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## BICAMERAL PARLIAMENTS – THEN AND NOW

**Abstract:** *Today's scientific consensus has well passed the view that only 3 branches of power can be conceived. As a summary we can state that of functions of power, there are 3. These are: legislature, executive, and judiciary. These functions can be enforced by different power factors, the relationship of which can be different by forms of government. It is vastly different between the parliamentary, presidential and the semi-presidential systems, the last one being a middle ground. In the estate-representative state models the two chambers were intended to represent the different social classes. With the embourgeoisement, and thus with the spread of parliamentarism the "second chambers" had long remained the depositary of the old ruling strata. In the democratic systems however – along with the former ones – we can notice the new functions of the senates, while generally their composition underwent changes as well. The dual adoption of laws can be the guarantor of a more measured legislation, and can prevent the necessity of constant modifications. In the case of the parliamentary systems where the parliament and the government are interlocked, it can create real separation of power, it „hampers” the downgrading of the functioning of the representative body of the people into a voting machine, especially as the more different the methods of election of the two chambers are. The second chamber, created based not on the people's representation, at least not on the party system, could reflect the society along different ruptures, as the citizens have interests and opinions independent of their party affiliation, but which at the same time can still be articulable to political ones. It could create a representative system for the apolitical persons jaded with the party system; with regard to exercising both the active and passive suffrage. It could overrule the decisions of the people's representative chamber on a professional principle, and not on the binary code of government/opposition (especially with the involvement of professionals who keep their distance from the parties). Well, at today's state of party politics, the people's representative parliament by far cannot be viewed as unified as a result of the powers having fairly different opinions.*

**Keywords:** *constitution, constitutional law, bicameral parliament, branches of power, parliamentarism.*

## INTRODUCTORY THOUGHTS

Today's scientific consensus has well passed the view that only 3 branches of power can be conceived. As a summary we can state that of functions of power, there are 3. These are: legislature, executive, and judiciary. These functions can be enforced by different power factors, the relationship of which can be different by forms of government. It is vastly different between the parliamentary, presidential and the semi-presidential systems, the last one being a middle ground. The degree of independence of the different elements of the separation of power does not always reach the level where we can view them as separate branches of power. The concentration of power is reduced, thereby the separation of power is increased if certain functions are filled by many.<sup>1</sup>

In the light of all these we can declare: the separation of power within the legislative power is consummated by the system of bicameral parliaments.<sup>2</sup>

## FUNCTIONS OF THE BICAMERAL PARLIAMENT

We are no exaggerating when we believe to discover the roots of this very legal institution in the ancient roman senate. In the estate-representative state models the two chambers were intended to represent the different social classes and strata.<sup>3</sup> With the embourgeoisement, and thus with the spread of parliamentarism the “second chambers” had long remained the depository of the old ruling strata. In the democratic systems however – along with the former ones – we can notice the new functions of the senates, while generally their composition underwent changes as well.

The dual adoption of laws can be the guarantor of a more measured legislation, and can prevent the necessity of constant modifications. “Thus the second chamber with its tradition-preserving, controlling, contributing powers fulfils a mildly restrictive, damping function” (translated from the original).<sup>4</sup> In the case

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<sup>1</sup> See in more detail: CSERVÁK Csaba: A hatalmi ágak megosztásának XXI. századi kérdései az Alaptörvényt követően, *Pro Futuro*, 2015/2. szám

<sup>2</sup> The existence of the separate legislative and constituent powers is somewhat related to this. *Ibid.*

<sup>3</sup> The “senate” was the representative body of the differently named aristocracy, the noblest stratum, while the lower house was the representative body of the lower and middle nobility, and later the gradually developing bourgeoisie.

<sup>4</sup> TAKÁCS Imre: *A törvényhozás második kamarája*, *Társadalmi Szemle* 1995/10. sz., 63.

of the parliamentary systems where the parliament and the government are interlocked,<sup>5</sup> it can create real separation of power, it „hampers” the downgrading of the functioning of the representative body of the people into a voting machine, especially as the more different the methods of election of the two chambers are. The theory of John Stuart Mill, which is still valid today, states that the body possessing excessive power, such as the legislative body, can easily become overconfident and violent if it does not have to officially take the opinion of anybody else into account.

The bicameral system secures a more considerable legitimation to the offices elected by the parliament, namely to the President of the Republic, the Constitutional Court judges, and other persons operating independently from the government.<sup>6</sup>

The second chamber, created based not on the people’s representation, at least not on the party system, could reflect the society along different ruptures, as the citizens have interests and opinions independent of their party affiliation, but which at the same time can still be articulable to political ones<sup>7</sup>. It could create a representative system for the apolitical persons jaded with the party system; with regard to exercising both the active and passive suffrage. It could overrule the decisions of the people’s representative chamber on a professional principle, and not on the binary code of government/opposition (especially with the involvement of professionals who keep their distance from the parties). Montesquieu and his contemporaries thought that the purpose of the second chamber was to mediate between the ruler and the people (that is the people’s representative chamber). Today we can underline the same mediatory role – between the parties (as the “ruler”) and the people. Thus this model could “dethrone the new prince”.<sup>8</sup>

With this many arguments, what is against the second chambers? According to Sieyès and his followers, the bicameralism is assailable because if the people is unified, then the representation also have to be unified. Well, at today’s state of party politics, the people’s representative parliament by far cannot be viewed as unified as a result of the powers having fairly different opinions.<sup>9</sup> With that

<sup>5</sup> Since the people’s representative parliament, that is the triumphant political power chooses the government, almost as its own “dream team”.

<sup>6</sup> The President of the Curia (Supreme Court of Hungary), the Prosecutor General, the Ombudsman, the Governor of the Hungarian National Bank. According to Kálmán Kulcsár, the president of the senate would be more suitable filling the impartial position of substitute head of state, instead of the usually active partisan politician president of the lower house.

<sup>7</sup> Based on Kálmán Kulcsár. KULCSÁR Kálmán: *A kétkamarás országgyűlés problémája*. Társadalmi Szemle 1995/10. szám

<sup>8</sup> Gramsci called today’s ruling party system this way. See e.g. BIHARI Mihály-POKOL Béla: *Politológia*, Nemzeti Tankönyvkiadó Rt. Budapest 1992., 228.

<sup>9</sup> On relation between voter, political party and deputy see: Slobodan Orlović, Priroda i pripadnost poslaničkog mandata u ustavnom sistemu Srbije, *Zbornik radova Pravnog fakulteta u Novom Sadu (Zbornik PFUNS)*, 3/2009, 236-238.

being said, if the decisions are the results of the opinions of the citizens, and thus the opinions of the parties in the parliament (that is, mainly in coalition), why is it not possible to integrate the second chamber into this process? The most controversial problem, and at the same time the question which makes reaching consensus the most difficult for the constitutional majority, is the composition of the senate.<sup>10</sup>

## CATEGORIES OF THE SECOND CHAMBERS

1. The bodies which can be categorised as the historical type of upper houses, have somewhat left the legacy of the former function of the institution to these present days<sup>11</sup> (we are dealing with this a few lines below). The common attribute of the parliaments belonging to this category, is that they contain some kind of – by birth, intellectual, etc. – elite. The representatives, because of who they are, through the pretence of inheritance, based on the principle of birth, become the depositaries of the office. Until the beginning of the 20<sup>th</sup> century, this group of upper houses was predominant,<sup>12</sup> however nowadays we can only encounter its classic form in Great Britain, where the House of Lords, after the reform of 1999, has some 600 life peers, and 92 hereditary peers. The parties could hand out 75 peers additionally among the hereditary lords.<sup>13</sup>
2. The federal type second chambers, intended to represent federal member states, fulfil the role of protection of the interests of the parts forming the state (which were to some degree sovereign). While in certain countries the principle of the equality of the member states appears, related to the composition of the parliament,<sup>14</sup> elsewhere the provinces receive representative seats proportionally to the population,<sup>15</sup> and even elsewhere they harmonise the two principles, they skew the proportionality in favour of the minorities.<sup>16</sup> Regarding the formation of the representativeness, the member state as sovereignty should necessarily manifest in it: namely the delegation by its legislative or executive power is the fundamental condition to be sorted into this category. In Germany certain members of the governments of the states chosen by

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<sup>10</sup> The example of the one-chamber parliament is the National Assembly of the Republic of Serbia. See: Slobodan Orlovic, *Narodna skupština Srbije i Evropski parlament – jedno ustavnopravno poređenje*, *Zbornik PFUNS*, 3/2011 tom II, 501.

<sup>11</sup> This is why some call this the category of historical or aristocratic upper houses.

<sup>12</sup> It was characteristic most typically to England, Hungary, the German states, Spain and Japan.

<sup>13</sup> CHRONOWSKI Nóra-DRINÓCZI Tímea (edit.): *Európai kormányformák rendszertana*, HVG-ORAC Lap- és Könyvkiadó, Budapest 2007., 178-179.

<sup>14</sup> Each state of the USA and Russia delegates 2-2 persons to the Senate.

<sup>15</sup> In Austria, in accordance with this, the share of the states varies between 3 and 12.

<sup>16</sup> This method is characteristic of India.

themselves (3-5 persons based on the population) form the Federal Council, and in Russia it is formed by 1-1 delegates from the supreme representative bodies and the governments. In Canada, uniquely the Governor General appoints the members of the senate from the candidates of the states. Interestingly, prominent figures of the literature put the upper house in the people's representative category, while many deemed it to be a federal one, after the 1913 introduction of the direct election of the members.<sup>17</sup>

3. The territorial or local governmental system of upper houses is very similar to the federal one, the only difference is that here the elements of the state do not have representation by their own right, but by their sovereign decisions. Particularly, the second chambers of regionally structured countries can be sorted into this group, which could be considered a transition between unitary and federal states. In the Netherlands, the 75 members of the *Erste Kamer* (they call the upper house this way!) are elected by the provincial councils, not necessarily from their own members. The mandate of the members adjusts to mandate of the local governments. The composition of the Swedish upper house was similar until it existed (1969), and the Belgian one as well until their transition into a federal state (1993).<sup>18</sup> In France, unique county colleges elect the senators, which have members from county and municipal representatives, as well as cantonal and regional councillors. In Spain, most of the senate is elected directly by the population of the regions (autonomous communities), and the other members are delegated by the legislative bodies of the autonomous communities. In Italy, the upper house is also based on the regions, however the senators gain their office through *universal and direct* suffrage, so in fact the region merely serves as a basis for the constituency division of the *people's representative* type second chamber.
4. With the corporatist type second chamber, the forming of their composition is done along the guide of the social division of labour; the individual occupational branches and advocacy groups get into the legislative process this way. The single presently existing example of this is the Irish Senate<sup>19</sup>. Because of the electoral systems, it is important to emphasize that 43 members are *elected* from the representatives of the agriculture, industry, public administration, education, commerce, etc., and non-governmental organizations, religious advocacy groups, by an electoral body of some 1000 people, six gain membership from the graduates of the two Irish universities, and 11 persons are elected by the prime minister.

<sup>17</sup> See SZENTE Zoltán: *Bevezetés a parlamenti jogba*. Atlantisz, Budapest 1998., 85.

<sup>18</sup> In Belgium, the provincial councils could elect one senator for each 200,000 residents.

<sup>19</sup> The Slovenian National Council fulfils a similar role, with weaker powers. The employers and employees delegate 4-4 representatives, the farmers, crafts, and independent professionals delegate 4 as well, the agricultural organizations delegate 6 representatives, while 22 represent local interests.

5. We can separate people's representative type second chambers, which embody the popular sovereignty through the principles of classic suffrage. So generally they are also based on parties, thus they cannot really fulfil one of the most important traditional functions of the second chambers, the role of political counterweight. However, a different composition of the two houses can happen. It can be a result of, for example, electing the two bodies according to different principles: this way in the Czech Republic, the chamber of deputies formed with party-list proportional representation is completed by the senate, formed with a two rounds absolute majority system. In Poland, the system is similar, the only difference is that they employ relative majority voting with the second chamber. The terms of the two houses can be different, and the elections can take place at different times, in international practice we can see many examples for rotation, that is, certain fractions of senators are elected in multiple phases.<sup>20</sup> The practice for the minimum age for active or passive suffrage to be different with the two chambers is common, usually in the case of the upper houses the passive suffrage is tied to higher ages (often 40 years).<sup>21</sup> In Romania, both chambers are based on a mixed system.
6. Second chambers can be formed based on other founding principles, as the mentioned types are not represented in their pure forms in the first place.<sup>22</sup> By the formation of the representative office, we can differentiate the membership based on birth, title, election or delegation, and appointment as well. For the appointment, the already mentioned Canadian system is the almost only living example today, while in the past century a great deal of states built their upper house according to this,<sup>23</sup> while in some present day senates it can only be considered as a fringe principle.<sup>24</sup> In Belgium, one-seventh of the members are chosen by the senators themselves (*co-option*).

The so-called “false-bicameral” systems merely mean a separation by the division of labour. In Norway, the elected parliament (Storting) chooses one-fourth of its members, they form the Lagting, while the remaining three-fourths form the Odelsting. The Icelandic Althing does the same, only the ration here is one-third to two-thirds.

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<sup>20</sup> For example, in the Czech Republic the election of one third of the senators – with a mandate of 6 years – takes places every second year. The USA follows a similar system.

<sup>21</sup> A Czech example again: the age of active suffrage is 18 years, and the passive one is 21, regarding the chamber of deputies, and 40, regarding the senate.

<sup>22</sup> Just think about the Irish, or the aforementioned Slovenian systems, which uphold different principles.

<sup>23</sup> E.g.: Italy, Russia, Portugal, Turkey.

<sup>24</sup> This way in Italy the president can appoint five persons senators for lifetime, with respect to their scientific, cultural, artistic achievements, and in England the monarch can appoint the former prime ministers lords the same way. Márta DEZSŐ uses a similar categorization: *Képviselőt és választás a parlamenti jogban*, Közgazdasági és Jogi Könyvkiadó, Budapest 1998., 111-113.

## THE SECOND CHAMBER'S HUNGARIAN PAST

In the Hungarian governmental system, which underwent an organic development, the secular and ecclesiastic magnates from the 16<sup>th</sup> century deliberated separately from the county noblemen, represented by envoys, and this status was sanctioned by Act I of 1608. In 1885, the reform of the second chamber happened, which was becoming anachronistic. (The name was changed to House of Magnates.)<sup>25</sup>

The descendants of the House of Habsburg, living in Hungary and older than 24 years were members by pretence of inheritance of the chamber, called back to life – after an 8-year pause – by Act I of 1926, with the name Upper House. The people who got in by office and dignity were, for example certain leaders of high ranking courts and prosecutions, the crown guards, the Chief of General Staff, representatives of certain churches (e.g. bishop, reformed secular leader, rabbi, etc.). In the spirit of democratization, noble families paying at least 2000 pengő in land tax and representatives of certain legal persons (Hungarian Academy of Sciences, Országos Vitézi Szék (rough translation: „National Valiant Order”), universities and colleges, etc.) became upper house members by election. 40 (later 87) persons could take part in the legislative work with the appointment of the governor.

The communist leadership, aiming at the concentration of power and denying public law traditions, discontinued the second chamber, and naturally even the possibility of it.

There was no place for the senate in the constitutional reform created during the regime change, during the delicate search for balance among the different political powers, and the bicameral system did not rise to new life. The prejudices related to the Horthy-era could also have prevented the calling back to life of the senate. According to Kálmán Kulcsár, the experiences of the temporal post-communist dominance of the Polish second chamber also worked against it.<sup>26</sup> Prominent representatives of our constitutional law literature however put their faith in this controversial legal institution.

## ABOUT THE RELATIONSHIP OF THE TWO CHAMBERS

With international comparison, the competences of the two chambers are generally as much equal to each other, as the composition of the second chamber approaches the principle of people's representation.<sup>27</sup> We now analyse the issue,

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<sup>25</sup> The membership of titular catholic bishops and főispán-s (lord-lieutenants of counties) ceased. However, the presidents of the Curia, Budapest Court of Appeal, Administrative Tribunal, and 50 members, appointed by the monarch for lifetime, and all representatives of the established churches got in.

<sup>26</sup> KULCSÁR Kálmán: *A kétkamarás országgyűlés problémája*. Társadalmi Szemle, 1995/10.

<sup>27</sup> For example, it is almost equal in Italy, this is usually called symmetrical bicameralism.



which in itself is worth a separate study, only schematically, following the main thread of our subject.

1. In the case of two, wholly equal houses, the senate has absolute veto. The danger here is that in the case of disagreement, a deadlock can occur: the legislation is indecisive. (To overcome this, it is customary to convene conciliation committees and conciliation sessions.)
2. In the case of the partially absolute veto, the second chamber is only equal in certain issues; the senate does not have competence over some greatly important domains (generally budget, election of the government, no-confidence provision), or, on the contrary, it does competence over some (issues regarding the constitutional or federal chamber).
3. We can talk about a strong suspending veto, when the lower house, with qualified majority, can ignore it. For example, in Germany the veto of the Federal Council, accepted by two-thirds majority, can be overruled by two-thirds of the present representatives of the Bundestag (but at least more than half).
4. The veto is weakly suspending, if in the end the lower house can overrule the decision of the senate with a simple majority. For example, the decisions of the English House of Lords can be ignored by the House of Commons with certain conditions – in financial matters.<sup>28</sup>
5. Thus we can observe that the 2., and the 3-4. categories, the range and the subject of the veto, can be mixed as well. This way in France the strong suspending veto is related to the organic laws.<sup>29</sup>

The veto of the second chamber can also be connected to the veto of the president.

#### PLANS FROM THE RECENT PAST REGARDING THE SECOND CHAMBER

The thoughts of the bicameral system which possesses rich historical traditions, appear through the filter of the needs (and interests) of the present era. Science has even devised complete models for the realization of the senate.

Kálmán Kulcsár would compose the 100-member chamber according to the following:

1. Delegates of the local governments would give forty percent of the members (capital city, towns with county rights, settlements with more or less than ten

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<sup>28</sup> I made the categorization based on Zoltán Szente. See SZENTE Zoltán: i.m., 95-104.

<sup>29</sup> It cannot be made out exactly (they did not elaborate on this issue), however it seems that the great ones of our literature wish to establish the second or third category system in Hungary.



- thousand population 10-10 % – the ratio can also be different, for example the first two, and the second and the third one as one-third—one-third<sup>30</sup>);
2. Twenty percent would be elected by the most important public bodies of the country (Hungarian Academy of Sciences, professional associations, universities);
  3. The third group (20%) would be the chosen ones of the minority organisations;
  4. The fourth group would be appointed by the president from certain artists, scientists, professionals enjoying high social esteem.

Representatives of the churches would also be involved, if their inner regulations allowed it<sup>31</sup>, however for the labour unions he deems a different representative forum suitable.

Márta Dezső would build the senate based  $\frac{3}{4}$  on local governments. The election of the representatives would either happen in a small list system, or rather by the local governments, based on the nominations of citizens and social organizations, since according to her, the representation of the local governments would be more pronounced. Per county 2, 3 or 4 (but an identical number) nominees would win mandates. Depending on this, the second chamber would have 60, 80 or at most 100 members. The other representatives would be given by the trans-border Hungarians (through mail, 2-4 persons) and the minorities of Hungary (1-1 persons), and every former prime minister and president of Hungary would get into the senate. (Márta Dezső support this name.)<sup>32</sup>

From the factors of the second chamber of the kingdom without king, Imre Takács would consider the regional and public intuitional delegates to be involved into a theoretical second chamber.<sup>33</sup>

Certain scientist would also construct the body in question according to the local governmental-district principle.<sup>34</sup>

Mihály Bihari suggest corporative, ethnic, religious elements for the construction of the senate; either election by the membership of the bodies, or based on the positional or administrative principle, but he does not reject the limited emergence of the co-option.<sup>35</sup>

<sup>30</sup> Therefore strangely not the location of the settlements, but the size would be the deciding factor.

<sup>31</sup> The inner regulations of the catholic church do not allow the church officials to take secular positions, and because of this, not all denominations could be represented by their chosen officials – points out Kálmán Kulcsár (the delegate nominated by him however can, which can be a solution.).

<sup>32</sup> See DEZSŐ Mártai. m. 118-120.

<sup>33</sup> TAKÁCS Imre: *A törvényhozás második kamarája*. Társadalmi Szemle 1995./10. sz.

<sup>34</sup> E.g.: Pokol Béla, Sajó András, see CSERVÁK Csaba: *Választási rendszerünk a jogösszehasonlítás és a reformlehetőségek tükrében*, Jogelméleti Szemle 2001/3.sz.

<sup>35</sup> BIHARI Mihály – POKOL Béla: *Politológia*, Nemzeti Tankönyvkiadó Rt. Budapest 2010., 615.

Mihály Samudraws up the possibility of a second chamber consisting of representatives from local governments and non-governmental organizations, and beside this he points to a very unique, not often mentioned solution, which unites the virtues of corporativism and the principle of people's representation. During the regime change came the idea, that certain advocacy groups, labour unions, associations, etc. could launch lists similar to traditional parties, and the citizens could vote for a party and beside this for a non-governmental organization. (Could gain entrance to the second chamber based on the latter.)<sup>36</sup>

László Trócsányi – in addition to the aforementioned ones – mentions the representatives and certain office-holders of the chambers of commerce and industry (for example: presidents of the Hungarian National Bank and the Supreme Court of Hungary).<sup>37</sup>

Thus the second chamber could represent the interests of the society along very complex points of view, despite this, its construction – even if supported by an array of experts – will most likely remain a plan only. After the hypothetical agreement of calling it into life, the constituents would be divided by the precise composition of it.<sup>38</sup>

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<sup>36</sup> SAMU Mihály: *Alkotmányozás, alkotmány, alkotmányosság*, Korona kiadó, Budapest 1997.

<sup>37</sup> TRÓCSÁNYI László: *Közjogiváltozások és a rendszerváltás*, Magyar Közigazgatás 1993/7. sz., 394.

<sup>38</sup> In the working paper of the preliminary constitutional committee lead by László Salamon, the suggestion for the second chamber was explicitly there, without the concrete composition of it.

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## Дводомни парламенти – некад и сад

**Сажетак:** Данашњи научни консензус одговара гледишту да једино ири зране власи моу биши замисливе. Као закључак можемо заузети сав да постоје ири функције власи. То су: лејислаива, ејекуиива и судсиво. Ове функције се моу осивариваи од сиране различиих фактора власи, чији однос може биши различии зависно од облика организације власи. Он је значајно различии између парламентарног, председничког и полупредседничког сисема, ири чему је последњи представља средње решење. У области представничког модела власи, два парламентарна дома осмишљена су са сврхом да представљају различите социјалне групе. Са појавом буржоазије и ширењем парламентаризма, други дом је дуго оистио као сигурно место сирарих владајућих слојева. У демократском сисему, међушим, уредо са ирећходним, моу се уочиши нове функције сената, док је генерално и њихова сирруктура иакође ирећиела иромене. Двојак постиуак усвајања закона може биши гарант боље лејислаиве и иредуирейиши поиребу неиреситаних измена. У случају парламентарних сисема у којем су парламенти и влада међусобно уклољени, он може сивориши реалну поделу власи, он „оијежава“ деградацију функционисања представничког тела грађана у ласачку машину, нарочио уколико је већа разлика између начина избора сваког од два дома. Други дом, који није заснован на представничиву грађана, бар не на сираначком сисему, може рефлектовати друштво дуж различиих подела, јер грађани имају иијересе и мишљења независно од њихове иариијске ириадности, али која у иио време још увек моу биши изражена као полиитчка. Овај дом би могао сивориши представнички сисем за аполиитчне особе незаиниересоване за сираначки сисем; у односу на осиваривање како актиивног иако и пасивног бирачког ирава. Овај дом може неирихваиши одлуку дома народног представничива на ирофесионалном иринципу, а не на бинарном коду владајућих сирруктура и оиозиције (нарочио уз укључивање ирофесионалних иоејединаца који држе дисшанцу у односу на полиитчке сиранке). Према садашњем положају полиитчких сиранака, парламенти као представничиво грађана не може биши посмаиран као јединсивен, иио је резултат снага које имају ирилично различииа мишљења.

**Кључне речи:** устави, уставно право, дводомни парламенти, зване власи, парламентаризам.

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