De Senaat : Rechtsvergelijkend onderzoek naar het
House of Lords, de Sénat, de Eerste Kamer en de
Bundesrat

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Summary

The core question of this study is whether senatorial chambers offer sufficient value in addition to lower houses of parliament to justify their continuing existence. The question arises with some regularity in many West European states that still have a bi-cameral parliamentary system. More in particular, the study investigates whether the British House of Lords, the French Sénat, the Dutch Eerste Kamer and the German Bundesrat are still considered to have substantial added value with respect to the legislative process as well as control of executive action. As background to this principal question, a comparative study is made of the extent to which those senatorial chambers which are directly democratically legitimised (as in France), exercise their duties with regard to co-legislation and control of executive action more effectively than senatorial chambers which are not (as in the United Kingdom) or merely indirectly democratically legitimised (as in the Netherlands and Germany).

With regard to activities that are the domain of the upper houses as co-legislators and controllers of executive action, use is made of a conception derived from British literature. In this conception, 'bi-cameralism' implies the relation between the two chambers, in which the upper house ideal-typically plays either a 'rivaling' or an 'assisting' role. 'Rivalry' is here to be taken to mean the (im)possibility for the upper house to wholly or partially enforce its own politico-policy accents. 'Assistance' in parliamentary legislative practice implies first and foremost correction as to lawfulness, in particular improvements of a legal-dogmatic and legal-technical nature. Suggestions for improving the effectiveness and social desirability of legislative texts as well as their politico-bi-cameral and non-controversial nature are also placed under the heading 'assistance'.

There are substantial differences between the four upper houses with regard to democratic legitimisation, composition and organisation. The members of the British and German upper houses (over 700 and 69 members, respectively) are appointed rather than elected. In the United Kingdom, they are appointed 'for Life' through the head of government; in Germany indirectly for an indeterminate period of time from the incumbent governments of the sixteen Länder. The members of the Dutch upper house, 75 in total, are elected indirectly through a system of proportional representation. Finally, the members of the French Sénat (321) are elected through a system made up of elements of both proportional representation and majority voting. As a result, in the case of the British upper house, democratic legitimisation is virtually absent with regard to co-legislation and control of executive action, whereas the Bundesrat has been indirectly legitimised through the Länder administrations. For the Sénat and the Dutch upper house, the Eerste Kamer, democratic legitimisation, at least in theory, may be regarded as a significant Leitmotiv. It was found that the party-political relations within the respective upper houses are also influenced by the system employed: election or appointment. Until the coming into effect of the House of Lords Act 1999, the British upper house was dominated quantitatively by the Conservatives. After the majority of the Hereditary Peers had been sent off that year, the Labour government started to appoint additional Life Peers of a non-Conservative persuasion at an accelerated pace. This created a more balanced image in a party-political sense. No longer is it possible for one of the major British political movements to automatically have an absolute majority in the House of Lords. Such a conclusion can definitely not be drawn for the political move-
mements represented in the Sénat, in spite of the fact that French senators are elected rather than appointed through free and secret ballots. Even a sudden substantial change in preference of the electorate, a phenomenon occurring with remarkable regularity in contemporary France, may only effect marginal changes in seat distribution in the Palais de Luxembourg. This is a consequence of the distinctive electoral regime for the French upper house. A number of mutually reinforcing rules in electoral legislation cause rural France to be structurally over-represented in the upper house. Consequently, since 1958, the centre-right has dominated the Sénat uninterruptedly.

The degree of party-political stability of the House of Lords and the Sénat can never be equalled by the Eerste Kamer and the Bundesrat. In the Netherlands, virtually every change in electoral preference on the occasion of the quadrennial elections for provincial administrations has a direct and full impact on the composition of the upper house. The party-political composition of the Bundesrat is affected by the separate elections for each of the sixteen Länder parliaments. Since 1972, in the majority of cases, the party-political relations in the Bundesrat have developed ‘opposite to’ coalition relations in the Bundestag. In the Dutch Eerste Kamer, finally, the opposition parties in the lower house have never had a majority of the seats since the introduction of general suffrage.

The most important duty of the four upper houses is co-legislation. Large differences in legislative practice have been found. Managing the legislative timetable is the prerogative of national governments. As a rule, the lower houses have (as in France) or wish to have (as in the United Kingdom) little influence on the composition and progress of the agenda. In the case of the Netherlands, a fully passive attitude was found. Only the Bundesrat exerts influence on a structural basis, where the legislative agenda is concerned.

In the Federal Republic of Germany, furthermore, the right of initiative is also successfully exercised on a regular basis by the (varying majority coalitions in the) upper house. In parliamentary practice, the Sénat and the House of Lords are fully dependent on the good will of the government of the day and, of course, the party-political majority in the Assemblée nationale and the House of Commons, respectively. The Dutch Eerste Kamer has no right of legislative initiative.

With regard to the extent to which the four upper houses are given the opportunity to exert genuine influence on legislative products through the very important committee phase, again the Bundesrat comes out on top. As a result of the certainty of continuous legislative expertise offered by the public servants of the Länder, German senators have two opportunities through committees to review bills in the course of the regular legislative process. French senators gain expertise though an organisation specially geared for that purpose. Each senator holds a nine-year mandate. He/she can only sit on a single permanent committee and the bills must be thoroughly prepared and monitored by rapporteurs. Aside from the input offered on a permanent basis by the government, the thoroughness of the work by the British committees strongly depends on the expertise that happens to be available in the House of Lords at that moment, so that bills in one policy area may be paid more attention than those in others. Strength in numbers and especially the appointment of hundreds of new Life Peers indisputably have enhanced the intensity with which committee work is done in the House of Lords.

The Dutch Eerste Kamer also enjoys the least favourable position where influence on legislative products is concerned. Inasmuch as the 75 part-time senators under a four-year
mandate are not able to generate much time and manpower to develop ‘lasting’ expertise, but especially because they have, in effect, no instruments at their disposal to amend the substance of bills, the committee stage of the Eerste Kamer can be readily left out. The main instruments available to the upper houses for the purpose of amending bills are the right of veto and the right of amendment, sometimes combined with forms of dispute settlement in order to definitively resolve any conflicts with the lower house. A suspensory veto right has proved to be of little practical value to the senate in amending bills. Both the House of Lords and the Bundesrat use the instrument sparingly. Of more interest is the absolute right of veto. The Bundesrat and the Eerste Kamer have such a right, in the case of the Bundesrat applying to 65% of bills. An absolute right of veto has shown to generate a large preventative effect if combined with the power of intervention during preceding stages in the legislative process. This assumption was borne out unequivocally as a result of studying the Bundestag’s Plenarprotokolle. It was found that amendment proposals introduced by the Bundesrat during the ‘erste Durchgang’ were most likely to be adopted by the Bundestag, even where such Bundesrat’s proposals were of a non-‘assisting’ (read: political) nature. In a bi-cameral legislative system, such as that of the Netherlands, where the right of veto will be exercised in rare cases at the end of the legislative process, preventative ‘tinkering’ with bills based on senatorial wishes is precluded by definition. However, even in the ultimate stage of the Dutch legislative process, when the upper house is entitled to scrutinise and assess the final product, no legal basis exists for ‘tinkering’. Apart from the odd ‘crumb’, through the novelle construction, it does not happen. An across-the-board ‘yes’ or ‘no’ are the only options for Dutch senators. Placed at the end of a complex and time-consuming legislative process, and relatively closely coached by the government coalition of the day, the answer is readily ‘yes’, even where, occasionally, it is perfectly clear in advance that the bill is in complete breach of the rule-of-law principle. The Sénat and the House of Lords have a right of amendment, which is exercised on a large scale. In French legislative practice, depending on the party-political relations of the day, the right of amendment is found to be deployed as a ‘rivaling’ instrument to slow down the process of bills that are unwelcome. The French constitutional legislator, however, has provided the government with a number of legal means to reduce the effectiveness of ‘rivaling’ behaviour to virtually zero. The right of amendment of either house has proved more significant as an instrument of ‘assistance’. Improvement of the quality of bills is paramount in this respect. The House of Lords in particular, but also the Sénat, spend a lot of time and energy on this. The fact that the House of Lords puts that much energy into legislative activities of an ‘assisting’ nature has also something to do with dispute resolution as operative in the United Kingdom. If the House of Commons and the House of Lords continue to disagree on the final draft of a bill, the latter may be ‘overruled’ in the end pursuant to the Parliament Acts 1911 and 1949. In France, a Commission Mixte Paritaire, which is a conciliation commission consisting of members of both houses, will be established in case of dispute, before the Assemblée nationale, with the cooperation of the government, renders a final judgment on (the wording of) the bill. Also in Germany, where the Bundesrat has been given powers closely resembling a right of amendment to modify legislative products, disputes over the wording of bills may ultimately be entrusted to a conciliation commission (Vermittlungsausschuss). The Bundesrat has the power to still withhold its consent (Zustimmung) afterwards in approximately 65 per cent of bills, in
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which case the bill is consigned to the dustbin. In sharp contrast with the Bundesrat, the House of Lords and the Sénat may eventually be sidelined.

The above entails that, in practice, the review of legislative proposals conducted by the four upper houses under study largely takes place under the guidance of the government. In theory, they exercise their legislative duties on the basis of a dualistic conception; in practice, however, they engage in activities that are mainly of an ‘assisting’ nature. This is different for the Netherlands only, since the Dutch upper house has been denied any instruments, in the form of a right of amendment or a derived right, to effectively render ‘assistance’ and lacks almost totally the necessary room to act in parliamentary practice.

Politically ‘rivaling’ activities by the upper house within the context of the legislative process are consistently nipped in the bud (France) or simply not tolerated (United Kingdom and the Netherlands). Only in the Federal Republic of Germany is the senate capable of playing a ‘rivaling’ role in a politico-policy sense as well as an ‘assisting’ role where legal-dogmatic and legal-technical considerations are concerned. It is not so much the federal structure of the Bundesrepublik that has caused the difference in practical operation. It is rather a very well thought-out system of interrelated legal rules governing federal legislative procedure starting with the first Durchgang, through strongly professionalised permanent committees and the second Durchgang, to, where applicable, the final vote on the outcome of the Vermittlungsausschuss.

There is no evidence of a strong relation between proper democratic legitimisation of the upper house and co-legislative influence exerted by that same house. The duly democratically legitimised Dutch upper house has virtually no role to play as co-legislator, whereas it was found that the House of Lords, which has no democratic legitimisation whatsoever, is now a comparatively serious ‘assisting’ legislative partner. Time and lasting - hence further advancing - expertise are major factors in this respect.

Although the four senatorial houses spend most of their time by far on co-legislative duties, they also perform others. The majority of these can be simply brought under the heading ‘control of executive action’. As yet, additional control of government policy by upper houses, under the umbrella of ministerial responsibility, has proved of little effect. The House of Lords and the Sénat have been found to lack workable sanctioning instruments to render such policy control effective. Moreover, they are kept harmless by a rigid party-political organisation via the usual democratic majority rules. This is also observed in the Netherlands. As a result, the Dutch upper house spends almost no time controlling executive action. This attitude of great restraint adopted by the Eerste Kamer in relation to parliamentary scrutiny of executive action is especially remarkable, since only in the Netherlands the relation senate-government is formally based on confidence (vertrouwensregel).

Expressed in the terminology used here, this implies that, in the year 2001, ‘rivaling’ behaviour by the upper houses in relation to vigorous control of executive action, under the umbrella of ministerial responsibility, has nearly ceased to be a politico-strategic spearhead in the continuous search for a workable balance, in either the Sénat, the House of Lords and the Eerste Kamer. This in spite of all the efforts to this effect still taken on a regular basis by the French upper house in particular. In the United Kingdom and to a lesser degree in France, the resulting ‘deficit’ in the set of controlling duties of the upper houses has been somewhat taken up by independent investigative activities of a strongly ‘assisting’ nature. To achieve this, the House of Lords and the Sénat had to start operating outside the tradi-
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The traditional boundaries of ministerial responsibility. Independent information gathering by the upper house is often, certainly in the beginning, fully divorced from (possible future) government policy. Precisely because of the 'assisting' nature of their independent investigations, for which they had to extend their duties beyond the traditional boundaries of ministerial responsibility, these two upper houses have proved capable of adding some substance to control of executive action within traditional boundaries. An example would be EU-related policy views or topics relating to science and technology becoming part of the parliamentary debate in London or Paris.

It can be concluded that also where control of executive action is concerned the upper houses of the United Kingdom and France act increasingly in terms of 'assistance' and certainly not exclusively in terms of 'rivalry'. For the most part, the original bi-cameral concept of an effective additional check of government policy from a perspective of 'rivalry' is obsolete and needs to be modified. It was found that close party-political ties, be it within a monist context or otherwise, in large part determine the lack of 'rivalling' impact, especially in the United Kingdom, France and the Netherlands. The possible existence of a confidence rule that can be made fully operational, is not going to counteract this effect. The near complete absence of any form of effective control by the Dutch Eerste Kamer of executive action, as opposed to practices in the other countries under investigation, clearly demonstrates this.

Such traditional control instruments, under the umbrella of ministerial responsibility, as the right to pose questions (vragenrecht) or the right of parliamentary inquiry (enquête), have been found to be of no effect in the hands of the upper houses with the exception of the Bundesrat, of course. In general, the Bundesrat is kept abreast of things by the federal government. This is due to the fact that the federal upper house and the federal government are strongly interdependent, much more so than is the case in the other countries, where legislation is concerned. It must be borne in mind in this respect that it is the sixteen Länder that must implement policies. It is therefore logical, solely from a practical angle, that the German federal government optimally informs these 'executive' authorities on policy development.

In the year 2001, the senatorial chambers, with the exception of the Dutch upper house, continue to offer added value, particularly in the area of legislative 'assistance'. In addition to this, the British and French upper houses manifest themselves more and more effectively in an 'assisting' capacity through investigative reports on a number of core policy areas, for instance with regard to the EU. As a result, regular initiation of new legislative proposals has become a matter of course.

In view of the above, it seems therefore reasonable to abolish the now virtually meaningless Dutch upper house. A constitutional court will be well able to fill in the resulting gaps. Should abolition prove not to be feasible politically, then the following essential adjustments to the current system should be introduced:

1. The number of senators should be increased. They should spend more than the odd day a week on parliamentary work. The electoral mandate must be extended in duration, so that more expertise can be gained. A certain degree of assistance by public servants is needed. These preconditions will make it more feasible to effectively give meaning to the operation of a committee system. In that event, the Dutch upper house could engage in co-legislative activities in an almost purely 'assisting' capacity modelled on the British example. The
right of veto, which has proved to be completely meaningless, may be exchanged, to this end, for a right of veto of a suspensory nature of limited duration (as a political signal) in combination with a right of recommittal (terugzendrecht). In a substantive sense, such right of recommittal will provide the Dutch upper house with a right of amendment that can be exercised without restraint. Ultimately, it will have to be the first house, i.e. the lower house, as the weightiest chamber, which, through the power of amendment, determines whether or not amendments proposed by the upper house will be incorporated in the definitive legislative product. British and French bi-cameral legislative practice, incidentally, has demonstrated that well-argued amendment proposals from the senate have proved to be very persuasive. The regime governing constitutional amendments does not need to be revised so long as the Netherlands maintains a bi-cameral system.

The Dutch upper house should also spend time, in future, on non-legislative activities. An upper house that operates on the basis of a conception that is mainly of an 'assisting' nature is excellently suited to conduct parliamentary enquiries (enquêtes). Furthermore, it will prove conducive to conducting independent investigations and building the necessary areas of expertise based on the British and French examples.