

**Second Chambers as
Constitutional Guardians &
Protectors of Human Rights**

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June 1999

£5.00

Executive Summary

- The large volume of recent constitutional legislation, including the Human Rights Act 1998, has led to the creation of a more codified constitutional framework than the UK has previously experienced. This raises the issue of whether there is a need for greater institutional safeguards for the constitution and fundamental human rights.
- The UK is unique in that legislation to change the constitution, or limit fundamental freedoms, is enacted in exactly the same manner as ordinary legislation. Moreover the UK system of a strong executive and parliamentary sovereignty grants the government immense authority to do what it pleases. It is therefore all the more appropriate that Parliament keeps an effective check on the executive and scrutinises proposals for constitutional change and human rights infringement. Such constitutional protection is one of the classic roles of a second chamber.
- The origins of second chambers, either as a representative of 'establishment' interests or as a representative of regional territories in a federal system, has made them natural bulwarks against impulsive or politically-motivated action taken by the lower house. As second chambers also tend to demonstrate greater independence and party political detachment than first chambers, and tend to be less burdened with constituency duties, they are more able to attend to scrutiny functions.
- The House of Lords could exercise this role in two forms, first by providing safeguards when the government seeks to make changes to the constitution, and second by exercising scrutiny functions to ensure that government is carrying out its functions in a constitutional manner.
- The special powers which the House of Lords could exercise with respect to legislation which aims to change the constitution could include: greater delaying powers over constitutional legislation; an absolute or suspensory veto over constitutional legislation; or the right to call a referendum. The last power, whilst it would need to be exercised with constraint by the upper house, could serve as a powerful incentive to government to reach agreement with the upper house on constitutional issues.
- The House of Lords could also play a role in referring disputes over devolution or human rights matters in Westminster legislation to the courts where appropriate. These powers are enjoyed by many second chambers including those in France, Germany, Spain and Poland.
- The Human Rights Act 1998 itself creates an opportune moment for a reformed House of Lords to play its part in protecting human rights. Many upper chambers have special powers to scrutinise or veto legislation which has an impact on fundamental rights and freedoms. They also have special committees which can scrutinise legislation for human rights compliance, conduct inquiries, and propose human rights promoting legislation.
- The absence of a role for the UK Parliament in the process for ratifying international treaties, could also be amended by ensuring that the consent of the second chamber be sought before the executive enter into, or withdraw from, binding international obligations. Such a role is given to almost all European second chambers.

- The experience from overseas demonstrates that there is a wide variety of options available to enable a reformed House of Lords to play an effective role in constitutional protection. Which ever one, if any, is chosen a role as 'constitutional watchdog' for the House of Lords could serve to enhance effective parliamentary democracy.
- The Consultation Paper from the Royal Commission on Reform of the House of Lords asks whether there is a case for giving the reformed Second Chamber additional responsibilities as a "constitutional watchdog". Based on comparative experience from overseas the answer would be yes.

Introduction

Constitutional protection is one of the classic roles of a second chamber. As outlined in the Constitution Unit's briefing on second chambers,¹ the main origins of second chambers are twofold: as a representative of class and/or 'conservative' interests and as a representative of states within a federal system. In both cases it was natural that the second chamber took on a special role in protecting the institutions of the state against impulsive or politically-motivated action taken by the lower house. In most countries the upper house now has specific powers to safeguard the constitution. How extensive these powers are is related to the constitutional structure of the country. For example in federal systems such as Germany, Canada and South Africa, certain powers may be shared with state or provincial parliaments, while the upper house acts as a representative institution for the different parts of the federation. In unitary states upper houses also usually have greater powers with respect to safeguarding the constitution than they have over other legislation. This role may be complemented by the composition of the upper house. Often an upper house can operate with greater independence and party political detachment than the lower house. Members may be older, have wider experience and skills than members of the lower house, and be less burdened with constituency duties and more able to attend to scrutiny functions. Many of these traits are seen in the House of Lords.

The absence of a written constitution and the doctrine of parliamentary sovereignty grants the UK parliament immense authority to do what it pleases with the constitution (subject to the consent of the Crown, and compliance with European Union law). Therefore a particular responsibility falls on both houses of parliament to keep a check on the executive and scrutinise proposals for constitutional change. The current House of Lords does have some limited special powers of constitutional protection. In particular it has an absolute veto over legislation which seeks to extend the term of parliament.² Although on other constitutional matters the upper house has no special powers, many of its members see an important part of the house's role as constitutional protection. An enhanced role in constitutional protection for the House of Lords is envisaged in earlier policy documents of the Labour Party.³

This briefing aims to set out the role of the House of Lords in constitutional protection in an international perspective. The second chambers which have been examined are those member and associated states of the *European Commission on Democracy Through Law* which have bicameral parliaments. This is a Council of Europe body which seeks to strengthen the rule of law, human rights and democracy through comparative constitutional work. The member states with bicameral systems are Austria, Belgium, Croatia, Czech Republic, France, Germany, Ireland, Italy, Netherlands, Poland, Romania, Spain, and Switzerland. In addition Argentina, Canada, Japan, and the United States are observers. South Africa has

¹ *Second Chambers Overseas*, Constitution Unit., June 1999

² Parliament Act 1911, s. 2(1)

³ *Meet the Challenge: Make the Change*, Labour Party, 1989

special co-operation status. Where appropriate reference is also made in the paper to other systems.

In contrast to the UK, all the countries considered in this paper have written constitutions and Constitutional or Supreme Courts to guard the constitution, or to act as final arbiter on constitutional and/or human rights issues.⁴ This means that the systems employed in these countries are not directly applicable to the UK. However the recent volume of constitutional legislation passed in the UK gives an increasingly codified system. Also the Human Rights Act 1998, incorporating the European Convention on Human Rights, gives the UK for the first time a set of protected fundamental rights and freedoms equivalent to a constitutional bill of rights. In addition, although the Act does not give courts the jurisdiction to strike down primary legislation where it is incompatible with the Act (an analogy with being unconstitutional), section 4 grants the power to the higher courts to make a declaration of incompatibility where such legislation conflicts with the Act.⁵ The declaration does not create a binding legal obligation on government to amend or repeal the offending provision, although it may trigger a 'fast-track' procedure for passing amending legislation under section 10 of the Act. In the future the Act may be complemented by, or supplanted by, a British Bill of Rights possibly with greater powers for the judiciary to strike down incompatible primary legislation.

There are two aspects to safeguarding the Constitution: one is adopting safeguards when seeking to make changes to the constitution or the constitutional nature of a country, the second is providing safeguards to ensure that governmental action, including legislation, is conducted in accordance with the constitution. Given the changing nature of the UK constitution these are matters which may be appropriate for review when considering the functions of a new upper chamber. In addition Parliament has a leading role to play in implementing and monitoring the operation of human rights legislation and commitments. In particular under the current system which respects the doctrine of parliamentary sovereignty, it is appropriate that Parliament takes a substantial lead.⁶ If it were to take on a larger role as protector of the constitution, there are a number of ways in which the second chamber could carry the burden of new human rights work.

This paper sets out the role which a reformed House of Lords could play within the new UK constitution in the protection of human rights and of the constitution itself. The paper does not seek to positively advocate the adoption of a particular role or model. Instead it seeks only to set out, on the basis of the comparative experience of other countries, the manner in which such a role could be performed. It is recognised that the degree to which the House of Lords can adopt a role in guarding the constitution and protecting fundamental freedoms may depend on reforms outside of the House itself, such as the establishment of bodies outside of Parliament

⁴ For these purposes the House of Lords, while it is a final court of appeal, it is not a constitutional or supreme court. On this issue see the Constitution Unit briefing, *Reforming the Lords: The Role of the Law Lords*, June 1999.

⁵ Subordinate legislation may be dis-applied by the courts where it is incompatible with the Act unless primary legislation prevents removal of the incompatibility (Section 3).

⁶ The consultation paper on the Human Rights Bill "*Bringing Rights Home*" envisaged that parliament should play a leading role in protecting human rights and this was repeated in the White Paper, "*Rights Brought Home*" (CM 3782) at p.14.

with responsibility for constitutional monitoring and human rights protection. This is outside the scope of this paper but is referred to at points throughout the text.

Amending the constitution

Amending the constitution in those countries founded on a written constitution almost without exception requires a special procedure. In most cases the second chamber will have special powers or a specific role in the process. These may include:

- a delaying power over legislation which seeks to alter the constitution
- a requirement that a qualified majority of the second chamber approve the legislation
- the power to call a referendum to approve the legislation.

These powers may be apply separately or in combination, and may also be combined with a general requirement that a referendum be held, or approval be sought from state parliaments in federal systems. These procedures are summarised in the first column of the table at Annex 1. In all of these cases amendments to the constitution are subject to a more rigorous approval procedure to ordinary legislation.

In the UK constitutional bills can be agreed with no special procedure, beyond the convention that the committee stage of first class constitutional bills is taken on the floor of the House.⁷ This is historically linked to the lack of a written constitution in the UK, which makes it difficult to identify constitutional legislation as such. The difficulties of this are discussed in a section below.

Special powers

If it were felt desirable to vest the House of Lords with specific powers over constitutional legislation there are a number of models from overseas of ways in which this might be done. These include:

Requiring the consent of the House of Lords to adopt constitutional legislation

Whilst the upper house has only a suspensory veto over ordinary legislation, it might be given an absolute veto over constitutional change. This would mean that in such cases the House of Lords could not be overruled by invoking the Parliament Act. As noted above this is currently the case with bills to extend the life of a parliament. This would be a similar system to that currently used in France, where the upper house only has a suspensory veto over ordinary legislation, but has an absolute veto over constitutional change. Alternatively where consent is not obtained, legislation could be adopted only subject to obtaining a qualified majority in the House of Commons, or to an automatic referendum. The latter model is used in Switzerland.

⁷ See Constitution Unit, *Delivering Constitutional Reform*, 1996 p. 32 and *First Report from the Select Committee, Session 1945-46*, HC 9.

Requiring the support of a qualified majority of the House of Lords

This assumes not only that consent of the House of Lords is necessary to adopt constitutional legislation but also that a qualified majority is obtained. This might or might not be combined with a qualified majority in the lower house. Such a system is used in 11 of the 17 countries considered in this paper. This requirement could again be qualified with a provision that where a majority is obtained but there is a failure to obtain a qualified majority, the legislation may be adopted by a higher qualified majority of the House of Commons. This is the case in Spain, where an amendment requires 3/5 support in both houses, but if that cannot be obtained an amendment may pass with a 2/3 majority in the lower house and an absolute majority in the upper house.

Extended delaying powers over constitutional legislation

As in the Canadian Senate the House of Lords might not exercise a veto over constitutional legislation, but would delay legislation for a specified period, longer than for ordinary legislation. (Although in parliamentary terms constitutional change in Canada is relatively easy, it should be noted that this process must be followed by agreement in a majority of provincial assemblies, representing at least half the population.)

The power to call a referendum where there is a dispute over constitutional legislation

In several countries the upper house has limited powers to veto constitutional change, but may in one way or another insist on a referendum to ratify the change. If this power were given to the House of Lords it could be exercised with the support of a specified number of members, with the support of the majority of members, or in conjunction with a specified number of members of the House of Commons. Such powers exist in Austria where 1/3 of the members of either house may call a referendum, in Spain where 10% of upper house members may demand a referendum unless both houses have passed the legislation by a 2/3 majority, and in Italy where 1/5 of members may call a referendum in similar circumstances.

Parliamentary procedure

In addition to special powers, consideration might be given to special parliamentary procedures for dealing with constitutional bills. As mentioned above, the convention in the United Kingdom is that the committee stage of constitutional bills is taken on the floor of the House of Commons. This is a convention and not part of the standing orders of the House. Such a procedure could be formalised, or modified in the case of a reformed upper house. Alternatively such bills might be referred to a specific constitutional committee for scrutiny. Committees of this nature exist in other countries in both upper and lower houses (some such committees are identified in the context of human rights protection at annex 2). A full exploration of all the models for parliamentary procedure are outside the remit of this briefing.

Identifying constitutional legislation

In the comparator countries considered in this paper it is easy to identify which bills involve constitutional amendments and should therefore be subject to a special procedure. This is because a constitutional amendment is, literally, an amendment to a clearly defined constitutional document. If specific powers were to be given to the House of Lords in the passage of constitutional legislation, this would require an additional process to that which applies in other countries, of identifying such legislation. However, there are precedents for identifying different classes of legislation, both in the UK and elsewhere.

In the UK the 1911 Parliament Act, which limited the powers of the House of Lords, defined a category of 'money bills' over which the House of Lords has relatively fewer powers. It is the responsibility of the Speaker of the House of Commons to decide which bills qualify and are therefore subject to an easier passage through the upper house. The Speaker's decision is final.

Another example is Germany, where the upper house represents the states of the federation and has an absolute veto over legislation affecting state interests. On other legislation the upper house may be overruled by the lower house. As the states in Germany have a wide range of responsibilities it is not always clear if a bill should be subject to upper house veto. It is the responsibility of the drafter of the legislation (who might be government, a political party or a state government) to identify in the preamble of the legislation whether the consent of the upper house is required. It is relatively common for a bill to state that consent is not required, but for the upper house to judge otherwise. In this case it may lodge an objection, or as a last resort may appeal to the Constitutional Court.

In many countries a distinction is drawn not only between constitutional and ordinary bills, but also with a third category of bill generally called 'organic'. The latter are bills of a constitutional nature, but which do not require an actual amendment to the constitution. The equivalent in the UK of 'constitutional' and 'organic' bills might be bills dealing with 'primary constitutional issues' and 'secondary constitutional issues'. In other countries the scope of 'organic' bills may be stated in the constitution. For example the Spanish constitution states that laws relating to the exercise of fundamental rights and public liberties and to the electoral system, shall qualify as 'organic'. A similar distinction applies in France. These bills, like constitutional amendments, are subject to a more rigorous approval procedure. However, their definition is less clear and the classification of bills may therefore be subject to dispute. In most countries the ultimate appeal on such disagreements would lie with the specific body for determining constitutional disputes, normally the constitutional court or constitutional tribunal (see column 3 annex 1).

If the House of Lords were to be given greater formal powers over constitutional legislation, this would therefore require the following:

- *Definition of the scope of bills which would be considered constitutional.*

This could be made in the Act creating the new second chamber, as was the definition of money bills in the 1911 Act, and might include one or two categories of legislation. If two categories were used then primary constitutional legislation might include that legislation which alters the status of the monarchy; the powers

of the legislature, the executive, and the judiciary; the relationship between the entities of the Union and the relationship between Wales and England; the basic rights of individuals as set out in the Human Rights Act 1998, and any future Bill of Rights. Secondary constitutional might be defined as that which alters: the control and organisation of political parties; the conduct of elections including referendums and voting systems; the administration of justice; the administration of local government.

- *A procedure for certifying bills as constitutional, according to this definition.*
This responsibility might be given to the Speaker of the House of Commons, or the new upper house, or might be the responsibility of the government or the promoter of the bill.
- *An appeal mechanism.*
The word of the Speaker might be final, as presently with money bills, or there might be recourse to appeal to a higher body. Devolution legislation in the UK now provides for a reference to be made to the Judicial Committee of the Privy Council by the Law Officer to determine disputes on the competence of the devolved chambers. A similar reference procedure could be used as an appeal process concerning the designation of constitutional legislation. If this were to apply consideration would need to be given to who could instigate an appeal. This might be initiated by a majority, a qualified majority or a specified number of the upper house. There are precedents for such procedures overseas (see below).

An alternative: holding of referendums

If it were not felt desirable for constitutional bills to be formally defined, an alternative might be to give the power of initiative to the upper house in calling a referendum when they considered a bill to be of constitutional status. This initiative might be subject to a simple or a qualified majority in the upper house. Such a convention would depend on the restraint of the upper house, but could serve as a powerful incentive to government to reach agreement with the upper house on constitutional issues. Column two of the table at annex 1 sets out the powers of second chambers in other countries to call referendums.

Parliamentary Human Rights Committees

In many countries the second chamber has an additional power as a protector of the constitution, in that its members may scrutinise all legislation in terms of its constitutionality. Much of this work by second chambers overseas in practice relates to the human rights provisions of the constitution. Given that the Human Rights Act 1998 provides a form of Bill of Rights which may be considered a constitutional document for the UK, there may be arguments for adopting similar systems to those used overseas in relation to compliance with this Act.

All new legislation in the UK now effectively has to comply with the Human Rights Act. Under section 19⁸ of the Act each minister responsible for a bill has to state whether the bill complies with the Act and if not that they wish the House to proceed with it notwithstanding. Stating whether a bill is compatible with the Human Rights Act is similar to stating whether the bill is constitutional in countries where human rights guarantees are written into the constitution.

Human rights protection may be effected by the creation of specific bodies within the house to address human rights concerns. The types of bodies which exist in other upper houses are very varied, with different mandates, functions and powers. A table setting out such bodies is attached as Annex 2. On the basis of these comparators, possible functions and powers for a human rights committee of the House of Lords might include:

The scrutiny of legislation

The establishment of a joint human rights committee is already envisaged to complement the implementation of the Human Rights Act. This committee may operate on a full time basis as a joint committee or may operate as a committee of each house which holds joint sessions for certain functions. The current committees in the House of Lords, such as the Committee on Delegated Powers and Deregulation, could also scrutinise secondary legislation for compliance with the Human Rights Act.

A good example of human rights scrutiny is provided by the committees of the Australian Senate which are held in very high regard. The Standing Committee on Regulations and Ordinances and the Standing Committee for the Scrutiny of Bills both scrutinise measures for compliance with human rights criteria.⁹ Both Committees have equal numbers of members from government and opposition and operate on a bipartisan basis. The Committees employ legal advisers who report on possible infringements on rights caused by the measures in every forthcoming bill. The Committee on Regulations and Ordinances may recommend the disallowance by the Senate of any delegated legislation not in accordance with its human rights criteria, and the Senate has never rejected such a recommendation. The Committee for the Scrutiny of Bills alerts the Senate to possible infringements and these frequently result in members tabling amendments when the bill is considered. The lower house has no such committees.

Conducting inquiries

The House of Lords could have the power to initiate the conduct of inquiries by the human rights committee. This may be on matters relating both to domestic human rights concerns and matters concerning foreign policy. This could result in the provision of an opinion or position paper which sets out a recommended position

⁸ This section came into force on 24 November 1998.

⁹ The criteria used by both committees is similar. It that the measure does not: trespass unduly on personal rights and liberties; make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; make rights, liberties or obligations unduly dependent upon non-reviewable decisions; inappropriately delegate legislative powers; insufficiently subject the exercise of legislative power to parliamentary scrutiny.

for the House to adopt when addressing a particular issue. Similar powers exist in Poland and Romania.

The promotion of legislation

The House of Lords could assume the task of promoting legislation to give further effect to human rights commitments. These legislative proposals could come from a committee of the House which might make recommendations for legislative action. Committees of this kind exist in other second houses, for example Japan, Switzerland, and the Czech Republic.

Referral of legislation to a constitutional arbiter

The constitutionality of new legislation is subject in many countries to review by a constitutional court - a court which either exclusively deals with constitutional review and disputes (e.g. Austria, Germany, Italy) or a court of final instance which has jurisdiction to deal with constitutional issues (e.g. Ireland, Japan). The decisions of these courts are usually final and binding. Other countries provide for specific bodies to determine these disputes, for example the French Conseil d'Etat and the Polish Constitutional Tribunal. The decisions of both bodies are binding. Referring matters to these bodies may happen at different stages, pre-enactment or post-enactment. When legislation can be referred to the constitutional body pre-enactment, often this can be done by the upper house who can seek a ruling on the constitutionality of a measure before it approves it, or before it is promulgated.

The link between the upper house and a body of constitutional review may be in two forms. First, the upper house may have power to refer disputes or issues to the constitutional body. Common features of such reference procedures are:

- References can be made by a specified number of members of the house, or by the leader of the house on the approval of the house, rather than single members. In France 60 (out of 321) Senators or the leader of the Senate can make a reference to the Conseil d'Etat. In Poland 30 (out of 100) Senators can make the reference where they believe a piece of legislation is unconstitutional, in particular that it conflicts with the human rights provisions. In both countries similar power is vested in the lower house.
- References may take place only with respect to certain types of disputes. In Germany the upper chamber, which represents the states, may seek a ruling of constitutionality from the Constitutional Court but only on a dispute concerning the concurrent legislative jurisdiction of the States and the Federation. In Poland the speaker of the Senate can seek a ruling only on a jurisdictional dispute between organs of the state. In Spain either house may seek a declaration as to whether an international treaty conflicts with the constitution and in Romania 25 Senators may request a determination on the constitutionality of standing orders of Parliament.

As mentioned above, under devolution legislation the Judicial Committee of the Privy Council has a role in advising on disputes on jurisdiction prior to the enactment of legislation by a devolved chamber. If a system like this was desirable

in the UK the House of Lords might have a right of reference to the Judicial Committee of the Privy Council or the Appellate Committee of the House of Lords which has final competence under the Human Rights Act.¹⁰ It would need to be determined in what manner this power was to be exercised - on the approval of a majority of members, on the approval or a qualified majority, on the motion of a specified number.

Relationship with human rights offices and bodies

Some countries, in addition to national institutions such as a human rights commission, provide in the constitution for a special parliamentary body whose purpose is the protection of human rights, for example the Ombudsman in Romania and Argentina, the Commission on Citizen's Rights in Poland, and the Ombudsman in Spain. These offices or bodies may be nominated or elected by the upper house. In Poland the Commission for Citizens Rights is appointed by the lower house with the consent of the upper house, and the ombudsman in Romania is appointed by the upper house. In Argentina the appointment of the Ombudsman is appointed on the approval of 2/3 of each house. Bodies akin to these offices would be required to report on an annual basis to the House. A reformed House of Lords might include such an office.

In South Africa there are a number of independent bodies established under the Constitution to promote constitutional democracy. These include two bodies with a specific human rights mandate: the Office of the Public Protector (formerly called the Ombudsman) and a Human Rights Commission. There are then two Joint Committees in Parliament, established under the constitution, which are responsible for liaising with those bodies in the implementation of human rights policy. Even in a country where such a body or office does not have constitutional status, the upper house may play a role in holding the body or office accountable in so far as the upper house would consider the annual report of the body. Again a reformed House of Lords may wish to have such a committee which would communicate with human rights bodies, for example the Human Rights Commission of Northern Ireland. Any relationship must not infringe the independence of the human rights body.

It is worth noting that a Parliamentary Human Rights Group - a non formal body spanning both the House of Commons and the House of Lords - has existed in Westminster Parliament since 1976.

¹⁰ Such a power of reference would have implications for the composition of the House of Lords if the Law Lords form part of the House as they currently do. These issues are addressed in the Constitution Unit briefing on *The Role of the Law Lords* (fn.5), and should be considered in conjunction with this briefing.

International Human Rights Commitments

The UK is unique in the absence of a role for Parliament in the process for ratifying treaties. Reforming the process by which treaties are ratified would naturally involve a role for the House of Commons as well as the House of Lords, and would not be limited to the ratification of human rights treaties.¹¹ Most countries, and all European Union countries, provide that the ratification of an international treaty requires the consent of Parliament. This procedure might be considered in the UK. The denunciation of a treaty would then also require the consent of Parliament. In this context, where the treaty is one concerning fundamental human rights a qualified majority of both houses, or of the House of Lords, might be required. In Argentina for example denunciation of human rights treaties requires the approval of 2/3 majority of both Houses.

Where Parliament is involved in the provision of consent to a human rights treaty it might also be appropriate for parliament to play a role in monitoring the implementation of the obligations undertaken in those treaties. Under many human rights treaties the government is obliged to submit periodic reports to the responsible international organisation indicating the measures which it has taken to comply with the treaty standards. The House of Lords might have a role in debating and/or reviewing these reports. Such review may also fall within the jurisdiction of a committee as discussed above.

Conclusion

There is large diversity and variety in the roles which upper houses in other countries play in the field of constitutional and human rights protection. They are all also set against the background of a written constitution. However in the UK the process of devolution and the introduction of the Human Rights Act has provided a number of documents which can be identified as constitutional documents, and this has led to a more 'constitutionalised' framework within which a reformed House of Lords will operate. In particular the Human Rights Act will act as a form of 'constitutional' constraint. Therefore the gap between the system in the UK and that in the comparator countries is closing. So, while there may be no model from overseas which is directly suitable, the new constitutional setting and developments in the UK do provide a significant number of options for a role in human rights and constitutional protection for a reformed House of Lords.

¹¹ For an argument in favour of such an enhanced role in the area of international relations advocated see Robert Blackburn, "The House of Lords" in *Constitutional Reform* Blackburn and Plant (eds.), 1999, p. 30 ff.

Annex 1: Constitutional Safeguards: The role of Second Chambers

Country	Amending the Constitution	Ability to call a referendum	Body entrusted as guardians of the constitution	Constitutional powers of the upper house in constitutional disputes
Argentina	Passed by both houses with the vote of at least two-thirds of the members especially assembled for that purpose.	Called by the decision of both houses the but only at the initiative of the lower house.	Supreme Court	No constitutional powers.
Austria	Passed as ordinary legislation, but must be approved by a referendum if the amendment constitutes a total revision of the constitution, and if it is only a partial revision, a referendum is required if 1/3 of either house so demands.	Where there has been an objection of the upper house, any enactment of the lower house may be put to a referendum before it is signed by the President, if a majority of the lower house so demands.	Constitutional Court	Constitutional articles governing the election and representation in the Senate can only be passed if the majority of representatives in the Senate from at least four of the nine states approve it.
Belgium	Requires both houses to be dissolved and 2/3 majority in both new houses	No constitutional provision for the holding of referendums	Court of Arbitration	No constitutional powers.
Canada	Amendments may only be delayed by 180 days, but must also be agreed by legislative assemblies in 2/3 of provinces, comprising 50% of the population.	No constitutional provision for the holding of referendums.	Supreme Court	No constitutional powers.
Croatia	Requires approval by 2/3 of the lower house, the vote taken upon hearing the opinion of the upper house. The upper house or the President at the proposal of the government, may call a referendum to approve amendments.	Lower house may call a referendum on anything falling within it jurisdiction, and the upper house may make proposals for one.	Constitutional Court. The 11 constitutional court justices, are proposed by the upper house, and elected by the lower house.	No constitutional powers.
Czech Republic	Must be passed by 3/5 majority in both houses	No constitutional provision for the holding of referendums.	Constitutional Court. Judges on the constitutional court are appointed by the President with the consent of the Senate.	No constitutional powers.

Annex 1: Constitutional Safeguards: The role of Second Chambers

Country	Amending the Constitution	Ability to call a referendum	Body entrusted as guardians of the Constitution	Constitutional powers of the upper house in constitutional disputes
France	Amendments must be passed by both houses and then either a joint sitting by 3/5 majority or a referendum.	The president may on the proposal of government or on a joint motion of both houses submit a bill to referendum.	Constitutional Council which consists of nine members, three of whom are appointed by the president of the upper house. The other six are appointed by the president of the lower house and the president.	60 senators may seek a ruling from the Constitutional Council on the constitutionality of ordinary legislation. The same power is vested in the President, prime minister, speaker of either house, or 60 deputies.
Germany	Must pass by a majority of 2/3 in both houses. The federal structure and basic human rights provisions of the Constitution may not be amended.	No constitutional provision for the holding of referendums.	Constitutional Court. Half the members are elected by the upper house and half by the lower house.	The upper house may seek a ruling of constitutionality in a dispute concerning the concurrent legislative jurisdiction of the States and the Federation.
Ireland	Must be approved by referendum	A majority of the members of the upper house and not less than one-third of the members of the lower house may petition the President by them requesting a referendum before a bill is signed by the President.	Supreme Court.	The President may refer a Bill to the Supreme Court for a ruling on its constitutionality before signing it into law.
Italy	Must be passed by both houses by absolute majority and unless passed by 2/3 majority are subject to referendum if requested within three months by 1/5 members of either house, 500,000 electors or five regional councils.	No role for the upper house. Held on the demand of 500,000 voters or by five Regional Councils, if there is to be the total or partial repeal of a law or of a measure having force of law.	Constitutional Court composed of 15 judges, five of whom are nominate by both houses in a joint session. The President and the members of the ordinary and administrative supreme courts each nominate five others.	No constitutional powers.
Japan	Must be passed by 2/3 majority in each house	No constitutional provision for the holding of referendums.	Supreme Court.	No constitutional powers.
Netherlands	Require both houses to be dissolved and 2/3 majority in both new houses	No constitutional provision for the holding of referendums.	Supreme Court of the Netherlands cannot review the constitutionality of acts of Parliament or treaties	No constitutional powers.

Annex 1: Constitutional Safeguards: The role of Second Chambers

Country	Amending the Constitution	Ability to call a referendum	Body entrusted as guardians of the Constitution	Constitutional powers of the upper house in constitutional disputes
Poland	Must be passed by 2/3 majority in the lower house and absolute majority in the Senate.	Lower house has the right to call one, if approved by at least 50% of the members, or the president may call one with the consent of at least 50% of the members of the upper house	Constitutional Tribunal. Members chosen by the lower house.	30 Senators may apply to the Constitutional tribunal for a ruling on whether legislation or government action complies with the Constitution and the speaker of the upper house may apply for a ruling on a dispute over authority between organs of the state.
Romania	Must be passed by 2/3 majority in both houses. In the case of disagreement amendments may be passed by 75% of both houses sitting in a joint session. Revision may be initiated by 25% of the Senators	The president, after consultation with both house may call one to determine matters of national interest.	Constitutional Court comprising of 9 judges. The upper house appoints three judges. The lower house and the President of Romania each appoint three others.	25 senators or the speaker of the upper house may request a determination on the constitutionality of a bill before it is brought into force or of the standing orders of parliament. In the event of a ruling of unconstitutional, the measure may still become law if it is passed by a 2/3 majority in both houses.
South Africa	Must be passed by 2/3 majority in the lower house and six out of nine provinces in the upper house, voting as blocks	No constitutional provision for the holding of referendums.	Constitutional Court.	Only members of the lower house may apply to the Constitutional Court for an order declaring an Act of Parliament unconstitutional.
Spain	Must be passed by 3/5 majority in both houses. in the case of disagreement a joint committee will propose a compromise. After this agreement may be reached by 2/3 of the lower house and overall majority the upper house, but 10% of either house may call for a referendum.	No role for the upper house. The lower house can authorize a proposal of the government to call a referendum on political decisions of special importance.	Constitutional Court. 12 members appointed by the King. 4 are nominated by the Senate.	Either house may apply to the Constitutional Court for a declaration as to whether an international treaty conflicts with the constitution.
Switzerland	Unless passed by both houses, a referendum is required. 100,000 of the electorate may also demand a referendum on amendments.	No role for the upper house. A referendum on any legislation must be held if 50,000 of the electorate or eight Cantons so demand.	Federal Court elected by both houses.	No constitutional powers.

Annex 2: Human Rights Committees of the Second Chamber

Country	Committees in the upper house with a mandate to address domestic human rights concerns
Argentina	Standing Commission on Rights and Guarantees, established in accordance with the rules of procedure of the Senate. It provides opinions exclusively on human rights and constitutional guarantees. Committee on the Freedom of Expression. It provides opinions on matters relating to freedom of expression and the press. There is also a Bicameral Commission of the office of the National Ombudsman, which appoints the National Ombudsman. In the lower house there is also a Standing Commission on Rights and Guarantees.
Australia	Standing Committee on Regulations and Ordinances and the Standing Committee for the Scrutiny of Bills. Both bodies scrutinise measures to ensure that there is not undue encroachment on rights, liberties or obligations. The first committee can give notice to the upper house to disallow an instrument for failure to comply, the second provides comments on potential conflict between legislation and human rights criteria. No equivalent body exists in the lower house.
Austria	Standing Committee of Legal and Home Affairs. Mandate explicitly includes, but is not exclusively, human rights scrutiny of bills, treaties and reports. It may table motions for amendments where there are potential clashes with human rights obligations. In the lower house there is a Justice Committee which also uses a human rights criteria when scrutinising measures.
Belgium	No committee exclusively that deals with human rights, but the Advisory Committee For Equality of Opportunity between Men and Women deals explicitly with human rights concerns. The Committee may meet on the request of the President of the Senate to examine requests for advice or to examine an issue on its own initiative. In the lower house the Justice Committee monitors human rights situation internally.
Canada	No committee dealing exclusively with human rights, but the Standing Committee on Legal and Constitutional Affairs deals explicitly with constitutional human rights concerns. It may make proposals for amendments and issues recommendations for further action. There is also a Standing Senate Committee on Aboriginal Peoples. In the lower house there is a Standing Committee on Justice and Human Rights.
Croatia	Committee on the Constitution and Standing orders. It deals explicitly but not exclusively with human rights criteria and provides an opinion or position paper for discussion by the upper house concerning questions on the agenda of the lower house. In the lower house, the Committee on Human Rights and the Rights of Ethnic and National Communities or Minorities deals exclusively with monitoring the implementation of human rights policy
Czech Republic	Committee on Petitions, Human Rights, Science, Education and Culture. The Committee deals explicitly but not exclusively with human rights issues. It can recommend legislative measures. In the lower house there is also a Committee for Petitions, which can require Ministers to appear before it.
Japan	Standing Committee on Judicial Affairs which conducts inquiries into a measure or matter referred to it relating to human rights protection. It may propose bills. In the lower house there is also a Standing Committee on Judicial Affairs.
Netherlands	None. In the lower house there is a Petitions Committee which may deal with human rights issues referred to it by the house. The lower house also appoints the National Ombudsman.
Poland	Human Rights and Rule of Law Committee which reviews legislation for compliance with human rights. It may also comment on the method of implementation and enforcement of laws. In the lower house there is a Justice and Human Rights Committee.
Romania	Standing Committee on Human Rights which examines draft laws, conducts parliamentary inquiries and receives petitions. It reports to the Senate. There is no body in the lower house.
South Africa	Joint Committee on Human Rights Commission and Joint Committee on Public Prosecutor. Constitutional Committees established under the constitution, responsible for relations between parliament and the independent bodies.
Spain	Ad-hoc Joint Committee on Women's Rights and Joint Committee for Relations with the Ombudsman. In the lower house there are two committees: the Standing Committee on Petitions which deals exclusively with petitions alleging human rights violations, and the Standing Constitutional Committee which examines matters regarding fundamental rights and duties enacted in the Constitution.
Switzerland	Standing Committee for Legal Affairs. The Committee examines all draft measures relating to domestic policy, with special reference to human rights. It reports to the upper house. It can stimulate draft laws and federal orders. In the lower house there is a committee for Legal Affairs.

