Tomasz WIECIECH
Institute of Political Science and International Relations

FORMULAS OF REPRESENTATION OF CONSTITUENT UNITS IN THE PARLIAMENTS OF FEDERAL STATES

One of the characteristics of the federal system which distinguishes it as a form of organisation of government is the participation of the entities of the federation in wielding federal power, which is made possible above all by their representation in the structure of federal bodies.[1] This representation is inscribed in the wider principle of participation (shared rule), which is shown to be one of two principles, alongside autonomy (self rule), of the federal system.[2] An element of the principle of shared rule is also the special procedure of change of a constitutional system, which requires the involvement of the objects of the federation, while an equally important role is played by the structure of state bodies of the federation, thanks to which participation of the constituent units in the federal decision process becomes possible. Of particular importance here is the separate representation of the territorial communities forming the federation in the federal parliament, which is supposed to guarantee them a role in the creation of federal law and permit the articulation of interests at a nationwide legislative forum. Characteristic of federalism is the principle of double representation. "In federations 'the people' is treated as one being in a sense, and as a number of beings in another. The people is represented as a whole (nation) and as [individual] parts (separate regions forming the nation)."[3]

[1] Cf. J. Smith, *Federalism*, University of British Columbia Press, Vancouver 2004, p. 15.

[2] See D.J. Elazar, *Exploring Federalism*, University of Alabama Press, Tuscaloosa 1987, p. 12; M. Burgess, 'Federalism and Federation: A Reappraisal' in M. Burgess, A.-G. Gagnon (eds.), *Comparative Federalism and Federation*, Harvester Wheatsheaf, New York 1993, p. 5; E. Zwierzchowski, *Wprowadzenie do nauki prawa konstytucyjnego państw demokratycznych*, Katowice 1992, p. 63.

[3] P. King, 'Federation and Representation' in M. Burgess, A.-G. Gagnon (eds.), *Comparative Federalism…*, p. 96.

It is generally accepted that the principle of double representation enforces the acceptance by parliaments of federal states of a bicameral structure, in which the second chamber is supposed to guarantee representation to the constituent units. This view is sometimes accepted so uncritically that authors claim that "the existence of a second chamber in a federal state is practically inarguable," that it is "supra-systemic," or that "it is obvious and has an undoubted pandemic value."[4] The fact that the majority of federal states do have bicameral parliaments and that one of the results, if not the decisive one, of their acceptance of bicameralism was to enable the representation of the constituent units, should not in itself lead to the acceptance that "bicameralism has transformed *par excellence* into a structural characteristic of federalism itself."[5] The structural characteristics of federalism, to keep to that terminology, are not a bicameral system, but a separate representation of units of the federation in the federal parliament. This can also be realised successfully in the conditions of a unicameral legislature.[6] It is not hard to imagine practical solutions which could serve to show that federations in which only one chamber operates can also be effective.

In the Comoros Federation, which, nota bene, constitutes an example of rejection of a bicameral system in favour of unicameralism,[7] the unicameral parliament, the Union Assembly (*L'Assemblée de l'Union*) is made up of 18 members elected by general and direct elections and by 15 chosen in equal proportions (5 each) by the parliamentary assemblies of the three units of the federation. The constitution of Micronesia, too, designates two categories of members of the Congress: those elected in single-mandate districts for a two-year term, so-called "general" members, and deputies elected on the basis of state equality (art. 20), for whom the electoral district is the whole state, and whose term lasts four years. Moreover, in the second reading, which is decisive for the adoption of legislation, the members of Congress do not vote individually, but as part of state delegations (comprising both categories of

4 J. Szymanek, *Druga izba we współczesnym parlamencie. Analiza porównawcza na przykładzie europejskich państw unitarnych*, Warszawa 2005, p. 25.

5 Ibid., p. 26.

6 Preston King is one of few writers on this subject to very much emphasise this. See P. King, *Federalism and Federation*, Johns Hopkins University Press, Baltimore 1982, pp. 94-95, 140. Unicameral parliaments in federal states are also discussed by Thomas Fleiner-Gester. See T. Fleiner-Gester, 'Federalism in Australia and in Other Nations' in G. Craven (ed.), *Australian Federation. Towards the Second Century*, Melbourne University Press, Carlton (Vic.) 1992, p. 24.

7 Until 1999 the parliament of the Comoros Federation comprised two chambers: The Federal Assembly and the Senate, in which each of the federal entities was represented by 5 members. The new constitution of 2001 scrapped the bicameral parliament in favour of a unicameral Assembly of the Union. It is therefore not necessarily the case, as Eugeniusz Zwierzchowski writes, that "in federal state structures these chambers [i.e. second] constitute such a significant element of the political system that to question the sense of their existence is connected with negation of the existing territorial structure of the state, which generally means postulating converting the previous system into its opposite". E. Zwierzchowski, 'Prawnoustrojowa ewolucja drugich izb w państwach europejskich (próba syntezy)' in E. Zwierzchowski (ed.), *Izby drugie parlamentu*, Białystok 1996, p. 14.

members from each of the states), while a majority of two-thirds of the delegation is required for the law to be passed.

We can say, then, that under a system with a unicameral parliament the separate representation of units of the federation can be guaranteed above all by introduction of various categories of members, elected in various ways or for terms of varying lengths. Parliamentary procedures related to the realisation of legislative functions can also provide an effective guarantee of the results of the constituent units for the work of a unicameral federal legislature.

A further solution can be to allow the units of the federation the right to determine the formula for the structure of parliament. This type of regulation is included in the constitution of the United Arab Emirates (UAE) (art. 69). In this case it is the authorities of the constituent units (emirates) that determine to what extent, based on its make-up, the parliament – the National Federal Council (*Majlis Watani Itihad*) – will represent them. The only restriction introduced by the constitution is the prohibition of imperative mandates, resulting from art. 77.[8] For many years the members of the parliament of UAE were nominated by emirs, i.e. the heads of the executive of the units of the federation. In 2006, for the first time half of the 40 members of parliament were elected as a result of direct elections.[9]

Among the countries considered federal, unicameral parliaments also exist in Venezuela and St. Kitts and Nevis. In both cases there is no separate representation of the units of the federation in their structure. The constitution of Venezuela abandoned bicameralism in 1999, while the only reference to representation of the states in parliament can be found in art. 201, according to which members of parliament should be representatives of the people (*pueblo*) as well as the state in which they are elected. It is hard to see this as a satisfactory solution. There is no such reference in the constitution of St. Kitts and Nevis. This lack of appropriate regulation guaranteeing separate representation to the units of the federation certainly allows a question mark to be placed over the federal character of the system, especially in the case of the former country. In the case of the federation of St. Kitts and Nevis the matter is not as clear, since this is a small federation, consisting of only two units, meaning that even a lack of appropriate constitutional regulations does not have to disqualify the parliament of the country from being a federal legislature, i.e. also representing the interests of the constituent parts of the federation.[10]

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[8] Art. 77 states that a member of parliament should represent the whole federation, and not just the emirate of which he is a representative.

[9] The changes constitute the first stage of reform of the parliament; the next stages plan an increase in the number of members and introduction of free and direct elections of half of them. When this happens, the UAE parliament will join the ranks of unicameral federal legislatures in which members are distinguished by the way in which they were voted in.

[10] Two categories of members comprise the unicameral parliament of St. Kitts and Nevis: representatives, elected in general elections, and senators, appointed by the Governor General, of whom one third are nominated by the leader of the opposition, and the remaining two thirds by the premier.

Bicameralism is not, then, a precondition of a federal system. The separate representation of constituent parts can be guaranteed with success in a unicameral parliament too. It is probably not a coincidence that this type of solution can most often be found in federations which are rather small in terms of territory and size of population. In conditions of small statedom bicameralism is a much less rational solution than in federations of extensive territory, created by many entities.

Most frequently, however, federalism is associated with a bicameral legislature, in which one of the chambers ensures representation of the constituent parts in the federal parliament.[11] This is the simplest, and therefore also most popular method of guaranteeing them a separate representation. There are second chambers functioning in 18 of the 23 states generally considered to be federal. This structure of legislature was adopted in the first federation in history – the United States of America – and then in a series of others. Federalism gives a natural justification for bicameralism; in other words it is a sufficient condition for the existence of a second chamber, which legitimises its presence in the political system of a state. Federalism established an entirely new rationalisation for bicameral parliaments,[12] and without a doubt federal systems constitute a particularly favourable environment for bicameralism.[13] As a result, discussion about bicameralism as a rational form of parliamentary structure in a federal state in fact loses its raison d'être: "one can maintain that the general issues of bicameralism do not matter in a federal state, since the second chamber exercises functions that are specific to a federation."[14]

Unlike in the Comoros Federation and Micronesia, though, they are not fixed as representatives of the constituent units, as shown by the fact that the constitution does not designate the proportions in which the two islands must be represented by senators. However, it happens that specific senators are appointed owing to geographical factors. See A.L. Griffiths, 'St. Kitts and Nevis' in A.L. Griffiths (ed.), *Handbook of Federal Countries, 2002*, McGill-Queen's University Press, Montreal 2002, p. 273.

11 It is important to remember that, with federal bicameralism, even in the systemic construction of the first chamber solutions can be found which take into account the federal character of the system. The rule is that each entity of the federation has at least one seat in the first chamber guaranteed, irrespective of the size of the population, or, as in Australia, a minimum of five seats. An alternative solution is the correlation of borders of electoral districts with those of the federated units (art. 149 sec. 3 of the constitution of Switzerland) or requirement of domicile for candidates to the first chamber, which emphasises their connection to the state or province from which they are elected (in Mexico and Argentina candidates to the Chamber of Deputies must fulfil the same conditions in terms of domicile as candidates for senator – art. 55 of the constitution of Mexico and art. 45 of the constitution of Argentina).

12 D. Shell, 'The History of Bicameralism', *Journal of Legislative Studies*, Vol. 7, No. 1 (2001), p. 12.

13 S.C. Patterson, A. Mughan, 'Senates and the Theory of Bicameralism' in S.C. Patterson, A. Mughan (eds.), *Senates. Bicameralism in the Contemporary World*, Ohio State University Press, Columbus 1999, p. 10.

14 F. Koja, 'Rada Federalna w Austrii' in K. Działocha et al. (eds.), *Konstytucja w społeczeństwie obywatelskim. Księga pamiątkowa ku czci Prof. Witolda Zakrzewskiego*, Kraków 1989, p. 104. Similar: J. Czajowski, 'Dwuizbowa struktura parlamentu w państwie jednolitym' in J. Czajowski, M. Grzybowski (eds.), *Parlamenty państw europejskich*, Kraków 2005, p. 167.

When it comes to describing the formula of representation of constituent units of the federation in the second chamber, the following factors will be of decisive significance: the composition or division of seats between the constituent entities; the means by which the second chamber is constructed, where of significance is who (the federation or the entities) decides on the regulation of this material, and to what extent; the character of the representative mandate of the members sitting in the second chamber of parliament.

In terms of the composition, of prime importance is acceptance or rejection of the principle of equal representation of all entities of the federation. Of course, this principle was ultimately accepted by the American constitutional convention, although this was an issue that caused a great deal of disagreement and controversies during deliberations. Equal representation of all constituent parts is not a requirement of a federal system. This formula of distribution of seats in the second chamber of parliament is often known, though, as the classical type, as it was adopted not only by the American federation, which was the first in history, but also among the other earliest examples of the form: in Switzerland and Australia.

Out of the contemporary federal states which have a second chamber of parliament, equal representation of the constituent parts is present in its pure form in eight.[15] In two more (Malaysia, Mexico) the states are also represented in senates by an equal number of representatives, whereby in these states part of the second chamber is composed of senators elected in a different way, i.e. not on a territorial basis.[16] It appears, however, that in these cases too we can talk of equal representation of the entities of the federation, albeit weakened by the presence of deputies elected by use of a different formula. We can therefore conclude that the principle of equal representation of constituent parts is present in 10 of the 18 federal second chambers, of which exist a flawed form. This means that this principle is still the dominant formula for the division of seats between constituent parts in the second chamber of a federal parliament, although this domination is not significant.[17]

The equality of the constituent parts in a body meant to constitute their representation in a federal legislature shows and emphasises their status as equal partners

[15] Argentina, Australia, Brazil, Nigeria, Pakistan, Russia, South Africa, USA. Traditionally, the Swiss cantons also had equal representation in the Council of States. However, the constitution of 1999 abolished the previous half-cantons, raising their status to that of canton. At the same time, though, by not providing previous half-cantons with two seats in the Council (they still have the right to one representative), it introduced a distinction between cantons in terms of their representation in the second chamber. Based on the current constitution 20 cantons have the right to two seats in the Council of States, and six to one seat (art. 150 sec. 1 and 2).

[16] In Malaysia, 44 of the current 70 senators are nominated by the head of state (*Yang Di-Pertuan Agong*) on the recommendation of the premier, and 13 states are represented by two senators each. In Mexico each state elects three senators, a further three come from the federal district and 32 are elected by a proportional system, with the whole country being one electoral district.

[17] To the ten federations named we should add a further two, in which the entities of the federation are represented in an equal number but by a unicameral parliament. This would therefore give a total of 12 federal states employing the principle of equal representation of the constituent units.

within the federation.[18] Some constitutions, e.g. those of the USA and Australia, guarantee each state an inviolable right to representation equal to the other states in the Senate without its consent, in this way understanding the regulation on equal representation in the Senate as a particular procedure of change. It is important to stress that the determining factor in equal distribution of seats might be efforts to equalise all the entities of the federation not only with regard to the differences between them in the context of population, but also, for example, in terms of the level of economic development.[19] The principle of equality of the entities of a federation in federal legislature can also be displayed in parliamentary procedure. Art. 23 of the constitution of Australia does not permit the chair of the Senate to cast an additional or deciding vote in the case of a tie in votes. The justification for this is the requirement of equal representation of states in the Senate. This is because if the chair of the Senate could cast an additional vote, or if his vote were to decide on a result in the case of an undecided vote, then one state would have one of its senators operating as chair or with an additional vote (and therefore the state would have more votes than the remaining states), or would be able to settle issues in the case of a split vote.[20]

In cases where there is no principle of equality in operation, the division of seats is also not based on the proportional formula. It cannot be, since the effect of use of this formula would be to duplicate the composition of the first chamber. For this reason too the weighted system is used, in which by stipulating the number of seats to which each of the entities of the federation is entitled, the demographic aspect is considered, while introducing generally far-reaching modifications. The closest to proportionality is the model employed in the constitution of India, according to which the size of the state representations in the second chamber of the parliament (*Rajya Sabha*) is between one and 34, although the population ratio between the largest state and the smallest, entitled to one seat, is larger than 34:1. In Austria, though, the most populous land is entitled to 12 seats in the Federal Council, while the others are given as many as results from the ratio of their population to the population of the land with the greatest population, although each land has a guaranteed three seats, irrespective of whether it is entitled to this number under the aforementioned formula. The formula of distribution of votes between Länder in the German

[18] Cf. N. Aroney, 'Federal Representation and the Framers of the Australian Constitution' in G.A. Moens (ed.), *Constitutional and International Law Perspectives*, University of Queensland Press, St. Lucia 2000, p. 18. In Australia the constitutional guarantee of equal representation of the states in the Senate only covers the founder states, i.e. those which joined the federation on January 1, 1901. A newly admitted state can also receive an equal number of seats in the Senate to others, but this is dependent on the decision of the federal parliament. Note that this number is not necessarily lower than the number of seats guaranteed to the founder states – it can also be greater.

[19] See A. Żukowski, *Parlament Republiki Południowej Afryki*, Warszawa 2002, p. 15.

[20] H. Evans (ed.), *Odgers' Australian Senate Practice*, Department of the Senate, Canberra 2004, p. 219.

Bundesrat is well known.[21] Also worthy of note is the solution adopted in Canada, where in distribution of seats in the Senate is based on a principle of equality not of provinces, but of the four regions, into which the country is divided for the purposes of filling senate mandates. Because two provinces are also regions, and each of the other regions comprises four provinces, there is no concept of equality in this context.[22] The smallest province has the right to four seats, and the largest to 24, but the ratio of population between them is far in excess of 6:1.

Adoption of a balanced system can be seen as the expression of a compromise between the principle of equal treatment of entities of a federation and that of guaranteed representation corresponding to the population of each one.[23] It can also be the result of the need for special treatment of one of the constituent parts, as a result, for instance, of its ethnic and cultural separateness, as was the case in Quebec in Canada.[24]

Even when the demographic factor is considered in the composition of the second chamber, this principle continues to mean over-representation of smaller constituent parts.[25] Larger entities do indeed receive more seats in the second chamber, but not to an extent that they can dominate the composition in the way they might in the first chamber, and in fact dominate the decision-making process at the federal level[26]. This constitutes the most visible expression of compromise between the larger and smaller entities of the federation, seeming to lie at the base of every federal state. As K.C. Wheare writes, in federal states the dominant view is that "regional differences are so important that a safeguard needs to be included in the legislative process thanks to which less populated parts of the country are given by the legislature greater influences than they would deserve on the basis of population."[27]

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[21] Art. 51 sec. 1 of the Basic Law (1990) guarantees each Land at least three votes in the Federal Council. Länder with a population of over 2 million people have the right to four votes, those of over 6 million to five and over 7 million to six.

[22] After Newfoundland joined the Canadian Federation in 1949 the equality of the regions was also upset since, as a new province (as of 2001 named Newfoundland and Labrador), it became a part of one of the regions which in this situation has more seats in the Senate than all the rest.

[23] In reference to Austria: R. Thienel, 'Austriacki parlament federalny: organizacja i kompetencje', *Przegląd Prawa i Administracji*, Vol. 34 (1996), p. 20.

[24] "The Founding Fathers of the Confederation decided not to accept the principle of equal representation of individual provinces in the Senate owing to the special situation of Canada, in which one of the biggest and most populous provinces was inhabited by a cultural and linguistic minority in the country. Awarding the same number of senators to Quebec as to other, less populous provinces without large minority groups would deny this province the opportunity to effectively express the opinions of the Francophone populations." K. Complak, *Parlament Kanady*, Warszawa 1999, p. 216.

[25] See M. Russell, 'The Territorial Role of Second Chambers', *Journal of Legislative Studies*, Vol. 7, No. 1 (2001), p. 107.

[26] See T.O. Hueglin, A. Fenna, *Comparative Federalism. A Systematic Inquiry*, Broadview Press, Peterborough–Orchard Park 2006, p. 181.

[27] K.C. Wheare, *Legislative Bodies*, Bicentennial Publishing, New York 1993, p. 173.

Increasing the value of smaller parts of the federation at the cost of larger ones does mean, however, denial of the principle of equal representation of citizens, which constitutes the essence of democratic representation. The disproportions between the citizens of the various constituent parts are seen most vividly in places which employ the principle of equality of entities of the federation. California and Wyoming are each represented in the US Senate by two senators, even though the population ratio between the two states is around 66:1. In Australia the analogous ratio between New South Wales and Tasmania is 14:1, whereas the residents of each state elect 12 senators. A similar phenomenon can be found too in conditions where the balanced model is used. As an example, in the Federal Republic of Germany the representative norm in the Federal Council is 2.88 and 1.88 million for the most populous Länder, and 0.22 and 0.36 million for the least populous[28]. The balanced system constitutes an attempt to unify principles that are essentially difficult to unify, of equality of citizens and equality of constituent parts. However, as these principles are conflicting, the system fails to deliver an entirely satisfactory solution in this matter. Characteristic of federal systems, therefore, is sacrifice, at least to a certain degree, of equality of all citizens in favour of guarantee, again at least to a certain degree, of equality of the territorial communities which make up the federation. It is important to bear in mind, however, that this is a vital concession, which serves the overriding goal that is maintenance of a stable union of differing entities, something which must, for various reasons, lie in the interest of all.[29]

The second chambers of seven federations are derived from general and direct elections,[30] in five, the choice is made by representative bodies of the constituent parts,[31] in Germany the Bundesrat is composed of members of state parliaments, which appoint and dismiss them, while in Canada it is the Governor General who nominates senators on the recommendation of the premier (meaning that the head of the federal government decides on the composition of the Senate). In four federal countries various types of mixed system operate. In Malaysia some of the members of the Senate (currently 44) are nominated by the head of state on the recommendation of the federal premier, while the remaining 26 are elected by state parliaments (two each). From each of the entities of the Russian Federation, two members enter the Federal Council, one of whom is elected by the legislature and the other by the executive of each of the entities.[32] In South Africa,

[28] P. Czarny, *Bundesrat. Między niemiecką tradycją a europejską przyszłością*, Warszawa 2000, p. 66.

[29] Cf. P. King, 'Federation and Representation', p. 101.

[30] Argentina, Australia, Brazil, Mexico, Nigeria, Switzerland, USA.

[31] Austria, Bosnia and Herzegovina, Ethiopia, India, Pakistan. In the last two countries some of the members of the second chambers are appointed in a different way. However, given that they represent a clear minority in the makeup of the two chambers, we can state that both countries may be counted among those federations in which the second chambers are constituted by the parliaments of the constituent units.

[32] The decree on appointment of a member of the Council by the executive must be confirmed by the legislature of the federal entity, and with a 2/3 qualified majority. Until 2000 the heads of the legislature and executive of each of the entities were *ex officio* members of the Council.

the delegation of a province in the National Council of Provinces, the second chamber of the federal parliament, is formed by the premier of the province (or a member of the provincial legislature delegated by him), three special delegates elected by the provincial legislature from its members, and six permanent delegates, who are also elected by the representative body of the province. The way in which the Belgian Senate is composed is especially complicated: it has to ensure representation not only of the three regions which make up the federation, but also of the three language groups. Just over a half of Belgian senators are elected in general elections, some are chosen by the Council of the three language communities, and some become members of the second chamber by cooption.[33]

It is clear, therefore, that just as often as they are elected directly by the voters, members of the second chamber are elected by the parliaments of the entities of a federation, either as the only, dominant (Russia, South Africa) or the minor (Belgium, Malaysia) actor in this process. Far less frequently do the executives of the entities of a federation take part in the composition of the second chamber: in two countries is this the case, partly (Malaysia) or wholly (Canada).

General and direct elections seem to be a form of recompense for the deformation in terms of equality of citizens resulting from the principle of equal representation of constituent parts, although in the United States they were only introduced in 1913 and in Switzerland the members of the Council of States are elected in this way in all cantons since as recently as 1977. In the latter case this results from the fact that the right to alter the mode of elections to the second chamber has traditionally been, and continues to be the domain of canton law (at present the entitlements of cantons in this area are guaranteed by art. 150 sec. 3 of the federal constitution). For this reason, for a long time the method of alteration in the various cantons varied, with at first in the majority of them parliaments electing the deputies.[34] Today, as well, there are differences between the cantons in terms of the date of elections, regulations governing access to passive and active voting rights and the formula used for voting.[35] The cantons' legislation also determines the length of terms served by deputies from the various cantons, which is at present four years in all of them.

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[33] The procedure of composition of the Senate is regulated in detail by art. 67 and 68 of the constitution. See also A. Młynarska-Sobaczewska, 'Prawo wyborcze do parlamentu Królestwa Belgii' in S. Grabowska, K. Składowski (eds.), *Prawo wyborcze do parlamentu w wybranych państwach europejskich*, Zakamycze, Kraków 2006, pp. 97-98; F. Gorlé, 'Les Assemblées Parlamentaires en Belgique selon la constitution du 17 février 1994' in K. Iwanicka, M. Skowronek, K. Stembrowicz (eds.), *Parlament, prawo, ludzie. Studia ofiarowane Profesorowi Juliuszowi Bardachowi w sześćdziesięciolecie pracy twórczej*, Warszawa 1996, p. 81.

[34] J.F. Aubert, 'Parlament a Zgromadzenie Federalne' in *Parlament Szwajcarii*, trans. by B. Banaszak, Warszawa 2000, p. 23.

[35] At present, a majority system, often the French version, applies in all cantons. In one canton, though (Jura), a proportional system is used, and in one the canton assembly (*Landsgemeinde*), i.e. a meeting of all voters of the canton, makes the choice. P. Sarnecki, 'Prawo wyborcze do parlamentu Konfederacji Szwajcarskiej' in S. Grabowska, K. Składowski (eds.), *Prawo wyborcze...*, pp. 265-266.

The solution in place in Switzerland is exceptional (as we saw previously, only the constitution of the UAE features similar regulations),[36] with a rule that the way in which the second chamber is composed, like the length of terms of office, is determined in the regulations of the federal constitution. It is worth noting, however, that in Ethiopia the constitution entitles the state parliaments to introduce direct elections (art. 61 sec. 3), while in Malaysia direct elections can be introduced by the federal parliament on its own (art. 45 sec. 4 of the constitution). In the former case this is a concession on behalf of the states, and in the latter of course it is the opposite, as it weakens their position. In both countries, however, any other change, other than introduction of a general election (e.g. involving returning to the state executive the right to form the Senate), requires an alteration of the constitution. In four countries, though, the length of the term of office is not fixed in the federal constitution but matches the term of the parliamentary bodies of the entities of the federation selecting the members of the second chamber (Austria, Russia, South Africa – only permanent delegates)[37] or otherwise is not fixed at all, as in the case of the German Bundesrat and the special delegates to the National Council of Provinces in South Africa.

These exceptions do not, though, change the general picture, which shows that the way in which second chambers are composed is almost always the exclusive domain of the federal constitutions. This solution is understandable and in all respects rational, as it is the national bodies of the federation that are in question, and this is all the more the case as the autonomy of the entities is sufficiently protected, since their participation is required to make a change to the constitution.[38] It is important to emphasise, though, that the solutions in place in Switzerland clearly express and stress the status of the Council of States as the chamber which is supposed to represent the cantons in the federal parliament, in this way raising the status of the principle of federalism as one of the key elements of the state system.

The formula for the composition of the second chamber is decisive in the model of representation that is realised in it. In the case of direct elections the object of the representation of the second chamber of parliament is the residents of the entities of the federation. In other models it is most often the bodies of authority of these entities, legislative or executive or both depending on the solutions adopted. Within a general formula speaking of representation of the constituent units in the federal

[36] An analogous regulation was also in force in the Yugoslav federation founded in 1992. The designation of the means of constituting the second chamber of the federal parliament, the Chamber of the Republic (*Vece Republik*) was up to the legislative branch of the republics which constituted the republic. In practice the members of the Chamber were elected by their parliaments. See M. Crnobrnja, 'Yugoslavia' in A.L. Griffiths (ed.), *Handbook of Federal…*, p. 378, 383.

[37] The term of office of permanent delegates may be shortened as a result of changes in the party composition in the provincial legislature during the term. See art. 61 sec. 2 b point Ii of the federal constitution.

[38] In Austria, regulations on the composition and structure of the Federal Council are fortified by an additional special alteration procedure (art. 35 sec. 4). Some of the regulations in force in this area in the constitutions of Australia and the USA have already been mentioned.

parliaments as a requirement of a federal system, then, there is room for many varying solutions. The choice of which is adopted determines which of the various models of representation is used.

Although the second chambers of parliament fulfil a range of functions, a particular role played by the chambers of federal parliaments is to represent the interests of the constituent parts of the federation.[39] We can even assume that, in a federal state and a federal parliamentary system, this function takes centre stage.[40] As a result, a particular significance is taken on in the linking of members of the second chambers with the territorial communities whose interests they are to represent in the federal parliament. The form of these links, and how tightly they are fixed, is decisive not only in the specific case of the model of the representative mandate, but also for the effectiveness of the second chamber in fulfilling its basic function, i.e. representing the interests of the federated units and acting on behalf of the consideration of these interests in the federal legislative process.

The most important indicator of the level of connection between the federal entity and its representation is the way in which the composition of the second chamber is decided. The connection is strongest when the representation of the federal entity is shaped by its governmental bodies, or at least with their participation. It is no coincidence that this way of forming the composition of second chambers is the dominant model in federal states. Direct elections weaken this relationship considerably, and it is of course completely lacking if the members of the second chamber are appointed by the federal authorities.

In cases where the members of second chambers are elected by direct elections, the authorities of entities of the federation can gain an influence in the composition of the second chamber in case of a seat becoming vacated. This form of filling vacancies is envisaged in the constitutions of the United States and Australia.[41] In the former case supplementary elections are called for the state whose seat in the Senate is vacated, but the legislature of the state can permit the governor to make a temporary nomination until such time as the seat is filled by elections. In Australia, in accordance with art. 15 of the constitution, it is up to the state parliament to fill vacant

[39] In many other unitary states too, the members of the second chamber represent the territorial units of the state (France, Spain, Italy) or the composition of the second chamber is made up based on territory. None the less, only in a federal system does the role of second chambers as territorial representation have such significance for the political system.

[40] In the process of creation of most, if not all federal states, the question of representation of the constituent parts in the federal legislature has awakened the most emotion. In this area too much controversy has ensued, such as the struggle in the US Senate at the time of the Philadelphia Convention, which almost caused it to be abandoned. This clearly shows the significance attached to representation of federated units in the federal parliament as a guarantee of the defence of their interests.

[41] Also in the case of the unicameral parliament of Micronesia it is up to the state executive to fill vacancies, and only when less than 12 months remain to the end of the term of office. The state executives then have the right to fill all vacant seats, regardless of whether they are those of "normal" members of Congress or of those elected by art. 20 of the constitution.

seats. If the vacancy arises in the recess between sessions, the state governor can make a temporary nomination at the request of the state executive.[42] In Brazil, on the other hand, in order to avoid this kind of situation each senator is elected with two understudies, who have the right to take his place should it become vacant.[43] Vice-senators are also elected in Mexico (art. 57). In Argentina, meanwhile, the constitution orders that the executive of the given province immediately call supplementary elections in the case of vacation of a seat in the Senate (art. 62).

The majority of federal constitutions do not make reference to the possibility of combining a seat in the second chamber of the federal parliament with a position in the government of the federal entities. Only in Belgium, Germany, Russia and South Africa do the constitutions make a combination of positions in the executive and/or legislative of the constituent units with seats in the Senate, Bundesrat, Council of the Federation and National Council of Provinces compulsory. While in Germany and Russia this requirement concerns all members of the Bundesrat and Council of the Federation respectively, (art. 51 sec. 3 of the German Basic Law, art. 95 sec. 2 of the Russian constitution), in South Africa it applies only to certain of the members of the Council – special delegates (art. 61 sec. 4). For the remaining members (permanent delegates), meanwhile, the constitution prohibits combination of seats. In the case of election of a member of the provincial legislature to the National Council of Provinces, his place in the legislature expires (art. 62 sec. 2). As for Belgium, combination of seats only applies to senators elected by the Councils of the language communities.

In this way the Bundesrat is formed by the members of the executives of the Länder, while in Belgium some of the members of the Senate are at the same time members of the parliaments of the language communities. The Russian Council of the Federation and National Council of Provinces, on the other hand, is made up of both members of the executive and legislative authorities of the constituent parts, in the former case proportionally (one member from each authority), and in the latter with a clear advantage to the legislative factor, since three out of the four permanent delegates are elected from the members of the provincial legislature and only the premier is a member of the provincial executive.

Combination of positions in the government of the constituent parts with a senatorial seat is constitutionally inadmissible only in a few federations. A clear prohibition of combination of a parliamentary seat with any public office or elected position is given by the constitution of Brazil (art. 54 IId). The constitution of Austria bans members of the Federal Council from being members of a state parliament, but only

[42] In practice seats are vacated relatively frequently. Between November 1977 and September 2007 the state authorities had to fill vacant seats some 61 times, i.e. an average of over two occasions per year. On 48 occasions the state parliaments made the choice, the governor appointed 12 senators, and in one case the seat was not filled.

[43] Art. 56 II § 1. Even in cases where there is no replacement, the state authorities are not entitled to fill the vacant seat. In this situation the constitution foresees by-elections, but only when more than 15 months remain to the end of the terms of office (§ 2).

that which elects them (art. 35 sec. 2), while there is nothing to stop them from being members of another state parliament.[44]

In total, only in six federations does the constitution refer to this issue. Where there is no appropriate constitutional regulation, introducing any prohibitions in the scope of combination of functions depends on the way in which the second chamber is composed. In cases where members are elected by the parliaments of the federal entities, it is they who rule on this issue. In those states where the composition of the second chamber is decided by direct elections or the nominations of the federal authorities, it is these bodies that are responsible for introducing any prohibitions on combination of functions. In this way in Australia a ban on members of a state parliament taking up a senatorial seat is provided by federal regulations on the holding of elections (Commonwealth Electoral Act 1918, art. 164). In Switzerland, meanwhile, establishment of regulations in the combination of a seat in the Council of States with a function in regional government is part of canton law. Regulations forbidding this kind of practice are in place today in the majority of cantons.[45]

Particularly in the case of direct elections, a means to ensure at least minimal ties between the federal entity and its representative is the requirement of domicile, which can assume various, more and less rigorous, forms. It might demand candidates to the second chamber to have been born in the province which they are to represent (Argentina), or at least in the neighbouring state (Mexico), or to reside there permanently (Brazil, UAE) or only at the time of the election (USA), possibly for a length of time stated in the constitution (two years immediately before the elections in Argentina, six months in Mexico; in the former case this requirement is an alternative to birth in the province, while in the latter a candidate must fulfil both conditions). The question of domicile is handled differently again in India, where article 3 of the Representation of the People Act of 1951 sets out that no one who is not a voter in parliamentary elections in a state can represent that state in Rajya Sabha.[46] The requirement of domicile is present not only in the case of direct elections.[47] In a situation where the federal entities are responsible for deciding the composition of the second chamber, this question is settled in their constitutions or acts of a lower government.[48]

It may seem that the most effective way of affiliating a representative with a federal entity is an imperative mandate, but this is only used in four federal parliaments, and in its complete form only in the German Bundesrat. Committing members of

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[44] R. Thienel, 'Austriacki parlament…', p. 21.

[45] A. Huber-Hotz, 'System dwuizbowy – model i rzeczywistość' in *Parlament Szwajcarii*, p. 117.

[46] N.B. in practice this regulation is constantly ignored. See A.G. Noorani, *Constitutional Questions in India. The President, Parliament and the States*, Oxford University Press, New Delhi–New York 2000, pp. 138-139.

[47] Canadian senators are required to reside in the province to be represented in the Senate.

[48] The solutions employed in Austria are typical. The federal constitution requires that members of the Council have the right of election to the Land parliament, conditions for which are determined by Land law.

the Bundesrat to binding instructions does not result directly from any regulation of the Basic Law, but this kind of mandate is indirectly suggested above all by the possibility of appeal of members through Länder governments and by the requirement of universal voting by Länder delegations, but also by other constitutional regulations.[49] Binding instructions and recommendations are made to the members of the Bundesrat by the government,[50] but we should note that in constitutional practice the principle of the binding mandate has been considerably toned down. It is important to remember that the Basic Law does not insist that instructions be given, while in political practice heads of government also have a certain freedom in terms of ignoring instructions, if the requirements of the changing political situation dictate such behaviour.[51]

Similar mechanisms, which are in fact based on the German regulations, are envisaged by the constitution of South Africa. Each provincial delegation in the National Council of Provinces has one vote, cast in its name by the premier, although this method of voting only takes place in cases concerning the provinces. In all other issues, which, notably, are far fewer in number, the members of the Council vote individually. It is characteristic that, in accordance with the constitution, individual voting of members of delegations is the exception. The rule is voting by province, as envisaged by art. 65 sec. 1a of the constitution. When votes are given by the provinces, the voting method is designated by the instructions of the provincial legislatures.[52] The constitution of South Africa also permits permanent delegates of the National Council of Provinces to be dismissed, although this right is not held by the provincial legislature, but by the party which nominated the delegate in question (art. 62 sec. 4c & d).

Elements of the imperative mandate also appear in the Russian Council of the Federation and in the Nigerian Senate, in the form of the possibility of dismissing a representative during his term of office. In Russia, the decision is taken by the au-

[49] As Piotr Czarny writes, "In general we can state that the construction of the imperative mandate results from historical interpretation and from the entirety of legal-positive solutions, and not from one specific regulation of the Basic Law." P. Czarny, *Bundesrat…*, p. 61.

[50] B. Banaszak, 'Introduction' in *Konstytucja Niemiec*, Warszawa 2008, p. 24.

[51] P. Czarny, *Bundesrat…*, p. 63.

[52] The instructions of provincial legislatures as a method of determining the voting of delegations are sanctioned by art. 65 sec. 2 of the constitution, which also foresees uniform regulation of this question in federal law. Given the lack of such a law, in terms of instructions various practices have developed in the various provinces. It is common for instructions to be given individually for specific draft legislation, which is handled by the National Council of Provinces. Some legislatures give the members of the delegations a certain freedom when it comes to deciding on the manner of voting, while others forbid any deviation from the authorisation contained in instruction without prior consultation with the legislature of the province. In fact, the legislatures of the provinces decide on the way in which the delegation votes in all matters concerning the province. See C. Murray, 'Designing Parliament for Cooperative Federalism: South Africa's National Council of Provinces' in F.L. Seidle, D.C. Docherty (eds.), *Reforming Parliamentary Democracy*, McGill-Queen's University Press, Montreal–Ithaca 2003, note 10, p. 219.

thorities of the federal entities responsible for nominating particular members,[53] while in Nigeria dismissal takes place as the result of a referendum called by the electoral committee following the submission to it of an official petition expressing a vote of no confidence in the representative from the voters of his district, signed by no fewer than half of the people registered to vote in that district (art. 69 of the federal constitution). It is worth noting, though, that members of the first chamber of parliament can also be dismissed by a similar procedure, meaning that "recall" in Nigeria does not have entirely federalist overtones. This is all the more the case as for the purposes of the election of senators states are divided into three electoral districts, and the right to dismiss representatives is only held by voters from the district, not those of the whole state.

A number of federal constitutions, on the other hand, feature a clear prohibition on imperative mandate. As examples we can cite Austria (art. 56 sec. 1), Switzerland (art. 161) and the Comoros Federation (art. 22).

As mentioned earlier, second chambers of federal parliaments realise a different model of representation depending on the formula of their composition. None the less, particularly characteristic is the fact that in most cases federal constitutions, irrespective of the method of composition of the second chamber, point to the constituent parts of the federation as entities represented in the second chamber. Art. 34 sec. 1 of the constitution of Austria asserts simply that the Länder are represented in the Federal Council, while according to art. 80 sec. 1b of the constitution of India the Rajya Sabha is made up, apart from people nominated by the president, of "representatives of the states and territories of the Union," and in Canada art. 22 of the Constitutional Act of 1867 refers to the representation of the provinces in the Senate. Similar formulations are in use in the constitutions of South Africa ("the National Council of Provinces represents the provinces," art. 42 sec. 4), Switzerland ("the Council of the Cantons consists of 46 deputies of cantons," art. 150 sec. 1). Brazil ("the Federal Senate consists of representatives of the states and the Federal District", art. 46) and Australia ("the Senate will consist of senators from every state," art. 7).

The German Basic Law does not designate Länder as subjects of representation, but rather states that through the Bundesrat they work together in the legislation and administration of the Federation as well as in European Union matters. However, although "from a legal point of view, taking into account the composition of the Bundesrat and way in which it is formed, it is incorrect to describe it as a chamber of lands of the union," "for the whole body of work of the Bundesrat this description is better than any other which might be used."[54] The fact that these Länder are the sub-

[53] In 2001-2004 the authorities of the federal entities could easily dismiss their representatives, something which they did relatively often. As of December 2004, the dismissal procedure has to be initiated by the chair of the Council of the Federation. This new regulation weakens the control on the members of the Council from the bodies electing them. Since the change no deputies to the Council of the Federation have been dismissed.

[54] R. Herzog, 'Pozycja Bundesratu w demokratycznym państwie federalnym' in J. Isensee, P. Kirchhof (eds.), *Parlament Republiki Federalnej Niemiec*, trans. by B. Banaszak, Warszawa 1995, p. 186.

ject of representation in the Bundesrat is also suggested by the way of voting in the Council envisaged by the Basic Law. Uniform voting expresses the "will" of the Land, which must be one, not various.[55] As mentioned above, uniform voting is also the basic method employed in the National Council of Provinces in South Africa. While in Germany the Länder have varying numbers of votes, though, in South Africa each province has just one.

In other constitutions which do not stress the federation as being the entity represented in the second chamber, a completely different meaning of representation in the two chambers can be noticed. This can be seen particularly clearly in the constitution of Mexico, which only describes members of the Chamber of Deputies as representatives of the Nation (representantes de la *Nación,* art. 51).[56] The words of the American constitution, on the other hand, are not so clear, although when we take into account historical circumstances and the fact that initially it was the senators that elected the state legislature, we can assert without great risk that the Senate was to be the representation of the States as territorial communities, and the connection of representation of states and election of senators by the state legislature designated the senators as "ambassadors" of the states in Congress.[57] The historical evolution of the Senate, which we will discuss later, crowned by the introduction of direct elections of senators, to a significant degree changed the perception of the Senate. Similar remarks can be made in reference to the Senate of Argentina, whose members have been elected in general elections only since 2001.

A constitutional declaration naming a state, land or province as a collective entity represented in the second chamber is consolidated by the fact that, for the purposes of an election of deputies the constituent parts are not divided into electoral districts. In this way elected members of parliament represent the whole constituent unit of the federation, and not only part of it. Out of the seven federations in which the second chambers are constituted by general and direct elections, only in Nigeria does the constitution divide states into three electoral districts for the purposes of election of senators (art. 71 a). In other countries the requirement of election of all representatives of the state, province etc. by the sum of the people is formulated expressis verbis in the federal constitution (art. 54 of the constitution of Argentina, art. 7 of that of Australia) or results from one of the articles in an unambiguous way

[55] Cf. E. Zwierzchowski, 'Rada Federalna Republiki Federalnej Niemiec' in E. Zwierzchowski (ed.), *Izby drugie…*, pp. 183-184.

[56] It is impossible to agree with J. Czajowski, according to whom art. 51 means that "the deputies and senators are representatives of the people" (J. Czajowski, *Kongres Generalny Meksykańskich Stanów Zjednoczonych*, Warszawa 2002, p. 33). Firstly, art. 51, typically, does not contain mention of senators, and secondly deputies are described in it as "representatives of the Nation", not "the people". As the constitution uses both terms, they can not be used interchangeably.

[57] R.A. Baker, *The Senate of the United States. A Bicentennial History*, Robert E. Krieger Publishing Company, Malabar 1988, p. 8. Similar: B. Sinclair, 'Coequal Partner: The U.S. Senate' in S.C. Patterson, A. Mughan (ed.), *Senates…*, p. 34.

(Brazil, Mexico, USA).[58] In the case of Switzerland decision in this question, as in a number of others connected to the composition of the Council of States, rests with canton law. At present all cantons form an electoral district for the purposes of election of councillors.

If uniform voting is an argument for the thesis that the constituent units are the entities represented in the second chamber, and emphasises the connection between representatives and the federal entity, then the constitutional prohibition on individual voting clearly shows a desire to weaken this link, and thereby also the role of the second chamber as a representation of the interests of the constituent units. A regulation appears in the American constitution, and one modelled on it in that of Argentina, which clearly endows each senator with one vote, and this was meant to weaken the construction whereby they might present the uniform representative view of the state.[59]

Of course, in the vast majority of federal parliaments representatives of federated units vote individually. None the less, as a rule this is not emphasised as decidedly as in the American and Argentinian constitutions. Although there is no qualitative difference, then, the principle is underscored that representation in the Senates of these countries is individual in character, and that there is no room for expression of the uniform "will" of the entities of the federation.

An important question is whether designating of the constituent units as the entity represented in the second chamber bears any practical consequences. Although this type of representation is traditionally seen as one of the elements of the broad perception of an imperative mandate,[60] in most of the states discussed here it does not have any consequences, but remains in the scope of constitutional declarations.[61] This is the case above all because this declaration is not accompanied by mecha-

[58] Since the constitutions of these countries state that senators represent states, and furthermore are elected by their inhabitants, there can be no doubt that, although the terms of the constitution do not clearly establish this, the representatives of states have the right to vote for all senators representing them in the federal legislature. Cf. J. Czajowski, *Kongres Generalny…*, p. 20; Z. Kiełmiński, *Kongres Stanów Zjednoczonych Ameryki*, Warszawa 1994, p. 11; J. Spyra, *Kongres Narodowy Federacyjnej Republiki Brazylii*, Warszawa 1999, p. 15.

[59] J. Jaskiernia, 'Funkcje dwuizbowości Kongresu w systemie ustrojowym USA', *Państwo i Prawo*, Issue 3 (1991), p. 59.

[60] J. Karp states that the very formulation of art. 86 of the 1992 constitution of the Federation of Yugoslavia, designating members of the second chamber as representatives of the republic in which they were elected, allows their mandate to be described as particularistic, as opposed to the universal mandate of the members of the first chamber, who were to represent the whole Yugoslav nation. See J. Karp, 'Parlamentaryzm byłej Jugosławii oraz Serbii i Czarnogóry' in J. Czajowski, M. Grzybowski (eds.), *Parlamenty…*, p. 195.

[61] Characteristic here is the position of the Swiss doctrine, established on the basis of the previous basic law, which unequivocally stated that in spite of the various descriptions f the constitution "the relationship with representation in the two chambers does not differ. Both chambers are federal bodies, and, despite the different ways they are formed, represent the general interests of the whole country." Z. Czeszejko-Sochacki, 'Rada Kantonów Konfederacji Szwajcarskiej' in E. Zwierzchowski (ed.), *Izby drugie…*, p. 244.

nisms which are able to make it reality. However, as Paweł Sarnecki rightly notes in his analysis of the case of the Austrian Federal Council, if the federal constitution "states clearly that Länder are represented in the Federal Council… it would be entirely understandable to equip the Land parliaments, and therefore the factor that elects 'federal councils,' with the right also to determine their approach, meaning an appropriate understanding of the Länder's interests in the forum of the Council."[62] Similar remarks might be made in reference to other second chambers, especially those whose members are elected by the authorities of the entities of the federation, and also those which are constituted by means of general elections. If the constitution indicates that the entity represented in the second chamber is a state, province or land this type of declaration should lead to appropriate consequences. This is because it indicates that the representative mandate of members of the second chambers is different from that of members of parliament entering the first chambers. They are not elected to represent the interests of the voters or citizens, but only those of some of them, i.e. those residing in the same constituent part of the federation as them. In this way, senators designated by the various states or provinces who begin activities in the parliamentary forum or voting in a particular way should bear in mind the interests of the federal entities that they represent. While the role of the second chamber in a federal state is to represent the interests of the constituent units, in a federal parliament the problem of who is entitled to decide what the interests are becomes a key issue. It would seem natural for this to be the authorities of the states, provinces or cantons. Their functions cannot, after all, be reduced entirely to the internal sphere of the federated units, but must also encompass the external dimension. In other words, the authorities of the entities of the federation are elected also to represent their citizens in respect to the federal authorities. In this way the principle of double representation can be realised in the most appropriate manner. The point of a separate representation for the constituent parts in the federal parliament is not only to defend the principle of federalism itself,[63] but to ensure joint participation in the construction of the decisions of the federal authorities, and participation of the distinct territorial communities in expressing the will of the state federation. It is for this reason that it appears that in a federal bicameral system a natural model of parliamentary mandate in the second chamber is imperative mandate. As Meg Russell points out, institutional connection of members of second chambers with the authorities of the constituent parts of the federation would bring with it the additional advantage of enabling correlation of policies conducted on the two levels of government.[64]

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62 P. Sarnecki, 'Rada Federalna Republiki Austrii' in E. Zwierzchowski (ed.), *Izby drugie…*, pp. 72-73.

63 It is impossible, then, to fully share the view of J. Szymanek, according to whom federal bicameralism "has a clearly defined sense in the form of representation of the constituent parts of a unified country, and therefore of defence of the very principle of federalism." J. Szymanek, 'Dwuizbowość parlamentu w europejskich systemach politycznych', *Studia Prawnicze*, Issues 3-4 (2000), p. 60.

64 M. Russell, 'The Territorial…', p. 112.

The formation of a second chamber of federal parliament via general elections by breaking the institutional connection between the authorities of the federal entities and their representatives in the federal legislature causes two competing centres of representation of these entities to arise. At the same time a situation arises whereby the authorities of the federal entities expressing their will to represent the interests of those entities to the federal authorities do not dispose of appropriate constitutional means, while members of the second chambers, who are suitably secured constitutionally, are not effective mouthpieces of these interests, especially because their activities in parliament are stimulated above all by party affiliation, and not territorial affiliation.

From this point of view, the most desirable (i.e. in accordance with the resolutions of the federal system) means of creation of the composition of the second chamber of a federal parliament is the election of its members by the authorities of the federal entities, and possibly, like in Switzerland, leaving it up to them to decide on the composition of the second chamber of its representatives. In this kind of situation there is no hint of competition in terms of representation of cantons to the federation, since the canton authorities voluntarily withdraw from fulfilling this function, while at the same time having the chance of a stronger connection of the representatives of the canton with its governmental bodies if they decide that they insufficiently represent canton interests in the Council.

The relationship of the representation of the entities of the federation and its authorities through the process of composition of the second chamber is not sufficient condition, but it is vital for a real representation of the interests of the constituent parts in the federal parliament. Direct elections, as shown by the experiences of those federations which constitute the second chamber in this way, almost always result in the domination of party divides, in this way weakening the character of the second chamber as a "federal" chamber in which the interest of the constituent units are supposed to be represented. In some cases, incidentally, this is the intention of the introduction of direct elections, such as in Brazil, where they were supposed to be a way to reduce the power of the state governors and weaken their influence on the federal authorities.

A consequence of direct elections is to break the institutional link between the federal entity and its representatives in the federal parliament. Elections, however, suit the activeness of political parties. In this way, in second chambers formed thus, divisions occur much more often on party lines than owing to geographical borders. Significant here is an opinion expressed by an Australian historian, just 12 years after the founding of the Australian federation commenting on the practical functioning of the Senate: "There never was before, and, we expect, never will be [in parliament] a division in opinions by state borders; and the establishment of the Senate as a defence of state interests appears now (…) to be an unnecessary means of caution."[65]

[65] B.R. Wise, *The Making of the Australian Commonwealth, 1889-1900. A Stage in the Growth of the Empire*, Longmans, Green and Co., London–New York–Bombay–Calcutta 1913, p. 248.

The election of members of second chambers by the governments of the constituent units is not in itself, though, a sufficient guarantee that they will in reality represent their interests in the federal legislature. For this to be the case, the link must have a significantly deeper character, and its most important facet must be connection to the representative by an imperative mandate. Even when members of the second chamber are elected by the parliaments of the federal entities, there is no guarantee that representatives chosen in this way will realise the interests of the constituent parts, if they are not bound by instructions and if the bodies appointing them do not have appropriate sanctions with which they can force them to follow these instructions.

The history of the American Senate can be instructive in this field. As mentioned earlier, as a result of the equal representation of the states and the appointment of senators by the state legislatures, it was perceived as an instrument of influence of the states on the federal authorities, and the senators were expected to act as a kind of ambassador of their state in Congress. Right up to 1913, when an amendment to the constitution introduced direct election of senators, the legislatures making their appointment at the same time passed an instruction that contained a traditional formula obliging the senator to vote in an appropriate way in the Senate ("Be it resolved that our Senators in Congress are hereby instructed…"). However, as a result of the lack of sanction to ensure adherence to these instructions, with time very few senators took them into account at all. The only sanctions the legislatures had at their disposal were to refrain from re-election or force the resignation of the senator in question, but the effectiveness of these methods was very much limited.[66] Efforts at the 1st and 8th Congress to introduce to the federal constitution the institution of recall of senators proved fruitless. In addition, the emancipation of senators from the influences of state legislatures also led to changes in the way they were elected. From the 1930s, candidates for senator began to run a rudimentary election campaign, which would precede the formal decision of the legislature, serving to show which candidates had the greatest support among the inhabitants of the state. With time, state legislatures began to respect the results of pre-elections or electoral conventions, as a result of which their influence on the choice of senators became illusory. The culmination of this process was the introduction of the 17th Amendment, direct election of senators in all states.

These two factors, i.e. the free mandate of senators and the removal of the right to their election for state legislatures, meant that the Senate did not become a tool by which the states could control the decisions of the federal authorities. Senators, liberated relatively early on from the influence of state legislatures, were themselves

[66] The term of office of senators was significantly shorter than that of the state legislatures, thus guaranteeing them greater independence. Resignation, meanwhile, was honourable conduct, and became rarer as the prestige of the Senate grew. It was often recorded in the first half of the 19th century, the last occasion being in 1846. See W.H. Riker, 'The Senate and American Federalism' in S.C. Patterson (ed.), *American Legislative Behaviour*, D. Van Nostrand Company Inc., Princeton 1968, pp. 30-35.

responsible for defining their role as members of Congress,[67] and the Senate itself did not become a "chamber of states," but with time became to a greater degree a federal entity than the House of Representatives.

Criticism of second chambers in federal states is very often connected to a lack of ability to effectively represent the interests of the entities of the federation. This results especially from the way in which they are constituted, which does not provide the members of second chambers with an appropriate legitimacy to represent the states or provinces, or causes domination of second chambers by party-political divisions. The first argument is illustrated by the examples of Canada and Malaysia, in which all (Canada) or the majority of members of the second chambers are appointed by the federal authorities. As a result, in these countries even the composition of the second chambers effectively prevents the members from fulfilling their function of representing the provinces and states adequately.[68] It is characteristic that in the case of Malaysia the number of members of the Dewan Negara stemming from appointment grew, meaning that the federal premier, who in fact decided on these nominations, obtained an ever greater influence in the second chamber.[69]

The domination of party divides is the rule in places where the second chamber is elected by general elections[70]. The role of political parties is shown clearly by the system for electing of senators in Argentina and Mexico. In the former case, a semi-proportional system operates in elections to the Senate, i.e. voters vote for a party list, while the party or coalition that receives the highest number of votes receives two seats, and that which receives the second highest number receives the third (art. 54[71]). In Mexico two senators are elected by a simple majority system, and one seat in each state goes to the party whose candidates come second in terms of number of votes (art. 56).

Similar phenomena can also be seen, though, in those countries where election of members of chambers is carried out by the parliaments of the constituent ele-

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67 Cf. B. Sinclair, 'Coequal Partner…', pp. 34-35.

68 See e.g. D. Roblin, 'The Case for an Elected Senate', *Canadian Parliamentary Review*, Vol. 5, No. 3 (1982), p. 8; A. Harding, *Law, Government and the Constitution in Malaysia*, Kluwer Law International, Hague–London–Boston 1996, p. 96.

69 D.A. Johnson, A. Milner, 'Westminster Implanted: The Malaysian Experience' in H. Patapan, J. Wanna, P. Weller (eds.), *Westminster Legacies. Democracy and Responsible Government in Asia and the Pacific*, University of New South Wales Press, Sydney 2005, p. 93.

70 In making such a general conclusion, we must declare two reservations. Owing to the peculiarities of the organisation of American and Swiss political parties, the individual members of the US Senate enjoy much independence and party discipline is very much restricted, while the members of the Council of States are much more closely bound to their canton than the whole federation, as a result of the high degree of independence of canton party organisations.

71 See P. Uziębło, 'Wybrane zagadnienia prawa wyborczego Ameryki Południowej (po przemianach demokratycznych końca XX i początku XXI wieku i ich wpływ na system rządów)' in T. Mołdawa, J. Szymanek (eds.), *Systemy rządów. Dylematy konstytucyjnej regulacji i praktycznej funkcjonalności*, Warszawa 2007, pp. 164-165.

ments. The standard examples of federations in which this is the case are Austria, South Africa and India. In the first case, the requirement in the federal constitution that at least one seat be given to the second largest party in the national parliament even suggests a decisive role for political parties in the appointment of members in the Federal Council.[72]

The participation of political parties in filling senatorial seats is also handled by the regulations on the means of filling vacant seats in the Australian Senate. Although, as has been shown, competence in this field belongs to the state authorities, according to art. 15 of the constitution, they must if possible appoint to the Senate a person from the same party as that of the senator vacating the seat. It is characteristic that the original regulation, which provided state legislatures with complete freedom in this field, was changed in 1977, after the traditional convention, which in spite of a lack of legal requirements dictated that vacant seats be filled with people from the same party, was broken several times by some of the state parliaments.[73]

The cases cited here, as well as the role mentioned earlier of the parties in the composition of the National Council of Provinces in South Africa, demonstrate the constitutionally required participation of parties in the creation of second parliamentary chambers in federal states. In other federations, the leading role of political parties in the process of composition of second chambers is stimulated above all by general elections, which create a particularly favourable environment for activity of political parties. The domination of political parties does, however, cause the political resolutions of second chambers often to mirror the first chamber,[74] in this way undermining the constitutional legitimacy of bicameralism in the federal system.

According to Russell, the domination of second chambers by party interests does not necessarily means that the interests of the constituent units cannot also be represented there. However, this takes place in a different way, not through official parliamentary procedures, but through political channels. She gives the Australian Senate as an example of a parliament functioning in this way.[75] Looking at the practice of the functioning of the Senate in Australia, though, it is hard to share this view. Firstly, it is very rare for senators from one state to vote together, in spite of their various party affiliations.[76] Secondly, as Wilfried Swenden's research shows, the senators themselves

[72] I. Kathrein, 'Rada Federalna' in H. Schambeck (ed.), *Parlament Republiki Austrii*, trans. by B. Banaszak, Warszawa 1997, p. 105.

[73] See J. Uhr, 'Explicating the Australian Senate', *Journal of Legislative Studies*, Vol. 8, No. 3 (2002), p. 18.

[74] Cf. J. Szymanek, *Dwuizbowość…*, p. 38.

[75] M. Russell, 'What are Second Chambers for?', *Parliamentary Affairs*, Vol. 54, No. 3 (2001), p. 445.

[76] J. Uhr, 'The Canadian and Australian Senates: Comparing Federal Political Institutions' in B.W. Hodgins et al. (eds.), *Federalism in Canada & Australia. Historical Perspectives 1920-1988*, Trent University Frost Centre, Peterborough 1989, p. 141.

do not consider representing the interests of their state as the most important task, or even as one of the most important, and do not perceive the Senate as an institution meant to particularly serve to articulate or defend these interests.[77] Thirdly, as a result of its highly centralised selection procedure, the Senate is paradoxically the more partisan of the parliamentary chambers. Candidates for senator are more often recruited from party activists at federal level, meaning that they represent an even more national perspective than the members of the House of Representatives.[78]

While the example of the Australian Senate might not be an apt one, then Russell's thesis can at least be defended by reference to the practice of Switzerland, where the Council of States, though elected by general elections, is considered an effective representative of the interests of the cantons. Suffice to say that in discussions on wholesale changes to the constitution of Switzerland, the Working Group for Preparation of a Complete Change to the Constitution rejected postulates on greater institutionalisation of the links of the cantons to the parliament as a federal body, e.g. by way of appointment to the Council of the Cantons of members of the canton governments or parliaments, stating that "sufficient for the creation of appropriate links between the cantons are the customs in place outside legal norms as well as the means which the cantons have hitherto had at their disposal."[79] The case of Switzerland is a special one, though, and it is worth remembering that in this case the case the cantons have sufficient means to, if necessary, radically strengthen the institutional bonds joining them with their representatives in the Council of States.

As mentioned earlier, it would be optimal from the point of view of federal representation for members of second chambers to be elected by the governing bodies of the federal entities with acceptance of the model of representation in the form of an imperative mandate. This kind of solution would ensure an appropriately strong connection between the entity represented (federated unit) and its representative. An argument raised against parliamentary chambers appointed in another way than by general elections, however, is their supposed lack of sufficient democratic legitimation, which can only be provided by general, free elections. It is characteristic that in the first draft of the Australian federal constitution from 1891 competences in appointing senators were entrusted to the state legislatures. This idea was rejected, though, in the second draft, owing to fears that a Senate appointed in this way would not have a sufficiently strong legitimation to fall back on as would the states, with their huge powers.[80]

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[77] W. Swenden, *Federalism and Second Chambers. Regional Representation in Parliamentary Federations: the Australian Senate and German Bundesrat Compared*, P. I. E.-Peter Lang, Brussels 2004, pp. 205, 209.

[78] For more information see P. van Onselen, 'Pre-Parliamentary Backgrounds of Australian Major Party MPs: Effects on Representation', *Journal of Legislative Studies*, Vol. 10, No. 4 (2004), pp. 90-97.

[79] 'Schlussbericht der Arbeitsgruppe für die Vorbereitung einer Totalrevision der Bundesverfassung', 1973, Vol. 4, p. 475 quoted in A. Huber-Hotz, 'System dwuizbowy…', p. 117.

[80] See J. Warden, 'Federalism and the Design of the Australian Constitution', *Federalism Research Centre Discussion Papers*, No. 19 (1992), p. 12.

Similar arguments can be heard in the debate going on today on reform of the Canadian Senate.[81] It is worth noting, though, that the problem of democratic legitimation of second chambers in federal states must be looked at somewhat differently. Of course, if the members of second chambers are appointed by governing bodies of the federal entities, their democratic legitimacy will only be indirect. Does this mean, though, that it will be too weak or insufficient? Federations are composed of two kinds of community: national, and of separate territorial communities. The latter elect their governing bodies, equipping them with the appropriate democratic legitimacy (it is often the federal constitutions that guarantee the democratic character of the systems of the federal entities), and entrusting them in this way to represent them both in the internal and external spheres, also against the federal authorities. The connection of the representatives of the entities of the federation in the federal parliament with the governing bodies of these entities is the best form of confirmation of their legitimacy, as these bodies are appointed by the citizens of the federated units.

Even if we state that from the point of view of democracy it will be better if the body that appoints representatives and to which they are responsible is the legislature, still the accusations levelled at the German Bundesrat of lack of sufficient democratic legitimacy are not justified. Ultimately the members of the Länder governments entering the Bundesrat are politically accountable to their state parliaments, which are after all elected by democratic elections.[82]

Furthermore, the experiences of federal states show that in those countries where the second chamber does not ensure effective representation of interests of the constituent units in the federal legislature, informal institutions are established for this purpose, which do not have a constitutional basis from what, from the point of view of a democratic political system, causing considerably more doubts than a second chamber not elected by general elections. In Canada, where the Senate is entirely marginalised, the institution representing the interests of the provinces towards the federal authorities has become the regular meetings of the federal premier with the premiers of the provinces, functioning under the name of Conference of the Heads of Governments. A similar institution has been formed in Austria, the Conference of Leaders of the Federal Länder, which is also informal and not based in constitutional law. "In it participate people at the head of the Länder, generally the leaders of the relevant national party organisations. The Conference is of great political significance, and its participants are influential people. For this reason too it represents the interests of the Länder with respect to the federation and participates, in an informal manner, in the legislative process, as it is in this forum, and not at the Council of the

[81] See T. Kent, 'An Elected Senate: Key to Redressing the Democratic Deficit, Revitalizing Federalism', *Policy Options*, Vol. 25, No. 4 (2004), p. 50.

[82] Cf. W.J. Patzelt, 'The Very Federal House: The German Bundesrat' in S.C. Patterson, A. Mughan (eds.), *Senates…*, pp. 70-71. Although Herzog writes about the "insufficiency of democratic legimacy" of the Bundesrat, he also stresses that the regulations of the Basic Law on e.g. the state of absolute legislative necessity causes the "Basic Law to assess the democratic legitimacy of the Bundesrat remarkably highly". R. Herzog, 'Pozycja Bundesratu…', pp. 195-196.

Federation that the more important draft legislation is discussed."[83] In this way the real decision centre is moved out from the constitutional bodies of the state, which cannot be considered to be a desirable or correct state of affairs, especially from the point of view of democratic control, but also that of the rule of law.

The desire to equip the second chamber with the greatest democratic legitimacy possible can therefore lead to a situation whereby, as a result of the establishment of extra-constitutional government institutions, the democratic legitimacy of the whole political system of the state is weakened.

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The variety of the solutions of political system visible in federal states in terms of representation of the constituent units in federal parliaments does not permit a simple classification to be constructed. Certainly, second chambers in contemporary federal states are not easy to classify and describe in terms of traditional, very simplified, models of Senate and Council. The diversification between them is so large – especially if we take into account more detailed regulations, rather than just general ones – that without great risk we can state that no two federal state parliaments have the same formulas of representation for the constituent units.

Of particular interest are the attempts in two federations to ensure separate representation of the constituent parts within a unicameral parliament. Although such solutions are few and far between, and characteristic of countries which are small and have a relatively short constitutional history, they force us to revise our traditional view that bicameralism is a prerequisite of federal systems.

The question of whether a second chamber of parliament will be an effective representative of the interests of the constituent parts of the federal state is decided not only be the formula of representation assumed, but also by the competences with which it is equipped. In general, second chambers of federal parliaments are among the most powerful in comparison with their counterparts in unitary states[84]. This issue requires a separate, detailed study, however.

It is a characteristic of many federations that the effectiveness of their second chambers as representatives of federated units is assessed as very low. On the one hand, this situation might suggest centralising tendencies appearing in a concrete federal system. On the other hand, though, a diminishing significance of parliamentary representation of the constituent parts might be perceived as one of the factors generating and supporting these tendencies. Ultimately, between the factors of social nature and systemic institutions mutual relations develop, and not only one-sided ones.

Translated by Ben Koschalka

[83] R. Thienel, 'Austriacki parlament…', p. 22.

[84] Cf. S.C. Patterson, A. Mughan, 'Fundamentals of Institutional Design: The Functions and Powers of Parliamentary Second Chambers', *Journal of Legislative Studies*, Vol. 7, No. 1 (2001), p. 45.

Tomasz WIECIECH Ph.D. (b. 1981), political scientist, lecturer at the Department of Constitutionalism and Political Systems of the Jagiellonian University. Research interests include issues of governmental systems in Anglo-Saxon countries as well as comparative studies in the field of federalism and parliamentary systems. He has published in 'Politeja' and the monthly 'Państwo i Prawo.'