The Egyptian Shura council and the international experiences

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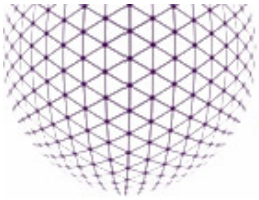

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index

Upper Houses in Comparative Perspective

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Introduction

This chapter is deliberately synthetic, seeking to pull together what we already know about upper houses in the world's parliaments rather than to add to this body of knowledge. Equally, its goal is not to look in detail at bicameral arrangements in specific cases, but to introduce the reader to the immense variation in bicameral arrangements found in the world today. Its basic theme is that there is no "one size fits all" solution to effective bicameralism. Creating an effective upper house entails hard work, good will among all those involved in the political process and, often, trial and error. Even then, effective bicameralism is not guaranteed. A number of countries have experimented with bicameralism and ended up eliminating their upper house, including, for example Denmark, New Zealand and Sweden since the 1950s. Thus, if a senate is to be effective, the minimum conditions are that the reasons for its creation or reform need to be spelled out and justified in advance, as do its structure and functions, and especially its relationship to the lower house and/or president. Ultimately, successful upper houses can strengthen the regime by enhancing democratic accountability and promoting popular identification with, and support for, the constitutional order.

A Global Profile

According to the Inter-Parliamentary Union, there were 190 national parliaments in the world in 2012. Of these, 76, or 40 per cent, are bicameral in structure and the remaining 60 per cent are unicameral, or have only a lower house. Both types of parliament are found in all regions of the world, while almost all (17 of 20) federal states in the world today have a bicameral parliament. Bicameralism is not the product of a federal state structure, however, since 57 unitary states also have an upper house. Similar variation is found in the way in which individuals become upper house members. Usually, different pathways to membership are found in the same upper house; most members may be directly elected, for example, but some may

be appointed. For the most part, however, the membership of 28, or 36.8 per cent, of the world's upper houses is directly elected, that of another 28 is mostly indirectly elected and that of the remaining 20 houses are appointed by the government, the head of state, or the king.

This brief profile of upper houses in the world today gives some idea of the wide variation in their fundamental characteristics. I shall now try to introduce some order into this variation by examining upper houses under three headings:

1. Theory of bicameralism;
2. Powers;
3. Legitimacy.

Theory of Bicameralism

Why would a country choose to have a bicameral parliament in preference to a unicameral one? What are the advantages of bicameralism? Political theorists have argued that there are two principal justifications for having a parliamentary upper house - reflection and representation.

Reflection essentially means the upper house "provides for a second opinion" that can check the actions of a usually popularly elected lower house whose decisions might be hasty and intemperate, even despotic under pressure from voters anxious for change. James Madison, one of the United States' Founding Fathers, argued that that the popular house is "liable to err…from fecklessness and passion" and that a second chamber might provide "a necessary fence against this danger." In providing a venue for calm and reasoned deliberation free of electoral pressures, the upper house provides for protection against the potential majority tyranny of the lower house.

In checking the lower house, an upper house is also argued to contribute to legislative performance and good governance through reviewing, revising and improving proposed legislation. Thus, for Lord Bryce, a British diplomat and member of the House of Lords, "the chief advantage of dividing a legislature into two branches is that the one may check the haste and correct the mistakes of the other."

Representation concerns the question of whose interests should be protected against potentially tyrannical lower houses? Initially, the answer to this question was class-based. The estates of the realm, the aristocracy, the clergy, and so on, had to be shielded against the onset of political democracy and the power of the masses. As the world has become more democratic, however, the basis of upper house representation has become most commonly territorial, protecting, for example, small states in the U.S. or territorially defined ethnic/linguistic groupings in the newly federalized Belgian state.

But there is an argument that the emergence of disciplined, ideological parties has subverted the territorial basis of representation in the struggle for control of the national political agenda. The Australian Senate, although its members are directly elected on a territorial basis, is commonly argued to be a "party house' rather than a "states' house." A similar argument has been made in regard to Germany and, indeed, to the archetypal states' house, the U.S. Senate. When parties are polarized, upper house members go with their party rather than the territory they represent.

Upper House Powers

There is immense variation in the distribution of policy making power between upper and lower houses, with the overwhelming norm being some degree of lower house domination. The range stretches from full legislative co-equality to limited powers of delay over certain kinds of legislation. Two factors shape the actual balance of power – constitutional provision and practical politics. In the United States, for example, the constitution guarantees the Senate co-equal legislative powers with the House of Representatives and even gives it unique powers in areas like the confirmation of supreme court justices and diplomats. But, perhaps just as importantly, the U.S. Senate has seized these constitutional guarantees and unfailingly held on to them as smaller states have been intent on not being dominated in the legislative process by their larger counterparts. Such is not always the case, however. Constitutionally speaking, 315 of the 319 members of the Italian Senate are directly elected and enjoy co-equal powers with the Chamber of Deputies. In practice, however, the Senate has generally deferred to the lower house on the ground that that is where the leaders of the major parties hold their elected positions.

Italy and the U.S. are far from the norm when it comes to relations between lower and upper houses. The far more common situation is for upper houses to have little or no power to initiate legislation, no power to influence or delay financial legislation and limited powers at best to delay non-financial legislative proposals emanating from the lower house. This power of delay, for example, is 12 months in Britain, 3 months in Poland and two in Spain. Moreover, when the two houses conflict over the content of legislation, various mechanisms exist to reconcile these differences. For example, proposed bills can "shuttle" between the two houses until differences are ironed out or conference committees consisting of members from both houses can be appointed to work out differences in their respective versions of the bill. Generally speaking, though, the lower house has the power ultimately to override obstructionism on the part of the upper house and turn their preferred version of legislative proposals into the law of the land. For example, upper house amendment proposals can be rejected or they automatically become void if the lower house does not respond to them within a certain period of time. Similarly, the lower house version of a bill

often becomes the law of the land even if the upper house continues to oppose it. An interesting exception is Germany where the Bundesrat has the final say in all disputes over legislation concerning the lander (or states) in cases of disagreement between the lander and federal governments.

Legitimacy

Perhaps the greatest disadvantage for upper house, however, is their legitimacy deficit. This has various sources. Constitutional provision guaranteeing the primacy of the lower house is one reason upper houses enjoy lower status and repute in the eyes of the people. Similarly, being mostly appointed or indirectly elected, upper houses mostly cannot make the same claim as lower houses to be the legitimate voice of the people. But some take this argument further and claim that upper houses, even when directly elected, are undemocratic political institutions because they breach the fundamental democratic principle of "one person, one vote, one value." Lower houses strive to implement this principle by having the electoral constituencies from which representatives are elected roughly equal in population size. Upper houses ignore this principle when they give equal numbers of representatives to territorial units of vastly unequal population size. The U.S. is the usual example of this departure from democratic principle. Wyoming, with about 536,000 residents has the same number of senators (two) as California, which has over 37 million people living in the state. Moreover, this argument continues, upper houses are even more undemocratic when they are not directly elected insofar as their members, even though their legislative influence may be small, cannot be held popularly accountable for their actions in periodic elections. Democracy is held to give way to elitism.

Another line of attack on upper houses concerns the reflection function that political theorists have held to be one of their principal virtues. The counter claim is that upper houses obstruct and frustrate the popular will, as expressed in the lower house, more often than they contribute to constructive, salutary delay. Indeed, especially when in the hands of a different party (or coalition of parties) to that found in the lower house, appointed or indirectly elected lower houses can actually obstruct and subvert the popular will. More practically, upper houses are accused of introducing inefficiencies and unnecessary duplication in the processing of important legislation and of sometimes failing to produce an adequately critical review of legislative proposals.

Thus, what some laud as virtues in upper houses, others condemn as vices and subversions of the democratic ethos. It is because of these profoundly different perspectives that upper houses are "essentially contested institutions" and discussion of their elimination or reform is a perennial item on the democratic political agenda.

Background Paper on the Shura Council Constitutional Framework and Political Practice

Arab Forum for Alternatives: Nuran Ahmed

Supervised By: Mohammed Elagati

The Egyptian Shura Council is one of the most controversial political bodies in Egypt, caught between those who support its continuation and those who believe it should be abolished. This is an old debate in Egyptian politics that dates back to the Council's founding under President Sadat. However, this debate was given a boost in the wake of the revolution of January 25, 2011 in the context of attempts to revisit the past political legacy and build a new political system that meets current requirements.

Most of those who call the Council ineffective typically emphasize the stage during which parliamentary mechanisms returned to Egyptian political life under President Sadat. This was a time when the Shura Council had limited influence in politics, especially the legislative process. Detractors also pointed to the deteriorating status of this institution in the years of Mubarak's rule and the shortcomings it became notorious for in its composition, whereby Council members became close to the executive branch and the ruling National Democratic Party, causing the general public to lose confidence in the Council and its effectiveness. This is partly due to the method by which members enter the Council by presidential appointment. The validity of these arguments notwithstanding, they are removed from the historical experience of this Council in Egyptian parliamentary life before the 1952 revolution, in that the Senate was a key feature of Egyptian parliamentary life and has been a tradition of Egyptian politics since that time. In any case, the matter was resolved (at least for the foreseeable future) in favor of the Council's continuing to play a role in the legislative process as an authority for the laws, and an elected think tank completely integrated with the elected body (the House of Representatives). This paper will attempt to evaluate this Council within the new constitutional framework that governs it, as well as the practice and actual operation of this Council. Finally, it seeks to propose new ways of

enhancing the body's operations to achieve the desired balance between powers and build on its past achievements.

1. First: The Constitutional Framework:

This framework gives us an image of the formation, role, and jurisdiction of the Shura Council. We begin with **the formation of the Shura Council**:

The details of this are found in Articles 1, 130, 129, 128, 112, 111, 97, 94, 83, and 82[1]. These articles state that the Shura Council is to be one of the legislative power structures in Egypt, along with the House of Representatives, and the following article states that it is not possible to combine membership in the two houses. Article 128 set universal direct suffrage as a way to form the Council so as to have a minimum of 150 members, with the President able to appoint no more than one tenth of the elected members. Article 129 set the requirements of candidates for membership in the Council to include Egyptian citizenship, the holding of civil and political rights, possession of a higher education degree, and a minimum age of 35. Article 130 set Council terms at 6 years, with half the members subject to renewal every 3 years. Article 97 dealt with choosing the Speaker of the Council and his deputy by election for half of the Shura Council's legislative term. Article 94 provided for the President to convene the normal annual session of the Council; this also applies to adjourning the Shura Council, which falls to the president with the Council's consent. Finally, Article 224 of the constitution provided for the holding of elections for the Shura Council, using either the list system or the individual system, or some combination thereof as determined by the electoral law.

-In considering the above articles on the composition of the Shura Council, most striking is their continuity with the constitution of 1971, where the new constitution, as before, enabled the president to influence the formation of the Council by appointing a number of its members, with a difference between the two constitutions being the ratio of elected to appointed members. Also in common is the duration of the electoral cycle for the Council, which both constitutions set at 6 years, with the renewal of half of the members coming every 3 years.[2] This also applies to the election

1. http://dostourmasr2012.com/
2. http://hccourt.gov.eg/Constitutions/Egyptian_Constitution.asp

of the Speaker of the Council and its representatives, and their duration in these positions, as well as the shared prohibition on combining membership in the House of Representatives (called the People's Assembly in the 1971 constitution) and the Shura Council. However, this does not eliminate the points of difference between the two constitutions, in that the new constitution asserts that the Shura Council is to be one of the components of the legislative branch. This issue is a subject of ambiguity in the 1971 constitution, which deals with it as an advisory body with respect to jurisdiction, and as a legislative body with respect to composition, formation, and relationship with the executive branch. Another difference is in the articles stipulating conditions to be fulfilled by Shura Council candidates, as the text does not address the need to include members who are workers and peasants; rather it emphasizes the need for nominees to have a higher degree (meaning that the social status of the candidate is no longer important for nomination and instead focusing on qualifications). This can be interpreted as part of the political settlement in favor of dealing with the Shura Council as a chamber of parliament.[3] In addition to the controversy over the text's effectiveness at providing for entry of members of the working and peasant classes in the Shura Council, and then dealing with the Shura Council as the "Upper House," with all the stringent accompanying conditions required of members in comparison to the House of Representatives; this clarity extended to the text on the mechanisms for filling any empty seat on the Council. However, with respect to presidential influence on forming the Council, the degree to which he can intervene in appointing members to the Council has been reduced. This provision is accompanied by the text of Article 97, which explicitly states that the election to Speaker of the Council and Deputy Speaker should be confined to elected members. These two provisions are meant to restore the internal structural balance in favor of the elected portion of the Council, which carries representative authority, corresponding to the Council's role in the legislative process under the new constitution. Reducing this percentage is also a step toward scaling back the interference of the executive branch in the legislative branch over the long term, as it would restore public confidence in the Council's political effectiveness (although it does not necessarily reflect progress in its actual application).

3. George Fahimi, Karim Sarhan, "Parliament in the New Constitution of Egypt", Arab Forum for Alternatives Studies, 2012.

The above analysis illustrates the key influences on the formation of the Shura Council, including the gray areas found in a number of articles like Article 128. This article set the minimum number of members of the Shura Council at 150, but did not specify a specific number of members and lacked a clear mechanism for determining the number in each election cycle. This is connected to the authority of the head of state to appoint a percentage of members, which allows the President to give one of the two chambers priority over the other[4], as it opens the door to the potential for an attempt to circumvent the majority of the Council if it is not compatible with the president's positions; this may also raise questions on the legislature's independence from the executive branch. Not setting the number of members could have been understood and accepted if it were coupled with a provision for periodic review that allows for flexibility in forming these institutions in a way commensurate with societal developments. For example, changes might be needed when there is an increase in the number of members in line with developments in demographic or population increases in the electoral districts and provinces. Some of the articles are also ambiguous, such as the article prohibiting combined membership in the Shura Council and the House of Representatives, which made it incumbent on the law to lay out the specifics of how they ought not to be combined. Also ambiguous is the requirement that candidates for the Shura Council "enjoy civil and political rights." This provision is confusing and ambiguous, and a more precise formulation might be the requirement for a clean criminal record or completion of military service.

2. The Role of the Shura Council:

Article 82 of the constitution confirmed that the Shura Council is one of the structures of the legislative branch and Article 100 of the constitution gave the Shura Council jurisdiction to preserve its internal system. Article 102 of the constitution gave the Shura Council the right to adopt laws, and the right to modify and break-up articles and amendments brought before it, and it stipulated that laws cannot be passed without the consent of the Shura Council (both Councils must consent, but we will limit our discussion to the Shura Council under consideration here). Article 105 stipulated that it is the right of any member of the Council to submit a proposal on a general subject directed to the ministers and their chiefs and representatives. Article 106 provided for the potential for ten members of the Shura Council to

4. Muhammad Elagati, "Comment on the Draft of the Constitution", Arab Forum for Alternative Studies, 2012.

present a request to debate a general topic of government policy in the public interest. Article 108 allowed for the Shura Council to refer proposals that it receives from citizens to the concerned ministers, to present their statements concerning them, and Article 109 enabled the Shura Council to require the ministers to attend the Council and respond to the topics under discussion. Article 131 gave the Shura Council the right to have sole legislative jurisdiction when the House of Representatives is dissolved. Additionally, all measures taken by the president in the absence of the two Councils have force of law, which must be submitted to the Council and to the House of Representatives later. Article 145 required the Shura Council and the House of Representatives to agree on ratifying treaties to set them into force. Article 148 required agreement from both the Shura Council and the House of Representatives to announce a state of emergency, by approval of the Shura Council majority alone when the House of Representatives is dissolved. Article 153 provided for the Speaker of the Shura Council to temporarily assume the functions of the president if he leaves his position, and also to notify the National Electoral Commission if the House of Representatives is dissolved. Article 193 of the constitution provided for the membership of the Speaker of the Council in the National Security Council, which develops strategies to achieve national security, and Article 197 required the membership of the Speaker in the National Defense Council, which considers the affairs of the security and safety of the country, discusses the budget of the armed forces, and gives its opinion on bills relating to the armed forces. Article 201 required that reports of independent bodies and regulatory agencies be submitted to several entities, one of which is the Shura Council. Article 202 stipulated that the Shura Council agree on the presidential nominees to head the independent bodies and regulatory agencies, as well as requiring the consent of the members of the Council to dismiss them. Article 207 provided for the Shura Council to be among several other bodies to hear the opinion of the Economic and Social Council in connection with policies and bills related to the Council's jurisdiction. With regard to amending the constitution, Article 217 provided for the Council to discuss amendment requests, and issue a decision to accept amendments in whole or in part. Article 218 supplemented this so that in the case of the initial approval of any constitutional amendment there is to be a discussion by the Shura Council in addition to the House of Representatives of the provisions of the articles replacing the amendment in preparation for submission to a popular referendum later. Article 84 determined the scope of work of members of the Shura Council, restricting them to parliamentary work unless there is a legal provision that creates an exception.

-**Analysis of these constitutional articles and texts** shows a new perception of the Shura Council and its role, a view that is gaining importance in light of a number of features. The first structural observation is the large degree of connectedness in the provisions on the House of Representatives and the Shura Council, which reflects the text of Article 82 on the overlapping legislative jurisdiction between the two houses. This overlap is also reflected in that the jurisdiction and powers vested in the Shura Council were not granted to the Council exclusively. More precisely, the constitution did not grant the Shura Council unique jurisdiction (with minor exceptions). This also illustrates the shared jurisdictions that the Council came to enjoy which were limited in earlier constitutional documents to the House of Representatives (the People's Assembly). In this context, earlier constitutional texts reveal attempts to institutionalize the Shura Council and create traditions unique to it as with the House of Representatives (the People's Assembly). Thus was launched the preparation and implementation of constitutional by-laws that control how its system operates, establishing its presence in the political process and defining its relationship to a large number of political and executive institutions in the state. This also led to an expansion of the Council's jurisdiction, as with Article 135 which enabled the Shura Council to influence the formation of an executive branch institution (the presidency) and by requiring presidential candidates to recommend a number of members of the Shura Council.

-Another important aspect of these texts is the unprecedented attempt to insert the Council into Egyptian policymaking. A number of articles, like the articles dealing with the composition of the National Defense Council and the National Security Council highlight the potential of the Council entering the realm of sovereign issues and decision-making.

-The third observation is that these provisions strengthened the powers held by the Council in relation to the executive branch (the Prime Minister, their Cabinet and deputies), as well as the direct nature of the relationship between the Council and the executive branch. The Shura Council was thus given a number of tools for parliamentary oversight, such as presenting a nonbinding proposals and requests for debate. But one of the concerns over that is despite the Shura council's ability to hold requests for discussions , and its legislative authority, there is no constitutional article stating full parliamentary monitoring tools particularly the interrogation and auditing

tools. This direct nature extended the relationship between the Council and citizens by allowing it to receive complaints and suggestions from them and forward them to the executive, and thus also play the role of mediator among citizenry.

-In the context of these constitutional provisions mentioned earlier, it is possible to cite several of their shortcomings, for instance considering Article 102 of the constitution, we find that an article like this increases the complexity of the legislative process and delays the completion of legislative work, by requiring the consent of both houses on legislation. This article is also ambiguous, especially the statement that "it is not permissible for any Council...except after making a review of it." The Article did not make clear who should make the review.[5] The dysfunction is also reflected in Article 106, which grants Shura Council members greater authority than the House of Representatives. This article gives enforceability to Shura Council requests for ministerial debate with a lower number of members than required by the House; as a representative elected body, the House of Representatives ought to have the same authority. However, Article 108 also shows the continuing constraints that the law imposes on the political and legislative process under the heading of national security; this empties the article of its content, and gives Council members the right to obtain information their work requires as a routine matter that does not violate the concept of [the right to] address public authorities. There are clearly some articles that support an active role for the Shura Council in the decision-making process, especially in areas of national security and other sovereign issues that were not the jurisdiction of this institution before, such as Article 193 and Article 197 on the membership of the Speaker of the Shura Council in the National Security Council and the National Defense Council. However, there is an overlap in tasks between these two councils and the influence and effectiveness of these mechanisms is ambiguous. It is therefore questionable whether the Speaker of the Shura Council would be able to influence these institutions, particularly the National Defense Council, which dominates the formation of the military.

-Consider also Article 148 on imposing a state of emergency, but the constitution was deficient in addressing accountability during an emergency in that it did not take up the possibility that parliament would refuse to

5. Muhammad Elagati, "Comment on the Draft of the Constitution", Arab Forum for Alternative Studies, 2012.

declare a state of emergency – as if the masses could resort to resolving this dispute between the branches by public referendum. And this is what may be imposed in the event of vacancy of either of the two offices in anticipation of a potential monopoly of power by any of the parties - especially the president.

3. Third: The Relationship of the Council to Other Bodies

Article 87 of the constitution granted the right to decide the validity of the membership of the Shura Council to the Court of Cassation, and Article 90 of the constitution required that the police and the public prosecution (judicial branch) cannot arrest a member of the Shura Council in any case, except in cases of *flagrante delicto*, without the permission of the Council itself. Article 88 specified that any member who receives gifts or benefits in kind is to immediately transfer these gifts to the public treasury to preserve them; it also requires each member of the Shura Council to provide a financial disclosure to the Council itself on taking office and leaving the Council. We now turn to the most controversial relationship, which is the relationship between the executive branch and the Shura Council, the topic dealt with in this paper. The constitution stipulated in Article 92 that the Council is not allowed to hold a meeting in any place besides the headquarters unless they request it from the president or if one third of the members agree, and any decisions that result from this meeting shall be considered void. Article 93 of the constitution supplemented this, in that it allowed meetings of the Council to be held in secret at the request of the President, the government, or the Speaker of the Council himself, and finally based on a request presented by 20 members of the Shura Council. Article 94 provided for the President of the Republic to convoke the Shura Council, and if not convoked then the Council shall gather on the constitutionally prescribed day, and the President of the Republic has the right to end the session. Article 95 gave the president, the government, and a number of members from the Council the right to call for the Council to hold an extraordinary meeting. Article 128 gave the President a hand in forming the Shura Council, enabling him to appoint one tenth of the members of the Council. Article 105 gave the Shura Council and its members the right to present a desired proposal on a general subject to any of the ministers and their chiefs, and Article 106 gave the right to the Shura Council and its members to request discussion of a topic related to the policy of the government. Article 108 gave the Shura Council the ability to process the letters and complaints submitted by the citizens to the government to decide, and then provide the appropriate data for them. The

same applies to Article 109, which allowed the Prime Minister and the President to attend meetings of the Shura Council in exchange for making their attendance obligatory based on the request of the Council for either of them. Article 131 gave the Shura Council the power to legislate in the case of absence of the House of Representatives, and for the President when he makes decisions that have the force of law. Likewise, the Shura Council review presidential decisions that hold the force of law when the House of Representatives is absent for a decision. Article 137 contains the provision that the President take an oath in front of the Shura Council and the House of Representatives, and in the absence of the House of Representatives this oath can be performed in front of the Shura Council. The constitution in Article 135 set the number of members of the Shura Council required for nominating a candidate for the presidency, and Article 145 required the approval of the Shura Council in addition to the approval of the House of Representatives for the approval of international treaties. Article 148 of the constitution requires approval of the Shura Council in the absence of the House of Representatives to approve a state of emergency, but the constitution establishes equality between the two houses in requiring the approval of a majority of its members prior to approving the state of emergency.

Article 153 provided for the Speaker of the Shura Council to exercise presidential powers when the position of the president is vacant and the House of Representatives is dissolved. Article 156 sought to separate governmental and parliamentary positions, meaning that whenever a member of the Shura Council assumes a governmental position he also vacates his seat on the Council. Article 161 provided for the potential of any of the members of the government (the Cabinet) to give statements in front of the Shura Council.

Article 201 provided for regulatory agencies and independent bodies to present their reports to a number of entities, one of which is the Shura Council, and Article 202 required the Shura Council to agree on the names presidentially appointed to lead these entities and bodies, and their dismissal is based on the majority of the members of the Shura Council. Article 207 required the Shura Council to hear the opinion of the Economic and Social Council with regard to social and economic policies and related bills.

Articles 193 and 197 stipulated for the first time in the history of Egyptian political life that the Speaker of the Shura Council should be a member of the National Security Council and the National Defense Council. These two bodies are concerned with studying Egyptian national security affairs, dealing with disaster situations, and discussing the budget of the armed forces and the laws related to the armed forces.

Article 100 of the constitution stipulated that it is permissible for the Speaker of the Council to request protection from the security forces and armed forces, or their presence close to the Council, in the framework of the authority authorized to the Speaker for protecting the internal order of the Council.

Regarding the relationship between the Shura Council and the House of Representatives, Article 102 stipulated that any bill would not be approved without the consent of both Councils, as well as a majority of the members of each. Article 103 required the creation of a committee of members of both Councils in order to resolve any legislative disagreement between them, and Article 131 gave full legislative jurisdiction to the Shura Council when the House of Representatives is dissolved.

Article 217 stipulated the need for the Shura Council and the House of Representatives to discuss any request to amend the constitution, and after the expiration of a set period, each Council issues a decision to either accept the amendment in whole or in part or reject it completely, and Article 218 supplemented the previous article in that the Council and the House of Representatives shall agree on the constitutional amendment, each Council discusses the provisions of the amendment and then puts it to a public referendum.

Analyzing these articles leads to the conclusion that the new constitution works to divide the relationship between the Shura Council and many state agencies and bodies, and the relationships are going in two directions. One direction is strengthening the Council with regards to other state institutions, beginning with the Council's jurisdiction and oversight role over the executive authority (nonbinding proposal, request for debate). This also includes the potential for shaping the institution of the presidency by nominating presidential candidates (and this is a positive article, which breaks the deadlock around nominations for high positions, particularly the

presidency in the post-revolutionary stage, by simplifying the process through lowering the number of members needed to nominate a candidate); participating in announcing a state of emergency; as well as the authority to approve the appointment and dismissal of the heads of independent bodies and regulatory agencies. This is not to mention the immunity from arrest given to Shura Council members unless the Council gives permission. This immunity extends to the security arena where the constitution protects the Council from the armed forces approaching unless the Speaker requests it. The other direction of this relationship is represented in the authority and oversight that other institutions impose on the Shura Council. This includes the judiciary's jurisdiction over the Shura Council in deciding the validity of the membership; the authority of the State Treasury to exercise a degree of financial control over members due to their parliamentary status; there is also the authority of financial oversight the Council has over its members and the Council's being required to refer to a number of specialized councils like the Economic and Social Council on policies related to this council. The President also plays a role in forming the Council with his ability to appoint a percentage of the members. And we must not forget the relationship between the Shura Council and the House of Representatives, which manifests in the need for both of them to approve laws before they are issued, however an article in the constitution tips the balance of power in favor of the House of Representatives; in the case of a legislative disagreement between the two councils, the final say lies with the House of Representatives. These powers given to the Council are new in Egyptian parliamentary life, which no Shura Council has witnessed since the return of parliamentary life under President Sadat.

Despite being a positive step towards greater involvement of the legislature in political decision-making, these articles mean more democratization of decisions in the political process. But the matter is not free of defects, the most important of which is the imbalance in relations between some of these institutions and the Shura Council. We find that some articles put the Shura Council in a dominant position over the House, despite the fact that the House of Representatives is most representative of the masses. And this is in addition with the large amount of overlap in legislative jurisdictions between the two Councils, an issue that may lead to future jurisdictional clashes when differing political currents occupy the bodies, not to mention the issues of complexity and slow passage of legislation. The context of the relationship between the institution of the presidency and the Speaker of the parliament reveals an imbalance that is

reflected in the design of the new political system according to these articles, among which are the articles that enable the Speaker of the Shura Council to assume the presidency temporarily in the absence of the Speaker of the House, in which case there is no indication of the presence of the vice president, which was the most important thing taken from the Mubarak era. This is one of the most important things that should have been given special attention to create a strong and integrated institution of the presidency. Perhaps striking a balance is one of the goals of the articles that govern the relationship between the Shura Council and the rest of the institutions, but a part of this goal is accommodation in a number of places, most notably when the constitution requires a multiplicity of bodies to bring reports of the regulatory agencies to it, which is open to the potential of conflict between decision-making institutions,[6] in addition to the ambiguous articles that did not give the Shura Council a specific function to carry out when these agencies reported to it. A noteworthy feature in the framework of the relationships between the councils and other agencies and institutions is the new relationship that the constitution created with the agencies of National Defense and National Security. This is a new shift where, for the first time, one of the legislative institutions are engage with sovereign and strategic topics linked to national security. However, the fact is that at this stage the capacity and effectiveness of civil and elected institutions will decrease (including the Shura Council) in favor of their military and security counterparts within these councils. This does not, however, diminish the benefits of this step, where the existence of these civil institutions can be useful in the gradual recognition of the military institutions from close-up. This can be accomplished through long term progress as part of a wider process to realign the balance of the political system between the civil-military system, or civil-security system.

4. Second: The Framework of Political Practice:

This framework supplements the previously considered constitutional framework in order to produce a more accurate evaluation of the Council. This framework primarily means that the Council will conduct legislative work and the focus will be on the period in which the Council fully assumes the tasks of the legislative process since the adoption of the current constitution. The first item of note is the Shura Council's weak and limited

6. Muhammad Elagati, "Comments on the Draft Constitution", Arab Forum for Alternative Studies, 2012.

legislative achievement during this period, during which it has not passed anything yet except the new parliamentary election law and the addition of amendments to the internal by-laws of the Council. Most of the Council's work has focused on ongoing debate on a number of **bills** that came as part of the officially declared prioritizing of legislation on laws of demonstrations, a bill to issue *sokuk* (Sharia-compliant bonds), an election law, a bill on the flow of information following a package of previous laws in important other bills such as a bill to create a national body for food safety, the draft of amendment No. 107 of 2012 on the participation of the armed forces with the civilian police in peacekeeping, the protection of public facilities, a bill to amend wages for state workers, discussions of an amendment of Law 148 on real estate financing, a desired proposal on the crucial point of the Suez Canal, a bill establishing a body to develop the Suez Canal, a bill to recover stolen funds, a bill to establish a National Council for Education and Research, a bill amending the law on political rights No. 38 of 1972, discussions about the potential of amending the *waqf* law, and to stop assigning projects to the Ministry of Awqaf[7]. There are many challenges resulted from the complexity of both economic and political context, hindering the work and achievements of the state institutions, as for the legislative one we can consider the following:

1- **Inadequate Societal Discussion on the Council**. From the beginning, the continuity of the Council was built on the constitutional declaration of 2011, which laid out a system of two chambers composed of 270 members, and limited the mission of the Council to expressing an opinion on bills related to general policy referred to it by the President of the Republic. This was followed by a shift whereby the Council expanded its jurisdiction, which did not get as much discussion from society as it deserved. The Council could have gained more power and political support to perform its work, particularly in that moment.

2 - **Weakness of the Shura Council's working mechanisms.** The Council, according to the constitution, cannot exercise any of the basic functions of the legislative branch, ie complete "**parliamentary oversight**" as it only has two tools (nonbinding proposal and request for discussion), tools that limit the ability of the Council to perform oversight of the executive branch.

7. Parliament of the Revolution, Al Shorouk Al Masri newspaper, available on the link: http://shorouknews.com/egypt/parliament-rev

3 - **Suspicion of unconstitutionality dogging the Shura Council**. The Egyptian Supreme Constitutional Court recently ruled the Shura Council invalid in its present composition, on the grounds of defects in election procedures whereby there was a competition among candidates who ran on party lists for parliamentary seats allocated to independent candidates, depriving the latter of a fair chance to enter the Council.[8] Suspicions over the council raised in context of the immunity of the council against dissolution, Suspicion of unconstitutionality extends to several pieces of legislation issued by the Council, which violate principles set forth in the constitution, like the new election law.[9]

4. The **Council's representativeness of** the public. This Council is currently charged with full legislative functions (along with the House of Representatives). Yet the Council is not an expression and representation of society, which is the most basic requirement of this task,The percentage of citizens that participated in Council elections from total eligible voters did not exceed 7%. This lack of adequate participation in forming the Council has impacted the long-term legitimacy that legislation issued by it might have enjoyed. Also, the process of the election wasn't preceded by a clear declaration about the legislative duties of the Shura council in case of the house of representatives' absence, as the Shura council was converted into legislative body, the elections of the Council did not ensure national diversity, where all of the elements that are represented in the national diversity (women, Copts, etc.) were appointed and not elected, which proves that it does not represent all sectors of society.

5. Linked to the previous factor is the **imbalance in the appointed members of the Council**. There were promises by President Morsi to increase the balance in the selection of members appointed from outside the Islamic current.[10] However, the appointed members of the Council by the President tend to be affiliated or close to the Islamic current.[11] We found that among the 90 appointed members, 42 members belong to the islamist

[8] http://www.almasryalyoum.com/node/1343186

9. See the following link: http://arabic.rt.com/news_all_news/news/608047/

10. Voice of the People channel, available at the following link: http://www.youtube.com/watch?v=OHgECuJfwQw

11. http://digital.ahram.org.eg/articles.aspx?Serial=1136321&eid=1734

camp and its allies (Freedom and Justice Party occupies 12 seats, the Nour Party 7 seats, the Wasat Party occupies 9 seats, 3 seats for the Building and development party, 4 seats for the Hadara "civilization" party, one seat for the Authenticity party, and finally the Ghad el-Thawra party occupies 6 seats).[12] by election and presidential appointments, both of which increase the concerns among political actors over the formation of a coalition to back President Morsi to pass legislation that only meets the wishes of the party or the currents of political Islam.

6. **Conflict with constitutional provisions**. While the constitution provides for the President to appoint one tenth of its members, the current ratio of presidentially appointed members has reached a third of Council members. This raises concerns about neutrality and the functioning of the legislative process that will be carried out by this Council[13], as the appointments of the members came out before the results of the referendum of the constitution complying with the old constitution of 1971 that allows the president to appoint one –third of the council's members. The and harms the confidence of the citizens and the political forces in the Council. As a complement to this contradiction, a number of members who the President appointed belong to the dissolved National Democratic Party, which violates Article 232 on the section of transitional provisions in the constitution that prevents those who belonged to the former National Democratic Party from engaging in political activities for 10 years.[14] Finally, there is a new election bill that was approved by the Shura Council, and a number of its items violate clear provisions in the constitution regarding the division of electoral districts and the ban on nominating members of the dissolved National Democratic Party in the next legislative elections.[15] This illustrates the need to be cautious and scrutinize legislation before it is issued (to the extent possible). Those cautions have to be extended to the duties of monitoring, official addressing of the public

[12] http://www.shoura.gov.eg/(S(icnw151css1jh5is2gpcxt0l))/App_Ara/?TabID=91502

13. Sama Suleiman, "The Fall of Membership of the Shura Council from the Inter-Parliamentary Union", available at the following link: http://elbadil.com /opinion /2013 /02 /04/104923

14. http://www.almasryalyoum.com/node/1341086

15. http://www.almasryalyoum.com/node/1481401

authorities that has to be through the chair of the council not the chairs of committees. [16]

7. **Adopting contentious legislation** in this transitional phase, which is further complicating the work of the Council. In the framework of mistrust and polarization witnessed by the society and political activity currently, the current stage requires a degree of consensus that allows for all the state institutions to address urgent issues, including legislative institutions.

Egypt's democratic transition is still in the earliest stages. Political leaders must carefully consider their actions in building a new political system, which requires a delicate and calculated balance between the branches of the state, to ensure a minimum of understanding and cooperation between the three branches. This must be done in a way that ensures the efficiency of the political process, its continuity, and avoids the risk that the nascent democratic experience would relapse due to conflict and rivalry between the branches. Should these rivalries take hold, the existing differences between the current judicial branch and the legislative branch (the Shura Council) would weaken the institutions of the state and its actors. Within the framework of this desired balance we must reconsider the relationship between the two councils (the House of Representatives and the Shura Council) in a way that does not allow for the tyranny of one over the other, and ensures a special place for each of them to serve in the legislative process. As the House of Representatives (which is more representative of the public) is currently absent, this stage may require greater emphasis on the role played by the existing legislative branch (ie the People's Assembly) in monitoring the executive branch until the return of the elected House of Representatives in a way that reduces the state of controversy surrounding the Council.

[16] Workshop's report "**Evaluation of Shura council's legislative performance**" 18th March 2013, "Refaa ELtahtawi Forum for democratic studies in the Middle East and North Africa.

LEGISLATIVE CHALLENGES IN DEVELOPING COUNTRIES: THE NIGERIAN EXPERIENCE

By Senator Anyim Ude

Nigeria operates a bi-cameral legislature—the Senate (Upper Chamber) and the House of Representatives (Lower Chamber). The Senate has 109 members while the House of Representatives has 360 members. Both Chambers are constitutionally known as & called the National Assembly.

I spent over 42 years at different levels of the Nigerian Public Service (the Executive), most of it in the area of Broadcast Media Management, before being offered the opportunity to serve for four years (2007 – 2011) as a Senator of the Federal Republic of Nigeria.

My four years in the Upper Legislative Chamber were exciting and rewarding. It was exciting because, coming from a bureaucratic background, it gave me the opportunity to participate in shaping events in the second of the three arms of government in a democratic setting (the third is, of course, the Judiciary).

It was rewarding because after 4 years in the Upper Chamber, also known in Nigeria as the Red Chamber, I becamericher in information about governance from both the Executive and Legislative perspectives.

CHALLENGES: Like any human endeavour or organization there were challenges, but there were more legislativethan personal challenges. In a new environment far from one's local habitat, there were a few personal challenges of adapting to the new environment, acquiring accommodation and hiring aidesfor my Legislative work.

After the inauguration of a new Session of the National Assembly (ours was the 6th Session), the first legislativechallenge was the election of Principal Officers of the Senate. The 109 Senators had to choose their leaders as stipulated by law – the Senate President, his Deputy, the Majority Leader, the Chief Whip, the Minority Leader etc.

Depending on the number of Senators from a few of the over 60 political parties that sponsored candidates for the election that brought them to the Senate, the choicehad a potential for destabilizing the Chamber. Luckily for us in our time, the Peoples' Democratic Party (PDP) that formed the Federal Government of Nigeria also had the majority of Senators in the Senate (and also in the Lower House). So, the election of Principal Officers went smoothly.

There was also the challenge of maintaining a harmonious relationship between the Senate (and indeed the National Assembly) and the Executive branch of Government.

I had assumed that the relationship between the Senate and the Executive wouldat all times be rancour-free since both arms were controlled by the same political party (the PDP). But that was not always the case.For instance, the passage by the Senate of Money Bills or Annual Budgets prepared and submitted to a joint session of the National Assembly by the President of the Federal Republic of Nigeria at the end of every year always created friction between the Executive and the Legislature.

The Executive believed that the duty of the Legislature was to pass theseinto law without amendments. In order words, the National Assembly was expected to rubber stamp the Executive's proposals.But the Legislature believed that the Budget was a mere proposal and that it had the Constitutional responsibility to make necessary adjustments before passing it into law.

This always involved rigorous lobbying and negotiation that led to delayed passage of the Budget, delayed assent by the President and consequently delayed implementation of the Annual Budget.

The area of friction usually centered around Executive proposals forinfrastructural facilities in different sectors such as agriculture, roads, transport, aviation, education, water supply and electricity. The credit from the electorate for successful implementation of the projects went to the Executive and was expected to helpfertilizethe ground for the next Presidential election. The performance of the Executive was judged by the number of visible capital projects executed in all the constituencies across the country.

Legislators,on their part,also want something to show to the electorate as their own achievements when they go back to them for re-election at the end of their four year-term of office. Consequently, the Legislators designed what havebecome popularly known as Constituency Projects which they insist must be accommodated in the Annual Budget. These projects also cover such areas as electricity, water supply, education androads.

During pre-Budget discussions between both sides, some agreements were usually reached in advance leading to some of the Constituency Projects being accommodated in the Budget Proposals before submission to the National Assembly. While processing the Budget after submission, the Legislators usually found the projects admitted into the Budget inadequate.The National Assembly would then add and subtract a few more projectsin the Budget.

Inevitably, these additions and subtractions ledto some increases in the Budget arithmetic submitted by the President. At that point the President's men would cry foul and negotiations would begin. At the end of the day there would be compromises and everybody would go to the ultimate beneficiary, the Electorate, smiling.

These Executive-Legislature frictions also showed up when the Senate noticed long delays by the Executive either in implementing Motions passed on specific issues by the Senate orassentingto private Members Bills passed by the Senate and forwarded to the Executive.

The Senate (and indeed the National Assembly) frowned at the delays and some-times outright refusal by the President to assent to such Bills or implement the Motions. To some of the President's men, such Motions were only advisory since they did not have any force of law.

But to Legislators the President was morally bound to implement such Motions from the Peoples' Representatives after robust debates. At one point the Legislators were so infuriated that they threatened to initiate impeachment moves. Later, lobbying and negotiation were deployed and frayed nerves calmed.

Most of the duties of the Senate are performed in the Standing Committees of the Senate. Every Senator was either a Chairman or Vice Chairman of one of the 50 Standing Committees and a Member of at least four other Committees. I was the Chairman of the Senate Committee on

Aviation for three years and Chairman of the Senate Committee on Works for one year.

The Committees are empowered by law to carryout oversight functions of the different Ministries, Departments and Agencies of Government. This exercise helped to ensure that all the funds approved in Annual Budgets were properly applied. Where funds were suspected to have been misapplied or misappropriated, the Committees had the power to set up Panels of Investigation.

The challenges of functioning in those capacities were enormous, especially that of aviation because of the international nature of the industry.An example of the challenge my Committee on Aviation faced in the implementation of its oversight functions was when it visited most of the 21 airports in Nigeria and saw old and dilapidated aviation facilities requiring replacement.

On inquiry, we were told of some huge sums of money released two years earlier to the aviation industry by the Federal Government for their replacement.But we were dissatisfied with the ways the funds were applied.

Consequently, we invoked the relevant section of the Nigerian Constitution that empowered each Chamber of the National Assembly to expose corruption, inefficiency or waste in the disbursement of funds appropriated by the National Assembly.

The Committee sought for and obtained the mandate of the Senate to investigate the matter. Our investigation led to several recommendationsone of which was that two former Ministers of Aviation in Nigeria be further investigated for fraud and prosecuted, if found guilty. The Senate approved the recommendations and the two former Ministers were later investigated and prosecuted. The case was still going on in one of the Nigerian Courts in Lagos when I left the Senate.

There was also the challenge of time management and workload in the Chamber, office, constituency and the society at large. The primary responsibility of a Senator (or law maker) is to make laws for the good governance of the country. That involved the passage of Executive Bills, packaging and submission of Private Members' Bills and Motions to the Senate and active participation in debates on the floor.

In the office, a Senator had to spend several hours treatingseveral correspondences from within and outside the country on different issues ranging from law-making, constituency problems to committee work. In addition to Aviation, I served on Senate Committees on Capital Market, Land Transport, Defence& Army and Culture & Tourism. And correspondences came from or on these Committees.

These Committees also involved several hours of meetings in different committee rooms. It was common for a Senator after these meetings to return to his office to meet a crowd of visitors waiting for attention.Ninety percent of those visitors were usually constituents who traveled several kilometers to see their Senator with their problems. Ninety percent of those problems required financial assistance. These ranged from payment of school fees or medical bills of their children or spouses to employment for their children. Because of the absence of social welfare schemes such as health insurance and unemployment benefits by the State, legislators were obliged to bear some of these societal burdens.

In my second year in the Senate, I introduced a Bill for an Act to provide social security for unemployed graduates and the aged in Nigeria. The Bill sailedthrough Second Reading but did not go through all the processes of Public Hearing, Third Reading and Concurrence in the House of Representatives before I left the Senate.

The fate of that Bill, which was regarded as a welcome development by the millions of young unemployed graduates, emphasized the challenge of length of time in law-making in Parliament, especially a bi-cameral Parliament. The questions then are: How long should it take a Bill to become an Act in a bi-cameral Parliament? Because of cost and apparent duplication in operation, does a developing country really need a two-Chamber Parliament?

As a politician, a Senator received several invitations from professional organizations, religious bodies, clubs, traditional institutions and town unions for addresses and donations. The good or poor management of these myriad of invitations and requests,which are peculiar to our political environment, could be critical to the assessment of a Senator’s performance by the electorate, especially in an election year.

Another challenge is the management of the Opposition in Parliament when Bills or Motions were introduced in the Senate usually through the Majority

Leader.The Opposition party or parties almost always picked holes in the Bills or Motions with a view to "shooting" them down, especially if they came from the ruling party. They succeeded where they were in the majority but failed where in minority as they were throughout the period I served.

From time to time the President submitted for confirmation lists of certain people for appointment intopositions in Government. These included Ministers, Ambassadors to foreign lands and Members of some statutory Bodies such as the Civil Service or Police Service Commissions. Lobbying remained a useful instrument on the part of the President's men for getting the lists through the Senate.

Some of these nominees for appointments were sometimes rejected at the Confirmation Hearings at the level of Standing Committees either as a result of poor performance at the Hearing, poor service records or scandalous lifestyles that might have been brought to the attention of Members of a Committee. In such cases the Committee would make appropriate recommendations to the Senate for rejection of the nominee(s). In that case, the President was obliged to resubmit new nominees for confirmation.

During my time in the Senate, I realized that in handling parliamentarychallenges, two legal instruments were mandatory. Thesewere the Constitution of the Federal Republic of Nigeria and the Senate Standing Orders. The Standing Orders regulate the operations and procedures of the Upper Chamber.

Debates are essential channels for arriving at decisions in Parliament and adequate knowledge of the provisions of the Constitution and the Standing Orders are imperative for effective and meaningful participation in debates. Anything to the contrary could lead to personal embarrassment in the Chamber.

Also asa Senator you must be current with certain basic information on developments in all sectors of the country and globally as knowledge of these developments helps to enrich contributions to debates in Parliament.

Legislators would have preferred to hire higher-level professionals as staff but they are constrained by the employment and salary structure approved by the Government. These staff are mandatorily required to go with their employers at the end of their term of office.

However, in a few cases approvals are granted to Legislators to hire consultants for specific assignments.

The number,level and quality of staff approved and hired for a Senator's Office help to improve the input of the Senator. This is because these "backroom" staff must engage in research on issues before the Senate to enhance the quality of the Senator's contributions to debates onthe floor and speeches outside the Senate.

In our own circumstance in Nigeria, the Senator's achievements are rated not only in the numberof Bills and Motions introduced in the Senate, the quality or frequency of his contributions on the floor of the Senate, but also on the quality and quantum of development projects attracted to his constituency.

If there are no development projects such as good roads, electricity, pipe-borne waterand educational institutions in the Senator's constituency, those who elected him expect himto make all necessary contacts at all levels of Government to make those things happen. A Senator is also expected to give jobs to the unemployed, empower the poor and generally solve all his constituents' problems. No excuses are acceptable for failure.

During my four years in the Senate, I did some of those things that touched the lives of most of the people in my constituency. The assessments were usually left to the beneficiaries and their judgment could affect the next election.That is if the Legislator made himself available for re-election and the political God-fathers allow the electorate to have their way.

Senator Anyim Ude

THE NATIONAL COUNCIL OF PROVINCES: SOUTH AFRICA'S "UPPER HOUSE"

JAMES SELFE, MP[17]

South Africa has had an upper house ever since the Cape Colony achieved self-governing status in 1872. For most of the pre-democratic era, the Union and later Republic of South Africa had a Senate, which was abolished in the early 1980's when the "tri-cameral" constitution (which provided for houses of parliament for whites, "coloureds" and Indians) was enacted. Even then, there was an upper house of sorts, in the form of the President's Council, one of the functions of which was to resolve disputes between the three ethnic houses.

South Africa's interim constitution, which was the framework within which the first democratic elections were held in 1994, made provision for a Senate, consisting of ten senators, elected indirectly and by proportional representation by each of the nine provincial legislatures. The Senate and the National Assembly, sitting together, made up the Constitutional Assembly (CA), which was charged with drawing up and enacting the final Constitution. The fact that each province had equal numbers of senators gave additional representation to smaller and less populous provinces in the CA, and a somewhat more equal say in the legislative process.

The Senate was supposed to operate as the forum for provincial interests in the national legislature, but it struggled to fulfil that role. To be frank, it was composed largely of members who did not get elected to the National Assembly, and was regarded as something of a "second team". Its members were therefore not necessarily rooted in the politics of their provinces, and they had no reporting line or responsibilities to the provinces. The Senate did establish a Select Committee on Liaison with the Provinces, but the committee's oversight role was ill defined, misunderstood and

[17] James Selfe was elected as a Senator in 1994, and subsequently as a permanent delegate to the National Council of Provinces in 1997, representing the Western Cape and the opposition Democratic Party (as it was then). He was elected to the National Assembly in 1999, and was re-elected in 2004 and 2009. He has served as the Chairperson of the Federal Executive of the official opposition Democratic Alliance since 2000, and was a parliamentary whip between 1994 and 2002.

resented by many provincial governments. In addition, the Senate had co-equal powers with the National Assembly and, while that gave the Senate more powers than are traditionally conferred on an upper house, it had no distinctive role and was, as a legislative institution, therefore neither fish nor fowl.

In the negotiations that resulted in the final Constitution, there was as a consequence an influential body within the CA who believed that South Africa ought not to have an upper house at all. This was not only because of the indistinct roles and responsibilities of the Senate as a custodian of provincial interests, but also because the majority party, the ANC, had adopted policy at the time that saw provinces merely as administrative units (similar to French *departements*).

Fortunately for the survival of the upper house, the final Constitution, enacted in 1996, had to conform to 34 constitutional principles that had been negotiated as the basis of the transition to democracy, and several of these principles (notably principles XVI, XVIII, XIX, XX, XXI and XXII) made the continued existence of provinces with legislative and executive competences a requirement for the final constitution to be certified by the Constitutional Court. In addition, as was pointed out at the time, the vast majority of federal or quasi-federal countries have an upper house in which the states/provinces are represented, and thus was born the National Council of Provinces (NCOP), the upper house of the South African parliament.[18]

Having had to concede this point, the CA was determined to ensure an institutionalised and structural linkage between the NCOP and the provinces. In determining this linkage, a sub-committee of the CA was enriched by a study tour to the Federal Republic of Germany, where it observed the workings of the *Bundesrat*. The *Bundesrat* is essentially a forum of the governments of the German *landen*, and the delegations to the *Bundesrat* from the various *landen* (which can consist of politicians and/or civil servants) are altered depending on the subject matter being discussed.

The NCOP is, in composition, similar but not identical. As was the case with the Senate, each of the nine provinces is entitled to a delegation of ten members to the NCOP, elected indirectly and proportionately by the provincial legislature after every election. Six members of this delegation are so-called "permanent delegates", and remain delegates (subject to

[18] See sections 60 to 72 of the Constitution of the Republic of South Africa (Act 108 of 1996), hereinafter referred to as "the Constitution".

considerations discussed below) for the length of the parliamentary term[19]. The other four are called "special delegates", and can include the Premier of the province[20]. The special delegates are designated by the province and do change, depending on the agenda of the NCOP. Each provincial delegation is managed by a provincial whip designated by the premier of the province concerned, and this whip exercises discipline over all members of the delegation, irrespective of their party affiliation. To cement the link between the NCOP delegates and the provinces, permanent delegates to the NCOP may attend and speak at sessions of the provincial legislature and its committees, but may not vote[21].

At the suggestion of the then German Chancellor Helmut Kohl, the composition of the NCOP was augmented by a tenth delegation representing organised local government[22]. However, except for ceremonial occasions, the delegation representing organised local government hardly ever attends the sessions of the NCOP, in part because they are not entitled to vote in NCOP proceedings.

The NCOP's role is set out in section 42(4) of the Constitution, which states

The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.

This is in contrast to the role of the National Assembly, set out in section 42(3):

The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action.

The differences in roles were, on the face of it, slight, but very significant and have led to disputes about the NCOP's constitutional role. The first dispute occurred about whether the national executive was

[19] See section 60(2) read with section 62 of the Constitution.
[20] See section 60(2) of the Constitution.
[21] See section 113 of the Constitution.
[22] See section 67 of the Constitution.

accountable to the NCOP in the same way as it was to the National Assembly, since "overseeing executive action" was specified as one of the roles of the National Assembly, but was absent from the list of NCOP competences. In a technical committee set up by the Senate in 1997 to prepare for the implementation of the provisions of the Constitution relating to the NCOP, a proposal was made by the majority party that questions to the Executive by members of the NCOP be limited to "provincial matters" (however defined). The author, who served on the committee, had to indicate that his party was determined to take this matter to the Constitutional Court if necessary to assert the NCOP's status as a house of equal status when it related to accountability to Parliament in terms of section 42 read with section 92(2)[23] of the Constitution. The majority party backed down on the proposal.

The other significant difference lay in the participation of the NCOP in the legislative process. The South African Constitution provides for four different legislative processes depending on the type of legislation being passed. Section 74 deals with amendments to the Constitution; section 75 with ordinary national legislation; section 76 with legislation affecting the provinces or provincial competences; and section 77 with money bills (which the NCOP may not initiate or prepare[24]). Insofar as these provisions affect the upper house, delegates to the NCOP vote on section 75 and 77 legislation as individual representatives of their political parties. However, when a constitutional amendment affecting the provinces, or when section 76 legislation, is before the NCOP, each delegation exercises a single vote determined in accordance with a mandate it receives from the provincial legislature.

Legislative matters affecting provincial competences, which must be dealt with in terms of section 76, are specified in a Schedule to the Constitution, and include health, education, social development, roads,

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[23] Section 42(1) reads:

Parliament consists of –

(a) the National Assembly; and

(b) the National Council of Provinces.

Section 92(2) states that:

Members of the Cabinet are accountable collectively and individually ***to Parliament*** for the exercise of their powers and the performance of their functions.

[24] See section 68(b) of the Constitution.

community safety and sport. These are matters about which both the central parliament and the provinces can individually legislate, and which both "spheres" of government administer concurrently.

Conferring mandates on NCOP delegates is regulated by national legislation[25], but the practice varies slightly from province to province. However, common to all is the need for NCOP delegates to confer with the committees of the provincial legislature on legislation before the national parliament. In the early stages of the passage of legislation, NCOP delegates may get a "negotiating mandate" enabling them to suggest amendments in the NCOP committee dealing with the Bill; eventually, the finalised Bill will be presented to the provincial legislature which can decide whether or not to support it.

Theoretically, this gives the provinces enormous power: if five of the nine provincial delegations refuse to support legislation introduced in terms of section 76, or pass a different version of this legislation with which the National Assembly does not concur, the Bill must be referred to a Mediation Committee consisting of equal numbers of members of the National Assembly and delegates to the NCOP[26]. The job of the Mediation Committee is to attempt to craft a Bill that would be acceptable to both Houses. However, if it is unable to do so, the Bill simply lapses.

However, in practice, the NCOP has seldom if ever exercised these significant powers, largely because of practical political considerations. The ANC is the majority party in eight of the nine provinces and while some provincial structures of the governing party are often in open revolt against the national leadership (most recently in the provinces of Limpopo and the North West), NCOP delegates and provincial legislators are seldom willing to risk their political careers in reckless displays of independence. Re-election to any legislature is dependent on an MP or MPL's position on closed lists determined by the party leadership, and this is a powerful incentive to compliance with the party line. Thus, for the most part, the NCOP assents to legislation passed by the National Assembly with a tweak here and there to save face.

[25] See section 65(2) of the Constitution.
[26] See section 78 of the Constitution.

Despite the fight that was put up for the NCOP's co-equal status when it came to the accountability of the executive to Parliament, the oversight role of the NCOP is also more impressive in theory than in practice. As has been outlined above, the Constitution is explicit that the Executive is responsible to Parliament, and that Parliament consists of the National Assembly and the NCOP. For this reason, members of the NCOP can ask parliamentary questions, NCOP committees can summon Cabinet Ministers and civil servants to account for themselves, debate matters of national importance and so on. In practice, its presiding officers have adopted a deferential stance towards the Executive, and tough questioning of Cabinet members and officials is seldom a feature of the NCOP's agenda or activities.

It is also politically difficult for members of opposition parties to exercise the oversight functions the Constitution gives to the NCOP. Because NCOP delegations are elected by proportional representation, members of opposition parties represented in the provincial legislatures are elected as part of these delegations. However, they are bound by provincial mandates on section 76 legislation, and are subject to the (often very cramping) discipline of provincial whips, not from their party. In extreme circumstances, a provincial legislature may even recall a permanent delegate if he or she "has lost the confidence of the provincial legislature, or is recalled by the party that nominated that person"[27], and though only one delegate has ever been recalled in the NCOP's history, and for unrelated reasons, this does act as a sword of Damocles over the heads of permanent delegates from minority parties. Of course, were this action to be taken against a delegate from a minority party, the party concerned in the legislature would, it is assumed, simply re-nominate him or her, and it is presumably for this reason that this extreme measure has not been used more regularly. But even when the rules of the NCOP clearly permit delegates from minority parties to take action (such as to put questions and motions) the bias of the presiding officers (drawn from the majority party) has on many occasions been embarrassingly obvious for a country that boasts of being a open and participatory constitutional democracy.

The NCOP, as has been stated, is a legislative house designed to promote the interests of the provinces in the first instance. In pursuit of this objective, the NCOP committees frequently conduct oversight over provincial departments and institutions, and at least once a year, embark on

[27] See section 62(4)(c) of the Constitution.

what is called a “provincial week”, where one or more of the committees visit particular provinces to see for themselves the state of delivery. Frequently, these oversight visits are accompanied by public participation events that can become truly farcical. Political parties mobilise their members to attend in numbers; “sweet-heart” and “attack” questions are planted with members of the audience; random complaints are investigated with great seriousness; cheering and booing by the audience of public participation events are entertained (or at least not prohibited) by the chairpersons, and these events are particularly lively as elections approach. Whether they serve their goal of improving service delivery by provincial governments is very questionable.

Not only is their usefulness questionable, but also their constitutionality. After a particularly politically charged political week arranged by the NCOP in the Western Cape province, which is governed by the opposition DA, the Premier of the province obtained a legal opinion to the effect that the oversight functions of the NCOP were limited to the concurrent competences described in Schedule 4 of the Constitution. In other words, the NCOP was not permitted to embark on an unregulated fishing expedition to exercise oversight over any or all matters, but merely those matters over which the national government and the provincial government have concurrent responsibility.

The NCOP has also got important powers relating to its oversight of local government. In terms of section 139 of the Constitution, a province can dissolve a municipal council that cannot perform its duties or fulfil its obligations. If a province takes such a step, the NCOP needs to be informed of this intervention, and it may end the dissolution after taking certain steps. This acts as a significant check on the provinces’ power to dissolve municipal councils for political rather than when objective reasons justify this. In practice what happens is that a committee of the NCOP is dispatched to the municipality to interrogate the reasons for placing the municipality under administration; it reports back to the NCOP and in theory, the NCOP can order the restitution of the municipal council. Again, political considerations tend to be predominant: many municipalities that are completely dysfunctional and bankrupt escape the attention of and intervention by provincial governments. This being said, when the power of the NCOP to oversee provincial intervention is used properly, it can temper the indiscriminate or partisan exercise of that power.

Conclusion

The NCOP has a complex and nuanced relationship with the national executive, with the National Assembly and with the provincial legislatures. The Constitution confers on it significant powers. In the fractious politics of post-democratic South Africa, these powers are under-utilised. In part, this is because the NCOP tends to be regarded as a lesser institution; in part, it can be attributed to the fact that all politicians are nominated (and re-nominated) by parties, thereby inducing a deferential attitude by politicians towards party bosses.

Because of its structure and the way provincial delegations vote, the only way that the NCOP will alter the way in which it is regarded is for the legislatures it represents to start becoming less compliant and executive-minded. The surest way of this happening is for different political parties to become majorities in the legislatures, as is the case at the moment in the Western Cape province, and was historically the case in KwaZulu-Natal province.

But, as has been alluded to, the ruling party (which is the majority in eight of the nine provinces) is extremely divided. Despite "democratic centralism" whereby the national executive committee of the ANC determines who become candidates, who become whips, and who become mayors and premiers, the choices made are often deeply unpopular at a local level. Late last year, half the ANC municipal councillors in the municipality of Tlokwe, in the North West province, voted with the minority DA to replace the ANC mayor with a DA mayor. Despite the intervention by no less a personality than President Zuma, the DA mayor has remained in power because the ANC cannot trust its own members to vote her out. If this tendency persists, there is the possibility that the members of the provincial legislatures will likewise become less compliant to the party line, and if this happens, the NCOP will become an altogether a more relevant and interesting forum.

Moreover, there is a move towards the institution of constituencies for public representatives. This proposal carries the support of the DA and the "platform" Agang, recently launched by anti-apartheid activist Mamphela Ramphele. Were provincial legislatures to have their own support bases, they would be less dependent on the party bosses and the party line, and they would increasingly articulate the demands of their voters.

Therefore, the future role of the NCOP and its interaction with other spheres of government lies not so much in its architecture but in political dynamics.

THE INDIAN UPPER HOUSE (RAJYA SABHA)

By

Mani Shankar Aiyar

Member of Parliament, Rajya Sabha

Introduction

In India, it is the Union that creates, dissolves or modifies the boundaries of States. It is thus the Union that precedes the States. Because of this, India cannot be described as a 'Federation' but, more accurately, as a union of states with 'federal features'.

In this regard, the Indian Union is to be distinguished from unitary states like Sri Lanka or Bangladesh, which have only a central legislature and no provincial legislatures. It is also to be distinguished from the United States where 13 independent states decided to part with some of their powers to a federal government, which means that the states preceded the federation and had an inherent right to withdraw the powers that they ceded to the federal authority. (That is, of course, what led to the American Civil War, 1861-65, the bloodiest war ever fought till then – it contains salutary lessons about the dangers of states' powers without balancing these appropriately with central powers in the constitution). It is also different from confederations like Brazil, where the confederation is technically speaking a union of independent states that may or many not continue in the confederation depending on their satisfaction with it.

India cannot be a unitary state because of its size and population and also, the linguistic variety of the country, where 28 languages are formally recognized and several thousand dialects are also given encouragement. From a European point of view, it is somewhat bewildering that a subcontinent with so many diversities can regard itself as a single nation. Hence the colonial insistence that India was never a nation but one invented

by British rule. This is not surprising as the European definition of a 'nation' tends by and large to be based on ethnicity. Therefore, where the geographical surface of east, central and west Europe together has approximately the same area as contemporary India, India regards itself as one nation while Europe comprises nearly 40 different nation states. The guiding principle of the European idea of 'nation' appears to be to secure unity through uniformity. In India, unity is based on diversity. Indeed, the Indian nation is built on the proposition that the celebration of diversity strengthens national unity, whereas any attempt at imposing uniformity diminishes rather than reinforces national unity.

The unitary state is simply inconceivable in so diverse a country as India. Within the boundaries of India are included people of every colour, every race and every religion that the world knows. Our population at 1.2 billion is second only to China's. But while only Mandarin is the official language of the Peoples' Republic of China, the number of recognized Indian languages keeps on increasing in response to popular demand while every effort is made to nurture the many different dialects in which our languages are spoken. This linguistic diversity is also accompanied by diversity in music and dance, eating habits and clothes worn, rituals and traditions.

The States and the Centre

The accommodation of all these diversities requires that the governance of the country be entrusted, in substantial measure, to states. The states themselves sometimes have very large populations, such as Uttar Pradesh with 140 million (which would make it the 8th largest country in the world if it were independent). This requires that there be devolution of state powers to institutions of local self-government in significant measure. Indeed, Mahatma Gandhi wanted our Constitution to be built from below, with direct elections to village bodies, and indirect elections from village units of democracy to State legislatures and Parliament. However, the Constituent Assembly preferred adult suffrage at all levels of elected government with a strong centre in regard to subjects that had a national import and State legislatures being largely empowered to deal with areas of State significance such as law and order, public order, measures of social justice and welfare, and local government issues. Also, many of the productive sectors of the economy were assigned to the States rather than retained at the centre. However, to give content to a national view of economic development and social justice, the Concurrent List provided for both the centre and the States

to work together in the stipulated concurrent domains, with the proviso that in the event of State laws not being in conformity with central laws, it is central legislation that would prevail.

Thus, the States and their powers came to hold a central position in the Constitution. But this did not spring uniquely from the process of constitution making after Independence; rather, its roots go back to the process of evolving self-government in India through the first half of the 20th century. From the time of the Viceroyalty of Lord Ripon (1880-84) to the Morley-Minto Reforms of 1909, the Imperial power restricted any self-governance by Indians to the municipalities and their traditional positions in village India. The reforms of 1909 brought in provisions for consultations with Indians at the provincial level but without any decision-making powers on any but peripheral matters and no legislative powers at all. It was ten years later, in 1919, that the British Parliament passed the Government of India Act. The Act set up provincial legislatures, but reserved to the Governor-General or his provincial Governors the right to overrule the provincial legislature. The Central Assembly was confined to consultative functions. Subsequently, in 1935, a further Government of India Act was passed by the British Parliament, under which a fair degree of provincial autonomy was granted to provincial legislatures and provincial governments, but with a very restrictive role for Indians in the central legislature. Thus, the experience of running provincial legislatures and even provincial governments was strongly embedded in the Indian polity for decades before India came to independence and started work on the Republic's independent constitution.

As constitution-making for India by the British Parliament progressively created a domain in the Indian polity for province-specific legislation and executive action, this obliged political parties, even during the Freedom struggle, to organize themselves in a quasi-federal manner, with a strong centre but also strong and relatively autonomous provincial branches. The provincial leaders of the principal political parties were not only powers to reckon with at the provincial level, but the colonial practice of slowly and reluctantly ceding legal and executive authority to the provinces meant that these provincial leaders not only built up their political base in their respective provinces, they also acquired some experience of administering these provinces. This was in contrast to the central leaders of the political parties who were given hardly any opportunity to for hands-on learning of the intricacies of executive authority and administrative

functioning. Yet, there was clear recognition that Independence could only be secured by central and provincial leaders working together in a disciplined manner in the recognition that if they did not hang together, they would hang separately! Therefore, the hierarchy of political organization privileged the central leadership but taught both the central and provincial leaders that they had to respect each other's domain, that provincial autonomy would have to be exercised within the constraints of the larger national cause.

So, the progressive empowerment of the provinces provided a ready made model for defining the domain of the states in the Constitution of independent India. (The provinces were re-designated as states in independent India's Constitution). Thus, with a few adjustments, this model was carried almost bodily from the provisions of the Government of India Act 1935 into the new Constitution that was proclaimed on 26 January 1950.

The clear demarcation of the responsibilities of the states needed reflection at the centre. While running the central legislature and the central Government was a novel experience for Indian politicians in the immediate aftermath of Independence, the political class in the colonial period had cut its teeth in provincial legislatures and provincial governments. The only administrative experience that the first Prime Minister of India, Jawaharlal Nehru, had before becoming the "first servant of the Indian people" as he described himself at Independence, was as Chairman of the municipality of Allahabad, a city in the eastern part of the United Provinces. But the lesson had been learned that India would hold only if the constituent states were both relatively autonomous in their respective spheres and mutually dependent at the national level.

The Upper House

To reconcile states' interests with central imperatives, the constitution makers believed that a unicameral legislature at the centre would not work. India's immense diversity had to find reflection in the national polity. States were of such varying sizes and population, with considerable regional differences in prosperity and poverty, that a popularly elected central legislature would mean differential representation of states in the central legislature, the larger states population-wise having a much larger presence than the smaller states. It was important, therefore, that the states have a

recognizable voice at the centre. However, the British House of Lords could hardly serve as the model for an independent India that was determined to rid itself of the remaining vestiges of feudalism. Therefore, a Chamber of Princes as an Indian version of the House of Lords was unacceptable. At the other end of the spectrum was the US example of each state sending two Senators to the Upper House of the US Congress. This has made the Senate the dominant chamber in the US legislature. It was felt by our Founding Fathers that this was not suitable for India because we were not a 'Federation of States' but a 'Union of States'.

Consensus was forged on the basis of each state legislature electing its representatives to the Upper House while the electorate at large directly elected Members from roughly the same sized constituencies to the Lower House. Accordingly, the Lower House was designated the House of the People (Lok Sabha) and the Upper House was designated the Council of States (Rajya Sabha). This meant, of course, that the Upper House neither had the predominant position that the Senate has in the US legislature nor was it based on equal representation of each state irrespective of size or population. Rather, the Indian Upper House was conceived as a second Chamber that would inject the states' point of view into central legislation. This was regarded as especially important for matters falling in the Concurrent list. However, the subordinate role of the Upper House was underlined in the decision to keep all money bills out of the decision-making powers of the Rajya Sabha.

The Budget is presented only in the Lower House. The Constitution provides that the Upper House could – and should – deliberate on money matters but it is only in the Lower House that moneys are voted. In respect of other legislation, Government can introduce legislation in the Upper House and in all non-money legislation the Rajya Sabha has full powers of debate and vote. Its Members are represented in all Parliamentary committees where they have the same status and rights as Members of the Lower House, including the right to serve as Chairperson. This is most important in Department-related Standing Committees that examine draft legislation in detail and submit (non-binding) Reports to Parliament on Demands for Grants of the different Ministries/Departments of the Union Government. But if the Upper House were to vote against a Bill passed by the Lower House, then that Bill would return to the Lower House for further consideration and vote. In the end, it would be the decision of the Lower House that would prevail.

The principal exception to this general rule is with respect to amendments to the Constitution. Amendments to the Constitution can be carried out only with each House voting separately in favour by a majority of two-thirds and with at least half the members of the House present and voting. For amendments that impinge on the State list, there is the further requirement that at least half the state assemblies approve the Constitutional amendment before these are sent to the President for his/her approval. A Constitutional amendment passed in the Lower House by the required majority can be rejected by the Upper House if the Treasury benches fail to muster the required majority in the Upper House.

In providing for a bicameral central legislature, the constitution-makers intended that only central governance issues would be discussed in Parliament. State-specific issues were to be raised in state legislatures and it was ruled that such issues not be agitated in Parliament. But this has changed with time and political changes on the ground. In the first two decades of Independence, the Indian National Congress, which had led the Freedom Movement, dominated not only the centre but was also in power in all the states (bar a brief interregnum when the Communist party was elected to power in 1957 in the State of Kerala). This changed with the elections of 1967. While the Congress retained power at the Centre, albeit with a considerably reduced majority, other parties came to office in a large number of states. This trend has been reinforced over subsequent decades to the point where a majority of state governments are run by regional rather than national parties. This is also reflected in the central legislature, where over 40 parties find representation. It also means that we have entered a 'coalition era' as far as the formation of central governments are concerned. For the past two decades, we have not had single-party governments and even when the Congress formed a government on its own in 1991-96, its survival depended on the 'outside support' of other parties. This has led to regional parties participating in coalition governments at the centre and having an often decisive voice in determining the fate of central governments, especially on national issues (such as relations with neighbouring countries) that have regional implications. This blurs the distinction between central and state responsibility. So, the Lok Sabha is often seized of issues that the Founding Fathers would have regarded as State issues or as matters for resolution in the Council of States. This in turn means that central legislators do not see much, if any, difference in their respective roles in the Lok Sabha and the Rajya Sabha. Accordingly, rather than being packed with Members having a state perspective on national

issues, as originally intended, the background and interests of Rajya Sabha Members is growing increasingly indistinguishable from that of Members of the Lok Sabha, the distinction often being that Lok Sabha Members are those who have won their elections - and Rajya Sabha Members those who have lost their elections at the bar of the people!

Inevitably perhaps, regional rivalries between different regional parties, and issues of regional rather than national importance, find ventilation in the central Parliament. Where presiding officers in the first two decades were fairly firm in disallowing regional issues from being agitated in Parliament, much of the discussion time in Parliament is being taken over by regional issues unchecked, more often than not without the permission of the Chair, leading to frequent and long adjournments of the proceedings in the sometimes vain hope that the House will be brought to order for subsequent sittings. Such disruption has come to characterize the Upper House as much as it has the Lower House, and usually on the same issue, thus further blurring the distinction between the two Houses. This is a practical matter rather than one requiring constitutional fundamentalism. It is perhaps time to revisit the rules framed by the Houses themselves for the conduct of their business, and provide for discussion on regional issues in the national forum.

The most disturbing thing about Parliamentary democracy in India is the amount of time that gets wasted in disruption. Although the Rajya Sabha has been described colloquially as the House of Elders, unruly demonstrations have become as much a part of the Upper House's reality as in the Lower House. This reflects extremely badly on the dignity of the House and lowers alarmingly the prestige of Parliament in the eyes of the general public. There is no provision either for lost time to be recovered or by longer or additional sittings of the House. Also, both Houses are meeting for shorter and shorter periods than in the early years of our democracy. Happily, there is recognition on the part of the presiding officers and most, if not all, political parties that without maintaining dignity and decorum in the House, Upper or Lower, it would be impossible to maintain the dignity of the House in the eyes of the voters, thus jeopardizing the very future of Parliamentary democracy in the country. This widespread recognition of the threat to democracy in surrendering control of the House to elements other than the Chair is the best hope that wiser counsel will prevail and that Parliamentary practice will be adjusted to ground realities instead of being grounded in a fundamentalist interpretation of rules.

The Australian Senate

by Natasha Stott Despoja[28]

A parliamentary system without appropriate checks and balances is a dangerous system. In the words of the former Clerk of the Australian Senate, Harry Evans, it is a 'sort of elective monarchy'.

INTRODUCTION: 'REAL ACTION'

In Australian politics, much of the real action has been among the red leather benches of the Upper House.The Senate has been responsible for the more deliberative legislative work and has provided an effective check on executive power.The Upper House is considered the safeguard: the most conspicuous example of an institution set up to strike a balance between the will of the broader Parliament and the otherwise unrestricted power in the House of Representatives of the Executive of Government.

Not unlike other multi-member elected chambers (as opposed to the single member electorates in the Lower House), the Australian Senate has been characterised by greater diversity in its make-up and, in the past few decades, it has seen minor parties hold, or share, the balance of power. This diversity and difference have had an impact on the Senate's ability to operate as a House of Review as well as on the development of policy and legislation.

[28]Natasha Stott Despoja AM, former Leader, Australian Democrats; Senator for South Australia 1995-2008. Since 1995, Senator Stott Despoja has addressed the Senate 1848 times; successfully amended legislation 108 times; introduced 24 Private Senator's Bills; had 128 motions passed; and presented 187 petitions. In 1996, she received14.5% of the vote - a quota in her own right (she is one of only two Democrats to do so at a half Senate election). At the 2001 election she received the highest personal vote of any Senator. In 2001 she was recognised as a World Economic Forum Global Leader for Tomorrow.

SENATE ROLE

The Commonwealth of Australia Constitution Act of 1900[29] established the Senate as part of a bicameral system of government in the new Federation. The Senate was given comparable powers to the House of Representatives (except in relation to money bills) and its composition included equal representation of the States, through direct election by popular franchise, the latter a world first.

Little wonder the Australian Parliament has been referred to as a 'Washminster system': a unique hybrid of the United States and Westminster models, as equal representation of the States emulates the US Senate model and the decision to give the Senate an active legislative role is like the UK House of Lords:"…whether the term 'Washminster' is used or not, the Australian system has generally been acknowledged as an unusual hybrid of majoritarianism, federalism, responsible government, separation of powers, and limited parliamentary sovereignty".[30]

A defining feature of the Australian Senate, and one that has had the greatest impact on its accountability role, was the advent of proportional representation in 1949.This has meant it has been rare for a Government, even when it achieved a commanding victory in the Lower House, to control the Senate in its own right.

"UNREPRESENTATIVE SWILL"

This has not always been well-received by the House of Representatives, where Government is formed.Although they have similar powers, the Senate and the House of Representatives have enjoyed a tension that has, in the main, served democracy well. But it does not mean that Members of the Executive have been happy when their legislation has been blocked, amended or referred to committee for greater scrutiny.

Prime Minister Paul Keating once described the Senate as "unrepresentative swill". His frustration was directed at the fact that the

[29] According to the Museum of Australian Democracy, the Act was "the blueprint of the Commonwealth, setting out how the new federation would be established and the guidelines for the way Australians would shape their nation".

[30] The Oxford Companion to Australian Politics.

State of Tasmania (with a relatively small population) has the same Senate representation as the most populous state of New South Wales. Even in recent times, when the Lower House has had a 'hung Parliament', Lower House MPs have not held back when they felt the Senate has disrupted their legislative working.[31]These ribald exchanges reflect the fact that despite its size -- 76 Senators: 12 from each State and 2 from the Territories -- and that the Prime Minister is chosen from the Lower House, the Senate has enormous power to affect the business of the government of the day.

Some of this Lower House frustration has arisen out of the seemingly disproportionate influence of the cross-bench.As a member of the longest serving third party in Australian history, the Australian Democrats, I often experienced this irritation.[32]

Between 1981-2005, the balance of power in the Senate was held by -- or shared with -- the Australian Democrats. In 2008, it was shared by Independents and Greens and, since 2011, it has been held by the Greens. Despite this, the balance of power has come into play rarely in the Senate. It is only a real factor when the two major parties disagree.

"House of the Living Dead"

The Democrats used to joke that we helped turn the Senate from a "house of the living dead", into a genuine house of review.Our party played a key role in the evolving role of the Senate, helping to build in greater checks and balances on the government of the day. One example is the 'Macklin Motion'[33] which ensures a deadline for the introduction of bills.

Over time, the Senate has been given powerful tools for reviewing, debating and improving legislation; for questioning and probing government for information that they would rather keep to themselves; and for keeping it

[31]Lindsay Tanner, ABC's News Radio, March 11, 2010: "Things have got to a stage now where virtually every major thing we are pursuing is being blocked by the Liberal Party in the Senate".

[32]"Hostile Senate threatens budget", Louise Dodson Chief Political Correspondent, Canberra. May 16 2002.

[33] Named after former Deputy Leader of the Australian Democrats, Senator Michael Macklin.

accountable. It is a place to debate issues of community and national significance.

Committees

The Senate's committee system has led to ground-breaking, sometimes controversial, committee inquiries on everything from media ownership laws to stem cell policy.Committees have been one of the most effective ways to ensure broad community input as well as provide expert analysis, whether it was examining proposed government legislation or instigating policy.Some of my most satisfying committee references include: 'An Inquiry into An Australian Republic'[34]; examining the adequacy of Australian privacy laws[35]; the scientific, ethical and regulatory aspects of human cloning and stem cell research; and Paid Parental Leave[36]. These inquiries led to constructive changes to legislative ideas or generated new laws.

Public inquiries provide a chance for the community to have an input in law-making and policy development. World-leading inquiries, such as those into the Stolen Generations have led to apologies on the matters of indigenous children taken from their parents and child migrants.[37]A 2002 Senate Select Committee "A Certain Maritime Incident"exposed Government lies during the 2001 election about children being thrown overboard a vessel by asylum seekers.

Legislative committees have exposed flaws, from the technical to the moral, in legislation before the Parliament. My favourite example is when I had to move to disallow Custom regulations in relation to the export of

[34]During 2004, the committee reviewed 730 submissions and conducted hearings in all state capitals. The Committee tabled its report called *Road to a Republic* on 31 August 2004

[35]The real Big Brother: Inquiry into the Privacy Act 1988**, 23 June 2005.**

[36]Senate Employment, Workplace Relations and Education Committee inquiry into the Workplace Relations Amendment (Paid Maternity Leave) Bill 2002.

[37] The Senate Legal and Constitutional Committee report Inquiry into the Stolen Generation was published in 2000.The Senate Community Affairs References Committee report on child migrants was published in August 2001 *Lost innocents: righting the record report on child migration*.

embryos. So badly drafted were the Government's regulations, they could have prevented pregnant women from travelling overseas.[38]

The Senate Estimates process – which examines government expenditure -- enables MPs to scrutinise the work of the Executive through direct questions to Ministers and their departmental officials.However, this process has become increasingly partisan and can be bitterly personal.At the most recent Senate Environment and Communications Committee Estimates hearing, Senators resorted to exchanges that included a witness accused of being "brain dead".[39]

SENATORS AS LEGISLATORS

A highlight of my time in the Senate was instigating legislation.[40]Even though many Private Senator's bills do not reach third voting stage, many of these policies are adopted by governments (for example, my 1998 initiative to enshrine genetic privacy in law, was adopted by the government and became law in 2002[41]).

My Workplace Relations Amendment (Paid Maternity Leave) Bill 2002 formed the basis of the Labor Government's legislation which passed in 2010, and the Somatic Cell Nuclear Transfer (SCNT) and Related Research Bill 2006was replicated by a Government back bench MP and passed after a conscience debate in both Houses in 2006.[42]

Others are works in progress. My joint bills with Senator Andrew Bartlett, such as the Same-Sex Marriages Bill 2006 and legislation for parliamentary ratification of troop deployments, have been adopted by other MPs.

[38]Customs (Prohibited Exports) Amendment Regulations 2003 (No.1)

[39]Senators trade barbs at NBN hearingwww.smh.com.au

[40]I tabled twenty four Private Member's Bills.

[41]Genetic Privacy and Non-discrimination Bill 1998.

[42] Senator Kay Patterson.

CONSCIENCE VOTES

Some of the best debates in the chamber have been on so-called 'matters of conscience'.Significant 'conscience debates' in the past 20 years were on euthanasia[43], stem cell policy[44], and removing ministerial discretion for the abortifacient RU486[45].

In a conscience vote, MPs have to read the legislation and form their own opinion. Basically, most legislators have to do their homework instead of being told how to vote by a party Whip.It is a nice contrast to the rigidity of the two party system in Australia, which is arguably greater than comparable democracies, such as the United Kingdom and the United States.[46]

But the outstanding demonstration of camaraderie on legislation was the cross-party work among female Senators in 2006. This was an unusual, but significant, episode.Women from all parties worked together to develop and pass Private Member's Bills. These included the Therapeutic Goods Amendment (Repeal of Ministerial responsibility for the approval of RU486) Act 2005[47]; the Pregnancy Counselling (Truth in Advertising) Bill 2006 and removing restrictions on foreign aid funding.

Collaboration across party lines adds to the quality and diversity of the policy and legislative work of the Upper House.Nonetheless, partisanship is now stronger than ever. As former Deputy Clerk Anne Lynch has pointed out, prior to 1978, Senate committee reports were consensual. These days, they represent distinct and often dissenting party views.[48]

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[43] *Euthanasia Laws Bill 1996*

[44] Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Bill 2006

[45] Therapeutic Goods Amendment (Repeal of Ministerial responsibility for the approval of RU486) Act 2006

[46] In the US Congress, Members routinely cross the floor and co-sponsor bills. In the UK, it has not been uncommon for Labour MPs to question their own or for there to be 'Whipless Tories'.

[47] Therapeutic Goods Amendment (Repeal of Ministerial responsibility for approval of RU486) Bill 2005 *(Senators Nash, Troeth, Allison and Moore).*

[48] "Anne Lynch quantifies the erosion of consensus and the growth of partisanship on Senate committees over the last 20 years. In 1978, all Senate committee inquiries resulted in consensus reports, whereas by 1998 consensus had evaporated and

CONTROL OF BOTH HOUSES

While some Members of the Executive may rue the Senate's power, Australians consistently exercise their desire for a check on executive power. Itis not unusual for electors to vote differently for the two Houses.[49]

After the 1975 election, the Fraser Government gained control of both Houses[50]. However, it was short-lived: the government lost its majority in the upper house at the next election and the balance of power was delivered to the Australian Democrats for the first time.[51]

I was in Parliament when, in 2005, the Coalition Government under Prime Minister John Howard obtained a slender majority of one seat in the Senate, which meant they could govern in their own right.This period saw the Senate operate largely as a rubber stamp for the executive and for the Lower House; committees were shut down, reports truncated. The Senate operated as a sausage factory: legislation was passed without amendment,

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partisan dissent had become the norm. Whereas there had once been a stark contrast between the `ritual stag fights' of the chamber and relatively non-partisan work out of the spot light, this was no longer the case." POP 34-Representation and Institutional Change: 50 Years of Proportional Representation in the Senate. Papers on Parliament No. 34, December 1999, Editors Marian Sawer and Sarah Miskin

[49] "As Murray Goot details, the Australian electorate clearly supports (and indeed rewards) the role of the Senate in blocking unpopular policies. The fact that a government has achieved a majority of seats in the lower house (sometimes, as in 1990 and 1998, with less than 40 per cent of the primary votes) does not mean that the electorate wants the Senate to rubber stamp all government policies. A significant number of Australians vote differently for the two houses of the federal parliament and, of those, a percentage are quite explicit in seeing a minor party vote in the Senate as an insurance policy against overweening government", in POP 34-Representation and Institutional Change: 50 Years of Proportional Representation in the Senate. Papers on Parliament No. 34, December 1999, Editors Marian Sawer and Sarah Miskin

[50] "The Coalition of Fraser's Liberal Party of Australia and Doug Anthony's National Country Party secured government in its own right, winning the largest majority government in Australian history. The Liberals actually won a majority in their own right, with 68 seats. Wikipedia.

[51] The 1977 election was held a year earlier than required, partly to bring elections for the House and Senate back into line. A half-Senate election had to be held by the middle of 1978, since the double dissolution election of 1975 had resulted in the terms of senators being backdated to July 1975.

the committee system and its inquiries were heavily curtailed, orders for documents were ignored. Complex and important legislation was rushed through the Senate with alacrity, sometimes without debate and usually with little time for scrutiny or debate, often under gags and guillotines. The Senate Committee system was 'restructured', with the Government giving themselves the majority, and the position of Chair, on the remaining committees. I recall having only minutes to address tens of amendments, let alone question Ministers on the impact of proposed laws.

These factors had an impact on the nature and quality of the legislation passed. Radical changes to workplace laws, Welfare to Work provisions, Anti-Terror Laws, even a nuclear waste dump, were approved with minimal discussion or amendment.[52]This activity also had an electoral impact. The 2007 election saw a return to the more traditional make-up of the upper house, with a diverse mix of parties.[53]In the 42nd Parliament (12.02.08 – 19.07.10) 1549 amendments were passed and in the 43rd Parliament, so far, 659 have been passed. There have been 18 bills negated in the 43rd Parliament, compared with 68 in the 42nd Parliament.

My mandate is bigger than yours

After the 1996 election, in which the Howard Government received a large majority in the House of Representatives[54], there was much debate

[52]Democrats Senator Natasha Stott Despoja accused the Government of gagging debate, to the detriment of free speech and democracy. "This is a shameful and sad day for democracy," Senator Stott Despoja said, "This was arguably the most significant piece of legislation the Senate has dealt with in the last decade. Yet the Government stopped Senators from speaking to the Bill and refused to allow debate on the majority of the proposed amendments.In an affront to the role of the Senate, the Government showed no willingness to seriously consider the many amendments circulated by the Democrats and other Opposition parties". Anti-terror laws rammed through - minus debate,*The Age*, Jewel Topsfield, CanberraDecember 7, 2005.

[53]This included Independents, the Democratic Labor Party (DLP) and a new third force, (after the demise of the Democrats), the Greens.

[54]The 29-seat swing was the second-largest defeat, in terms of seats lost, by a sitting government in Australia.

about the Government's right to implement its election promises (such as the privatisation of the phone network, Telstra) without Senate interference.

There was a lot of chest-beating about "mandates". Incidentally, those of us who wanted to keep our promises not to sell Telstra argued that the mandate to form government in the Lower House, did not equate to a mandate to pass legislation through the Senate without scrutiny or amendment.

Deadlocks

On those occasions where the Houses cannot agree on legislation there is a constitutional provision for a double dissolution and an election. During my time, the Government had double dissolution 'triggers' but never used them[55]. Negotiations on controversial laws were often prompted by a fear of such an election.[56]Governments rarely chance a full election unless they are confident that they can return, and with stronger numbers.

There have only been six double dissolutions (under s. 57 of the Australian Constitution): 1914, 1951, 1974, 1975, 1983 and 1987. Only in 1974 was the double dissolution followed by a joint sitting. A double dissolution election does not guarantee the legislation becomes law and there is no limit to the number of bills that can be put to a joint sitting after an election (provided they have met the constitutional requirements). It is also the only time all Senators go to an election at the same time. As a result, the quota for election is halved (around 7%) so the big winners in such a scenario can be minor parties.

The Power to Hold Government to Ransom

One out-dated feature of the Senate is its ability to block supply [i.e. the budget] for the ordinary annual services of government.

[55]The double dissolution provision comes into play if the Senate and House twice fail to agree on a piece of legislation (in section 57 called "a proposed law", and commonly referred to as a trigger).

[56]For example, Senator Cheryl Kernot's negotiations with the Coalition Government on the Workplace Relations bills in 1996 were heavily influenced by a 'double d' fear.

This power saw a Government held to ransom in 1975 and in my view should be removed.Blocking supply does not automatically lead to an election, and can actually inhibit the resolution of a major dispute between the Government and the Senate, as well as having the obvious risk of threatening the pay of public servants, our international reputation and the stability of the entire economy.The existence of this power does little to engender good relations in a bicameral system.

Facilitating bicameral relations

To facilitate an effective working relationship between the Houses, closer interaction between MPs from both chambers, as well as among different parties, can lead to better negotiation and compromise.

The establishment of Joint Committees – on which Members from both Houses serve, with cross-party representation included -- has resulted in more positive interaction among MPs, and can assist with the passage of good laws.

Conclusion

In June 2011, when New Zealand Prime Minister John Key finished his address to the Joint Sitting of the Australian Federal Parliament, the Speaker Harry Jenkins mused that the presence of Senators had a positive effect on the chamber.

He was being a little facetious, as most Joint Sittings are characterised by respect and silence from both sides and unedifying behaviour is not restricted to one chamber. Yet, I like to think the Senate is still considered an effective and distinctive house of review in which the theatrics of, and the gladiatorial debate so much a part of the Lower House are not always replicated.

Statistics once revealed that, on average, more words were spoken in the Senate – due to the more sophisticated nature of the debate. I suspect that is changing. My concern about the Australian Senate is not that it will become a rubber stamp for the Lower House – the proportional voting system, among other things, guard against that – but that the House of Review is not always sought after by those with a passion for legislative and committee work.

The Role of the Dutch Senate in the Parliamentary System of the Netherlands

Nico Schrijver*

This paper introduces the political system of the Netherlands and focuses on the functions and powers of the Senate, one of the two Houses of Parliament.

Firstly, it provides a brief review of the emergence of the Dutch State, its Constitution and its Parliamentary system. Next, it discusses the specific functions of the Senate and provides some examples from practice on the independent role of the Senate. Some conclusions are provided.

1- A brief history of the emergence of the Dutch State and its parliament

The roots of the Netherlands as a political entity go back to the 15th century. Political formation was advanced when the seven Northern provinces concluded the Union of Utrecht in 1579 and separated themselves from the Spanish. In their war with Spain, which lasted for 80 years (1568-1648), the provinces jointly emerged as a Republic. The Republic received international recognition as a sovereign nation at the major international peace conference of 1648 in Westphalia. The seven provinces had united in a confederation and had established the States-General, composed of the representatives of the provinces, as their joint assembly. Holland was the wealthiest and most powerful of the provinces. Decision-making in the States-General was far from easy since as a rule each province's consent was required. The provinces remained sovereign and were autonomous in most legislative and judicial matters and to a large extent also with respect to taxation. The States-General were responsible only for external affairs, such as foreign relations, the navy, and overseas trade companies and their finances.

From 1795-1813 the Netherlands was under French occupation. When the Netherlands was restored to independence in 1813, William of Orange, for long influential in the army and in state affairs, emerged as the

Sovereign and became King. Hence, from 1813 and now for 200 years the Netherlands has been a kingdom, also called a constitutional monarchy. Initially, the Kingdom of the Netherlands also comprised Belgium but this country separated in 1830 and vested its own kingdom. In the context of the post-war decolonization process, the Netherlands East-Indies became an independent State, Indonesia, in 1946 and Surinam achieved its full independence in 1975. Currently, the Kingdom of the Netherlands consists of the Netherlands in Europe and six islands in the Caribbean. It has a population of approximately 17 million in habitants.

2- The Constitution of the Netherlands

The Kingdom of the Netherlands had its first official constitution in 1814. This constitution introduced a bicameral system and the two chambers were and still are jointly called the States-General. The First Chamber was appointed by the King and the Second Chamber elected by the provincial councils which were composed of representatives of the nobility, the cities and towns, and the class of rural landlords. At regular intervals amendments of the constitution took place.

In 1815 a number of fundamental rights were incorporated into the constitution, such as the right to petition, the protection of property and the home and the freedom of the press. In response to revolutionary events in Europe and in France in particular, a major revision of the constitution took place in 1848. More civil liberties became incorporated, including the right to association and assembly, and the freedom of education. The reform of 1848 also laid the foundations for the current parliamentary system. It introduced: ministerial responsibility towards both houses of parliament as opposed to the complete ‘inviolability’ of the King; direct elections for the Second Chamber by the upper class based upon census (income dependent); and indirect election of the First Chamber by the provincial councils which themselves were now directly elected by the inhabitants. In general parliamentary powers were extended, whereas the King was empowered to dissolve Parliament. Because of this far-reaching overnight reform from an absolute monarchy towards a constitutional monarchy and parliamentary system, many view the year of 1848 as the Dutch year of revolution.

Under the constitutional reforms of 1917 and 1922 the right to vote of all male citizens and all female citizens, respectively, was established. In 1983, a rephrased bill of rights was introduced and some classical and social

rights were added. They are preceded by the general opening article 1 which provides for equality and non-discrimination of all citizens and prohibits discrimination on the grounds of religion, belief, political opinion, race or sex or on any grounds whatsoever. The freedom of religion, in the Netherlands recognized as a fundamental right for over four centuries, was extended to freely manifest one's belief. Furthermore, some privacy rights were added in 1983.

3- The Parliamentary System

The bicameral system was introduced in 1815 at the request of the Belgians in order to improve the representation of their nobility. Ever since, the States-General has consisted of the two houses: the Second Chamber and the First Chamber, also called the Senate. The Second Chamber is composed of 150 members and is elected directly for a period of four years, unless the government falls. In that case, a new mandate is sought from the electorate. In recent years the Netherlands has experienced several resignations of the government and consequently new elections for the Second Chamber.

The First Chamber consists of 75 members elected by the members of the 12 provincial councils, also elected for a period of four years. In both Chambers around ten political parties are represented, the largest being the Conservative Liberal Party (VVD), the Labour Party and the Christian Democratic Party. Membership of the Second Chamber is a full-time job and is remunerated accordingly, whereas membership of the First Chamber/Senate is part-time only.

The function of the Parliament is first of all to serve as co-legislator. The constitution provides: 'Acts of Parliament shall be passed jointly by the Government and the States-General.' Hence, both Houses are involved. Furthermore, Parliament has the right to question ministers and state secretaries and both Houses have also the right of inquiry. Of the two Houses, only the Second Chamber has the right to initiate its own legislation, to amend bills, to nominate persons as judges on the Supreme Court and to appoint the National Ombudsman. All sessions of the Parliament are held in public and members as well as ministers and state secretaries enjoy immunity for anything they say during the sessions of the States-General.

The Parliament operates first of all upon the basis of the rule of confidence, a customary rule. This rule requires that the cabinet ministers and state secretaries enjoy, individually and collectively, the confidence of the majority of Parliament and usually, in addition, the confidence of their political parties' grouping in the Second Chamber.

As mentioned above, the power of legislation rests with both the Government and the parliament. Both the Government and the Second Chamber are authorized to propose legislation. In practice, nearly all bills are introduced by the Government, often after years of preparation. The introduction of a bill in the Second Chamber is preceded by the advice of the Council of State and followed by written consultations by committees of the Second Chamber with the Government. Subsequently, the bill is to be considered by in the plenary session. At that stage both the Government and the Second Chamber can amend the bills. After the bill has been adopted, sometimes by consensus but mostly upon a majority vote, it goes to the First Chamber. First, its committees can enter into written consultations with the Government and frequently do so with respect to substantive bills. Upon receipt and discussion of replies, the bill is submitted to the plenary session of the Senate. The Senate has the power to only pass or reject the bill and has no power of amendment. In exceptional cases, the Senate can request or compel a minister to suspend discussion on the proposed bill and introduce first in the Second Chamber a new amendment, which is then called a *novelle*. Upon discussion and adoption in the Second Chamber, the minister can then return with the bill thus amended to the Senate.

A Bill becomes an Act of Parliament once it has been ratified by the King, which takes place under the political responsibility of the minister, who countersigns the Act.

4- Specific functions of the Senate

Being originally nominated by the King, the Senate was initially viewed as the *ménagerie du roi* or allies of the monarch: 'his Majesty's "bulwark" against the people's representatives of the Second Chamber'. However, upon the constitutional change in 1848 the Senate became elected by the provincial councils and hence also became indirectly the people's representatives. For all kinds of reasons, so far the bicameral system has been maintained, although occasionally discussions take place on dismantling it. However, this would require a two-thirds parliamentary

majority in both Houses (hence, also in the Senate itself), which is necessary for a revision of the constitution.

In practice, the role of the Senate in the Dutch political system is generally appreciated for various reasons. Frequently, it has been viewed as a chamber for reflection and to think twice before major changes in legislation or general politics are introduced. The Senate is supposed to cast a special eye over the legality, the quality and the enforceability of legislation. In this often more legally than politically oriented role it frequently assesses the compatibility of the bills with European Union law and international law standards. Lastly, in the view of some, it serves to moderate the Second Chamber's tendency towards 'the whims of the day'.

Since 1983 (when four year terms for all senators were introduced) the political composition of the Senate has resembled that of the Second Chamber. In both Houses ten political parties are represented. However, since elections hardly ever take place in the same year, the political composition is not always the same. The current situation in 2013 demonstrates this perfectly. Whereas the newly formed coalition Government of the Conservative Liberal Party and the Labour Party enjoys in the Second Chamber a majority of 80 out of 150 seats, the two coalition parties are in a minority position in the Senate: only 30 out of 75 seats. This makes it necessary for the Government to seek the support of additional parties in the Senate. This political situation has brought the role of the Senate once again into the limelight.

5- Some examples of the independent role of the Senate of the Netherlands

Practice demonstrates that the Dutch Government never can take it for granted that a Senate majority will automatically support a bill once a majority of the Second Chamber has passed it. While normally this will be the case, the Senate engages each time in a careful procedure to assess the merits of the bill in general and its legality, quality and enforceability in particular. Obviously, a political grouping will in most cases cast the same vote as its MPs in the Second Chamber did. Yet, it will in principle conduct its own assessment of the bill independently. Occasionally, it occurs that one or more political groupings deviate from the voting behavior of their political allies in the Second Chamber. Three examples demonstrate this.

Each of them attracted considerable political and media attention in the Netherlands.

Electronic patients data system.

For a long time, the healthcare sector in the Netherlands has been seeking to economize on its administration costs. Apart from a need to cut spending, it was also widely believed that a more open administration of patients and their individual medical records could contribute not only to more efficiency but would also serve the interest of the patients in a better way. After lengthy discussions and the adoption of several amendments, a bill was passed by the Second Chamber and submitted to the Senate. However, senators from various political groupings raised a host of questions and the protection of privacy emerged as the principal issue of concern. The opposition to the bill was led by a senator of the Conservative Liberal Party, a party serving in the government and to which the responsible minister of Healthcare belonged. Nevertheless, in two rounds of written consultations and in two plenary oral rounds, the minister failed to convince his own political grouping of the minimally required protection of the privacy of the data. Thereupon, his own political group decided to join the opposition and to vote against the bill. As a result, it could not be adopted.

Preventing a full ban on the ritual slaughtering of animals.

Another example relates to a majority initiative in the Second Chamber to introduce legislation to ban ritual slaughtering of animals without stunning. Both the Jewish and Islamic traditions require that one cannot stun an animal before slaughtering. While in both religions some precautionary measures are prescribed in order to conduct slaughtering in the least painful way, it is obvious that animals, especially larger ones, cannot but suffer during this last phase of their life. Therefore, the political Party for the Animals (represented in both Houses with two seats and one seat, respectively) took the initiative of introducing a bill banning the slaughtering of animals without stunning in the Netherlands. They were supported in this endeavor by the Conservative Liberal Party, the Labour Party, the Green Left party and the progressive liberal party D66, while some other political parties (Socialist Party) and the populist (somewhat anti-Muslim) Party for Freedom also voted in favour. Hence, the bill was adopted in the Second Chamber by large majority (116 out of 150). It was

fervently opposed by the various Christian democratic parties. The adoption of the bill gave rise to an outcry of protest in both the Jewish and Muslim communities in the Netherlands, whereas it was welcomed in circles putting the need for animal welfare first. The Senate decided to initiate in-depth research into the various modalities of the bill and sought to balance the constitutional duty to respect freedom of religion, including the freedom to profess religion according to its own rituals within the limits of law, and minority rights with the recognised need to enhance animal welfare during the process of slaughtering. Soon it became obvious that a majority was of the opinion that the bill inadequately respected the constitutional freedom of religion and minority rights. Moreover, from a technical legal point of view the bill had some shortcomings, partly as a result of amendments adopted in the Second Chamber. Within the Senate it was widely felt that, apart from problems in meeting the legality test of the constitution and international human rights treaties which the Netherlands is bound to apply, the bill could also not be easily enforced in practice. This would, in the view of many senators, give rise to court proceedings and they felt that here it was the duty of the legislature and not of the judiciary to provide clarity. Their opinion was fervently opposed by the MP of the Party for the Animals who defended the bill in the Senate on behalf of the entire Second Chamber. Whereas this MP performed in a competent way, the majority was not convinced. The latter included nearly all the senators of the three political groupings which had earlier co-sponsored the bill in the Second Chamber. Thereupon, the majority of the Senate appealed to the Government to come forward with an alternative and to enter into consultations with the two religious communities and other interested actors on this. This resulted in a so-called 'Covenant on the improvement of the animal welfare in the process of ritual slaughtering without stunning'. It was adopted by the representatives of the Government, the Jewish community in the Netherlands and the Islamic Community in the Netherlands as well as by the Association of Slaughtering Houses in the Netherlands. The Covenant has a type of contractual status and is not a piece of legislation. The Covenant provides for strict criteria for the selection of animals, the treatment of animals, the professional qualifications of the slaughters, the maximum number of seconds (forty) of suffering of the animals, supervision by food and health authorities and other important matters relating to the conditions of slaughtering and animal welfare. The role of the Senate was instrumental in bringing about this compromise on such a sensitive issue in Dutch society.

Police Reform Act.

For the past two or three years the Dutch Government has been aiming to improve the organization of its police forces by establishing one united national police force, headed by one National Chief Police and operating under the political responsibility Minister of Security and Justice. Previously, 27 police units existed in the country, each headed by its own chief and operating under the responsibility of the region's mayors as well as the national government. Arguably, this situation had resulted not only in overlap and duplication but also in less responsiveness and effectiveness. One of the main political projects of the minister, still in office, was to guide this bill though both Houses of Parliament. Upon adoption by the Second Chamber with considerable clarifications and some amendments, the bill went to the Senate. Various political parties were rather critical and wanted the minister to amend or otherwise withdraw the bill. However, for the minister the introduction of one national police corps was his major political project and he resisted very much any withdrawal of the bill or return to the Second Chamber with an amended version, given it had already adopted this one. However, he also acknowledged the need to adapt his proposal for quality reasons. Ultimately, just before summer 2013 he resorted to promising a so-called reparation law, with as many as 17 points, upon condition that his plans based upon the original law could enter into force from 1 September 2013 (just before the 12 September elections for a new Second Chamber). The majority of the Senate was willing to support him in this and the bill thus could be adopted. The minister kept his word and introduced the reparation bill quite quickly to Parliament, and thus indirectly amended his original proposal to meet the concerns of the Senate. From a legislative point of view this was of course not the ideal way of proceeding, but nevertheless the demands of the Senate were met in an indirect way.

6- Conclusions

1. The Netherlands is a constitutional monarchy. Since 1815, the Netherlands has had a bicameral system, consisting of a Second Chamber with 150 full-time members and a First Chamber/Senate with 75 part-time members.

2. Only the Government and the Second Chamber have the power to initiate legislation and to amend bills. The Senate can only accept or reject bills. However, in practice some other mechanisms have

emerged by which the Senate can exert considerable power should it wish to do so.

- First, it can compel the Government to introduce a *novelle*, i.e. an amendment to a bill already adopted by the Second Chamber and submitted for discussion with the Senate;
- Secondly, the Senate can decide to reject a bill and request that the Government comes forward with alternatives, sometimes extra-legislative alternatives as the example of the Covenant on the Ritual Slaughtering of Animals demonstrates;
- Thirdly, the Senate can also agree a compromise with the Government entailing the adoption of the proposed bill under the simultaneous commitment of the Government to submit an additional reparation bill to amend *de facto* some controversial points of the bill.

3. In general terms, it can safely be concluded that the role of the Dutch Senate is widely appreciated as a chamber for reflection and a quality test for legislation from the point of view of legality, public support in society and enforceability.

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The Canadian Senate Model

By Senator Mac Harb

The Canadian senate model is based on the British House of Lords,as Canada is still a monarchy and the Queen of England is also the Queen of Canada. There are 105 senators appointed to represent the provinces and Canadian territories.Some of the provinces have started to elect their senators, but the authority to recommend appointment remains in the hand of the Prime Minister.

The Queen'sRepresentative (Governor General) is the one who actually appoints Senators based on the advice of the Canadian Prime Minister.

A senator has to own property in the province that the senator represents and must establish residency in that province. Their role is to represent the interest of the country and the interest of the province they are representing.

A question is often asked about whom and how can a person become a senator? The answer to this question is a complex one. Because in the end it's the Prime Minister who makes the decision on senators'appointment, he often consults with his inner circle for suggestions of names. He might appoint a prominent doctor, a famous journalist, a human rights activist or a former member of the lower house.

There are also manyoccasions when the Prime Minister appoints members of his political party, or people that he personally knows and feels are worthy of appointment, so, in short there's no clear cut rule on how the selection is done, however a senator must be at least thirty years of age and cannot serve beyond the age of 75.

Andsome might ask, "what do senators do?"Well,they are supposed to be the "house of reflection" or the house of "sober second thought"; they

look at all the legislation that is passed by the lower house, they hold discussions on this legislation and they closely analyze each proposed law and they can amend it and send it back to the lower house or defeat it if necessary. The Senate can also introduce laws in the Senate, as long as these laws are not money bills. In another words, if the implementation of these laws is going to cost the government money, then these laws must be introduced in the lower house.

An example of the Senate'swork, where a bill was introduced in the lower house but was not approved by the Senate, was a bill that was adopted by the lower house that imposed penalties on people involved in cruelty to animals. This bill, if the senate had agreed to it, would have made it an offense fora person to cause an animal undue suffering. This bill initially looked like a kind gesture but once the senate conducted hearings and debate on it, it was found that under the rules as written and if adopted, a Muslim or a Jewish person could be held accountable during a slaughter of a cow or goat for consumption because it could be concluded that a goat or a cow could suffer during the process. Also it was found thatboiling a lobster could inflict pain on the lobster, or a fish that's caught.As a result, the bill was not supported in its present form and was sent back to the lower house.

Many of the initiatives that are introduced by the lower house face scrutiny in the senate.Senate committees are where most of the serious work is conducted. It is not uncommon that a senator serves on the same committee for many years. This length of service provides the Senate committee members with in-depth knowledge of the various subjects that are discussed by the senate committees, whereas this cannot be said of committees in the lower house.

Another question that is often raised is whether to elect or not to elect the Senate. Thisis a raging debate now and has been for many years. Some Canadians want their senators elected, otherswant them selected; some want them appointed for a much shorter term, and there are those who want the senate abolished altogether. However,on the issue of abolition, to abolish the Senate or change itsoperation in a major way would need the approval of the majority of provinces and these provinces population will need to be representative of the Canadian majority. Changing a constitution is often a challenge, thus making it very difficult to agree on a proposal for senate reform.

Some might argue that the people who designed the Canadian constitution, back in the late 1800's, saw the wisdom in having it selected rather than elected, thus, they deliberately made the Senate an appointed body in order to make it less important than the House of Commons and to keep it humble—despite the fact that in the order of precedence a senator ranks higher in importance than a member of the House of Commons.

At present, the Government of Canada has asked the Supreme Court of Canada to rule on a series of questions relating to senate reform that the Government wants an answer to.The six questions sent to the court include asking the justices to rule on: the constitutionality of limiting Senate terms to eight, nine or 10 years, among other options; how to go about consulting the provinces on Senate reform and how to go about electing senators who are currently appointed by the Prime Minister; whether the federal government can repeal the minimum wealth requirements and property qualifications for senators; and how the country could go about abolishing the Senate.

As for my own views, while I am neutral on the question of election or appointment of senators, I will say that if the senate is elected, it needs to be given more powers than it currentlyhas. Currently the Senate cannot defeat the Government; this is something only the lower house can do.Also, thesenate has only one minister in government, and there are over thirty cabinet members from the lower house.

Another question that comes to mind is that once you have elected senators, then many decisions will start to become political, and senators will start voting on what's popular rather than voting on what's the correct way to deal with issues under debate.

In addition, the issue of more powersis complex. Ifthe Senate is elected and given more powers, more ministers in cabinet and more financial resources, this new found power will have to come from another institution and that is the lower house.While on the surface this may look like a noble idea, the truth is that there will be gridlocks and the government will begin to find it difficult to govern. A case in point is what we see in the United States and the challenges that face the Congress as wellas the US Senate, making it difficult for the administration to govern smoothly. Lastly, if you

decide to elect senators, then you need to look at the entire model of government, something that's needed in any reform one undertakes.

And finally, do we really need a senate? This question we often have to answer in the course of our activities. When asked if we need a senate, another question comes to mind, do we need judges? Police?Firefighters?Teachers?All of these are important questions that need to be answered and by in large the answer is yes! We do need a senate and we need to ensure that we do have a chance to re-consider our lower house'sdecisions and how they impact the average citizen.

When the Senate reviews a proposed law, senators look at whether the proposed law meets the constitutional requirements, whether it meets our charter of rights and freedoms and finally they look at whether or not it meets the intended objective of what the lower house is trying to achieve. The Senate also has the power to exercise oversight over the government by calling Ministers and citizens to appear before senate committees and testify and answer questions .

For modern Egypt this question is as important as it is for Britain,Canada and other countries around the world. The question is, what type of reform to our institutions do we need and how do we proceed with these reforms? Our national institutions are continuously evolving and in need of reform, but we should never abandon the idea of "sober second thought", we should never shy away from an independent advice and from having a senate provide elected members of the lower house with the opportunity to benefit from a sage advice, and an advice that is not imposed on them by the government.