the timetable of all important issues that the contemporary parliament deals with aim of their resolving through adoption of the laws and other decisions. Additional procedure which makes the functioning of the upper house within the parliament, is in fact suitable "filter" for removal of all possible too rashly adopted decisions which would be expression of the present dispositions which could arise in crisis. They could in the end be damaging for the entire democratic orientation of the parliament.

There are understandings that such slowed process of adoption of the laws create, on one hand, creates good conditions for success, quality and lasting positive effects of creation of laws and all measure necessary for their implementation, while it is at the same time in conflict with modern increased dynamics of economic and every other development of the state. In essence the second house is adequate democratic form for feeling the plurality of interests in the process of parliamentary decision-making as well as to extend the horizons in evaluation, interpretation and selection of all those goals that stand before the House of Representatives today. If the object of political representation consists of the creation of the laws which express general interest, then the role of second house is at the same time to be a barrier for every attempt of endangering the uniformity and indivisibility of the people's sovereignty and interests of the nation.

When this ideological, theoretical and practical scheme of the second epoch in the developed European democracy, is seen from the view of present state of the constitutional system and parliamentary assembly in Bosnia and Herzegovina then it is not hard to conclude that it is not possible in this environment to achieve democratic concept of second house nor of the legislative body in its entirety. The basic what can and must be emphasized, is that in the conditions of existing political system in Bosnia and Herzegovina, there is not a single reason mentioned above necessary for establishment of successful democratic functioning of the institution of "second house".

The first that could be given in terms of justifying such claim, is that the competencies of "second house" or House of Peoples are completely identical to the competences of the lower house or House of Representatives. It is evident that within scope of functioning of within

competence of "second house" or House of Representatives fall all those competencies which were established by "Dayton Constitution" as follows:
The Parliamentary Assembly is responsible for:

a. adoption of the decisions necessary to implement decisions of the Presidency or or to carry out the responsibilities of the Assembly under the constitution
b. deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina;
c. approval of the Budget for the Institutions of Bosnia and Herzegovina
d. deciding whether to consent to the ratification of treaties;
e. and other issues necessary for implementation of its functions or which have been bestowed upon it by the mutual agreement between the entities. Article 4. t. 4. of the Constitution of Bosnia and Herzegovina.

The Second House or House of Peoples is composed of 15 delegates, 2/3 from the Federation (including 5 Croats and 5 Bosniaks) and 1/3 from the Republika Srpska (5 Serbs). Croat delegates from the Federation shall be elected by the Croat delegates in the House of Peoples of the Federation, and the Bosniak delegates from the Federation shall be elected by the Bosniak delegates in the House of Peoples of the Federation. The delegates from the Republika Srpska shall be elected by the National Assembly of the Republika Srpska. Nine members of the House of Peoples constitutes a quorum, provided that at least three delegates from each group are present - three Bosniak delegates, three Croat delegates, three Serb delegates (Article IV, item 1 of the Constitution of Bosnia and Herzegovina).

The additional issue that must be raised is that besides the same competencies of the upper and lower house within the Parliamentary Assembly, there is also great similarity as to the process of formation of these two houses and their internal structure.

Practically, the lower house has a somewhat larger number of members that the upper house, while the principle of formation is exactly the same. The House of Representatives is comprised of 42 members, two-thirds elected from the Federation and one-third elected from the Republika Srpska. Article IV, t. 2 of the Constitution of Bosnia and Herzegovina. Finally, when it comes to the adoption of the decisions the procedure in both houses is mostly the same. The only thing that has to be mentioned with regard to the Parliamentary Assembly of Bosnia and Herzegovina is "ethnical veto" which can be raised regarding each issue deliberated by the Assembly.

Namely, since every decision of the Parliamentary Assembly may be declared destructive of a vital interest of Bosniak, Croat or Serb Peoples, by the majority vote of the Bosniak, Croat or Serb Delegates, such decision must be approved by the majority vote of Bosniak, Croat or Serb delegates in the House of Peoples.

When the majority of Bosniak, Croat or Serb delegates raise an objection with regard to the aforementioned jeopardy for the vital interest of the aforementioned so called constituent peoples, the Chair of the House of Peoples shall summon the joint commission composed of three delegates, one delegate coming from each peoples Bosniak, Croat and Serb, with the objective to resolve the issue in question. If the commission fails to resolve the issue within the time limit of five days the issue shall be transferred to the Constitutional Court which shall deliberate on this issue in expedite proceedings.

Therefore, it is obvious that the bicameralism which is applied in the Constitution of Bosnia and Herzegovina, *sui generis*, neither have a justification not grounds in European constitutional and

legal inheritance, principals of the constitutional right, European Convention for the Protection of Human Rights and Fundamental Freedoms and all other relevant documents of the Council of Europe, OSCE and other European organizations.

The House of Peoples is formed exclusively from the individuals, which are coming from the so called constituent peoples, Serbs, Croats and Bosniaks. This means that there is full constitutional ban for the election in to this House of all those individuals which are falling under the group of remaining 20 peoples, which according to the census from 1991, are making population of Bosnia and Herzegovina.

This way all the provisions on the House of Peoples are contrary to the provisions of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, provisions of Protocol XII to the European Convention for the Protection of Human Rights and Fundamental Freedoms which prohibits ethnic and any other discrimination of persons.

Namely, Protocol no. 12 was ratified and entered into force in Bosnia and Herzegovina on 1 April 2005. This Protocol directly forbids all forms of discrimination of individuals that are under the jurisdiction of States signatories of the European Convention. Provisions on the creation and activities of the House of People are discriminatory and as such they directly contravene the European Convention and the Protocol no. 12 to the European Convention. Having in mind obligations under Article 1 of the European Convention, Bosnia and Herzegovina must remove these provisions and establish equal human rights protection for ever person under its jurisdiction.

THE ROLE OF THE SECOND CHAMBER IN THE CZECH REPUBLIC: THE SENATE OF THE PARLIAMENT OF THE CZECH REPUBLIC, by Eliska Wagnerova, Constitutional Court, Brno, Member, Czech Republic

According to the Constitution of the Czech Republic which entered into force on the 1st of January, 1993, the legislative power belongs to the Parliament of the Czech Republic that consists of two chambers: the Senat – it is the Upper House of the Parliament and the Chamber of Deputies – it is the Lower House of the Parliament. The seat of the Senate is the Wallenstein Palace in Prague.

The Senat has 81 members, it is a permanent constituitonal institution, it cannot be dissolved and every other year it is renewed by one third. Any Czech citizen who at the election date recheases the minimum age of 40 may be elected to the Senat. Senators are elected according to the majority principle in 81 single mandate constituencies for 6 years, therefore citizens elect 81 specific personalities. Every two years elections take place in one third of the constituencies. Elections take place in two rounds. However, a senator may be elected already in the first round of the election if he or she acquires more than 50 % of the votes cast. The two most successful candidates move on to the second round of the election. The first elections to the Senate were held in 1996, all 81 senators were then elected, a third of them for 2 years, another on for 4 years and yet another third for 6 years. After two years new elections took place, this time only in one third of the constituencies where senators have been elected for two years. Out of 19 incumbent senators 12 were re-elected.

In 1999 a by-election was called for the mandate of the deceased senator Václav Benda. Regular elections took place in 2000, again in one third of the constituencies. 20 outgoing senators attempted to defend their mandates, 6 were re-elected. Two years later regular elections took place again. Out of the 27 outgoing senators 15 attempted to be re-elected. 6 senators have succeeded in defending their mandates, besides them 21 new senators were elected. At the end of 2003 a by-election was called for mandates left by senators Pavel Rychetský and Dagmar Lastovecká who were appointed the chairman and a justice of the Constitutional Court of the Czech Republic respectively. In October 2004, another by-election was called for mandates left by senators who had been elected members of the European Parliament. Regular elections followed in Nowember, 14 outgoing senators ran for re-election, out of them 5 succeeded.

The Senate as a constitutional safety mechanism

The Senate cannot be dissolved. In the event of the dissolution of the Chamber of Deputies it belongs to the Senate to adopt statutory measures in matters that could not be delayed and would require otherwise the adoption of an act. The unconditional approval of the Senate is requested when adopting constitutional acts and some other acts, e.g. electoral acts.

The powers of the Senate

The Senate

- Debates the bills referred from the Chamber of Deputies (it may approve them, reject them or return them with proposed amendments); constitutional and electoral acts cannot be adopted without its express consent
- Proposes bills
- Declares its position to legislative acts and other documents of the European Union
- Adopts statutory measures when the Chamber of Deputies is dissolved

- Approves the ratification of international treaties
- Together with the Chamber of Deputies declares the state of war, approves the stay of foreign troops on the territory of the Czech Republic or the posting of armed forces outside of the territory of the Czech Republic
- Elects the President of the Republic at a joint session of the two chambers
- Approves the appointment of justices of the Constitutional Court
- Is exclusively entitled to bring an action against the President of the Republic for high treason (Article 65 paragraph 2 of the Constitution)
- Submits to the President of the Republic proposals to confer or bestow state decorations
- Submits to the Chamber of Deputies 2 candidates for the position of the Public Defender of Rights (ombudsman) and 2 candidates for the position of his deputy
- Submits to the President of the Republic the candidates for the positions of chairman and inspectors of the Office for the Protection of Personal Data.

The offlcers of the Senate, the bodles of the Senate

At the first meeting after each election to the Senate senators elect the president and the vice-presidents of the Senate. For the 5th term of office Senator Přemysl Sobotka has been elected president of the Senate, senators Petr Pithart, Jiří Liška, Edvard Outrata and Petr Smutný became vice-presidents of the Senate. Furthermore, at the beginning of each term of office the Senate establishes, besides the Committee on Agenda and Procedure and the Committee on Mandate and Parliamentary Privilege foreseen by the law, other committees. Their number and scope of activities is not defined by the law, the Senate decides about it at ist meeting. For the 5th term of office, i. e. the period since the end of 2004 until the 1st meeting after the elections in 2006, the Senate has established the following committees:
The Committee on Agenda and Procedure
The Committee on Mandate and Parliamentary Privilege
The Committee on Legal and Constitutional Affairs
The Committee on EU Affairs
The Committee on National Economy, Agriculture and Transport
The Committee on Public Administration, Regional Development and Environment
The Committee on Education, Science, Culture, Human Rights and Petitions
The Committee on Foreign Affairs, Defence and Security
The Committee on Health and Social Policy

Committees debate matters referred to them and issues they agree to consider. With the exception of the Committee on Agenda and Procedure and the Committee on Mandate and Parliamentary Privilege a senator may be a member of only one committee. The president and the vice-presidents of the Senate are members solely of the Committee on Agenda and Procedure. The members of the government may be at once deputies or senators; however, they cannot be either president or vice-president of the Senate or member of a committee or commission of the Senate.

For dealing with a specific agenda the committee may with the consent of the Senate establish a sub-committee. Senators from other committees may become members of it.

The Senate establishes commissions especially when their tasks are within the scope of more than one body of the Senate or when they are not in the competence of any of the bodies established by the Senate. Senators and other persons as well become members of the

commissions. At the beginning of its term of office the Senate at first notes the establishment of the Commission on Election. The Senate has the following commissions:
The Commission on Election
The Standing Commission on Compatriots Living Abroad
The Standing Commission on the Constitution of the Czech Republic and Parliamentary Procedure
The Standing Commission on Rural Development
The Standing Commission on Senate Chancellery Activities
The Standing Commission on Media

The Senate elects as well its representatives into seven interparliamentary organisations. These permanent delegations are joint with the Chamber of Deputies.

Senators may join in Senate caucuses according to their membership in political parties and movements for which they were candidates in the elections. A Senate caucus may be formed as well by Senators who were independent candidates in the elections or senators nominated by parties who do not fulfil the prerequisite of the number of senators needed for the establishment of a caucus. Each senator may be a member of only one caucus. 5 senators are needed for the establishment of a Senate caucus. ln the Senate there are the following caucuses:
ODS (Civic Democratic Party) – 37 members
KDU-ČSL (Christian-Democratic Union - Czechoslovak People's Party) – 14 members
The Club for an Open Democracy (KOD) – 13 members
ČSSD (Czech Social Democratic Party) – 7 members
Association of Independent Candidates (SNK) - 7 members - Senator Josef Zoser Senators who do not belong to any caucus are considered as independent or nonparty, 3 of them are now in the Senate.

The legislative procedure

Bills are submitted to the Chamber of Deputies. A bill may be submitted by an individual deputy, by a group of deputies, by the Senate, by the government or by the assembly of a higher-level territorial self-governing unit (a region).

All bills with the exception of the State Budget Bill and the State Final Account considered solely by the Chamber of Deputies are assigned to the Senate after being approved by the Chamber of Deputies.

The committee on Agenda and Procedure of the Senate refers these bills to the committees for consideration. It recommends at once to the president of the Senate the date and agenda of the meeting of the Senate.

The Senate has a 30-days deadline for considering the "current" bills. It may express its will not to consider a bill, approve it, reject it or return it to the Chamber of Deputies with proposed amendments. Unless the Senate adopts a motion, the elapsing of the deadline is deemed to mean the approval of a bill. In the event of the return of an amended bill the Chamber of Deputies votes again on it. It votes first on the wording approved by the Senate, a majority of more than 50 % of the present deputies is necessary to carry the bill. For the repeated approval of a bill in the wording approved by the Chamber of Deputies the notes of the absolute majority of all the deputies, i. e. 101 votes, are needed. The Chamber of Deputies votes on all the proposed amendments at once, it cannot pick only some of them.

In the event of rejection of a bill the Chamber of Deputies votes whether it stands by its original wording. For its adoption an absolute majority of deputies is necessary, i. e. 101 votes. If the bill does not gather a sufficient number of votes, the bill is not carried.

The bills of constitutional acts or amendments of the Constitution of the Czech Republic must be approved by both chambers, by the votes of three fifths of all deputies and three fifths of the senators present. Hence the Chamber of Deputies cannot in this case override the Senate. The same happens in the case of the election acts, the Senate Rules of Procedure Act and the Act on the Relations between the Chambers of Parliament. No deadline is running for the consideration of these bills.

The Senate as a whole has as well the right of legislative initiative. A bill submitted by the Senate to the Chamber of Deputies may be proposed for consideration in the Senate by senators, a committee or a commission of the Senate. If the Senate bill is approved, the president of the Senate referes it to the Chamber of Deputies on the basis of a Senate authorization. At once one of the senators is appointed to present the grounds of the bill in the Chamber of Deputies. Since the establishment of the Senate in 1996 – 50 Senate initiatives were submitted to the president, 13 of them have been promulgated in the Collection of Laws of the Czech Republic.

Overall the Senate has considered during the first 8 years of its existence (1996 - 2004) 291 international treaties and 850 bills (16 constitutional), approved 355 of them, expressed the will not to consider 214 of them, returned to the Chamber of Deputies 207 bills with proposed amendments, rejected 44 bills and did not adopt a motion in 30 cases. Out of the 207 bills returned to the Chamber of Deputies by the Senate with proposed amendments, the Chamber of Deputies has adopted 132 bills in the wording approved by the Senate, 61 in the original wording approved by the Chamber of Deputies, and 14 were not adopted.

The Senate and the European Union

On May 1, 2004, the Czech Republic joined the European Union. An amendment to the Rules of Procedure of the Senate revised cooperation between the Senate and the government in matters connected to the commitments resulting from our membership in EU. The Senate (or its Committee on EU Affairs or the Committee on Foreign Affairs, Defence and Security) regularly deal with legislative acts of the European Union, government positions to those acts, communication and other "European" documents. The website Senate and the European Union is updated regularly.

The Senate and the public

The meetings of the Senate are public, unless the Senate adopts a motion calling for a completely or partially closed meeting. This is concerning especially the debates on confidential matters dealing with the defence or the security of the State. The debates on bills and statutory measures are always public. Places from which they can follow the course of the Senate meeting are reserved for the public, guests and media representatives. The same principles apply to the Senate committee and commissions meetings. All Senate publications are as well public (Senate documents, shorthand Senate meeting minutes, adopted motions and vote result listings).

On the basis of a motion of at least 5 senators or of a Senate committee the Senate may decide to organize a public hearing. Its aim is to consider a specific matter within the competence of the

Senate with experts and other persons able to provide information on the debated issue. A public hearing may be organized as well by each Senate committee on issues within its scope of competence. So far seven public hearings of the Senate as such have taken place. The first was devoted to the position of public media in the Czech Republic and in the EU, the second to the importance and future of universities and science, the third to the issues of racism and xenophobia, the fourth to the foreign policy of the Czech Republic, its integration in the EU and to European security, the fifth to human rights and cloning, the sixth to the act on social aid and finally the seventh was devoted to distinguishing between literary terms Czech Republic and Czechia and their foreign-language equivalents.

As a parliamentary chamber the Senate is the addressee of many petitions considered by the respective committee that informs regularly the Senate plenary about them. The purpose of this procedure is to mediate the information between the petitioners and administrative bodies, clarify misunderstandings etc. Each petition signed by more than ten thousands people is not only considered by the committee but also discussed by the plenary. Many seminars and conferences take place regularly on the premises of the Senate during which senators open a forum for the expression of representatives of both the professional and lay public. During the 1st term of office there were approx. 140 of them, during the 2nd term of office already approx. 220, in the 3rd term of office approx. 195, and finally in the 4th term 179.

Should we leave aside these specific activities of the Senate, the Czech second chamber is opening itself to the public as well through many other means. Remarks and comments on bills may be forwarded to the rapporteurs of the different commitees by normal or electronic mail. The Senate is presenting all key data about its activities on the Internet, both topical ones, but also for the different terms of office, it makes public the composition of its bodies and of Senate political groups or the addresses of regional senatorial offices. Furthermore, it publishes the quarterly "The Senate“ informing about the activities in the Senate and also about foreign second chambers, citizens may find in press centre not only information brochures but also bills. The Senate Chancellery ensures visits with a qualified commentary to schools and more numerous groups from the different constituencies. Every weekend, a permanent exhibition in the historical premises of the Wallenstein Palace is free of charge open to the public. Wallenstein garden is open through the major part of the year.

The Senat Chancellery

The Senat Chancellery ensures the professional, technical and organisational service for the activity of the Senat. The Secretary General who represents the Chancellery outwards is responsible for its operation and manages it. We find among other things under his direct subordination the important Legislative Department and the recently established Division on European Affairs. The Chancellery is further divided into two Sectors. The Senate Sector includes departments and divisions directly cooperating with senators and helping them in their activities, ensuring the conditions for the consideration of bills and the organisation and course of the Senate meetings, organizing of protocol and other events in the Senate, providing to the senators background and information materials, etc.

The Financial and Administrative Sector consists of the departments and divisions with competences that indude - besides others - securing financial means necessary for the functioning of the Senate, ensuring the operation of the buildings and their technical equipment, the maintenance and reconstruction of the historical premises of the seat of the Senate. Ir is also

in charge of legal issues, tasks in the area of IT, administration of property owned by the Czech Republic and catering services.

The Senat and the Constitutional Court of the Czech Republic

One of the powers of the Senat is to approve the appointment of justices of the Constitutional Court of the Czech Republic. According to the Act on the Constitutional Court, No. 182/1993 Coll., the President of the Czech Republic shall seek the consent of the Senate to his appointment of a Justice. If the President does not obtain consent under paragraph 1 within 60 days of his request, only due to the fact that the Senate did not vote on the matter within the above-stated period, then the Senate shall be deemed to have given its consent.

At the present time the Constitutional Court of the Czech Republic consists of 13 Justices.

CONTRIBUTION DE LA FRANCE, par Olivier Dutheillet de Lamothe, Conseil constitutionnel, Paris, Membre, France

Aux termes de l'article 24 de la Constitution :
« Le Parlement comprend l'Assemblée nationale et le Sénat.
« Les députés à l'Assemblée nationale sont élus au suffrage direct.
« Le Sénat est élu au suffrage indirect. Il assure la représentation des collectivités territoriales de la République. Les Français établis hors de France sont représentés au Sénat. »

Le Parlement est donc bicaméral : il comprend deux chambres de pleine compétence et aux attributions quasi semblables.

Dans cet équilibre institutionnel, le Sénat a constitutionnellement une vocation spécifique : il représente les collectivités territoriales de métropole et d'outre-mer, ainsi que les français expatriés. De cette spécificité institutionnelle, découle le mode de scrutin sénatorial. Pour être indirect, le suffrage sénatorial n'en est pas moins universel, ce qui justifie que les sénateurs disposent des mêmes prérogatives que les députés sous la double réserve de la faculté pour le Gouvernement de donner le « dernier mot » à l'Assemblée nationale pour le vote de la loi et de la possibilité pour l'Assemblée nationale de mettre en cause la responsabilité politique du Gouvernement ; en contrepartie, l'Assemblée nationale peut être dissoute, à la différence du Sénat, assemblée permanente.

Avec la consécration du bicamérisme, la Cinquième République s'est inscrite dans la tradition républicaine française. Initiée par le Directoire, l'existence d'une seconde chambre avec des pouvoirs variables est une constante institutionnelle depuis l'avènement de la Troisième République en 1875.

Les Français, en héritiers de Montesquieu, aiment le jeu des « check and balances ». Il faut que le pouvoir arrête le pouvoir ; le Sénat peut jouer un rôle essentiel dans l'équilibre institutionnel, surtout dans le cadre du parlementarisme rationalisé d'abord par la Constitution, puis par le fait majoritaire, face à une Assemblée nationale en symbiose naturelle avec l'exécutif.

Si le bicamérisme est incontesté, le Sénat ou les sénateurs se trouvent néanmoins depuis plusieurs années sous le feu de critiques : le Sénat est tantôt « le bastion du conservatisme », « la forteresse de l'opposition » ou « une anomalie historique ». Ces critiques se focalisent sur le système électoral du Sénat qui, aboutirait à une déformation de l'expression du suffrage universel au profit des communes rurales et aux dépens des communes les plus peuplées. Par-delà ces critiques, un accord semble se dégager sur le principe de la spécificité sénatoriale : pour être équilibré, le bicamérisme doit être différencié et le Sénat ne saurait être le clone, le double de l'Assemblée nationale. C'est là toute la problématique sénatoriale : comment assumer sa mission constitutionnelle de représentation des collectivités, son rôle traditionnel de chambre de réflexion, sans prêter le flanc au reproche de l'opposition systématique ?

Ces critiques ont conduit à **une importante réforme du Sénat** réalisée par deux lois du 30 juillet 2003.

La loi organique n° 2003-696 du 30 juillet 2003 répond à trois objectifs distincts :

- elle abaisse la durée du mandat de sénateur de neuf à six ans afin de renforcer la légitimité du Sénat et son ancrage auprès des collectivités territoriales ; en conséquence, elle prévoit le renouvellement du Sénat non plus par tiers mais par moitié tous les trois ans dans le but de maintenir la stabilité de cette institution ;
- elle abaisse l'âge d'éligibilité au Sénat à trente ans afin de rapprocher ce seuil des autres élections ;
- elle augmente le nombre de sénateurs des départements de vingt-deux sièges afin de tenir compte de l'évolution démographique tout en pérennisant la clé de répartition en vigueur depuis 1948 : un sénateur jusqu'à 154 000 habitants puis un sénateur supplémentaire par tranche ou fraction de tranche de 250 000 habitants. Le Sénat comprendra ainsi en 2010 346 sénateurs.

La loi n° 2003-697 du 30 juillet 2003 portant réforme de l'élection des sénateurs rétablit le scrutin majoritaire à deux tours dans les départements où sont élus trois sénateurs ou moins afin de mieux prendre en compte la spécificité des territoires et de garantir une représentation des collectivités territoriales équilibrée.

L'établissement du mode de scrutin proportionnel pour les départements ayant à pourvoir quatre sièges de sénateurs ou plus a pour effet de garantir un équilibre entre les deux modes de scrutin puisque 180 des 346 sénateurs sont élus selon la règle du scrutin proportionnel, soit 52 %.

Le collège électoral sénatorial comprend environ 150 000 grands électeurs :

577 députés,
1870 conseillers régionaux,
4000 conseillers généraux
et 142 000 délégués des conseils municipaux.

La fonction législative

Deux mécanismes constitutionnels permettent au Sénat de marquer les textes de son empreinte : la navette et la commission mixte paritaire.

Une fois le texte adopté en première lecture, la navette, le va-et-vient entre les deux chambres, reste le mode de droit commun d'adoption des lois : « Tout projet ou proposition de loi est examiné successivement par les deux assemblées du Parlement en vue de l'adoption d'un texte identique » (article 45 de la Constitution). La navette, c'est en règle générale trois lectures devant chaque Assemblée ou deux lectures si le Gouvernement déclare l'urgence. La navette a pour fonction d'aplanir, de résorber des divergences, de rapprocher les points de vue.

La navette peut être interrompue par la convocation, à l'initiative du Premier Ministre, après deux lectures ou, en cas d'urgence, une seule lecture dans chaque assemblée, d'une commission mixte paritaire comprenant sept députés titulaires, sept députés suppléants, sept sénateurs titulaires, sept sénateurs suppléants, soit au total vingt-huit parlementaires. La CMP donne aux sénateurs la possibilité de convaincre les députés de se ranger au texte sénatorial, le dernier texte adopté étant généralement celui du Sénat. En cas de réussite de la CMP, les deux assemblées sont appelées à délibérer sur le texte élaboré par la Commission, lequel reprend pour les articles restant en discussion soit le texte du Sénat, soit celui de l'Assemblée,

soit un texte de compromis. La C.M.P. est ainsi une procédure essentiellement parlementaire, bicamérale, où députés et sénateurs se retrouvent sur un pied d'égalité, la décision de convoquer la CMP et de soumettre ou non ses conclusions relevant toutefois de la compétence du seul Premier ministre.

Si la procédure de la CMP échoue du fait soit de l'absence d'un texte commun, soit du rejet de ses conclusions par l'une ou l'autre des deux Assemblées, une alternative s'offre au Gouvernement : il reprend le cours de la navette, dans l'espoir, sans doute illusoire, d'un accord entre les deux Assemblées, ou bien il se résout à donner le « dernier mot » à l'Assemblée nationale après une nouvelle lecture par l'Assemblée Nationale et le Sénat.

Même si les majorités sont différentes, le vote des lois par les deux assemblées demeure le principe et le « dernier mot » l'exception, du moins en termes statistiques : depuis 1959, près de 9 lois sur 10 ont été adoptées par accord entre les deux assemblées.

La première vocation d'une seconde chambre n'est pas de s'opposer : elle est de relire les textes de l'autre assemblée, d'en améliorer la qualité, de corriger les erreurs techniques ou les excès réels ou supposés de la majorité gouvernementale. Cette fonction de nouvelle délibération est essentielle dans le mécanisme de confection de l'acte législatif. Le bicamérisme, c'est la garantie d'un double regard sur la loi qui peut transcender les clivages politiques.

La fonction de contrôle

En dépit du silence de la Constitution sur ce point, le contrôle du Gouvernement est une fonction essentielle du Sénat. La prédilection du Sénat pour les activités de contrôle s'explique peut-être par le mode de scrutin sénatorial et la durée du mandat, qui autorise une certaine distanciation, un recul par rapport aux contingences de la vie politique et une grande liberté de pensée face au Gouvernement. Le Sénat est en principe moins sensible au fait majoritaire que l'Assemblée nationale.

Les déclarations gouvernementales en séance publique sont, par définition, dues à l'initiative du Gouvernement ou d'un ministre.

Lorsque le Gouvernement met en œuvre l'article 49-1 de la Constitution, un ministre lit, à la tribune du Sénat, le programme du Gouvernement, et éventuellement la déclaration de politique générale, sur lesquels le Gouvernement engage sa responsabilité devant l'Assemblée nationale ; cette déclaration ne donne lieu à aucun débat. Un débat est en revanche organisé, si le Gouvernement demande au Sénat l'approbation d'une déclaration de politique générale en application de l'article 49, alinéa 4 de la Constitution. Le Gouvernement peut demander au Sénat un vote sans engager simultanément sa responsabilité devant l'Assemblée nationale ; dans le cas contraire, la demande d'approbation est prévue à une date différente de l'Assemblée nationale. L'article 49, alinéa 4, a été mis en œuvre treize fois.

En amont ou en aval de la séance publique, les commissions permanentes, en vertu de l'article 22 du Règlement du Sénat, « assurent l'information du Sénat pour lui permettre d'exercer, conformément à la Constitution, son contrôle sur la politique du Gouvernement ». Dans la limite du temps laissé disponible par l'examen des textes gouvernementaux, le

contrôle, pris dans l'acception la plus large de ce terme, est au cœur de l'activité générale des commissions permanentes qui peuvent se réunir tout au long de l'année.

Pour compléter la réflexion des commissions permanentes, trois offices parlementaires ont été créés pour « l'évaluation des choix scientifiques et techniques » (1983), l' « évaluation de la législation » et l' « évaluation des politiques publiques » (1996). Si cet office a été supprimé par la loi de finances pour 2001, le Bureau du Sénat a autorisé la création, sous l'égide de la commission des Finances, d'un « Comité d'évaluation des politiques publiques ». Le Sénat dispose-t-il d'une véritable capacité d'expertise ou de contre-expertise autonome ? Cette question a été posée par les groupes politiques de la majorité sénatoriale, qui, après avoir loué la qualité du travail des commissions permanentes, ont souhaité un renforcement significatif des instruments d'évaluation et d'analyse des politiques publiques, y compris le recours plus fréquent à des experts extérieurs, car si le Parlement dispose de la palette la plus large des pouvoirs d'information et de contrôle, encore doit-il avoir les moyens humains et techniques pour les exercer effectivement.

Par nature, l'évaluation débouche sur la prospective, comme l'illustrent les travaux de l'Office parlementaire d'évaluation des choix scientifiques et technologiques.

THE SECOND CHAMBER IN GERMANY: THE BUNDESRAT, by Georg Nolte, Member, Germany and Thomas Meerpohl, University of Munich

I. The *Bundesrat* and German Federalism

The German *Grundgesetz* is a democratic *and* a federal constitution based on the principle of separation of powers. On the federal level the three branches of power are: the *Bundestag* and the *Bundesrat* constituting the legislative branch, the Federal Government (*Bundesregierung*) and various administrative agencies constituting the executive branch and the Federal Courts, including the Federal Constitutional Court (*Bundesverfassungsgericht*), constituting the judicial branch.

The influence of the *Länder* on the federal political system is mainly channelled through the *Bundesrat,* the Federal Council. Members of this body are not elected by the *Land* citizens or the *Land* parliaments, but they are appointed by the *Land* governments as representatives of the respective *Land*. Even though the *Bundesrat* is composed of members of the governments of the *Länder* it is an organ on the federal level and it is acting only on the federal level.

II. The *Bundesrat* as a Second Chamber

According to Article 50 of the *Grundgesetz*, the *Länder* participate through the *Bundesrat* in the federal legislative process, in the administration of the federal state and in issues concerning the European Union.

The participation of the *Bundesrat* in the federal legislative process is threefold: first, the *Bundesrat* has a power of initiative with regard to primary legislation,[17] second, the Bundesrat has a power, by way of objection, to force another vote of the *Bundestag* on bills that do not explicitly require the consent of the *Bundesrat* (*Einspruchsgesetze*) and third, the *Bundesrat* has the right of veto with regard to bills that require its consent[18] (*Zustimmungsgesetze*).

The *Bundesrat* is not a second chamber in the sense of equally participating in the legislative process, as, for instance, the US Senate.[19] According to Article 77 (1) of the *Grundgesetz*, the *Bundestag*, the German parliament consisting of 601[20] directly elected and independent members, is the legislative organ responsible to adopt primary legislation. The *Bundesrat*, on the other hand, is merely conceived as a control organ whose primary purpose is to ensure that rights and interests of the *Länder* are respected. In political reality, however, the *Bundesrat* often acts as a Second Chamber, in particular when its political majority differs from that in the *Bundestag*.

III. Composition and Voting Procedure

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[17] *See Article 76 (1) and (3) of the Grundgesetz.*

[18] *Bills require the consent of the Bundesrat (Zustimmungsgesetz) if the Grundgesetz indicates that its consent is required (principle of enumeration). Such is mostly the case in areas in which significant interests of the Länder, are involved e.g. questions of finances or public administration.*

[19] *See Brockmeyer, in Schmidt-Bleibtreu / Klein, GG, Article 50 Rn. 4.*

[20] *The number may vary due to the specifics of German election law. The number of seats on 1 August 2005 is 601.*

The *Bundesrat* is composed of members of the governments (or of the executives) of the sixteen German *Länder*.[21] The delegates of the *Länder* to the *Bundesrat* are not elected to their position. The government of each *Land* appoints and recalls the delegates that are taking the seat in the *Bundesrat*. This means that the composition of the *Bundesrat* and the distribution of political power within that organ are not fixed for a certain election period. The composition may change with every parliamentary election in one of the sixteen *Länder*[22] (perpetual federal organ). It also means that the delegates are bound to follow the instructions of their governments .

The number of votes for each Land in the *Bundesrat* depends on the size of its population.[23] North-Rhine-Westphalia, Bavaria and Baden-Württemberg, being the three most populous *Länder*, each have six votes, whereas smaller *Länder* such as Saarland, Bremen or Hamburg have only three votes. The total number of votes is sixty-nine. Delegates may be substituted by other members of the government of the *Land* if a member is prevented to attend a meeting. It is not unusual that the Prime Minister of the *Land* (*Ministerpräsident*) himself or herself takes one of the seats.

Members of the *Bundesrat* are required to vote *en bloc* and thereby represent the position of their *Land*. In 2002 the *Bundesverfassungsgericht* confirmed that the votes of each *Land* must be uniform and thus cannot be split up depending on the preference of the individual members.[24] The fact that the *Land* delegates cannot split their votes sometimes leads to the situation that those *Länder* abstain which are governed by a coalition of political parties that cannot agree on a common position regarding a bill.[25] Since all decisions of the *Bundesrat* require a majority of the votes of all its members[26] an abstention in fact counts as a negative vote. All the votes of a *Land* may be casted by the same delegate if a *Land* is only represented by a single member during a plenary meeting.

The presidency of the *Bundesrat* rotates anually among the Prime Ministers (*Ministerpräsidenten)* of the sixteen *Länder*. The President of the *Bundesrat* chairs plenary sessions of the body.[27] The members of the *Bundesrat* may not at the same time also be members of the *Bundstag* since these two organs shall control and complement each other in the course of German legislation (incompatibility).

IV. Functions and Powers of the *Bundesrat*

The functions and powers of the *Bundesrat* are fourfold: participation in the legislative process (1), participation in federal administrative matters (2), participation in issues with regard to the European Union (3) and participation in the appointment of the judges of the Federal Constitutional Court (4).

1. Federal Legislation

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[21] *See Article 51 (1) of the Grundgesetz.*

[22] *The election of the parliaments of the Länder is an exclusive competence of the Länder so that there is today no possibility to coordinate the Länder election dates on the federal level.*

[23] *See Article 51 (2) of the Grundgesetz. Länder with more than 7 million inhabitants have six votes, Länder with more than six million inhabitants have five votes, Länder with more than two million have four votes and smaller Länder have three votes.*

[24] *Bundesverfassungsgericht, Judgment of 18.12.2002, 2 BvF 1/02, http://www.bundesverfassungsgericht.de.*

[25] *The abstention in cases of disagreement is often stipulated in the coalition agreements between the political parties which support Länder-governments.*

[26] *Not only of the members attending and voting.*

[27] *See paragraph 6 of the Geschäftsordnung des Bundesrates (rules of internal procedure of the Bundesrat).*

As mentioned above, it is necessary to distinguish two kinds of legislative acts on the federal level: *Zustimmungsgesetze* and *Einspruchsgesetze*. In principle, bills are *Einspruchsgesetze* as long as the *Grundgesetz* does not provide otherwise. In today's reality, however, approximately 60% of all federal laws are *Zustimmungsgesetze* since most of those laws either affect the public administration of the *Länder* - due to the principle of Article 83 that the *Länder* carry out federal laws by their own administrations[28] - or the financial interests of the *Länder.*[29]

If a law requires the consent of the *Bundesrat* (*Zustimmungsgesetz*) and the *Bundesrat* does not confirm the law, Article 78 of the *Grundgesetz* provides that the law does not enter into force. If, on the other hand, the bill does not require the consent of the *Bundesrat* (*Einspruchsgesetz*) and the *Bundesrat* objects, Article 77 (4) provides for a procedure in which the *Bundestag* is able to overrule the objection of the *Bundesrat*. [30]

The cooperation between the two federal legislative organs, *Bundestag* and *Bundesrat*, is facilitated by a Conciliation Committee composed of members from both organs (V*ermittlungsauschuss).*[31] Even if the *Vermittlungsausschuss* does not have any powers of decision its political role in the process of finding compromises between a majority in the *Bundesrat* and the federal government with its majority in the *Bundestag,* is immense.

2. Federal Administration

The participation of the *Bundesrat* in the federal public administration is carried out through its powers in the areas of financial auditing (Article 114 *Grundgesetz*), supervision of the regional administrations (Article 84 *Grundgesetz*), coercive measures against *Länder* that do not comply with their federal duties (Article 37 *Grundgesetz*) and in the special regime during the state of defence (Articles 115 a – 115 l *Grundgesetz*).

3. Issues concerning the European Union

The power of the *Bundesrat* to participate in issues concerning the European Union does not exceed its power in the legislative process. The transfer of sovereign powers from the national to the supranational level of the European Union must be accomplished by primary federal legislation which requires the consent of the *Bundesrat*.[32] This means that the *Bundesrat* has the power to block the ratification of European Union Treaties by not giving its consent. Still, the influence of the *Bundesrat* on everyday "European politics" is rather limited since the inter--governmentally structured European organs are staffed by the Federal government. However, a

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[28] *See Article 84 (1) and (2) of the Grundgesetz.*
[29] *See Article 105 (3) of the Grundgesetz.*
[30] *If the objection of the Bundesrat is based on a simple majority, the overruling of the Bundestag has also to be adopted by a simple majority. But if the Bundesrat adopts the objection with a majority of two thirds, the Bundestag may only overrule this objection with a majority of two thirds as well. This provision is important: in the spring of 2005 the opposition parties of the federal level (CDU/CSU and FDP) hold a two thirds majority in the Bundesrat which gives them the power to block every bill of the federal government. They thus have the possibility of making the Bundesrat refuse to affirm Zustimmungsgesetze (Article 78) or to make it object the bill with a two thirds majority in cases of Einspruchsgesetzen. In the latter case the possibility of the federal government to find a two thirds majority in the Bundestag to overrule the objection of the Bundesrat is only a theoretical one, since the federal government has only a simple majority.*
[31] *The legal basis for the Vermittlungausschuss is provided by Article 77 (2) of the Grundgesetz which gives the Bundesrat the power to call for the Conciliation Commission in all types of bills.*
[32] *See Article 23 (1) and (2).*

Federal Law provides that the *Bundesrat* establishes a special committee for questions concerning the European Union which deliberates all EU documents with are relevant for the German *Länder*.

4. Appointment of Judges of the Federal Constitutional Court

Article 94 (1) of the Grundgesetz provides that half of the judges of the Federal Constitutional Court are elected by the *Bundesrat*.[33] The election is direct with a required majority of two thirds of the votes in the *Bundesrat*.

V. Possible Reforms

When he dissolved Parliament on 21 July 2005, German Federal President Horst Köhler said that the German federal system is outdated. This statement marks a culmination of a long-standing political debate on the functioning of German federalism. In 2003 a Joint Commission of *Bundestag* and *Bundesrat* for the Modernization of the Federal System was constituted. It has formulated important proposals which, however, so far have not been implemented.[34]

The Bundesrat as a constitutional organ is only indirectly affected by this constitutional reform debate. The powers of the *Bundesrat* as such did not form the centre of this debate, but rather the extent of its powers to veto legislation (*Zustimmungsgesetze*). Indeed, the *Bundesrat* has been a powerful instrument for the political opposition in the *Bundestag*, whenever it commanded a majority in the *Bundesrat*, to block legislation proposed by the federal government and its parliamentary majority.

In the constitutional reform debate three approaches to reform the *Bundesrat* can be detected:

(1) Limited changes by way of modifying or re-interpreting competence norms or rules of procedure, in particular a reduction of the areas in which legislative bills require the consent of the *Bundesrat* (*Zustimmungsgesetze*) (Article 84 (1) 1 *Grundgesetz).*;

(2) "Parliamentisation" of the *Bundesrat* by way of the establishment of a "real" second chamber with directly elected members that have a free mandate (establishment of a Senate system);

(3) "Cantonalisation" of the *Bundesrat* by transforming it into a representation of *Länder* interests which is detached from party politics. Drawing on the Swiss model this idea seeks to neutralize the interest of governing political parties on the level of the *Bundesrat* by sending delegates from all political parties to the *Bunderat* to represent the special interests of the *Länder*.

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[33] *The other half is elected by a special committee of the Bundestag for the election of federal judges (see § 6 of the Law on the Federal Constitutional Court (BVerfGG).*

[34] *For an analysis of the results of that Joint Commission see: Hrbek / Eppler. (Hrsg.), Die unvollendete Föderalismus-Reform - Eine Zwischenbilanz nach dem Scheitern der Kommission zur Modernisierung der bundesstaatlichen Ordnung im Dezember 2004 (*2005).

The radical proposals (2) and (3) are unrealistic. Reform is only to be expected by way of modifying the areas in which the Bundesrat can veto federal legislation.[35] Such a reform, however, is within the the realm of the possible.

[35] *For a detailed analysis of the reform debate with respect to the Bundesrat after the failure of the 2003 Commission see: Eppler,." Warum die Reform des Bundesrats nur ein Randthema der Bundesstaatskommission war: Überlegungen zum Reformbedarf der Länderkammer und ichrer Rechte", in: Hrbek/ Eppler, (ed.), Die unvollendete Föderalismus-Reform - Eine Zwischenbilanz nach dem Scheitern der Kommission zur Modernisierung der bundesstaatlichen Ordnung im Dezember 2004 (2005), p. 103.*

THE ITALIAN SENATE, by Sergio Bartole, University of Trieste, Substitute Member, Italy

The new draft of the revision of the Constitution

The projects of constitutional reform of the Senate of the Republic we described in the previous pages were not successful, they were not approved by the Parliament. But the discussion on the revision of the Constitution went on and in october 2001 a constitutional law revising the rules of the Constitution and dealing specially with the regional and local autonomies entered in force. It enlarged the powers of the Regions which don't have any more only the legislative functions in the matters listed in Constitution, but have got a general competence since the State does not have any more a general competence but has only the legislative functions in the matters listed in art. 117 of the Constitution. When the draft of this constitutional reform had been submitted to the approval of the Parliament, many commentators had the impression that it was starting a process of federalization of the Italian Republic, but after its approval it was eveident that - notwithstanding the enlargement of their functions - the Regions did not get the status of member-States of a Federation.The State keeps its position of constitutional supremacy and, through the exercise of some of its powers, it is in the position of interfering in the activities of the regional governments and directing and coordinating them towards objectives established by the national Parliament and Cabinet.

Inter alia, it was not accepted the idea of transforming the Senate into a regional chamber similar to the German Bundesrat. The reform did not touch the organization of the national government. It only allowed the Parliament to provide for the participation of rapresentatives of the Regions in the activities of the bicameral parliamentary Committee for the regional questions.

The problem came back in the agenda of the Parliament when, after the election of 2001, the new majority decided to introduce a bill aimed at reforming the Constitution, not only the rules dealing with the regional and local autonomies but also those rules regarding the organization of the national government. A fraction of the parliamentary majority supported the idea of completing the process of enlargement of the powers ofthe Regions estalishing - at the same time - a federal Senate. As a matter of fact, the reform increases some of the regional competences, on one side, but, on the other side, it reduces the scope of other competence reestablishing - as far as interests of national relevance are at stake - the central powers in matters previously assigned without any limitations to the Regions by the reform of 2001.Moreover it allows the national government to block the entry in force of a regional law which is supposed to conflict with the interests of the national policy.

The draft is presently waiting the final vote of the Senate which can examine it but cannot introduce amendments.

The new Senate

The question of the structure of the new Senate divided the majority. It was largely shared the opinion that the system of national representation could not easily be given up. The political parties were not ready to see their role of political mediation substituted with the intermediation of the Regions and the politicians who were members of the Senate did not easily accepted the idea of loosing their positions in favour of representatives directly elected by the legislative assemblies or by the executive bodies of the Regions. Therefore the constitutional reform did

not completely implemented the original intent of some of its supporters. A direct regional representation in the Senate was not substituted for the old national representation mediated by the political parties. Even if provisions were adopted which try to establish a link between the Regions and the Senate providing for the election of the member of the Senate at the same time of the election of the members of the regional assemblies, the newly elected senators will not be representatives of the regional entities but of the regional peoples at large according to their political divisions and associations.

According to Article 57, as revised by the new constitutional law, the Senate will be elected by direct and universal suffrage on a regional basis. It means that in view of the election of the Senate the senatorial seats shall be divided between the Regions in proportion to the number of the electors of every Region. The senators shall be elected at the same time of the election of the members of the regional assemblies. This arrangement should guarantee a corrispondence of the choice of the electors for the Senate and the choice for the regional councilors (the members of the regional assemblies). Only citizesn can be elected who are at least twentyfive years old, are residents in the Region or were elected to local or regional councils or to one of the two Chambers. But the same article also provides for the participation of representatives of the Regions and of the local government in the activity of the Senate: every regional assembly shall have the right of electing one rappresentative and one representative shall be elected by the regional council of the local goverment, that is the council which represents the mayors of the Communes and the presidents of the Provinces of a Region.

The senators shall stay in office until the election of their successors; the mandate of the Senate lasts five years as the mandate of the Chamber of the Deputies. But, while the Chamber can be dissolved before the end of its term, this is not the case of the Senate. A strange provision, aimed at insuring the contemporaneous election of the Senate and of the regional assemblies, states that in case of a previous dissolution of a regional assembly, the newly elected assembly shall stay in office until the end of the mandate of the Senate, when this one will be renovated together with all the regional assemblies.

The division of the competences between the two Chambers

The Chamber of the Deputies is entrusted with the legislative functions dealing with the bills concerning the matters given to the exclusive competence of the State and of the bills authorizing the ratification of the international treaties: after the approval of the Chamber the bills are trasmitted to the Senate which can consider them on the request of two fifths of its members, is allowed to submit proposal of amendements but has to finalize the examen in thirty days. The final decision shall be taken by the Chamber.

The Senate is given the legislative function in the matters assigned to the concurrent competence of the Regions, and therefore it has to deal with the drafts of the framelegislation which has to be adopted in view of setting the legislative principles to be complied with by the regional legislation. After the approval of the Senate the drafts are trasmitted to the Chamber of Deputies which has thirty days for examinig them or amending them. If the Chamber submits amendments, the Senate shall adopt the final decision. But the Cabinet is allowed to support the amendments proposed by the Chamber asking their examen by a joint committee of the two Chambers, which can adopt a text to bypass the conflict: this text has to be examined and voted by the two Chambers without the submission of other amendments.

Both the Assemblies have to examine and approve some draftlaws dealing with matters of special constitutional relevance: the election of the Chambers, local government, the national standards of the protection of the civil and social rights, the substitution of the Cabinet for the local and regional authorities, the regional partecipation in the formation of the european acts, the interregional agreements, the coordination between the State and the Regions, the functions of the local government, the election of the regional executive bodies, the administrative justice and the procedure for the establishment of new Provinces and for the moving of Provinces and Communes from one Region to another Region.

The Cabinet is allowed to engage its responsibility asking that its proposals which are essential in view of the implementation of its policies, shall be submitted for their final approval to the Chamber even if they cover matters which fall in the competence of the Senate.

Moreover, when according to the opinion of the Cabinet a regional law is damaging the national interests of the Republic, the Cabinet is allowed to invite the concerned Region to amend or cancel the dangerous provisions, and, if the Region does no follow the invitation the Cabinet, can submit the question to the joint meeting of the Chambers requiring the nullification of the regional law. The relevant subsequent decree shall be adopted by the President of the Republic.

The national law shall insure the coordination of the activities of the Senate, of the Regions and of the entities of the local government. The senators are allowed to take part in the meetings of the regional councils. The regional councils are allowed to submit to the Chambers their advise on draft laws which are examined in Parliament.

The other constitutional functions of the Senate

The Senate does not take part in the procedure for the vote of confidence in the Cabinet and it is not allowed to vote the withdrawal of the confidence from the Cabinet: this is a difference between the draft and the Constitution presently in force. Instead the draft keeps the participation of the Senate in the election of the President of the Republic, because the senators are members of the Assembly of the Republic which elects the Chief of the State. The President of the Senate is entrusted with the task of supplanting the President of the Republic.

The Senate elects one sixth of the members of the Superior Council of the Judiciary and four judges of the Constitutional Court.

Conclusions

Notwithstanding the competence regarding the election of members of the Superior Council of the Judiciary and of the Constitutional Court, the Senate cannot be defined a chamber of the guarantees, while the presence of the mentioned link with the territory develops only partially the initial project of a federal Senate. As a matter of fact, the political dimension of the representation it is not substituted with an organic representation of the regional entities. The rules providing for the election of the senators in the Regions are not really different from the rule presently in force according to which the Senate has to be elected on a regional basis.

The election of the senators at the same time of the election of the regional assemblies will necessarily emphasize the role of the political parties: the choice of the electors will be concentrated in the choice between the political parties and it is well known that in Italy this choice is always attentive to the national dimension of the political conflict.

It could be said that, notwithstanding its composition, the Senate will have an important role in supporting the policies of the Regions. But, if they are elected according to political cleavages, the senators will be more attentive to the national policies of their political parties than to the exigencies of the Regions.

Moreover, the matters assigned to the different competences of the two Chambers are frequently overlapping, therefore it will be difficult to have a clear idea of the legislative powers which are given to them. Probably the Cabinet will have a decisive role in solving the possible conflicts between the two Chambers as far as it has the power of calling a final decision of the Chamber of the Deputies when a draft law has a special interest for the implementation of its political program and it engages its political responsibility. Otherwise the Presidents of the two Chambers have to solve the conflicts by agreement or by delegating the decision to a committee composed by four deputies and four senators. The final decision cannot be revised by any authorities. This rule clearly conflicts with the constitutional rule of law, depriving the institutions and the citizens of the guarantee of the judicial review of a parliamentary decision which directly affects the balance of the State's powers and the relations between the State and the Regions. The question could arise if such a rule is not in conformity with a fundamental principle of the Constitution, and therefore it is unconstitutional notwithstanding its approval by a constitutional law.

THE ROLE OF THE SECOND CHAMBER IN THE BICAMERAL SYSTEM: THE NETHERLANDS, by Pieter van Dijk, Council of State, The Hague, Member, The Netherlands

1. The constitutional position of the Second Chamber

According to Article 51 of the Netherlands Constitution, the Netherlands Parliament (*Staten-Generaal*) consists of two Chambers:
a. The Second Chamber, which has the features of a House of Representatives; and
b. The First Chamber, which has the features of a Senate.

At certain occasions, *e.g*., the annual opening of the parliamentary year by the Queen, and for certain issues, *e.g*. the approval of the marriage of a member of the Royal Family, the two Chambers meet as United Assembly (*Verenigde Vergadering),* under the chair of the President of the First Chamber.

2. Composition and election of the Second Chamber

The Second Chamber consists of 150 members. The members are directly elected in periodic (every four years, unless the Second Chamber will be dissolved between times), secret elections. They are elected by the Netherlands citizens entitled to vote, on the basis of proportional representation (Articles 52-54 of the Constitution, in conjunction with Articles B.1, C.1 and C.2 of the Electoral Code).

Entitled to vote are all Netherlands citizens of 18 year and older who reside in The Netherlands or reside in another country but have been resident of The Netherlands for at least 10 years or who reside in Aruba or the Netherlands Antilles and are in public service of The Netherlands (Article B.1 of the Electoral Code).

Members are elected from lists of candidates, registered according to the procedure prescribed by the Electoral Code (Articles G.1-I.18 of the Electoral Code).

3. Composition and election of the First Chamber

The First Chamber consists of 75 members. The members are elected for a period of four years (unless it is dissolved in the meanwhile) in an indirect way, by the representatives of the 12 Provinces, who in turn are directly elected by the voters entitled to elect the members of the Second Chamber (Articles 55 and 129 of the Constitution, in conjunction with Article Q.2 of the Electoral Code).

4. Requirement of membership of Parliament

Eligible for membership of either Chamber are Netherlands citizens of 18 year and older who are entitled to vote in the elections for the second Chamber (Article 56 of the Constitution).

One and the same person may not be a member of both Chambers at the same time (Article 57 paragraph 1 of the Constitution).

For the period of their membership, members of Parliament may not be Minister, Deputy Minister, member of the Council of State, member of the Court of Auditors/Audit, member of the Supreme Court or Procurer-General or Advocate-General with the Supreme Court (Article 57 paragraph 2 of the Constitution).

5. Dissolution of Parliament

Either Chamber of Parliament may be dissolved by Royal Decree. The dissolution decree implies the order to hold new elections for the dissolved Chamber, which than must meet in new composition within three months. The dissolution becomes effective only on the date the Chamber meets in new composition (Article 64 of the Constitution).

6. Powers of the Second Chamber, as compared to those of the First Chamber

a. Legislative power

The adoption of statutes (including the approval of international treaties) is the common power of Government and Parliament (Article 81 of the Constitution).

As a rule, the initiative is taken by Government. Government submits a Bill to the Second Chamber, after obtaining the advisory opinion of the Council of State (Article 82 paragraph 1, in conjunction with Article 73 paragraph 1 of the Constitution).

Certain Bills, *e.g.,* those concerning the approval of the marriage of a member of the Royal House, are introduced to the two Chambers in United Assembly.

During the debate in the Second Chamber or United Assembly, as the case may be, Government may submit amendments to the Bill, and *the Second Chamber or United Assembly may also introduce amendments* by majority vote on the proposal of one or more of its members (Article 84 paragraph 1 of the Constitution).

After approval of the Bill by the second Chamber, Government submits the Bill to the First Chamber for approval (Article 85 of the Constitution). *The First Chamber may not introduce amendments* to the Bill; it may only adopt or reject the proposed Bill in its entirety (Article 85 of the Constitution).

If, during the debate in the First Chamber, Government wishes to introduce amendments, either *sua sponte* or at the suggestion of the First Chamber, it will have to submit these amendments first for approval to the Second Chamber.

After approval of the Bill by the First Chamber or the United Assembly, it is submitted to the Queen for assent, with the countersignature of the responsible Minister (Article 87 paragraph 1, in conjunction with Article 47 of the Constitution).

The initiative to new legislation may also be taken by one or more members of the Second Chamber or of the United Assembly (Article 82 paragraph 3 of the Constitution). They submit their proposal, after obtaining the advisory opinion of the Council of State, to the Second Chamber or the United Assembly, as the case may be, for adoption (Article 82 paragraph 3 of the Constitution, in conjunction with Article 15a of the Law concerning the Council of State).

During the debate in the Second Chamber or the United Assembly, as the case may be, the members who introduced the Bill may amend or withdraw it (Articles 84 paragraph 2 and 86 paragraph 2 of the Constitution).

The adoption of an amendment to the Constitution requires two readings in Parliament. In the first reading, the two Chambers may adopt, by simple majority, a Bill declaring that one or more amendments to the Constitution are under consideration (Article 137 paragraph 1 of the Constitution). As in the case of ordinary Bills, *the Second Chamber may adopt amendments* to the proposed Bill, but *the First Chamber may not*. The second reading may take place only after the dissolution of the two Chambers. The proposed amendment may then be adopted by a two-third majority of the votes in the two Chambers; no amendments may be adopted at this stage (Article 137 paragraphs 3 and 4 of the Constitution).

b. Budgetary power

The annual budget is submitted for approval to the Second Chamber by Government in the form of a Bill. As a consequence, the same procedure for adoption applies as is the case with a legislative Bill.

c. Right of control and investigation (enquête)

The Ministers are responsible to Parliament (Article 42 paragraph 2 of the Constitution). In that context, the Ministers and Deputy Ministers have the obligation to provide both Chambers and the United Assembly, orally or in writing, all the information requested by one or more members of Parliament, unless this would be contrary to the interest of the State (Article 68 of the Constitution).

In addition, both Chambers of Parliament, and the United Assembly, have the right of investigation (Article 70 of the Constitution). For that purpose they may institute a commission from among their members, which may hold hearings, summon witnesses and experts, interrogate them under oath, and report to their respective Chamber (Articles 140-150 of the Rules of procedure of the Second Chamber).

THE ROLE OF THE SECOND CHAMBER (SENATE) IN POLAND'S POLITICAL SYSTEM, by Hanna Suchocka, Embassy of Poland to the Holy See, Member, Poland

A bicameral parliament is part of Poland's political tradition. Since 1493, the second chamber has always been known as the Senate. Similar legal regulations pertaining to the Senate were found in Poland's (and Europe's) first written constitution of 3rd May 1791. The two Polish constitutions of the inter-war period--that of 1921 as well as of 1935--enshrined the existence of the Senate as the second chamber of parliament.

After the Second World War, however, according to the pattern of all the states that found themselves within the Soviet sphere of influence, the institution of the Senate was done away with on the basis of a rigged 1946 referendum. The referendum itself was little more than a smoke-screen, since the political decision to abolish the Senate had already been taken earlier. The general principle binding in the communist bloc was the liquidation of the second chamber of parliament. Bicameralism was allowed only in states of a federal nature, in which the second chamber was to represent the federation's component parts.

Polish society always perceived the liquidation of the Senate as a political arrangement imposed by the communist authorities and not in keeping with Poland's political tradition.

Hence, the issue of restoring the second chamber of parliament loomed as one of the political demands raised during the 1989 Round Table negotiations. Restoration of the Senate was regarded as one of the symbols of Poland's return to its democratic tradition. At the same time, it was seen as a kind of guarantee of political equilibrium. As a result of the agreements reached by the then ruling communist authorities and the Solidarity opposition, only partially free elections to the Sejm, the first chamber of parliament, were introduced. It was agreed a priori that 35 percent of the seats in the new Sejm would fall to opposition forces and the remaining 65 percent to the ruling communist party and its allies. Those agreements therefore granted a qualified majority for the forces then in power. Under those circumstances, the opposition sought a solution that would enable it to balance those odds to some extent. That role was to be played by the Senate. It was agreed that the election to the Senate would be entirely free, meaning that the final distribution of seats, as in every free and democratic society, would be decided by the voters alone. The Senate election differed therefore from the Sejm election, where the balance of forces had been pre-arranged under a pre-election contract. The Senate was therefore regarded as the 'morally' more legitimate chamber, since its composition was determined by completely free elections.

Under the then existing circumstances, the Senate was to be a kind of guarantor of the democratic nature of the legislative process which would not be dominated by the Sejm's ruling majority rooted in the communist system. One of the Senate's prerogatives was the option of blocking legislation that ran counter to the expectations pinned on the system's democratic evolution.

The Senate comprised 100 Senators, two from each voivodship (province) with the exception of the most populous Warsaw and Katowice voivodships which had three senators each. The Senate was elected by free, universal and direct suffrage and by secret ballot.

The first elections to the Senate, held in 1989, were all but a total success for Solidarity. Forces grouped round the Solidarity movement won 99 seats, with but one mandate going to a non-Solidarity candidate.

In spite of the principle that the voting district for the Senate was to be a voivodship, the Senate never had the nature of a territorial representation. Both chambers represented the will of the nation. But the regulations pertaining to the Senate were imprecise. As a result, in the course of the legislative process, the two chambers' scope of competence triggered a number of disputes and misunderstandings. It may be said the detailed rules of procedure were constructed in the course of actual practice, only later to become enshrined in the future constitution.

A dispute between the Sejm and Senate became especially apparent during work on a new constitution.

Since agreement could not be reached between the two chambers on creating a single, joint constitutional commission, each chamber draw up its own constitutional draft. In effect, a common basis from the two drafts could not be found, and parliament terminated its term in office in 1991 (two years ahead of schedule) without adopting a new constitution.

Following the 1991 parliamentary election, when both the Sejm and Senate were elected in fully free balloting, that particular historic and symbolic aspect of the Senate's position was no longer an issue.

The role of the Senate was described in terms of its role in the legislative process. That is how it was defined in what was known as the 'Little Constitution' of 1992[36] as well as in the next Constitution of 1997.[37]

The experiences of the Senate's first term were taken into account when the new Polish constitution was being drafted. In general terms, the construction of the Senate and its political placement has remained essentially unchanged since 1989. According to Article 10, Passage 2, and Article 95 of the Constitution of the Republic of Poland of 1997, legislative authority in the Republic of Poland is vested in the Sejm and Senate. Both those organs are functionally and procedurally connected, and some of the rules regulating the structure and functioning of the Sejm are applicable to the Senate as well.[38] Like deputies to the Sejm, the President of the Republic of Poland, the Government and citizens, the Senate enjoys the right of legislative initiative.

As an organ of the legislative authority, the Senate reviews bills passed by the Sejm within 30 days of their submission, unless they happen to be urgent bills. In that event, the 30-day period gets shortened to 14 days. The Senate has the option of accepting a Sejm bill without introducing any changes, introducing changes to the bill or rejecting it. A Senate resolution rejecting a bill or an amendment proposed in a Senate resolution are regarded as accepted if the Sejm does not reject it by an absolute majority of votes with a quorum of at least one-half of all Sejm deputies taking part.

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[36] *The Constitutional Act of 17th October 1992 on mutual relations between the legislative and executive authority in the Republic of Poland and on local government (Journal of Laws No. 84).*

[37] *Constitution of the Republic of Poland of 2nd April 1997. Sejm Publishers, Warsaw 1997.*

[38] *Compare P. Winczorek, Commentary to the Constitution of the Republic of Poland of 2nd April 1997. Liber, Warsaw 2000, pp. 121 and on.*

With regards to the state budget adopted by the Sejm, the budget law is submitted to the Senate which has only 20 days to review it. When constitutional changes have been adopted, the Senate is given 60 days to review them.

Ultimately, the Senate, which reviews all bills passed by the Sejm, may not block any piece of legislation. In that respect, its role has been essentially changed and weakened when compared to the first Senate elected in 1989. At that time, under the constitution then in force, a qualified two-thirds majority was needed to reject Senate-proposed amendments. In the politically fragmented Sejm of that period, it was often difficult to muster such a majority, and that strengthened the position of the Senate. Under the conditions existing at that time, as I have already pointed out, such a position of the Senate stemmed from specific political conditions. In the years that followed, those conditions lost their currency. Efforts were therefore made to limit the Senate's ability to block legislation, and that resulted in the introduction of an absolute Sejm majority required to reject Senate resolutions modifying or rejecting Sejm-passed legislation.

In the exercise of their legislative authority, the Sejm and Senate therefore do not occupy equal positions.

It may therefore be stated that at present the Senate's basic role is to correct errors committed by the Sejm in the course of the legislative process. When the legislative process proceeds apace, the risk of committing law-making errors is considerable.

Apart from participating in the legislative process, the Senate performs other functions as well. One of the more important is its part in the formation of other state bodies. The Senate must consent, for example to the appointment and recall of the President of the Supreme Chamber of Control as well as the appointment of the Commissioner for Citizens' Rights (Ombudsman), Commissioner for Children's Rights. The Senate appoints two members to the National Council of Radio and Television Broadcasting, two senators to the National Council of the Judiciary and, in equal numbers as President and Sejm, appoints members to the Council for Monetary Policy.

The differentiated political placement of the Sejm and Senate is also reflected by the fact that the Senate does not supervise or monitor the executive authority. Only the Sejm participates in the formation of the government (Articles 154 and 155) as well as in granting or refusing it a vote of confidence (Articles 158 and 160).

The Marshal (speaker) of the Senate and 30 senators may submit a motion to the Constitutional Tribunal to rule on whether legislation and international agreements are compatible with the Constitution, whether legislation conforms to ratified international agreements and whether legal regulations issued by central state organs are in compliance with the Constitution, ratified international agreements and existing legislation.

In connection with changes in the country's territorial division and a decrease in the number of voivodships, the principle of two senators per voidvodship was dispensed with, but the total number of senators has remained at 100. According to the Law on Sejm and Senate Elections in the Republic of Poland, adopted on 12th April 2001, a voting district encompasses the area of a voivodship or its part. From two to four senators are elected in a given voting district to a four-year term. Candidates receiving the biggest number of valid votes in a given electoral district are regarded as elected to the Senate. Senators are elected by universal, direct and secret ballot.

Every Polish citizen who has completed 18 years of age--regardless of their gender, nationality, race, religious persuasion or period of residence in Poland--enjoys active voting rights, ie the right to vote. Passive voting rights, ie the right to be elected to the Senate, are enjoyed by all Polish citizens who have completed 30 years of age. In elections to the Senate, the principle of direct balloting means that citizens themselves make the final choice of senators without the participation of intermediaries.

A by-election is held to fill any vacancy caused by the expiration of a senatorial mandate. By-elections are not held if less than nine months remain until the end of the chamber's term in office.

A senatorial mandate may not be held by the President of the National Bank of Poland, the President of the President of the Supreme Chamber of Control, Commissioner for Citizens' Rights (Ombudsman), Commissioner for Children's Rights or their deputies, by a member of the Council for Monetary Policy or the National Council of Radio and Television Broadcasting, the President of the National Remembrance Institute, an ambassador or an employee of the Sejm Chancellery, the Senate Chancellery, the Chancellery of the President of the Republic of Poland or the government administration. The latter ban does not apply to members of the Council of Minister and secretaries of state. Senators may not serve as councillors or board members of any level of local government, judges, prosecutors, registry-office officials, soldiers in active service, police officers or functionaries of secret state services.

Whereas in the 1989 elections the political alignment of the first chamber differed basically from that of the second chamber, the elections held in later years did not appreciably change the balance of political forces in the two chambers. That was the case despite certain differences such as the principle of proportionality binding in elections to the Sejm and the majority principle regulating elections to the Senate.

Successive changes to the Constitution have therefore essentially reduced the role of the Senate. At present, the Civic Platform, a centrist party that leads in popularity polls ahead of this year's parliamentary elections, has been collecting signatures in support of an initiative to abolish the Senate. It regards a second chamber in that form as dispensable in Poland's political system. At this point, it would be difficult to predict the consequences of that initiative.

THE FEDERATION COUNCIL OF THE FEDERAL ASSEMBLY (RUSSIAN FEDERATION), by Marat Baglay, Constitutional Court, Moscow, Member, Russian Federation

The Federal Assembly – the Parliament of the Russian Federation – consists of two chambers: the Council of Federation and the State Duma. The two-chamber structure of the parliament is explained by the federal nature of the Russian state consisting of 89 subjects of the Russian Federation which are equal in their rights (republics, krais, oblasts, autonomous okrugs, cities of federal significance, autonomous oblasts).

According to the Constitution, there are two representatives from each subject of the Federation in the Council of Federation: one from the representative and the other from executive bodies of state power which makes 178 members in total. Initially (1995-2000) these members were the heads of executive power (presidents, governors) and chairmen of legislative assemblies of the subjects of Federation. Such composition of the chamber did not allow it to be fully involved in the legislative work, because the members of the Council of Federation who were very busy with their work in the regions could gather for their sessions only during one week each month. That is why the Federal Law dated the 5th of August, 2005, repealed such a representation system and set that the members of the Council of Federation should be appointed by the heads of executive power and elected by legislative assemblies of each subject of the Federation. Since that time, the Council of Federation has become a permanent acting body which members act on the professional basis receiving money remuneration; they are not eligible to be engaged in other activities to be paid for, except teaching, scientific and creative work.

As far as elections of heads of executive power and legislative assemblies in the subjects of Federation are not carried out synchronically, the composition of the Council of Federation is often renewed, it, unlike the State Duma, does not have an established term of legislature, the chamber, in contrast to the Duma, can not be dissolved by the President under any circumstances. Members of the Council of Federation enjoy immunity during the whole term of office, their status is determined by the Federal law. They are obliged to observe the ethical norms fixed in the law and regulations, they submit income declarations and information about the property in which they possess the right of ownership.

The Council of Federation and State Duma hold separate sessions, the same person can not be simultaneously a member of the Council Federation and a deputy of the State Duma. The both chambers of the Federal Assembly may hold joint sessions to listen to the messages of the President of the Russian Federation, messages of the Constitutional Court of the Russian Federation, speeches by heads of foreign states. The internal organization of the Council of Federation is established by its own regulations. The chamber elects the Chairman of the Council of Federation and his (her) deputies from its members, forms committees, conducts parliamentary hearings on the issues within its competence. In contrast to the State Duma, there are not party factions and groups in the Council of Federation, although it is not prohibited for chamber members to be engaged in politics.

The position of the Council of Federation in the system of state power bodies is predetermined by the Constitution of the Russian Federation the basis of which is the principle of separation of powers. The Council of Federation is a body of legislative power which like the executive and judicial powers is independent. This created a constitutional guarantee against interference of any authority into the activity of the Council of Federation. Unlike the State Duma, the Council

of Federation is not eligible to participate in the procedure of providing consent to the President regarding appointment of the Chairman of the Government and solution of the issue of vote of confidence to the Government, but, at the same time, it appoints judges of superior courts of the country without Duma participation.

The main purpose of the Council of Federation is adoption of Federal laws and Federal constitutional laws. The Council of Federation and its members possess the right of legislative initiative, but draft laws are submitted only to the State Duma. After a law is adopted by the Duma this law is to be passed within five days to the Council of Federation which approves it by simply majority of votes of the total members and forwards it to the President for signing. If a draft law has not been approved within fourteen days, it is also considered adopted. In case the Council of Federation rejects a draft law, the chambers may establish a conciliation committee to overcome disagreements, afterwards this draft law is subject to reconsideration by the State Duma. In this case the Duma, if it does not agree with amendments of the Council of Federation, has the right to adopt the law by two thirds of votes of the total number of deputies. By such qualified majority the Council of Federation and the State Duma overcome the President's veto regarding federal laws. A federal constitutional law is adopted by not less than three fourths of votes of the members of the Council of Federation and two thirds of votes of State Duma deputies, in this case the President can not exercise the right of veto.

The competence of the Council of Federation may be divided into general and special ones. The general competence includes powers on adoption of laws: federal constitutional laws are specified in the Constitution (On the Government, On State of Emergency etc.), federal laws are adopted regarding the issues within the competence of the Russian Federation and joint competence of Federation and subjects of Federation which are fixed in Articles 71 and 72 of the Constitution.

However, in practice not all draft laws adopted by the Duma are considered by the Council of Federation. The Council of Federation is obliged to consider laws on the issues of:

- federal budget,
- federal taxes and duties,
- financial, currency, credit, customs regulation, money issuance,
- ratification and denouncement of international treaties,
- status and defense of the state borders,
- peace and war.

The special competence of the Council Federation includes the following:

- approval of changes of borders between the subjects of Federation,
- approval of Presidential Decrees on introduction of martial law and state of emergency,
- taking decisions on usage of the Armed Forces outside the territory of the Russian Federation,
- declaring Presidential elections in the Russian Federation,
- impeachment of the President of the Russian Federation;
- appointment of judges to the Constitutional Court, the Supreme Court and the Higher Arbitration Court of the Russian Federation,
- appointment and dismissal of the General Procurator of the Russian Federation,
- appointment and dismissal of the Deputy Chairman Accounting Chamber of the Russian Federation and half of its auditors (the other half of this body which exercises control over federal budget execution is formed by the State Duma).

In its practical activities the Council of Federation enjoys large rights. It issues statements and messages on the issues of internal and foreign policies, sends requests to the Government, applies to the Constitutional Court, requests necessary documents from any state authority body. Members of the Government and other officials are invited to and speak at the sessions of the Council of Federation. State authority bodies of the subjects of Federation are involved in discussion of draft laws. Most of the work is independently conducted by committees and commissions which consist of all members of the chamber.

Decisions of the Council of Federation are taken by open or secret voting, open voting may be roll-call. Voting is conducted with or without usage of electronic system, as well as by voting papers. Rating voting is also applied. Decisions are taken by simple or qualified majority of votes of total chamber members, however, in order to take decisions on procedural issues majority of votes of the members present at a session is sufficient. Proxy voting is also allowed.

The Council of Federation and the State Duma, as two parts of one parliament - the Federal Assembly, enjoy equal rights, although their powers are not equal. At the same time, it is obvious that the main load in adopting laws is laid on the State Duma, that is why the Duma (and as a consequence of the fact that this chamber is an arena of active interparty struggle) is more noticeable in the political life. It is widely acknowledged that the Council of Federation, as the body less politicized and reflecting official opinion of the subjects of Federation, embodies a quieter non-party approach to lawmaking, neutralizes a possibility of law adoption without taking into consideration the interests of regions of such a vast country.

The Council of Federation comparatively rare rejects draft laws adopted by the State Duma, approves draft laws within shorter terms. As for appointment of constitutionally specified officials, in the past the Council of Federation quite often rejected candidates proposed by the President; however, during the last years one have not noted such cases. The Chairman of the Council of Federation being officially the third person in the state under the protocol is a very noticeable figure in public life.

There is no doubt that the Council of Federation makes a significant contribution to the democratic functioning of state power system, plays a role of “containments and counterbalances” towards the other branches of state power. At the same time, in the public circles some suggestions periodically arise regarding transition to direct elections of members of this chamber (which, however, is difficult to combine with the existing requirements of the Constitution) in order to avoid formation of the half of the chambers from appointed representatives of the executive power.

THE SPANISH SENATE, by Ángel Sánchez Navarro, University Complutense, Madrid, Substitute Member, Spain

1. Introduction

The 1978 Spanish Constitution recovered the traditional Spanish bicameral system, already present in almost all previous constitutional texts (1834, 1837, 1845, 1869 and 1876). Only the 1812 Constitution, the Republican 1931 text and the Francoist "Fundamental Laws" opted for one chamber.

Therefore, the Spanish Parliament (*Cortes Generales*) is composed of the Congress of Deputies and the Senate. The *Cortes Generales* "represent the Spanish people" (Article 66.1), "exercise the legislative power of the State, approve its Budget, control Government action and hold all the other powers vested in them by the Constitution" (Article 66.2), and "are inviolable" (Article 66.3). In this scheme, the Senate is also defined as "the House of territorial representation" by Article 69.1[39].

Nevertheless, the Spanish Senate is currently subject to a process of constitutional reform. Before the March 2004 elections, the Socialist Spanish Party (PSOE) included in its electoral manifesto the will of reforming the Constitution in four particular points, one of them being the Senate. After its electoral victory, the new Prime Minister, J. L. Rodríguez Zapatero, underlined the same idea in his government programme. And at the present moment, the Council of State (*Consejo de Estado*), "supreme consultative organ of the Government" according to Article 107 of the Spanish Constitution has been asked about the main lines of this reform.

In any case, the content of this possible reform is not clear at all. Not only because of possible political problems, but also because neither the Socialist Party, nor the Government, have made clear their precise will. Generally speaking, the main idea is that of defining the contents of that "territorial representation" which the Constitution attributes to the Second Chamber.

This uncertainty results quite clearly from the text of the consultation made by the Government to the Council of State, asking for its opinion on the following issues:

1. The functions that the Senate has to fulfil as a Chamber of territorial representation and, particularly, the scope and degree of its participation in the exercise of the legislative power; the tasks that it should made as an space of cooperation among the Autonomous Communities and between these Communities and the State; and its powers related with other constitutional organs.

2. The most adequate composition of the Chamber to fulfil those functions and express the representation of territorial interests.

3. The institutional position of the Senate within the *Cortes Generales*, in the exercise of its functions as Chamber of territorial representation.

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[39] *The text of the Constitution has been taken from Constitutions of Europe. Texts collected by the Council of Europe Venice Commission. Martinus Nijhoff Publishers, Leiden-Boston, 2004, vol II, pages 1660 ff.*

4. The systemic consequences which the reformed model of Senate would have in the Spanish constitutional structure as a whole.

Therefore, the Council of State has to give, before the end of this year 2005, an opinion including every thinkable aspects of the Chamber: functions, composition, powers… That opinion would be the basis of a procedure of constitutional reform, which would logically have to be adopted by three fifths of both Chambers, and possible even by means of a referendum. In this context, this pages try to analyse the role of the Spanish Senate *up to now*.

2. Election and composition

Despite the already mentioned constitutional description of the Senate as "House of territorial representation", Spanish Autonomous Communities were not defined by the Constitution, which only foresaw the "right to autonomy of the [Spanish] nationalities and regions" (Article 2). In absence of a "map of autonomies", that would only be completed in 1983, the Constitution opted for a Senate formed by two different kinds of members:

a. A majority of Senators elected directly: "In each *province*, four Senators shall be elected by the voters thereof by universal, free, equal, direct and secret suffrage, under the terms to be laid down by an organic law" (Article 68.2 C.). Leaving apart some exceptional rules related to islands, most of the members (208) are thus elected by citizens, according to a majority system with limited vote. Since 1978, this greater part of the Chamber has always been elected in the General Legislative Elections, i.e., at the same time that the Congress. But it is not necessarily so: both Chambers are elected for four years (Articles 68.4 and 69.6), but "the President of the Government, after deliberation by the Council of Ministers, under his own exclusive responsibility, may propose the dissolution of Congress, the Senate or the *Cortes Generales*…".

b. A minority of Senators nominated by the Autonomous Communities: these "shall, moreover, nominate one Senator and a further Senator for each million inhabitants in their respective territories. The nomination shall be incumbent upon the Legislative Assembly, or, in default thereof, upon the Autonomous Community's highest corporate body, in accordance with the provisions of the Statutes…". Once that the Spanish map of autonomies was defined with 17 Communities, and all of them adopted an almost parliamentary structure, their respective Legislative Assemblies elect about 50 Senators (a number which changes with the population), following proportional criteria (although proportionality is quite difficult when the number of Senators elected is very low). The mandate of these Senators mostly depends on the Autonomous Elections, in which the Autonomous Parliaments are electe.

Therefore, the Senate is presently composed of 259 members, organized in Parliamentary Groups following party, and not territorial, lines. In fact, the possibility of linking the election of the Senate to the election of the Autonomous Legislative Assemblies is one of the ideas that have been considered in order to give content to the idea of "territorial representation".

3. Functions

At first sight, as it has been already pointed out, the Senate shares the constitutional functions also developed by the Congress: representative (Article 66.1), legislative, budgetary, control of the Government action… Nevertheless, the Spanish system clearly belongs to the type of

"imperfect bicameralism". That is: the Congress has a clearly more powerful position. Something justified for the different electoral system: each province, disregarding its population, elects four Senators, and does it through a majority system which allows results greatly disproportional.

Consequently:

- The Government is supported by the majority of the Congress (not of the Senate), and logically only the Congress may censure the Government (Articles 99, 113 and 114).

- The laws (including the Budget Law) have to be passed by both Chambers, but in case of disagreement the Congress' will prevail (Article 90). Organic Laws require absolute majority only in the Congress, but not in the Senate (Article 81). Decree-Laws must be voted and ratified by the Congress, but not by the Senate (Article 86). Finally, the Senate has a much shorter term to pass the bills (two months, or twenty days in case of bills declared to be "urgent": Article 90).

Nevertheless, the position of the Senate is not weak:

- Although it cannot censure the Government, it may control its activity through the usual instruments of parliamentary control (questions, motions…). In this Legislature, even a "Prime Minister Question Time" has been established in the Senate, once a month.

- As it has been previously pointed out, the constitutional reform has to be passed by both Chambers in quite similar terms: in the "aggravated" procedure of total revision, they are in the very same position (Article 168); in the "ordinary" procedure, reform must be approved by both Chambers, with only a slight better position of the Congress (Articles 167.1 and 2).

- The Senate nominates four (out of twelve) members of the Constitutional Court; ten (out of twenty) of the General Council of the Judiciary; six (out of twelve) of the Court of Audit; the appointment of the Defender of the People requires also a majority in this Chamber…

- Both Houses have to meet in joint sessions in order to exercise the non-legislative powers related to the Crown conferred upon the *Cortes Generales* by Title II of the Constitution (Article 74). Functions which may be highly relevant (providing for the succession of the Crown if all the lines designated by law become extinct; possibility of prohibition of marriage to persons with a right of succession to the Throne; recognition of the King's incapacity; appointment of the Regency and of the Guardian of the King during his/her minority, if there is no person entitled to it… Articles 57 and following).

- As a shy reflect of their characterization of Chamber of territorial representation, the parliamentary procedures for approval of agreements among Autonomous Communities (Article 145.2) and for the distribution of the "Inter-territorial Compensation Fund" among Autonomous Communities (Article 158.2) are initiated in the Senate. Nevertheless, in case of disagreement between Chambers, the Congress' will shall prevail, once more (Article 74.2).

- Finally, the Senate has a power which has been never used up to now and which is generally conceived as an ultimate resource not to be used unless exceptional circumstances make it necessary. According to Article 155, "if an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after lodging a complaint with the President of the… Community and failing to receive satisfaction therefore, may, *following approval granted by an absolute majority of the Senate*, take the measures necessary in order to compel the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interests".

4. Conclusion

The Spanish Senate has been conceived by the Constitution as a second-reading Chamber, less powerful than the Congress, but with some not negligible functions. Anyway, from its very first moments it has been criticized, for not being an "authentic" territorial representation Chamber, and in that line it is under a process of reform which will possibly have problems to be completed, but which of course introduces an element of uncertainty.

The main problem possible results from the Constitution itself, which at the same time defines the Senate as representing "the Spanish people" (Article 66.1) and as a Chamber of "territorial representation" (Article 69.1). This double characterization, reinforced by the initial non-definition of the territorial structure of the State, made it impossible to design a Chamber able to respond to the model of the "State of the Autonomies" which has resulted from the constitutional development. Autonomous Communities, as such, are almost absent of their structure, and once they have affirmed themselves as the most important subjects of the territorial organization of the State, they intend to increase their presence in the central institutions.

LE ROLE DE LA DEUXIEME CHAMBRE EN SUISSE, par Giorgio Malinverni, Université de Genève, Membre, Suisse

Introduction

En Suisse, le Parlement fédéral, appelé Assemblée fédérale, est composé de deux chambres, le Conseil national (Chambre du peuple) et le Conseil des Etats (Chambre des cantons), qui ont exactement les mêmes pouvoirs (bicamérisme parfait (art. 148 Cst)). Dans l'exercice de leurs fonctions législatives ils siègent séparément. Les deux chambres siègent en revanche ensemble, dans la salle du Conseil national et sous la présidence du président de ce dernier, pour exercer leurs fonctions électorales : élection des membres du Gouvernement (Conseil fédéral), des juges du Tribunal fédéral, du Chancelier de la Confédération, etc. (art. 157 Cst).

Le Conseil national (Chambre basse) est composé de 200 députés qui représentent le peuple. Les 200 sièges sont répartis entre les 26 cantons suisses, qui constituent les circonscriptions électorales, proportionnellement à la population de résidence de chaque canton (art. 149 Cst). Ainsi, le canton de Zurich, qui est le plus peuplé de la Suisse, peut envoyer au Conseil national 35 députés. Certains petits cantons n'ont en revanche droit qu'à un siège. Chaque électeur élit donc les députés de sa circonscription, c'est-à-dire de son canton.

Au Conseil des Etats (Chambre haute) siègent les représentants des cantons, à raison de deux députés par canton et de un par demi-canton. Au total, le nombre de députés au Conseil des Etats est donc de 46 (art. 150 Cst).

Contrairement au Conseil national, pour lequel l'élection est régie par le droit fédéral, le mode de désignation des députés au Conseil des Etats et la durée de leur mandat sont régis par le droit cantonal (art. 150 al. 3 Cst). Dans tous les cantons, les membres du Conseil des Etats sont élus par le peuple. Jusqu'à relativement récemment, toutefois, dans deux cantons, les Conseillers aux Etats n'étaient pas élus par le peuple, mais désignés par les autorités cantonales. Dans tous les cantons, sauf un (Jura), l'élection a lieu selon le système majoritaire.

Si dans la très grande majorité des cantons la durée du mandat des Conseillers aux Etats est de quatre ans (elle coïncide ainsi avec celle des conseillers nationaux), elle peut aussi être plus courte, ou plus longue. Cela dépend du droit cantonal. Dans son ensemble, le Conseil des Etats ne connaît donc pas de véritable législature.

C'est surtout à l'occasion des travaux entrepris il y a une quarantaine d'années déjà en vue d'une révision totale de la Constitution fédérale, que la discussion s'est focalisée sur le rôle et la fonction du Conseil des Etats. Certains auteurs et certains partis politiques ont même affirmé à cette occasion que la révision du rôle et de la fonction du Conseil des Etats devait être l'un des buts essentiels de la révision de la Constitution.

De plusieurs côtés, on a en effet soutenu que le Conseil des Etats ne représente pas véritablement les cantons, car celui-ci n'exercerait pas une action spécifique, qui devrait être une fonction fédéraliste. Il n'en a cependant rien été. La nouvelle Constitution fédérale du 18 avril 1999 n'a pas modifié la structure et le rôle du Conseil des Etats.

I. Les critiques adressées au Conseil des Etats

a. Les prétendues inégalités dans la représentation des partis

La principale raison des discussions qui ont précédé l'adoption de la nouvelle Constitution a résidé dans la nature même, ambiguë, du Conseil des Etats.

Du fait que, aujourd'hui, dans tous les cantons, l'élection des Conseillers aux Etats se fait par le peuple, et que ceux-ci votent sans instruction (interdiction du mandat impératif, art. 161 Cst. féd.), la Chambre haute est souvent perçue comme une deuxième chambre du peuple et non comme une véritable chambre des cantons. Toutefois, comme chaque canton n'a droit qu'à deux sièges (les demi-cantons à un seul siège) et que l'élection se fait selon le système majoritaire, il se trouve que, dans plusieurs cantons, certains courants politiques ne sont pas représentés. Ceci est vrai en particulier pour le parti socialiste, qui est l'un des quatre grands partis politiques au niveau national et qui, pour les raisons exposées ci-dessus, est sous-représenté au Conseil des Etats. Du fait que les petits cantons ruraux de la Suisse centrale ont le même nombre de députés que les cantons urbains, le Conseil des Etats se trouve être une chambre plus conservatrice que le Conseil national. Sa composition ne reflète pas les forces politiques du pays. Or, aux yeux de certains, il n'est pas admissible qu'un parti aussi important que le parti socialiste ne soit représenté au Conseil des Etats que par 3 ou 4 députés sur 46.

La sous-représentation socialiste s'explique par le fait que chaque députation cantonale à la Chambre haute n'a que deux membres, ce qui implique l'élection à la majoritaire. Dans certains cantons, le parti majoritaire, qui n'est pas socialiste, remporte les deux sièges. Dans d'autres cantons, les forces non socialistes se coalisent et remportent aussi les deux sièges. Dans un cas comme dans l'autre, le parti socialiste, seul grand parti de gauche en Suisse, est perdant.

b. Les prétendues inégalités dans la représentation du peuple

Du fait de l'élection populaire de ses membres et de l'absence de mandat impératif, le Conseil des Etats ne serait pas non plus, selon certains, une véritable chambre des cantons. Il n'assurerait pas une liaison suffisamment étroite entre les autorités fédérales et les Etats fédérés.

Pour cette raison, on affirme souvent que le Conseil des Etats ne représente pas véritablement les cantons. Il est plutôt considéré comme une deuxième chambre du peuple, qui ne se distinguerait du Conseil national que par le mode d'élection (la proportionnelle au Conseil national et la majoritaire au Conseil des Etats). L'entité politique représentée serait en revanche la même, à savoir, dans les deux cas, le peuple. Seuls les modes de représentation différeraient. Le Conseil des Etats ne se distinguerait plus guère du Conseil national que par le fait que tous les cantons, quelle que soit leur taille, y envoient deux députés.

Le fait que les grands et les petits cantons soient représentés par deux députés, indépendamment de leur population, a en outre pour conséquence que les Conseillers aux Etats de certains cantons représentent plus de citoyens que d'autres. Ainsi, chacun des deux Conseillers aux Etats du canton de Zurich représente à peu près 555'000 habitants tandis que ceux d'Uri n'en représentent que 17'000 environ. C'est certes là une conséquence du principe de l'égalité des cantons, qui prévaut dans la composition du Conseil des Etats. Toutefois, l'égalité de représentation des grands et des petits cantons, admissible en 1848, date de l'adoption de la Constitution fédérale, ne l'est plus, aux yeux de beaucoup, aujourd'hui.

II. Les propositions majeures de modification du Conseil des Etats

S'il n'a jamais été contesté que les deux Chambres doivent avoir des compositions différentes, plusieurs propositions ont été faites en vue d'assurer une représentation prétendument plus équitable qu'aujourd'hui du peuple et des partis politiques au Conseil des Etats.

Partant de la constatation que le centre de gravité politique se déplace des cantons vers la Confédération, plusieurs pensent que le moment serait venu de prendre son parti de cette évolution inéluctable et d'en tirer les conséquences, notamment à propos du Conseil des Etats. Pour les tenants de cette réforme, il faudrait en particulier remédier au double déséquilibre signalé plus haut, à savoir dans la représentation des partis et dans la représentation de la population.

Les différentes propositions suggérées dans le cadre des travaux tendant à une révision totale de la Constitution fédérale n'étaient pas toutes inspirées par des préoccupations identiques.

Bon nombre de propositions tendaient à adapter, dans une certaine mesure, le nombre de sièges au chiffre de la population de chaque canton. Parmi elles on retiendra par exemple celle qui visait à attribuer à chaque canton au minimum 2 sièges, mais 3 sièges aux cantons de plus de 200'000 habitants; 4 sièges aux cantons de plus de 500'000 habitants et 5 sièges aux cantons de plus de 1'000'000 d'habitants.

Une autre proposition mettait l'accent sur la nécessité de faire siéger au Conseil des Etats des personnalités de premier plan et de faire ainsi de cette chambre une véritable chambre des élites.

Une dernière proposition combinait la recherche d'une représentation équitable des partis politiques et de la population et le souci de protéger les minorités linguistiques, par un renforcement de la représentation des cantons de langue française et italienne.

III. Les propositions mineures de modification du Conseil des Etats

Les propositions qui viennent d'être évoquées ont provoqué de vives réactions de la part de ceux qui préféraient s'en tenir au système actuel. Les tenants du statu quo ont fait valoir notamment les arguments suivants.

Le Conseil des Etats n'a pas à assurer une représentation équitable du peuple et des partis, car sa fonction est celle de représenter non pas ces derniers, mais les cantons.

Selon eux, l'Etat fédéral suisse repose sur deux grands piliers, dont aucun n'a le pas sur l'autre : le peuple et les cantons. Or la structure du Parlement doit respecter ces deux éléments fondamentaux.

Historiquement, les cantons n'ont accepté de se fédérer qu'à la condition d'être traités de manière égale. Tout système qui s'écarterait de cette donnée fondamentale remettrait en cause le pacte fédéral. L'évolution de la Suisse depuis 1848 ne justifierait pas qu'il soit porté atteinte au principe de l'égalité des cantons. Selon cette vision des choses, le peuple et les partis doivent continuer à être représentés au Conseil national et les cantons au Conseil des Etats.

Les partisans de cette position plus conservatrice n'étaient toutefois pas opposés à toute innovation. Pour réaliser la pleine représentation des cantons, ils ont proposé diverses modifications mineures, qui vont dans le sens d'un renforcement du rôle du Conseil des Etats.

L'une des innovations les plus fréquemment avancées consistait à porter à 2 le nombre de sièges attribués aux demi-cantons alors que, actuellement, il n'en ont qu'un. Ces derniers ont en effet les mêmes attributs de la souveraineté que les cantons : parlements, gouvernements, tribunaux. Il conviendrait donc de leur reconnaître une pleine égalité de droits avec les cantons dans le domaine de la représentation au Conseil des Etats.

Une autre innovation proposée consistait à imposer, de par la Constitution fédérale, le choix de un député au moins au Conseil des Etats parmi les membres de chaque gouvernement cantonal. Les députations bénéficieraient ainsi de l'appui des autorités cantonales. Grâce à cette union personnelle, le contact entre les cantons et le Conseil des Etats serait encore plus étroit. Ces députés seraient tenus, en fait sinon en droit, de suivre les instructions de leurs cantons. Ils seraient soumis à un mandat impératif.

On a évoqué également la possibilité de créer, au sein de chaque Gouvernement cantonal, un département des affaires fédérales, dont le chef serait, de droit, membre du Conseil des Etats.

D'autres propositions tendaient à renforcer les liens entre le Conseil des Etats et les Parlements cantonaux en prévoyant par exemple qu'une fraction de l'effectif total du Conseil des Etats soit choisie dans les rangs des parlementaires cantonaux ou que les membres du Conseil des Etats soient, de droit, membres des Parlements cantonaux, avec voix délibérative ou consultative.

Il a également été proposé que le Conseil des Etats se compose de représentants des Gouvernements des cantons, comme en République fédérale d'Allemagne.

Une contribution a proposé que le Conseil des Etats se compose, comme maintenant, de 2 députés par canton, auxquels on ajouterait 2 députés pour la communauté des Suisses vivant à l'étranger, laquelle pourrait se comparer à un canton. Ces deux députés seraient élus par les Suisses de l'étranger au suffrage direct et universel.

IV. Les rapports du Conseil des Etats avec le Conseil national

En Suisse, le bicamérisme a un fondement historique et correspond à la structure fédérale et complexe du pays. Le système de la Chambre unique a donc rarement été préconisé. Même si les travaux parlementaires sont parfois d'une lenteur difficilement compréhensible, cela ne suffit pas à condamner le bicamérisme.

En revanche, il a parfois été proposé que les deux Chambres n'exercent pas des fonctions identiques.

Certaines propositions ont suggéré de réserver certains objets à la Chambre haute. Ainsi, toute nouvelle attribution de compétence à l'Etat central serait soumise, pour approbation, dans un premier temps, au Conseil des Etats. En cas de décision négative de ce dernier, le projet tomberait. En cas de décision positive, le projet d'attribution d'une nouvelle compétence à l'Etat central serait soumis au vote du peuple et des cantons (référendum constitutionnel).

Il a également été proposé que les compétences du Conseil des Etats soient limitées aux domaines où la participation cantonale est particulièrement indiquée. Dans ces domaines, le Conseil des Etats posséderait ainsi une compétence législative primaire.

Cependant, parmi les tenants d'une différenciation des compétences, plus nombreux sont ceux qui voudraient donner la priorité à la Chambre basse. Cette chambre leur paraît mériter une position privilégiée parce qu'elle représente le peuple et parce que, élue selon le système proportionnel, elle donne l'image la moins déformée des opinions du peuple suisse. Cette prépondérance de la Chambre basse pourrait être réalisée de deux façons, qui réduiraient toutes deux la Chambre haute au rôle de Chambre de réflexion.

Selon la première proposition, le Conseil national traiterait en priorité les projets présentés par le Gouvernement; il trancherait définitivement les divergences qui subsisteraient quand des projets de loi lui reviendraient du Conseil des Etats.

Selon la seconde proposition, les divergences entre les deux Chambres seraient tranchées par l'Assemblée fédérale (les deux Chambres réunies). La prépondérance numérique de la Chambre basse lui donnerait le pas sur la Chambre haute.

Conclusion

Comme nous l'avons déjà dit, la Constitution du 18 avril 1999 s'en est finalement tenue à l'idée d'un bicamérisme parfait, dans lequel les deux Chambres sont investies des mêmes compétences et des mêmes pouvoirs.

L'art. 150 Cst prévoit en effet que chaque canton délègue deux députés au Conseil des Etats (les demi-cantons un seul).

Le vote sans instruction est maintenu (art.161 Cst), de même que le bicamérisme parfait : les art. 148 al. 2 et 156 Cst prévoient en effet que les deux Chambres ont les mêmes attributions, qu'elles délibèrent séparément et que l'accord de chacune d'elles est requis pour l'adoption des lois.

Unofficial translation

INTRODUCTION OF A TWO-CHAMBER PARLIAMENTARY STRUCTURE IN UKRAINE, by Olga Kravchenko, Constitutional Court, Kyiv, Ukraine

The issue of the choice of the model of internal construction of the Ukrainian Parliament had been discussed during the elaboration of the draft of the Constitution of Ukraine (1990 - 1996). The Constitutional commission approved the draft of the Constitution of Ukraine (version as of February 24, 1996), in which the Parliament – National Assembly of Ukraine – was to be composed of the Chamber of Deputies and the Senate (Article 72 of the draft). The opponents of a two-chamber parliament referred to the fact that the second chamber in the Parliament would drive to federalization and prolongation of the legislative process. The supporters of the bicameralism stated that the quality of the legislative process would improve and that non-taking into account the interests of the territories would stimulate decentered tendencies.

The draft of the Constitution of Ukraine in its version as of February 24, 1996 was to be submitted to the all-Ukrainian referendum. However, on June 28, 1996 the Verkhovna Rada of Ukraine adopted the Constitution of Ukraine. The structural model of the Parliament was defined by Article 75 of the Constitution of Ukraine which stipulated the unicameral set-up of the Verkhovna Rada of Ukraine.

Despite the constitutional definition of the Verkhovna Rada of Ukraine as a unicameral parliament the idea of bicameralism didn't disappear but went to the periphery of the social and political attention. The results of the all-Ukrainian referendum conducted on April 16, 2000 at which the issue concerning the necessity of the formation of a bicameral parliament in Ukraine was submitted testify to that. According to the information of the Central Election Commission the majority of the population of Ukraine (81,68%) voted for the establishment of the bicameral Parliament in Ukraine.

In order to implement the decisions adopted at the all-Ukrainian referendum the Decree of the President of Ukraine established a Commission on the elaboration of draft-laws which arise from the decisions of the all-Ukrainian referendum. The draft-law of Ukraine as of April 25, 2000 "On introducing amendments to the Constitution of Ukraine upon the results of the all-Ukrainian referendum upon the people's initiative", submitted by the President of Ukraine to the Parliament which was to undergo the expertise at the Constitutional Court of Ukraine didn't contain the provisions on the bicameral parliament.

Alongside with the presidential draft-law, in order to assess the conformity with the requirements of Articles 157 and 158 of the Constitution of Ukraine an alternative draft-law of Ukraine as of May 10, 2000 #5300-1 "On amendments to the Constitution of Ukraine upon the results of the all-Ukrainian referendum of April 16, 2000" was submitted to the Constitutional Court of Ukraine by People's Deputies of Ukraine. The provisions of this draft-law envisaged that the Parliament of Ukraine would consist of two chambers: the Verkhovna Rada of Ukraine and the Senate of Ukraine (Article 75 of the said draft-law).

The idea of a two-chamber structure of the Verkhovna Rada of Ukraine was discussed in the context of admissibility of such construction of the Parliament within the unitary form of the

state order and the existing system of administrative and territorial structure of Ukraine. The supporters of the idea of turning the Verkhona Rada of Ukraine into a bicameral parliament stood for the opportunity to form the upper chamber upon the equal quota from oblasts (regions), and the opponents saw the violation of one of the democratic principles "one voter – one vote", taking into account an unequal number of voters in various regions.

In considering the draft-law of Ukraine as of May 10, 2000 #5300-1 "On amendments to the Constitution of Ukraine upon the results of the all-Ukrainian referendum of April 16, 2000" in the part of the implementation in Ukraine of a bicameral parliament, the Constitutional Court of Ukraine established that the introduction of the two-chamber parliament in the unitary state is the issue of expediency. However, in the mentioned draft-law there were absent the systemic changes to the Constitution of Ukraine in relation to the implementation of the two-chamber parliament which made it impossible for the Constitutional Court of Ukraine to comprehensively analyze such amendments as to their conformity with the Article 157 of the Constitution of Ukraine. Under such conditions the Constitutional Court of Ukraine ceased the proceedings in this case in that part of the draft-law which related to the amendments of the Constitution of Ukraine concerning the implementation of the bicameral parliament.

At the same time neither of the draft-laws on the implementation of the results of the all-Ukrainian referendum of 2000 submitted to the Verkhovna Rada of Ukraine was not approved.

The discussion as to the implementation of a two-chamber parliament in Ukraine was renewed with the initiative of conducting a political reform. The draft-laws on introducing amendments to the Constitution of Ukraine didn't contain the provisions on the transition to the two-chamber parliament in Ukraine except the Draft-law of Ukraine as of March 5, 2003 #3207 "On introducing amendments to the Constitution of Ukraine" which was submitted to the Verkhovna Rada of Ukraine by the President of Ukraine. This draft envisaged the establishment of two chambers of the Verkhovna Rada of Ukraine – the Chamber of Regions and the State Assembly. Instead of the considered draft-law on January 19, 2003 there was submitted a new draft, # 3207-1, which didn't have the provisions as to the transition to the two-chamber structure of the Verkhovna Rada of Ukraine.

In the light of the political events that had taken place at the end of 2004 the attention of the society, especially in the East of the country, was focused on the issue of the change of the form of the state order (from the unitary to the federal one), which was marked by the attempts to conduct an all-Ukrainian referendum concerning the necessity to form the bicameral parliament in Ukraine which had not found their logical termination.

At present the bicameralism is not a dominant tendency in the issue of the construction of a two-chamber Ukrainian parliament in relation to the fact that the Verkhovna Rada of Ukraine adopted the Law of Ukraine as of December 8, 2004 #2221-IV "On introducing amendments to the Constitution of Ukraine" in which a one-chamber structure of the Verkhovna Rada of Ukraine with the constitutional composition of 450 People's Deputies of Ukraine remained unchanged.

THE SECOND CHAMBER OF THE UNITED KINGDOM'S PARLIAMENT: THE HOUSE OF LORDS, by Jeffrey Jowell, University College, London, Member, United Kingdom

Introduction

Following the implementation of a radical scheme of devolution by the current Labour government, there now exist a variety of parliamentary bodies in the UK. They include: the Westminster Parliament, the Scottish Parliament (Holyrood), the National Assembly of Wales and the National Assembly of Northern Ireland.[40] The Westminster Parliament remains the only bicameral parliament, comprising the elected House of Commons ("HC") and the appointed House of Lords ("HL").[41] It is therefore the Westminster Parliament alone on which this short piece will focus and specifically on its second chamber, the House of Lords.[42]

1. Election and composition

The House of Lords is not elected. Up until 1958 it consisted almost entirely of Hereditary Peers. From 1958 there have been appointed 'Life Peers', which now constitute the majority of the House, as in 1999 all but 92 Hereditary Peers were abolished from sitting in the House of Lords. In addition, there are almost 50 'Lords Temporal' (Bishops and Archbishops, representing the established Anglican Church), and 12 "Law Lords" (who sit as the highest UK court but who will shortly move out of the Lords into a separate Supreme Court.)[43]

Members of the House of Lords are organised on a party basis in much the same way as the House of Commons, but with important differences. Members of the HL do not represent constituencies. The are appointed at large. Although some members of the Lords do take the party 'whips' ie, are loyal members of a political party, others do not.. Those who do not support one of the three main parties are known as 'crossbenchers' or 'independent peers'.

Appointment to the HL is by nomination of the government of the day. In the past the Conservative Party has dominated the membership, largely because of the conservative allegiance of the Hereditary Peers. However, over the last few years that balance has been altered and now and in the future the party with the most seats in the House of Commons will be the largest party in the Lords (although not necessary commanding the majority of votes).

In May 2000 the Government set up an independent Appointments Commission[44] with two main functions: first, to vet for propriety all nominations for peerages, including those from political parties; and secondly, to make recommendations for non-political peers (known colloquially as "People's Peers") in order to create a more representative (although still unelected) chamber.[45]

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[40] *See the Scotland Act 1998, Wales Act 1998 and Northern Ireland Act 1998. Devolution in the UK was asymmetric and so the different bodies have varying degrees of legislative autonomy.*

[41] *The Scottish Parliament contains something like a second chamber in the form of the Scottish Civic Forum.*

[42] *This account reflects the state of the HL in September 2005.*

[43] *Under the terms of the Constitutional Reform Act, 2005.*

[44] *The Commission is composed of three non-party political members and three members nominated by each political party.*

[45] *Details of the appointment criteria can be found at the Appointments Commission website: http://www.lordsappointments.gov.uk/.*

2. The powers and functions of the House of Lords

The House of Lords performs several key functions within the UK Parliament. For convenience, these functions may be reduced to the following headings: the *legislative* function, the *accountability* function and the *judicial* function.

The legislative *function*

Well over half of the work of the HL is devoted to the task of legislation. Most bills begin their life in the HC and then pass through the HL and back again. But some begin in the HL. Like the HC, the HL considers draft Bills during the different stages of the legislative process.[46] It has a significant role in scrutinising and revising legislation.

Unlike the HC, the HL is not constrained in its task by the restrictive parliamentary devices of "guillotines", or "programme motions"; there is no selection of amendments; all members are entitled to move and speak to their amendments and, unlike the HC, amendments may be made at the latest stage of a Bill's passage.[47]

The HL undertakes its legislative role both in full chamber and in committees.[48] Three such committees warrant particular mention, the first two of which are concerned with the grant of delegated powers to government ministers. Firstly, before a Bill receives detailed scrutiny, the Delegated Powers and Regulatory Reform Committee checks that any powers granted to a Minister (or to the National Assembly of Wales) to make secondary legislation are delegated appropriately in that they allow for adequate Parliamentary oversight where necessary.[49]

In addition, after a Bill becomes an Act, the Merits of Statutory Instruments Committee examines the policy aspects of any statutory instrument (ie, subordinate legislation) made under the parent Act and alerts the House of Lords to those instruments of particular interest or importance.[50]

Members of the HL also sit on several joint committees, most notably the Joint Commons-Lords Committee on Human Rights.[51] This committee examines matters relating to human rights in the United Kingdom.

The *Accountability* function

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[46] *These are as follows: the First Reading stage, the Second Reading stage, the Committee stage, the Report stage, the Third Reading and Passing stage. A Government Bill or Private Members' Bill may begin either in the HC or HL, after which, it will follow the normal legislative process.*

[47] *The Work of the House of Lords, March 2005 House of Lords Information Office (hereafter "WHL") p 4. This can be found at http://www.parliament.uk/documents/upload/HoLwork.pdf.*

[48] *The Committee Stage in the HL is taken by a committee of the whole House.*

[49] *The Committee has a particularly impressive record on this front. In the 2003-2004 session, the Committee reported on 46 Bills and made recommendations on 23 of them (source: WHL p 8). The Government is required to pay particular attention to committee recommendations under the informal Cabinet Office document, Guide to Legislative Procedures September 2003 (available on the Cabinet Office website < http://www.cabinet-office.gov.uk/> at 1 July 2004). See generally Dawn Oliver Constitutional Scrutiny of Executive Bills, [2004] Maquarie Law Journal 33-56.*

[50] *In the 2003-2004 session, the Committee reported on 657 statutory instruments of which 30 were drawn to the attention of the HL. Source: WHL p. 9.*

[51] *The Joint Committee on Human Rights website can be found at: http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm.*

There are several different methods open to the HL for holding the Government to account. These include oral and written questions, statements made in the HL by government ministers and debates in the House as a whole. There are daily opportunities to ask oral questions about different aspects of government policy and the last few years have seen a significant increase in the use of written questions. Ministers have lately given statements – and taken questions – on a number of major issues such as asylum policy, relations with the EU and terrorism.

The debates in the HL are of a particularly high quality owing to the rich diversity of expertise amongst the Lords. There are weekly 'general' debates lasting five hours (or two smaller debates). In addition, there are short debates lasting 1 to 1½ hours which provide opportunities to raise issues of concern.

There are four permanent investigative committees in the HL: the European Union Committee, the Economic Affairs Committee, the Science and Technology 2004 Committee and the Constitution Committee. On occasions, *ad hoc* committees are set up to investigate particular issues outside the remit of permanent committees or on particularly controversial issues such as the Assisted Dying for the Terminal Ill Bill (referred to a committee to deal with the moral and ethical issues involved) and the Constitutional Reform Bill (abolishing the position of Lord Chancellor and setting up an independent judicial appointments committee and separate supreme court). Drawing upon the expertise and experience of its members, the committees produce authoritative and influential written reports.[52]

The *judicial* function

The Appellate Committee of the House of Lords has historically formed the highest court of appeal in the country. Although technically members of the HL in its legislative capacity, the 12 "Law Lords" are, in effect, a self-contained court.[53] The recent Constitutional Reform Act 2005 will remove the Law Lords from the second chamber for all purposes.[54]

3. Voting mechanisms

There are no specific voting mechanisms in the House of Lords. Each member has one equal vote.

4. Contribution of the Chamber to a Functioning Democratic System

We have seen that the two principal democratic functions of the HL in its current form are: (a) to scrutinise and revise legislation as it passes through the Lords, and (b) to hold the government to account. It does so through robust scrutiny of governmental action (either in the full chamber or in committees), scrutiny and revision of government legislation, and by limited powers of delay (see further below). Although the HL rarely defeats the Government on the legislative

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[52] *WHL p 14.*

[53] *The participation of the Law Lords in legislative debates is governed by certain conventions. Lord Bingham has set these out as follows: that the Law Lords should not engage in matters where there is a strong element of party political controversy; and they bear in mind that they might render themselves ineligible to sit judicially if they were to express an opinion on a matter which might later be relevant to an appeal of the House. (HL Deb., 22 June 2000, vol. 614, col. 419). See Dawn Oliver, Constitutional Reform in the UK, Oxford University Press 2003, p 347.*

[54] *The Constitutional Reform Act 2005 received royal assent on March 24, 2005.*

amendments it tables, one can single out a number of occasions in which the HL has succeeded in bringing about an amendment to, or a withdrawal of, Bills of major constitutional import. [55] The successful amendment to the Civil Contingencies Bill and the withdrawal of a clause 10 in the Asylum and Immigration (Treatment of Claimants, etc) Bill 2003/4 will serve as examples.

- The Civil Contingencies Bill gave power to the Government to repeal or suspend any Act of Parliament in the event of a serious terrorist threat to human life, the environment or security.[56] Concerned at the lack of safeguards in the Bill, the HL secured several significant amendments: that regulations could only be made to deal with a specific emergency; they would be subject to a maximum life of 30 days and, if the Act needed to be used, there would be formal arrangements to review how it had worked.[57]

- Clause 10 of the Asylum and Immigration (Treatment of Claimants, etc) Bill 2003/4 excluded appeal or judicial review of the Asylum and Immigration Tribunal's decisions. There was widespread condemnation of this provision at the time but the Bill nevertheless passed through the HC unscathed. It was only by virtue of opposition in the HL that the Government withdrew the clause and undertook to bring forward alternative proposals for review of the decisions of the tribunal.[58]

These examples highlight the potential force of the HL as a "constitutional watchdog" and it is this role that most significantly defines the HL in its present form.

5. Relative Powers of the Two Chambers

As noted above, the HL is currently a non-elected second chamber. As such, it is deemed to be the subordinate chamber and constantly treads a fine line between holding the government to account and thwarting the agenda of the elected representatives of the people. This tension has been particularly acute under the Blair government and the two Houses have hit many flashpoints on issues ranging from health policy, to the war in Iraq, to Hunting. It is perhaps inevitable, given the nature of the HL, that the two Houses occasionally reach stalemate on a given issue. In such situations, the HC may rely on two separate provisions, the 'Salisbury doctrine' and the Parliament Acts 1911 and 1947, to secure the passage of a Bill.

- The Salisbury doctrine implies that the HL should not reject at second reading Government Bills brought from the HC for which the government has a mandate from the nation. This generally consists in those Bills which the government foreshadowed in its election manifesto.[59]

- The Parliament Act of 1911 reaffirmed the supremacy of the HC over the HL. It limited the power of the HL to veto money Bills and to delay Bills passed by the HC.[60] The original 1911 Act curtailed the Lords' ability to delay Bills to a two-year limit. The Commons updated the act

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[55] *In the 2003-2004 session, the HL defeated the Government on 51 amendments of the approximate 10,000 amendments tabled. Source: WHL.*
[56] *Introduced in the HC on January 7, 2004.*
[57] *WHL p. 6.*
[58] *For an excellent account of this episode, see generally, Oliver nt 6 supra.*
[59] *For a detailed account of the modern doctrine, see House of Lords library note LLN 2005/2004 The Salisbury doctrine (June 2005).*
[60] *There is one exception: MPs still need the blessing of the Lords if they want to extend the five-year lifespan of parliament.*

in 1949, reducing the Lords' delaying time to just one year. After that, the Speaker may put the Bill forward for royal assent without the consent of the Lords.[61]

The present Labour government has invoked the 1949 Act on three separate occasions since 1999.[62] This is significantly greater use of the Act than ever before and has fuelled the debate about whether the power of the House of Lords should be increased, perhaps by augmenting its legitimacy by having it elected, or whether the HL should be abolished or have its powers further trimmed.[63]

6. Proposals for reform

The past 6 years has witnessed a tortuous period of wrangling over the future of the second chamber.[64] There have been numerous statements, papers, reports, debates and votes along the way.[65] The debate has been driven by the desire to maintain the primacy of the HC whilst bolstering the legitimacy and effectiveness of the HL. The main outstanding points of contention are as follows:

- Whether the balance of power between the two Houses should remain the same;
- Whether the HL should be predominantly an elected or appointed chamber;
- The appropriate method of election/appointment;
- Whether, and when, the remaining hereditary peers should be removed from the chamber;
- The balance of political power in the second chamber;
- Whether members of the HL should be representative of different religious faiths and ethnic minorities;
- Whether members of the HL should be representative of the different regions within the UK;
- The duration of members' tenure;
- The size of the HL.

On each of these issues, there is considerable inter- and intra-party disagreement, broadly reflecting two different conceptions of the second chamber, as either a *revising* chamber or a *rival* chamber. There is a strong view that at least some of the members of the House of Lords should be elected, while others believe that strengthening of its legitimacy would weaken that of the primary House, namely, the Commons. Yet others believe that the great strength of the House of Lords is bringing into the realm of public discourse experts in their fields, who would not otherwise be attracted to politics and bring an independent view to the policy process.

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[61] *Source: The Guardian Thursday November 18, 2004. The HL may not delay money Bills.*

[62] *These were the European Parliamentary Elections Act 1999, which established a closed-list system, the Sexual Offences (Amendment) Act 2000, which lowered the age of consent for gay men to 16 and the Hunting Bill 2004.*

[63] *Following the government's most recent invocation of the 1949 Act – to pass the Hunting Bill 2004 – the Countryside Alliance unsuccessfully challenged the validity of the 1949 Act on the basis that it was passed without the consent of the Lords. See R on the application of Jackson & Ors [2005] EWCA Civ 126. Some of the judges in that case suggested that the Commons on their own would not be able to abolish the Lords without its consent. The appeal on this case is expected soon.*

[64] *For a fascinating and detailed chronology of the different reports and events on reform see House of Reform since 1999: a chronology, House of Lords library.*

[65] *The most prominent and comprehensive of these are the reports by the Royal Commission on the Reform of the House of Lords: A House for the Future (Cm 4534) and the Public Administration Select Committee The Second Chamber: Continuing the Reform – Fifth Report of Session 2001-2002 (HC 494, February 2002).*

The present Labour government are committed through their party manifesto to abolishing the remaining Hereditary Peers. It remains to be seen whether they, or any other future government, will further upset the balance of the two Houses of the UK Parliament.