



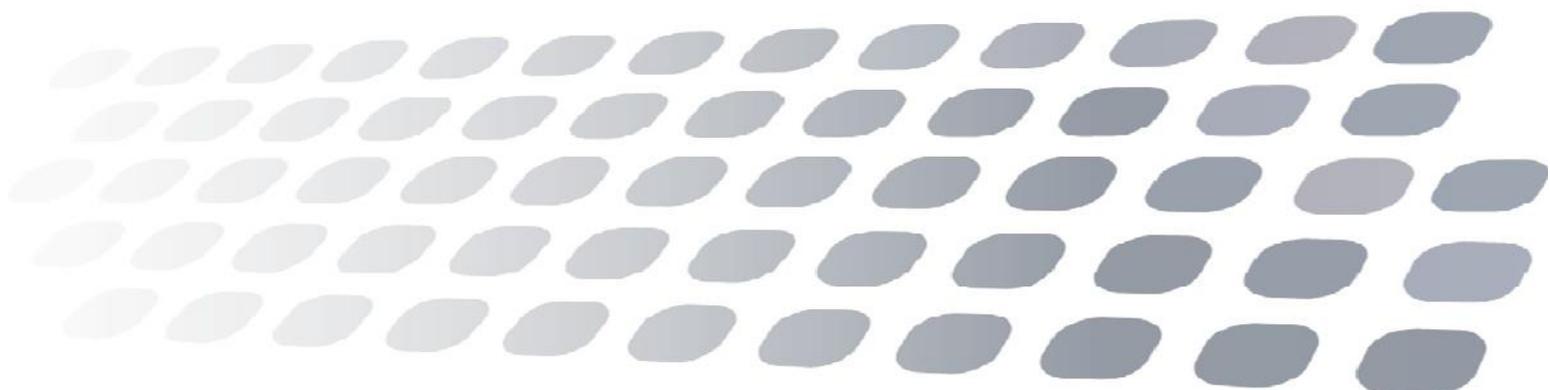
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TABLE OF CONTENTS

SPECIAL ISSUE

Representing Regions, Challenging Bicameralism

Edited by Anna Gamper

EDITORIAL

Representing Regions, Challenging Bicameralism: An Introduction
ANNA GAMPER ED- I-IX

ESSAYS

REGIONS AND THEIR CHAMBERS: OPTIONS FOR POWER-SHARING

Unicameralism, Bicameralism, Multicameralism: Evolution and Trends in Europe
PAOLO PASSAGLIA E- 1-29

Shared Rule vs Self-Rule? Bicameralism, Power-Sharing and the 'Joint Decision Trap'
ARTHUR BENZ E- 30-48

METHODS AND STRUCTURES OF TERRITORIAL REPRESENTATION

Beyond Second Chambers: Alternative Representation of Territorial Interests and Their Reasons
FRANCESCO PALERMO E- 49-70

Perfect and Imperfect Bicameralism: A Misleading Distinction?
GIACOMO DELLEDONNE E- 71-95

History of a (Limited) Success: Five Points on the Representativeness of the Committee of the Regions
GIUSEPPE MARTINICO E- 96-116

THE FUNCTIONAL DESIGN OF FEDERAL SECOND CHAMBERS

Legislative Functions of Second Chambers in Federal Systems
ANNA GAMPER E- 117-133

Extra-Legislative Functions of Second Chambers
ESTHER HAPPACHER E- 134-151

CASE STUDIES, PART I: SYMMETRY, BICAMERALISM AND MATURE FEDERAL SYSTEMS

The Swiss Ständerat: a Model of Perfect Bicameralism
EVA MARIA BELSER E- 152-181

The Austrian Bundesrat – Imperfect and Unreformed
PETER BUBJÄGER E- 182-197

The German Bundesrat and Executive Federalism
MATTHIAS NIEDOBITEK E- 198-214



CASE STUDIES, PART II: ASYMMETRY,
BICAMERALISM AND CONSTITUTIONAL
ENGINEERING

*Bicameralism in Belgium: the
dismantlement of the Senate for the sake of
multinational confederalism*

PATRICIA POPELIER E- 215-237

*The Secession Issue and Territorial
Autonomy in Spain: Bicameralism
Revisited*

ALBERTO LÓPEZ BASAGUREN E- 238-267

*Attempts to change the British House of
Lords into a second chamber of the nations
and regions: explaining a history of failed
reforms*

MEG RUSSELL E- 268-299

DEVELOPMENTS

*The Lesson from the Modern American
Federalism: A Challenge to Effective Public
Policy Performance*

GEIGUEN SHIN E- 300-320



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PERSPECTIVES ON FEDERALISM



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Representing Regions, Challenging Bicameralism: An Introduction

by

Anna Gamper*

Perspectives on Federalism, Vol. 10, issue 2, 2018



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Ed - I



Abstract

This special issue publishes a number of conference papers presented at the conference ‘Representing Regions, Challenging Bicameralism’ that took place on 22 and 23 March 2018 at the University of Innsbruck, Austria. In this issue, the developments of European bicameral parliaments in (quasi-)federal states are dealt with as well as the political impact of shared rule and alternative models to second chambers. Several papers compare the organizational and functional design of territorial second chambers. Finally, closer examination is given to the EU’s Committee of Regions and the second chambers in Austria, Belgium, Germany, Spain, Switzerland and the UK.

Key-words

Austria, Belgium, bicameralism, Committee of Regions, Europe, federalism, Germany, Italy, legislation, parliamentarism, regionalism, second chambers, shared rule, Spain, Switzerland, United Kingdom



1. Second Chambers Revisited

In the world of modern constitutionalism, second chambers belong to the most archaic institutions whose roots lie in a time before the enactment of the first written constitutions (Luther 2006: 8-13). Nevertheless, they are also remarkably versatile institutions that have assumed many roles in different constitutional contexts. From time to time, academic interest (see, eg, Patterson and Mughan 1999; Luther et al 2006; Baldwin and Shell 2002; Riescher et al 2010; Russell 2000) in second chambers flares up and then subsides, mostly leaving a dull sensation of an endangered species whose continued existence might not even be desirable. Still, and despite the fact that some second chambers were abolished over the last decades – the most recent example worldwide being the Senate of Mauritania – most of them are still maintained, and some have even been newly created (Coakley 2014). In Europe, the Irish Senate was upheld by a constitutional referendum in 2013, while the Italian Senate was confirmed in its organisation and functions by Italian voters in 2016. A new second chamber has recently been installed in Ivory Coast and Nepal as well as been reintroduced under the 2017 Constitution of Thailand.

Second chambers still show a fascinating variety of compositions that range from elitarian to democratic models. A majority of second chambers, however, is committed to territorial representation (Russell 2001), which is shown both by the composition and – sometimes – also by the functions of these chambers. Territorial representation implies a democratic composition, since, ultimately, the territorial peoples are represented. Depending on whether this is done directly or indirectly, symmetrically or asymmetrically, or in conformity with the same electoral principles that apply to the first chamber, this may result in very different outcomes. Territorial representation through a second chamber is usually a requisite in federal systems, with very few exceptions, such as St. Kitts and Nevis or Venezuela (Palermo and Kössler 2017: 165-177; Watts 2008: 147). However, many regionalized states too have a territorial second chamber which grants their regions some kind of shared rule even where regional self-rule is largely missing.

In Europe, also, a majority of second chambers of national parliaments have a territorial composition. Most of them can be found in federal states, such as Austria, Belgium, Germany or Switzerland, or in quasi-federal systems, such as Italy or Spain. There



is no federal or quasi-federal state in Europe without a bicameral parliament, in whose second chamber the regions (in Belgium: also the linguistic communities) are represented, while there are few states with some little degree of decentralisation and an either territorially or non-territorially composed second chamber. The UK constitutes a unique example, as Scotland, Wales and Northern Ireland enjoy an almost quasi-federal status regarding their powers (including, first and foremost, legislative powers, all of them being, however, subject to the supreme Westminster Parliament) and as the House of Lords is a second chamber, but, so far, without a territorial composition.

Despite the prevalence of territorial second chambers in (quasi-)federal states, however, neither these chambers nor the (quasi-)federal systems as such have remained unchallenged in recent times. Remarkably, there does not seem to be much difference between full-fledged or emerging, original or derivative, symmetric or asymmetric federal systems in this respect. Perhaps the most dramatic recent experience was the envisaged constitutional reform in Italy which would have altered the Senate organisationally and reduced its functions considerably. But other (quasi-)federal second chambers are also severely criticized, quite paradoxically either for their weakness and inefficiency or for their strength and braking power. A recurring narrative, moreover, is the absence of ‘true’ representation of regional interests despite formal adherence to the territoriality principle.

2. In this Issue

Against this background, an international conference titled ‘Representing Regions, Challenging Bicameralism’ took place on 22 and 23 March 2018 at the University of Innsbruck, Austria. Hosted by the University’s Research Centre on Federalism, it assembled a number of renowned experts on federalism and bicameralism who examined the complex relationship between both issues from various perspectives. The Journal is proud to present their written contributions in this special issue and would like to thank both the authors and the anonymous peer reviewers for their excellent inputs and punctuality.

Paolo Passaglia starts with an impressive picture on the genesis, trends and challenges of not only bi-, but also tri- and multicameralism in Europe. His rich exploration of the very diverse structures includes a warning that efficiency in parliamentary processes should



not be the sole value, but balanced against the democratic idea of representation of interests.

Territorial second chambers institutionalize shared rule by these territories, but are exposed to the risk of the ‘political decision trap’ (‘Politikverflechtungsfalle’, coined by Fritz Scharpf 1976). From a political science perspective, Arthur Benz argues that the trap is not inevitable, but that it depends on certain political conditions as to whether joint decision-making produces are just deadlocks or rather serve as a suitable environment for federal governance.

Francesco Palermo critically inquires whether federal second chambers truly perform the function of representing regional interests (apart from other functions that may be judged differently). His answer is in the negative, arguing that regional interests are frequently heterogeneous and that alternative models, such as executive-based as well as bilateral representation, are often more successful.

The effectiveness of second chambers is closely, though not unavoidably linked to the issue of perfect and imperfect bicameralism, which is treated by Giacomo Delledonne. According to this author, there is great diversity between imperfect second chambers and their functions that should not be underrated when it comes to the practical functioning of a second chamber.

Turning to the EU level, Giuseppe Martinico explores whether the Committee of Regions is or could be regarded as a ‘regional third chamber’. While such a function would not be wholly excluded at least to some extent, it is nevertheless hardly practiced under prevailing political and legal circumstances, namely the absence of strong powers and the heterogeneity of assembled interests.

Academic interest in federal second chambers usually focuses on their legislative powers. Still, this should not preclude discussion of their extra-legislative functions, which may endow them with additional constitutional legitimacy quite apart from issues of federalism. As Esther Happacher shows in her article, second chambers may be involved in or even solely responsible for a variety of important extra-legislative functions: in particular, functions related to the appointment and control of the executive, international and EU functions, or functions related to constitutional courts and the enforcement of sanctions.



But even their legislative functions are neither simply those of veto players nor are they limited to federalist purposes, as Anna Gamper argues. They range from the power to initiate and veto bills, to requests for pre- and post-enactment scrutiny by courts, to the call for referendums and even autonomous law-making. However, legislative decision-making in second chambers is, when compared empirically, largely majoritarian and thus is no guarantee for the individual protection of regions.

Six authors deal with specific cases of second chambers in Western European federal or quasi-federal states. The selection comprises the second chambers of Austria, Belgium, Germany and Switzerland as well as those of Spain and the UK which, for the above stated reasons, was included due to its fascinating character as a strongly, if asymmetrically regionalized state with a non-territorial second chamber under an unwritten constitution.

The most remarkable result of these case studies is perhaps that all compared second chambers are under critique, irrespective of the type of (perfect or imperfect) bicameralism and of (quasi-)federalism in which they are embedded. A vast majority is accused of disregarding the representation of regional interests which is partly due to a lack of legal powers, partly to their political dysfunctionality. Both aspects are characteristic of the ‘imperfect’ second chambers in Austria and Belgium, as Peter Bußjäger and Patricia Popelier respectively show; genetic differences – Austria emerged as an ‘original’ federal state, while Belgian federalism resulted from various constitutional amendments – have had no obvious impact on the altogether ‘weak’ roles of these second chambers. The second chambers in Germany and Spain are ‘imperfect’ as well; nonetheless, the German Bundesrat is usually regarded as a strong second chamber that efficiently protects the interests of the Länder. As Matthias Niedobitek explains, however, even the German Bundesrat, formally disqualified as a ‘second chamber’ by the German Bundesverfassungsgericht, is criticised for various reasons: one of these is its executive-based organisation that furthers the trend towards executive federalism in Germany. While the German Bundesrat achieves a representation of Länder interests on the whole, the Spanish Senado does not operate as a representative body of the Autonomous Communities and surely not for the protection of individual regional interests. This has become manifest recently, when the Senado agreed to apply Art 155 of the Spanish Constitution in order to enable the interim takeover by the central government in Catalonia.



Both the Italian Senato and the Swiss Ständerat are examples of perfect bicameralism: so far, the Senato's status has been maintained by the Italian constitutional referendum of 2016. As regards the Swiss Ständerat, Eva Maria Belser explains the importance of a counter-majoritarian chamber which strongly contributes to the consensual model of democracy in Switzerland. Even though in Switzerland, too, alternative mechanisms apply in order to represent cantonal interests, the protection given to smaller cantons by their (at least, basically) equal representation in the Ständerat is regarded as a value of its own.

A final very interesting case is constituted by the House of Lords. Amongst the second chambers examined in this special issue, but also from a wider perspective, it is unique in as much as the House's composition still follows an elitarian concept which has been under discussion for decades. As the UK became an asymmetric regionalized state, this raised the question whether the House of Lords could be democratized by transforming it into a representative chamber of the regions. Meg Russell reports that this particular aspect has been discussed, though not with much fervour, since many unresolved questions – e.g. whether an English 'region' with its own institutions should be created – are attached to it.

3. In Place of a Conclusion

Second chambers are too complex phenomena to allow for simple conclusions on their legitimacy. As regards the second chambers compared in this special issue, they have, indeed, survived thus far, and are also likely to survive in the not too distant future. Whether they represent regions in a politically efficient manner, is another question: most of the chambers examined do not, which is partly due to their lack of legal powers, partly to their political failure. But this does not constitute an argument against perfect bicameralism or, at any rate, powerful second chambers, since their chance of representing regional interests is surely higher than in the case of second chambers that do not even have sufficient legal instruments at their disposal. If it is, therefore, mainly the 'political' argument that speaks against second chambers we have to ask ourselves if this is a specific argument related to second chambers or rather something which parliaments, and first chambers, may be generally accused of. Are not parliaments, and first chambers, often politically dysfunctional, too? Do members of parliament, and first chambers, properly work in the interest of the people they represent? Have parliaments, and first chambers,



not become sleeping beauties, while the legislative trigger lies with the executives (Bradley and Pinelli 2012: 665-669)? In other words, is it a particularly *territorial* problem that second chambers are accused of, or rather a phenomenon inherent in modern parliamentarism?

There are five reasons, in my opinion, that plead for the continued existence of these second chambers: first, they are often confronted by a diffuse complaint of ‘political dysfunctionality’ which seems to be mostly orientated at their role in legislative processes. A more subtle look into the variety of their legislative powers as well as their extra-legislative powers shows a more differentiated picture. Second, territorial second chambers may strengthen non-territorial constitutional values, such as the separation of powers, multi-level democracy or consociationalism. Unlike elitarian second chambers, they are themselves democratic institutions. Third, federal systems need the ‘glue’ of shared rule at federal level (Watts 2008: 135). Even though several species of territorial representation models outside second chambers have emerged, one may doubt whether these are truly ‘alternative’ or rather ‘additional’ mechanisms. So far, there is hardly any empirical evidence on whether such mechanisms could really substitute second chambers if the latter were *totally replaced* by them. Some of them, such as interregional conferences, would, moreover, rather resemble chamber structures. Fourth, the problem that regions may have heterogeneous interests and that some of them may hold more mandates in the second chamber than others is not rooted in the construction of a second chamber as such, but in factual differences between regions on the one hand, and the chamber’s composition and internal decision-making on the other. There are several possible ways how second chambers may handle this, depending on the symmetry or asymmetry of composition and by the choice of decision-making that, depending on issues, may be designed in a more or less majority- or minority-friendly way. The same problems, moreover, principally occur within ‘alternative mechanisms’ whenever interests need to be aggregated, and even where bilateral instruments are used this will not prevent a clash of interests from an overall perspective. Fifth, the very existence of formal constitutional powers of second chambers may have a beneficial effect for the protection of territorial interests even if they do not normally use these powers.

These are surely not the only arguments in favour of territorial second chambers and neither can they make their obvious deficits, weaknesses and dysfunctions disappear.



Still, a differentiated view seems to be in place, and this is, I think, offered by the following articles very richly.

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References

- Baldwin Nicholas D.J. and Shell Donald (eds), 2002, *Second Chambers*, Frank Cass, London.
- Bradley Anthony W. and Pinelli Cesare, 2012, 'Parliamentarism', in Rosenfeld Michel and Sajó András (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 650-670.
- Coakley John, 2014, 'The Strange Revival of Bicameralism', *The Journal of Legislative Studies*, XX(4): 542-572.
- Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), 2006, *A World of Second Chambers*, Giuffrè Editore, Milan.
- Luther Jörg, 2006, 'The Search for a Constitutional Geography and Historiography of Second Chambers', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers*, Giuffrè Editore, Milan, 3-31.
- Palermo Francesco and Kössler Karl, 2017, *Comparative Federalism*, Hart, Oxford.
- Patterson Samuel C. and Mughan Anthony (eds), 1999, *Senates: Bicameralism in the Contemporary World*, Ohio State University Press, Columbus.
- Riescher Gisela, Ruß Sabine and Haas Christoph M. (eds), 2010, *Zweite Kammern*, Oldenbourg Verlag, Munich.
- Russell Meg, 2000, *Reforming the House of Lords: Lessons from Overseas*, Oxford University Press, Oxford.
- Russell Meg, 2001, 'The Territorial Role of Second Chambers', in Baldwin Nicholas D.J. and Shell Donald (eds), *Second Chambers*, Frank Cass, London, 105-118.
- Scharpf Fritz W., 1976, 'Theorie der Politikverflechtung', in Scharpf Fritz W., Reissert Bernd and Schnabel Fritz, *Politikverflechtung: Theorie und Empirie des kooperativen Föderalismus in der Bundesrepublik*, Scriptor Verlag, Kronberg, 13-66.
- Watts Ronald L., 2008, *Comparing Federal Systems*, 3rd edition. McGill-Queen's University Press, Montreal.



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Unicameralism, Bicameralism, Multicameralism: Evolution and Trends in Europe

by

Paolo Passaglia*

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Abstract

An analysis of the structure of parliaments in European countries shows that a wide range of options developed across the centuries. However, many of these patterns (among which tetracameralism, tricameralism, and qualified unicameralism) did not survive, despite their sometimes-remarkable historical interest.

Currently, parliaments in Europe are either unicameral or bicameral: while unicameralism is the most common option, bicameralism is generally adopted in more populous countries and/or States with strong territorial autonomies. As a matter of fact, among varieties of bicameralism, the most common is characterized by a ‘territorial’ second chamber. Nevertheless, other types of bicameralism deserve attention too, not only to provide a comprehensive outline of the comparative scene, but also to find features that can define emerging trends.

For this purpose, a classification of bicameralism will be outlined, mainly examining the patterns displayed by second chambers and the relationships between the two chambers. Combining this classification with the outcomes of the choice between unicameralism and bicameralism, some trends can be detected, although national experiences are so diverse that reliable norms are difficult to identify.

Key-words

parliament, unicameralism, bicameralism, representation, decision-making process



1. Introduction

A comparative analysis shows that there is a huge diversity in the patterns identifiable in parliaments across European systems, especially if one adopts an historical approach, as Europe is the region where most of the models experimented with throughout history were created. As a matter of fact, a complete examination of the patterns distinguishing parliaments in Europe would require a deep historical analysis, dating back at least to the Middle Ages (Marongiu 1968).

In those centuries, embryonic ideas of structures for the representation of society paved the way for systems made of councils and assemblies, each representing a sector of society in advising the monarch.

The structure of the system of councils and assemblies, that would later become the parliament, depended mostly on how society was divided, or rather on how the sectors of society that were considered as deserving representation were divided. As a result, the ancestors of modern parliaments were organised in a variable number of assemblies — or, as they would be called later, chambers or houses. The main patterns of the parliaments that characterised European countries were based on one, two, three or four assemblies. Over time, the number of assemblies was reduced, so that no more than two chambers can be found in modern parliaments. Nonetheless, a brief overview of the patterns existing in the past may be of some interest, especially as this can help us understand the reasons for the subsequent evolution that resulted in parliaments as we know them today (para. 2). After this overview, an analysis of contemporary patterns will be provided, with an attempt to classify the main categories of current parliaments in European countries (para. 3). The classification will allow to draw some concluding remarks (para. 4).

2. The Patterns of the Past

This overview of the patterns of the past should begin with an analysis of the evolution of the British Parliament, since its roots date back to the Anglo-Saxon period (Perceval 1953: 33-48), and its evolution can help to explain how the system developed as it is, and works today. The way in which Westminster became a bicameral parliament is a subject



that deserves special attention, both from an historical point of view, and in order to find links with its surviving peculiarities. The aim of this paper is much more general (or maybe generic), and therefore such an analysis does not fall within its scope: strictly speaking, after all, the British solution cannot be considered as a pattern of the past, but rather an ancient solution that exists to this day, thanks to adaptations and reforms; in fact, the structure of the British Parliament will be taken into account as a prototype of modern parliaments.

The real patterns of the past are those that disappeared because they were abolished more or less recently. Most of them can be jointly defined as ‘multicameralism’, because they featured a number of chambers greater than two. Two main types of multicameral parliaments can be identified: the three-chamber and the four-chamber systems, respectively called ‘tricameralism’ and ‘tetracameralism’.

Another pattern disappeared very recently, the so-called ‘qualified unicameralism’, that was characterised by a varying structure of the parliament.

2.1. Tricameralism

The most renowned example of tricameralism in history is certainly that which characterised the French *Ancien Régime*, where the States-General were divided into three assemblies, the first representing the clergy, the second the aristocracy and the third the commoners (Krynen 1987: 30-44).

After the French Revolution, the three-chamber structure of the legislature was reintroduced during the French Consulate (1799-1804) and at the beginning of the First Empire (1804-1807). Together with the *Corps législatif*, which was the successor of the Council of Elders (thus the equivalent of an upper chamber) and the *Tribunat*, successor of the Council of Five Hundred (the equivalent of a lower chamber), a *Sénat conservateur* was established and endowed with the power to protect the Constitution from legislative acts.

The system eventually became bicameral, when, in 1807, the *Tribunat* was abolished, in view of a further concentration of powers into the hands of the Emperor, which succeeded in subjecting the remaining chambers to his rule, so as to exercise his rule-making power without major counterweights.

As for the rest of Europe, perhaps the only recent case of tricameralism worthy of mention is that introduced in the Socialist Republic of Croatia, in which for almost two decades the legislature established was based on three councils, each of which represented



different approaches to decision-making. In this regard, the Constitution of 1974 established a Socio-Political Council, a Council of Municipalities and a Council of Associated Labor. When Croatia became an independent State, the Constitution of 1990 abolished tricameralism and introduced bicameralism.

Apart from France and, to some extent, Croatia, the most significant experiences of tricameralism are not to be found in Europe. Indeed, in the history of political thought, the idea of a three-chamber parliament is frequently associated with Simón Bolívar's theory, according to which a popularly elected chamber, (the Chamber of Tribunes) would be endowed with the power to regulate finance and foreign affairs, a hereditary chamber (the Senate) would enact law, and a third chamber (the Censors) would have the power to review the lawfulness of the acts of the other two and to protect fundamental rights.¹ This parliamentary pattern was never really established in the countries of the American continent when they gained independence; therefore the interest in Bolívar-style tricameralism relies essentially on its theoretical value.

In contrast, from a practical point of view tricameralism was a relevant feature of the Constitution of South Africa of 1983, which is sometimes called 'Tricameral Constitution', precisely to stress the importance of the changes made to the structure of the parliament with regard to the overall constitutional system (Welsh 1984: 147-162). The three-chamber structure of the parliament was a part of the country's *apartheid* policy, as each chamber represented a race: the House of Assembly was reserved for whites, the House of Representatives for blacks, and the House of Delegates for indians. The tripartition was combined with a limitation of powers of the Parliament as a whole, and a disparity between the chambers, such as to give the House of Assembly a preeminent role. The distance between the *apartheid* regime and modern democracies in Europe is so deep that an analysis of this experience of tricameralism in this paper would be rather odd: even this brief mention is probably enough to confirm the irrelevance of the subject, given that the division of chambers on the basis of race is, of course, wholly inconsistent with the principles regulating parliaments throughout Europe.

2.2. Tetracameralism

In some countries, the fragmentation of representation led to the creation of a four-chamber parliament. This was the case, in particular, with the Swedish *Riksdag* of the



Estates, in which four assemblies represented, respectively, the aristocracy, the clergy, the burghers and the peasants.

The traditional four-chamber Diet was abolished in 1866 and replaced with a bicameral legislature. This pattern survived in Finland, where the Swedish model was adopted in 1809, when the land was lost by the Realm of Sweden and became a Grand Duchy submitted to the rule of the Russian Empire. Although only sporadically convened, the Finnish legislature maintained its traditional structure for almost a century, until 1906, when tetracameralism was replaced by a unicameral parliament.

2.3. Qualified Unicameralism

A very peculiar structure for parliament is that of so-called ‘qualified unicameralism’, in which the parliament divides into two internal chambers when considering the most important (legislative) matters. This system was typical of Norway (as well as of Iceland, before 1991); since the 2009 Norwegian elections, however, it disappeared in favour of a classical unicameralism (Passaglia 2015: 85-95). In Norway, qualified unicameralism was the result of a compromise reached in 1814 during the Constituent Convention. On the one hand, most parliaments established at the time had a bicameral structure, typical of the constitutional ideals of the Enlightenment, and bicameralism characterised parliaments established by the Constitutions that had most influenced the Norwegian Constituent — namely the American Federal Constitution of 1787 and the French Constitutions of 1791, 1793 and 1795. On the other hand, nothing in the Norwegian political and social context truly justified bicameralism: there was virtually no nobility (and what little did exist would be abolished a few years later) that could form an aristocratic second chamber; Norway was conceived as a unitary state, such that there was no need to establish a second chamber to represent territorial autonomous entities (Rommetvedt 1992: 79).

The influence of foreign models led to a compromise, in the sense that it was ultimately decided that all Members of Parliament would be elected in the same way and form a single assembly, which would be divided into two chambers when dealing with specific matters. After elections, the Parliament (*Storting*) would elect a quarter of its members to form the *Lagting*, a sort of ‘upper chamber’, with the remaining three-quarters forming the *Odelsting*, or ‘lower chamber’.



Progressively, throughout the 19th century, the division between the two chambers became merely apparent and remained thus for the entire 20th century. Serious disagreements between the two chambers were therefore hard to identify.

As a result, at the beginning of the 21st century, Norwegian qualified unicameralism had a relatively long history of rather limited usefulness. The second chamber, conceived as a reduced copy of the first, did not significantly improve legislation and decision-making; such that the result of this increased procedural complexity was generally a longer time elapsing from the proposition to the adoption of an act, without any specific benefit for its contents.

A proposal to amend the Constitution and abolish the system of *Odelsting* and *Lagting* was introduced in 2004 and was passed by the *Storting* on 20 February 2007 by an overwhelming majority. The reform took effect in 2009, with the newly elected *Storting* (Smith 2008: 393).

3. The Current Landscape

The more complex patterns of parliament experimented with in the past did not survive into modern times; or, rather, they were restricted to very limited areas before they were abolished. Consequently, only two forms can be found in contemporary European States: unicameralism and bicameralism.

According to the Inter-Parliamentary Union's database,^{II} most countries have chosen the unicameral pattern: however, the bicameral one is far from rare. Overall, there are thirty-one unicameral parliaments in Europe at the national level, while bicameralism is adopted in seventeen countries. Unicameralism is therefore the structure of roughly two thirds of the parliaments (64.6%), although the minority choice in favour of bicameralism cannot be neglected (35.4%), at the very least statistically speaking.^{III} The case of Germany requires some explanation: formally, its parliament should be deemed unicameral, because the *Bundesrat* is not a second chamber in the traditional sense (Kotzur 2006: 257-290); nonetheless, in functioning as a constitutional body representing the Member States the *Bundesrat* plays a role that is absolutely comparable to that of formal second chambers in other countries, so that, for the purposes of this paper, the German Parliament will be considered bicameral.



The choice between one or two chambers is difficult to explain with clear and undisputable criteria. In fact, there is no correspondence between a pattern and one or more other characteristics of the countries; at the most, some trends and leanings can be estimated.

First, population size seems to impact the choice. Among the twelve most populous countries in Europe, ten have a bicameral parliament:^{IV} only Turkey (the third country by number of inhabitants) and Ukraine (the eighth) have adopted unicameralism. Four other countries in which the parliament consists of two chambers rank among the fourteenth and the twenty-first most populous.^V Therefore, among the less populous countries in Europe, only three States have adopted bicameralism: Ireland (twenty-eighth in ranking, by population), Bosnia and Herzegovina (the thirtieth), and Slovenia (the thirty-seventh).

This outline of the European situation confirms a trend that can also be identified at the worldwide level: unicameral parliaments are in the majority, but bicameralism is the pattern that characterises most of the countries with more than thirty million inhabitants: thirty out of the forty most populous States have a two-chamber system, so that approximately four billion people live in countries where the parliament is bicameral, notwithstanding the fact that the unicameral pattern is adopted by the Popular Republic of China.

Second, the geographic extension of the countries also seems to have some influence. In this regard, nine out of the first thirteen countries ranked by area, in Europe, have a bicameral parliament.^{VI} The exceptions are: Ukraine (the second), Sweden (the fifth), Norway (the sixth), and Finland (the eighth). From a more general perspective, geographic area can be considered as a criterion for the choice, since the Popular Republic of China is the only country, among the ten most extended ones, that has not chosen a bicameral parliament.

A third criterion to take into account is history, which appears to play a role in orienting towards either unicameralism or bicameralism. Indeed, in many systems, the present structure of the parliament was very much influenced by the solutions adopted in the past, such that a sort of 'path dependence' can be noted.^{VII} The case of the Parliament of Westminster is too obvious to merit explanation. However, several other examples could also be mentioned. In this regard, one could observe that in Eastern Europe, bicameralism was adopted in very few countries: it is fair to state that a possible link with



the past tradition of Soviet Law can be seen. According to Marxist-Leninist political theory, popular sovereignty could not be divided; therefore, in Soviet states, there was no room for a two-chamber parliament. However, the Soviet Union itself coupled popular representation with the representation of territories within the framework of a Union among formally autonomous Soviet republics. In other words, from a theoretical point of view, bicameralism was conceived as creating a rift in unitary popular sovereignty; in more concrete terms, second chambers were seen as typically conservative institutions, and therefore not consistent with the Marxist theory of the State and with the implementation of a Communist society. Upon the fall of Socialist regimes, the transition towards liberal democracy affected a very significant part of the institutional framework; however, unicameralism was replaced with two chambers in only a few cases. Apart from the Russian Federation, which derived its bicameralism directly from the past, bicameral legislatures were adopted in Belarus, in the Czech Republic (since 1996, notwithstanding major opposition – Kysela 2006: 1012-1013), in Poland (where the choice of bicameralism in 1989 ‘was quite unexpected’ — Granat 2006: 965), and in Romania, as well as in three former members of the Yugoslavian Federation, namely Bosnia and Herzegovina, Slovenia, and Croatia, where a Chamber of Counties serving as a second chamber was established in 1990, but was subsequently abolished in 2001. All fourteen remaining post-Socialist countries opted for unicameralism.

There is a form of path dependence on the opposite side too, as it is relatively rare to bring about a transformation from bicameralism to unicameralism. Leaving aside those Socialist states in which the second chambers were abolished precisely as a result of the theoretical approach to the division of power,^{VIII} unicameralism was sometimes the result of the abolition of the second chamber (such as in Denmark, in 1953) or of the merger of the two chambers into a single one (such as in Sweden, in 1971). The abolition or merger took place when the original reasons leading to the establishment of bicameralism no longer held: unicameralism was the result of an effort to simplify the structure of parliament, as its complexity was considered unnecessary.

Finally, and perhaps most importantly, the structure of the State quite clearly influences the structure of parliament, given that in Federations or in Regional States, a two-chamber system is generally adopted. Although the subject will not be considered in this paper, it is



noteworthy that the choice of bicameralism at the federal level is not frequently repeated at the sub-national level.^{IX}

Even extending the analysis to non-European countries, a comparative analysis shows that unicameralism in a federal state is rather exceptional: the unicameral parliaments of the United Arab Emirates, Venezuela, Comoros, Micronesia, St. Kitts and Nevis, and – until its recent division – Serbia-Montenegro, do not negate the strong trend in favour of bicameralism in federal countries (Watts 2010: 2).

The suggested link between the form of the State and the pattern of parliament could lead one to emphasise the potential impact of the need to represent territories on the existence of a second chamber: in this regard, a connection certainly exists; however, it should not be perceived as binding, as it is not an invariable rule that second chambers represent territories in federal or regional countries. This observation testifies to the appropriateness of engaging in further analysis of the role and functions of the second chambers: bicameralism can have, in fact, very different foundations and purposes. Thus, an overview of the main models of bicameralism in Europe is required to better describe the kaleidoscope of solutions adopted by different countries.

3.1. Patterns of Bicameralism

The choice of bicameralism can be for different reasons, for which scholars have proposed several rationales. For instance, the focus could be on the benefits of a second chamber in terms of representation of interests or in terms of the quality of the decision-making process (Money and Tsebelis 1992: 25-43); a further benefit was identified as consisting in a stronger protection of individuals' rights and freedoms (Llanos and Nolte 2003: 54-86). More generally, the functions of second chambers can be summarised with regard to the strengthening of 'representation' and 'reflection' (Norton 2007: 3-18; see also Romaniello 2016: 6-12).

Other possible purposes motivating the establishment of bicameralism could be classified on the basis of the definition of the second chamber. In this regard, five such definitions are proposed: 'aristocratic' (*a*), 'counter-majoritarian' (*b*), chamber of 'further reflection' (*c*), 'corporatist' (*d*), and 'territorial' (*e*).

(*a*) In some systems, the two chambers were conceived of to represent the different foundations of government: the lower chamber operated as the body that represents the



people, whereas the second chamber aimed to preserve the traditional aristocratic principle, being an unelected body of hereditary members or of members appointed irrespective of any electoral mandate.

This form of bicameralism was typical of the 19th century, when the democratic principle was taking root in European countries and still coexisted with traditional forms of legitimacy, such as the divine right of kings or the oligarchic form of exercising power. The upper chamber was then supposed to cushion the lower chamber's decisions, which would have been 'too much upon the democratical order', as Benjamin Rush, a signatory to the American Declaration of Independence, would have said (Hawke 1961: 193-194). A good example of this coexistence is the Kingdom of Italy immediately after Unity, when Victor Emanuel II was proclaimed, in 1861, King by 'the grace of God' and 'the will of the Nation'. Both of these principles were implemented in Parliament, since the members of the Chamber of Deputies were elected by popular vote while the members of the Royal Senate were formally appointed by the King, usually upon the 'more-than-persuasive' advice of the Government.

'Aristocratic' second chambers have rarely survived to present times. The most notable exception remains the House of Lords of the United Kingdom, irrespective of the evolution undergone by this institution in the 20th century and the attempted reforms that are still debated in Westminster today (Russell 2000; Russell 2013: 285-300).

Even though aristocratic chambers have disappeared in almost all democratic countries, some traces of the idea that led to their establishment may be recognised in some contemporary 'non-aristocratic' chambers, such as, for example, the Canadian Senate. In Canada, the British prototype was revisited: the hereditary members were abolished, but the formal appointment of senators by the Head of State (i.e. the Governor-in-Council) is still one of the institution's main features (Pinard 2006: 466-476).

A different kind of 'heir' of the aristocratic second chamber may be seen in those chambers which, by their composition, strive to ensure an additional dose of 'wisdom' within institutions. The Italian Senate is an example, since the minimum age to be elected as senators is 40 (whereas to be elected as members of the Chamber of Deputies, the minimum age is 25): consequently, being 'mature', senators are supposed to be wise enough to avoid any 'mistakes of youth'.



(b) Today, traces of the ancient aristocratic chambers may also be found in those second chambers that play a key role in avoiding the ‘tyranny of the majority’. Indeed, there are second chambers that are often counter-majoritarian institutions because of the way in which their members are appointed and, sometimes, because of the structure of the political system.

Even though the presence of a second chamber is itself a means to offer counterweights to the majority, since it increases the chances to express different points of view, there are some cases of second chambers that play a precise role in limiting the action of the political majority expressed in the first.

Some examples may be helpful. As mentioned above, in Canada, senators are appointed by the Governor-in-Council, and they serve until they reach the age of 75. Because of this system, a cabinet that remains in office for a long time can appoint a great number of senators, such that the majority of these senators share the political views of the Government (and of the majority of the House of Commons). As a result, when a new majority is elected, and a new Government is formed, the majority of senators remains, for some time, the expression of the old Government; in other words, the new Government needs time to appoint new senators to reverse the old majority, but these appointments cannot take place until the senators in power reach the age of 75. Thus, the Canadian Senate is a temporarily counter-majoritarian institution.

The French Senate of the Fifth Republic is another good example of a virtually counter-majoritarian institution. French senators are indirectly elected, as they are chosen by elected officials, and they represent territorial collectivities. This type of election, together with constituencies favouring rural areas, led to a stable right-wing majority; as a result, for a long time, the Senate was a chamber of opposition to any left-wing Government (Di Manno 2006: 251-252). The situation changed in the 2011 elections, which produced a centre-left majority for the first time; thus, for a few months the Senate was a chamber of opposition against the right-wing Government, before becoming part of the governmental majority with the presidential and legislative elections of 2012. Two years later, the new elections for the Senate resulted in a new centre-right majority, that restored the ‘ordinary’ opposition of the Senate to left-wing Governments.

(c) Another model of bicameralism is typical of the parliaments characterised by two chambers that share, as a general rule, the same degree of legitimacy, given that the



members of both chambers are selected in a very similar way, namely through direct election. In this case, the existence of two chambers is a means to ensure ‘further reflection’ in the decision-making process. The degree of ‘reflection’ changes, of course, depending on the powers and responsibilities of the second chamber; they may be equal to the first, but may also be limited to the function of a simple suspensive veto. The Italian Parliament, under the Constitution of 1947, is one of the standard examples of this type of bicameralism (the different ages required to become senators or Members of the Chamber of Deputies has not produced substantial dissimilarities in the composition of the chambers), apart from a period during which the second chamber worked as a limit upon the ‘tyranny of majority’, due to important differences that were introduced into the electoral system of the two Chambers.^x

(d) A different model for an upper chamber was adopted in the 1937 Irish Constitution, inspired by the ‘corporative’ social theory of Roman Catholicism, enshrined in the 1931 encyclical *Quadragesimo Anno* by Pope Pius XI. The *Seanad* is not elected, but consists of members appointed on the basis of their belonging to vocational and cultural interest groups (Garvin 1969: 14-23). A few years after the adoption of the Constitution of Ireland, a similar system was proposed in the Italian Constituent Assembly (1946-1947), but was eventually rejected.

This pattern has been largely unsuccessful, since Ireland is the only experience to have adopted it in a lasting manner. Moreover, a deeper analysis shows that the ‘corporatist’ structure of the Irish Senate has progressively vanished, due to the increasing influence of political parties in senators’ appointments. The fact that the institution appears rather anachronistic is clearly demonstrated by the proposed abolition of the Irish second chamber with the Thirty-Second Amendment of the Constitution (Abolition of Seanad Éireann) Bill 2013, that was approved by the Parliament in July 2013, but that was eventually rejected in the popular referendum held a few months later, on 4 October, with a majority of 51,7%.

(e) Today, the most common model appears to be that of a second chamber that represents peripheral entities. This kind of chamber is not unknown to states that can be defined as unitary; however, it is much more common, of course, in federal or regional states. As a matter of fact, the main objective behind the establishment of this type of chamber is to ensure a balance between the powers of the federation (or the regional state)



and the constitutional status of the Member States, Regions or Provinces, as applicable. Bicameralism is thus the result of both the need to ensure checks and balances in the relationships between different levels of government, and of the need to strengthen cooperation in decision-making (Palermo and Kössler 2017: 165-178).

According to traditional and very common classifications, this type of second chamber, that can be defined as ‘territorial’, is based on two different models. The first one is implemented in the ‘Senate model’ (e.g. in the United States, at least after the Seventeenth Amendment was ratified, in 1913), where the upper chamber is elected by the people, but the Member State is represented as a result of the constituency’s structure, the boundaries of which correspond to the State. The other, the ‘Council Model’ characterises Germany, where the members of the Federal Council (*Bundesrat*) are part of the executive branch of each *Land*. A third model should probably be taken into account, as there are second chambers the members of which are appointed pursuant to indirect elections, held by territorial legislatures: in the first decades of the history of the U.S. (prior to the adoption of the Seventeenth Amendment), the Senate was based on this electoral system, which is rather similar to that currently applied to elect the Austrian *Bundesrat*.^{XI}

To be more accurate, it could be questioned whether the method of selecting members is a viable criterion against which to classify territorial chambers, as other features can also play a crucial role: in particular, the weighting accorded to each territory is key in identifying how to situate the chamber in the institutional context. For this reason, a deeper analysis is required, and will be carried out below (para. 3.3).

In any case, it must be underlined that, as a matter of principle, all models are capable of effectively protecting peripheral entities *vis-à-vis* the central government. In practice, however, the ‘Council model’ appears to be far more successful, if simply because of the strict connection it establishes between local government and the central/federal decision-making process. The ‘Senate model’ may be more responsive to social inputs, but the electoral mandates can make senators much keener to defend their potential popular votes, rather than to preserve the balance of powers between the levels of government. The outcomes of the third model identified are more difficult to define, as there appears to be more variety in the ways in which local interests are protected.

As mentioned above, the ‘territorial second chamber’, conceived of as either a Council or a Senate (or belonging to the third category), can exist in a unitary State, but what



appears to be more significant is that this type of chamber is not a permanent feature of federal (or regional) states. Several federal states lack a federal upper chamber. In this regard, two systems may be mentioned. First, the Canadian Senate, that is not representative of Provinces, since its members are appointed on the basis of their region of provenance: for Ontario and Québec, the region corresponds to the Province, whereas the other provinces are considered in groups of three or four, as belonging to a region. Second, the case of the Italian Senate is interesting, because the Constitution states that the Senate shall be elected on a 'regional basis'; however, the correspondence between constituencies and regions has not actually endowed senators with a specific mandate to represent their territory of provenance.

Obviously, the absence of a federal second chamber does not imply an absence of the need for the levels of government to cooperate. Indeed, as in many other countries, in both Canada and Italy, cooperation is effected by means of a 'conference system', in which members or representatives of the executive branch at the national and the regional or provincial levels are members of joint committees that take part in the national decision-making process, delivering agreements and understandings: as a matter of fact, in many countries a form of 'executive federalism' has developed, in which 'the processes of intergovernmental negotiation . . . are dominated by the executives of the different governments' (Watts 1989: 3).

3.2. The Structure of Parliament and the Decision-Making Process

The choice between unicameralism and bicameralism naturally affects the efficiency of the decision-making process. It is no coincidence that, in his reference book on *Patterns of Democracy*, Arend Lijphart explains that '[t]he pure majoritarian model calls for the concentration of legislative power in a single chamber', whereas 'the pure consensus model is characterised by a bicameral legislature in which power is divided equally between two differently constituted chambers' (Lijphart 1999: 200). In other words, efficiency and rapidity in the decision-making process is clearly favoured by the existence of a single chamber; on the contrary, a less efficient process is the price that bicameralism must pay to ensure the pursuit of other interests. Whether bicameralism is worth this price depends upon the interests pursued by a system, and upon their value.



Therefore, ‘good bicameralism’ can be defined as a bicameral system that is capable of balancing efficiency and the pursuit of other interests: on one hand, it must ensure an appropriate consideration of the interests that should be taken into account in parliament and, on the other, it cannot allow this consideration to excessively delay or hinder the decision-making process.

The issue does not only concern *which* interests are or should be taken into account, but also *how* they are taken into account. This observation refers to the differences between the two chambers, especially as far as their respective powers are concerned.

The different forms of second chambers, as described above, may have greatly different effects upon their broader systems, on the basis of the powers enjoyed by each chamber.

Generally, second chambers do not have the same powers as the first chambers, either because certain accessory powers are lacking (e.g. they cannot hold Government accountable to them) or because the first chamber enjoys primacy with regard to the final decision in disputed issues. In these cases, the balance between efficiency and the pursuit of other interests results in a more complex decision-making process, which however can always be terminated by the final vote of the first chamber: thus, the interests that second chambers are supposed to represent can delay, but cannot block a decision from being taken.

In some cases, the allocation of powers between the chambers results in a separation. The chambers do not exercise the same powers, because a part of these is attributed to the first chamber and another part to the second. Therefore, the parliament sometimes operates as a unicameral body. Often, the first chamber is endowed with powers which the second does not possess (e.g. the power to express a vote of confidence in the Government), but the second chamber may sometimes enjoy reserved powers, such as the US Senate’s power to advise and give consent with respect to Presidential appointments. In these circumstances, the concrete operation of the decision-making process is not endangered, because the two chambers do not have to reach any agreement.

In contrast, efficiency does become an issue in parliaments characterised by so-called ‘perfect bicameralism’, a notion that describes parliaments in which the two chambers have the same powers and responsibilities, and neither the first nor the second is capable of overriding the opposition of the other. In this case, because of their composition (since, at



present, the democratic legitimacy of the members is roughly identical for both chambers), second chambers tend to be ‘copies’ of the first. This duplication is supposed to guarantee deeper reflection when adopting acts or motions, simply because the two assemblies must fully agree on the texts to be approved. Of course, the deeper reflection ensured by the second chamber can easily become an obstacle to the adoption of any decision at all: processes require much more time for completion, and the risk of being unable to jointly decide remains.

3.3. Current Bicameral Parliaments in Europe: an Overview

In Europe, among the seventeen bicameral parliaments, a large majority is characterised by a second chamber that represents territories (sub-para. *i*). The second category, in terms of the number of subscribing systems, is that based on a second chamber of ‘further reflection’ (sub-para. *ii*), while the other categories consist only of the systems seen above when describing the main patterns of bicameralism.

Thus, an ‘aristocratic’ second chamber continues to operate only in the United Kingdom, having been replaced everywhere else with other forms of representation. After all, the House of Lords is so peculiar to the British experience that it would be difficult to find chambers to compare with it.

With regard to the ‘counter-majoritarian’ second chambers, the case of the French Senate seems to be the only example of a chamber designed to be either a ‘counter-majoritarian’ chamber or one of ‘further reflection’, depending on the political orientation of the majority in the National Assembly.

Finally, when it comes to ‘corporatist’ second chambers, the Irish Senate is, to date, the only real example in Europe,^{xii} although the Slovenian second chamber recalls at least in part the idea of a chamber that is supposed to represent social categories.

Notwithstanding major differences in their composition, the British, French and Irish second chambers all share the commonality of occupying an ancillary position in the institutional context, compared to the first chambers. None of these second chambers are empowered to contest the Executive’s responsibility, and generally their role in the legislative process is limited to the power to oppose via a suspensive veto, which while more or less difficult to overcome, can never hamper the first chamber’s ability to have the final say. The inequality that characterises these embodiments of bicameralism can easily be



explained by the different roots of the chambers' legitimacy: aristocratic, corporatist and indirectly elected second chambers cannot compete, in terms of strength of legitimacy, with assemblies that are directly elected by the people.

If these second chambers are basically affected by a weakness deriving from their legitimacy, for the second chambers of the two other categories the situation is remarkably different.

(i) The number of second chambers designed to represent territories amounts to ten. Most of the countries where this kind of representation exists have a federal structure. This is the case of Austria, Belgium, Bosnia and Herzegovina, Germany, the Russian Federation and Switzerland. Spain cannot be considered a federal state. However, its regional structure can be assimilated to that of a federation, at least for the purposes of this paper. Three other chambers represent territories that are part of a unitary state: Belarus, the Netherlands and Slovenia.

In federal states, aside from the case of the German *Bundesrat* – with its peculiar way of linking State executives and State delegations in the Federal Council^{XIII} – the members of second chambers are mostly elected by territorial assemblies in a second-degree election. The choice of indirect elections characterises the Austrian *Bundesrat*,^{XIV} the House of Peoples in Bosnia and Herzegovina,^{XV} the Russian Council of the Federation,^{XVI} as well as most of the members of the Belgian Senate, after the 2014 constitutional reform that abolished direct elections.^{XVII}

Direct election of the members of the second chamber is the system chosen by all Swiss Cantons for the appointment of the Council of States,^{XVIII} even though the Constitution also allows for indirect elections (Biaggini and Sarott 2006: 729). The same system applies to approximately 80% of the members of the Spanish Senate, while the remaining members are appointed by territorial legislatures^{XIX}.

As noted above, some unitary States also grant territories with representation in the second chamber. This is the case with the Dutch Senate, the members of which are elected on the basis of lists drawn by the members of the twelve States-Provincial^{XX}. In a very different institutional framework, a second chamber representing territories can be found in Belarus, where almost all members of the Council of the Republic are elected by Local Councils^{XXI}.



As noted above, a peculiar second chamber is the National Council of Slovenia, that represents both local entities and social categories: twenty-two members are elected by local assemblies, while the other eighteen are chosen from among social categories^{XXII}, such that the chamber can be identified as a hybrid between a ‘territorial’ and a ‘corporatist’ chamber.

Because all of these second chambers – with the partial exception of the Slovenian case – are intended to represent territories, one of the key issues is the weight effectively recognised to such territories. In particular, the main alternative is between giving equal weight to all subnational entities, thus adopting the typical rule of international law (and of confederations), on one hand, and providing representation by population, on the other, such that the composition of the second chamber is similar to that of the lower chamber. The second rule is applied only in the Netherlands^{XXIII}, but four of the territorial second chambers adopt the first: Belarus^{XXIV}, Bosnia and Herzegovina^{XXV}, Russia^{XXVI}, and Switzerland^{XXVII}, as well as the Slovenian National Council, for its members elected by local assemblies^{XXVIII}.

An intermediate rule is also used: the representation may be weighted taking population into account.

The intermediate rule is a compromise between the ‘federative’ requirement that all the federal states must be treated equally and the democratic ideal of voting rights precisely reflecting the population numbers in each federal state. Of course, much depends on how the population is taken into account. For instance, in the German *Bundesrat*, the number of seats/votes is based on the population of each *Land*, with a form of strong *degressive proportionality*, so that smaller *Länder* have more votes than a distribution proportional to the population would grant. The protection of smaller *Länder* against the ‘tyranny’ of the larger ones is guaranteed by the rule according to which *each Land* is allocated at least three votes, and a maximum of six^{XXIX}.

The intermediate rule is also applied to the Austrian *Bundesrat*, but the impact of degressive proportionality is much less significant since, according to Article 34, § 2, of the Constitution of 1920, the number of representatives delegated by each *Land* ranges between three and twelve, depending on its population as ascertained by a regular census: [t]his means that the relationship between the numbers of *Länder* citizens is an important basis for the composition of both houses of the Federal Parliament, which is perhaps more



democratic, but at the same time diminishes the difference between the composition of both houses' (Gamper 2006: 789).

Representation weighted on the basis of population also characterises the Belgian^{xxx} and the Spanish Senates.^{xxxi}

When it comes to the role that the second chamber is called upon to play in the decision-making process, the general rule is that the first chamber has a wider set of powers than the second. In fact, the Executive, when required to be responsible to the parliament, is always responsible to the first, and not the second, chamber, with very few exceptions: among the ten 'territorial' second chambers, only the Dutch Senate and the House of Peoples of Bosnia and Herzegovina have the power to vote on confidence. The Swiss Council of States is also equal to the first chamber, but both have the power only to appoint the Government, and not to hold it accountable thereafter.

Similarly, the legislative process is generally characterised by the primacy of the first chamber. Only for constitutional reforms and matters directly concerning local autonomies do the two chambers share the same powers; for ordinary legislation that is unrelated to the territories' status or competences, the second chamber has, at the most, a suspensive veto. The idea underlying this inequality is probably linked to the aim of limiting the possible inefficiencies in the law-making process, that derive from the need to attain consensus between the two assemblies, to the subjects regarding which a peripheric point of view matters most.

Such modulation is clearly demonstrated, for instance, by Germany's regulation of the law-making process, especially after the constitutional reform of 2006, which reduced the powers of the *Bundesrat*, although with controversial outcomes in terms of efficacy (Scharpf 2007). As a matter of fact, for constitutional amendments, equality between the *Bundestag* and *Bundesrat* was established, as a two-thirds majority is required in both assemblies (Article 79, § 2, of the Basic Law). With regard to ordinary legislation, for some matters, the consent of the *Bundesrat* is required. An absolute veto is thus introduced for the following: protection by the Federal Criminal Police Office against the danger of international terrorism, when a threat transcends the boundary of one *Land*, when the jurisdiction of a *Land's* police authorities is unclear, or when the highest authority of an individual *Land* requests the federal authorities to assume responsibility for the matter at hand; state liability; the statutory rights and duties of civil servants of the *Länder*, the



municipalities and other corporations of public law, as well as of the judges in the *Länder*, except for their career regulations, remuneration and pensions (Articles 73, § 2, and 74, § 2, of the Basic Law). For all other matters, the *Bundesrat* may merely oppose legislation via the suspensive veto, the strength of which changes according to the votes in the *Bundesrat*: an objection by the majority of votes in the *Bundesrat* may be overridden by a decision of the majority of the Members of the *Bundestag*, while an objection by a majority of at least two thirds of the votes of the *Bundesrat* may only be overridden by a decision of a two-thirds majority, including at least a majority of the members of the *Bundestag*. In other words, when the *Bundesrat* displays strong opposition to a legislative measure, its veto is *de facto* nearly absolute (Article 77, § 4, of the Basic Law).

The variable effects of the veto in the legislative process is one of the most characteristic features of the German system, that, on the one hand, seems to be a model for newly shaped bicameral entities and, on the other, contributes to distinguish it from other territorial second chambers, the vetoes of which are considerably weaker.

Among the systems inspired by German bicameralism, one may recall Belgium, where, after the abolition of perfect bicameralism in 1995, the Senate now has fewer powers than the Chamber of Representatives, but maintains equality for constitutional amendments and the so-called ‘community laws’, i.e. those laws requiring a qualified majority, regulating the basic structure of the Belgian State, approving agreements of cooperation between the Federal State, the Communities and the Regions, approving international treaties, and providing for the organisation of the judiciary, the Council of State, and the Constitutional Court of Belgium. For all other legislation, which may be either unicameral or ‘virtual[ly] bicameral’ (Delpérée 2006: 706), the Senate may intervene as a chamber of consideration and reflection, within specific time limits.

With regard to the systems with a more standardised legislative veto, for example, the opposition of the Austrian *Bundesrat* can always be overridden a simple majority,^{xxxii} while that of the Spanish Senate can be overridden by the Congress of Deputies by an absolute majority or by a simple majority after a 2-month period (Article 90 of the Constitution). The Russian Federation Council has a high impact on the legislative process; its vetoes are absolute for constitutional amendments and, for ordinary legislation, require a defeating resolution adopted by a two-thirds majority of the members of the *Duma*.^{xxxiii}



As for the relationships between parliament and government, also in the context of the law-making process, the exceptions to the rule of primacy accorded to the first chambers are, again, the Bosnian, Dutch, and Swiss systems, where the two chambers are on an equal footing given that all bills must be adopted by both chambers in identical terms.^{xxxiv}

The case of the Netherlands should probably be considered in light of the continuity with a tradition dating back to the early 19th century, according to which the Senate was actually the ‘first chamber’,^{xxxv} even though in recent years its importance has begun to decrease, at least in practice (Boogaard 2018: 239-242). With regard to Bosnia and Herzegovina and to Switzerland, perfect bicameralism seems, on the contrary, to be a clear demonstration of the high degree of decentralisation that is typical of these two federations.

(ii) To complete this overview of European bicameralism, the remaining second chambers, the Czech, Italian, Polish and Romanian Senates, can be included in the category of ‘further reflection’.

These four assemblies are all characterised by the direct election of their members. At least in principle, this grants second chambers the same degree of democratic legitimacy as the first. Nevertheless, in this regard, an important feature to take into account is the electoral system: their equality in terms of legitimacy is enforced by the adoption of similar electoral systems, as occurs in Italy and in Romania.^{xxxvi} Different systems for the election of the members of the two chambers can actually lead to a different perception of political legitimacy. As a matter of fact, in both Poland and the Czech Republic, a majoritarian system was introduced for the Senate, while the Polish Diet and the Czech Chamber of Deputies are elected with a proportional system that is generally considered as a better means to represent the different political orientations existing in society. As a result, from a strictly political point of view, in Poland and in the Czech Republic, the Senate does not seem to be on an equal footing with the first chamber.

The impact of electoral systems on political legitimacy is far from unrelated to the legal framework of bicameralism. The two Senates that are elected with the same formula of their corresponding first chambers share, with the latter, the power to hold their respective Governments accountable; on the contrary, the Czech and Polish Senates do not have the power to pass a motion of no confidence.



Even when it comes to the legislative process, the differences appear significant. The Czech and Polish Senates are, in fact, clearly in a subordinate position. In Poland, only constitutional amendments require adoption by both chambers. On the contrary, ordinary laws are passed by the Diet; the Senate is granted thirty days to examine the text adopted by the first chamber. The Diet has, however, the final word in case of opposition by the Senate: the senatorial veto is therefore a simply suspensive one, that can be overridden by an absolute majority vote of the Diet. In the Czech Republic, the legislative process takes a very similar shape, apart from the fact that the Senate, unlike its Polish homologue, is empowered to amend draft legislation adopted by the Chamber of Deputies. The need for adoption by both chambers is not limited to constitutional amendments, as it applies also to other important acts, such as the ratification of international treaties, electoral law, or laws on referenda. The ordinary legislative process, however, gives the Senate a purely suspensive veto.

The situation is rather different in systems where the two chambers share, more or less, the same electoral system, as the law-making process is entirely based on the equality of the chambers. Italy is probably the last European country in which perfect bicameralism exists. Romania abolished it with the constitutional reform of 2003, but without abolishing equality between the chambers: in the new institutional framework, the idea that both chambers have the same powers (and therefore that any law requires the favourable vote of both, if it is to be adopted) was replaced by a specialisation of the chambers, that are now endowed with different legislative competences, such that, depending on the matter at hand, either the Chamber of Deputies or the Senate has the final word. This different way to conceive equality was clearly inspired by the need to simplify the legislative process and reduce the time required to pass a law.

4. Some Concluding Remarks (Looking for Trends)

The comparative overview briefly sketched in this paper does not seem to offer clear outcomes related to evolving norms that can characterise the structure of parliaments across the entire European region.

Because of this lack of clarity, in order to propose some concluding remarks, the bar must be set slightly lower: rather than identifying norms that are probably impossible to



define, one may attempt to pinpoint some trends that, although somewhat questionable, can help to foster debate on the role of representation that is proper to parliaments.

In an effort to outline the main trends, six can be identified.

The first deals with the simplification of parliamentary structure. Multicameralism, as well as qualified unicameralism, did not survive, probably because of their complexity: currently, the structure of parliaments must be as simple as possible, so that the two-chamber pattern represents the maximum degree of complexity that the systems can bear.

A second trend concerns the choice between unicameralism and bicameralism. Generally, the main option seems to be for unicameralism, apart from cases in which there are compelling or at least serious reasons in support of the establishment or, more frequently, the maintenance of a second chamber. These reasons may come from a very wide range of sources: from history to geography, from the institutional framework of the State to the structure of society.

Third, bicameralism tends to be linked with the need to make different roots of legitimacy coexist within the parliament. Because of this trend, the number of second chambers that share the same legitimacy as the first is relatively small, and in at least one of the four countries in which it exists, namely in Italy, it is subject to much question, as there have been several attempts to modify the Senate to transform it into an assembly representing regions.^{XXXVII}

The subsequent trend concerns precisely the pre-eminence of territorial representation as foundation of bicameralism. All patterns of bicameralism, other than the territorial, are clearly on the decline, not only because the number of systems that follow those patterns is modest, but also because no new second chamber has adopted any of them, apart from the partial exception of the Slovenian National Council. On the contrary, territorial second chambers are gaining momentum, even in states that are neither federal nor regional: the principle according to which peripheral interests deserve close consideration, irrespective of the form of the State, is thus an important element in the choice between unicameralism and bicameralism.

The need to stress an important interest in order to justify bicameralism is related to a fifth trend, which is probably the most important one. A two-chamber structure of parliament obviously affects the decision-making process in the sense that the latter is (inevitably) more complex than in unicameral legislatures. In this regard, the costs of



bicameralism must be compensated by advantages. In the past, advantages were found in limiting democracy or, later, in ensuring further reflection on the subjects at stake. Currently, the first advantage is obsolete, but the second too does not seem to deserve special consideration, given that one of the main concerns is to drive parliaments to decide as fast as they can: modern societies need quick decisions. It is no coincidence that rule-making power has been progressively decentralised from parliaments to executives, precisely to answer societal needs for rapid decisions. Against this backdrop, bicameralism can survive either because it brings patent advantages in terms of representation, or because its shape is not incompatible with a satisfactorily fast decision-making process.

These remarks introduce the sixth and final trend: in general, innovations in the decision-making process tend towards simplification. The reduction of the number of chambers to achieve unicameralism, such as in Denmark (1953) or in Sweden (1971), as well as, more recently, in Croatia (2001), is the most significant example, but in the same vein one could also consider the abolition of perfect bicameralism that took place in Belgium (1995) and in Romania (2003), and that is still a widely supported proposal in Italy. In addition, where (unofficial) bicameralism is a hallmark of the entire institutional framework, as in Germany, the constitutional reform of 2006 reduced the powers of the *Bundesrat* to facilitate the *Bundestag* having the final word. In other words, the idea of balancing representation and rapidity in decision-making has strongly influenced the most recent changes in constitutional framework, in the sense of enhancing efficiency as much as possible. The real issue for the near future is therefore to achieve this purpose without neglecting the need for an adequate degree of representation.

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^I Bolívar expressed his preference for a three-Chamber Parliament in his *Message to the Congress of Bolivia*, delivered on 25 May 1826 (Fitzgerald 1971: 95-105).

^{II} See *PARLINE database on national parliaments*, <http://archive.ipu.org/parline/parlinesearch.asp> (last accessed on 20 April 2018).

^{III} This paper does not consider the legislature of the European Union. The reason for this choice does not rest upon on the controversial nature of the Union, but rather on the difficulty of establishing parallels between the structure of national parliaments on one hand, and that of the European Union legislature on the other. Regarding the latter, a literal argument could lead to its definition as a unicameral body, but on other (non-negligible) readings, it could be considered as a bicameral or even multicameral structure (Passaglia 2006: 1085-1213).

^{IV} The countries are (listed by number of inhabitants, from highest to least): the Russian Federation, Germany, France, the United Kingdom, Italy, Spain, Poland, Romania, the Netherlands, and Belgium.

^V Reference is made to Czechia, Belarus (nineteenth), Austria (twentieth), and Switzerland.

^{VI} The countries are (listed by geographical extension, from greatest to least): the Russian Federation, France,



Spain, Germany, Poland, Italy, the United Kingdom, Romania, and Belarus.

^{VII} 'In broad terms, 'path dependence' means that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it. It entails, in other words, a causal relationship between stages in a temporal sequence, with each stage strongly influencing the direction of the following stage' (Hathaway 2001: 103-104).

^{VIII} For instance, Hungary abolished bicameralism in 1960, while in the Democratic Republic of Germany, the *Länderkammer*, the second chamber that represented the *Länder*, was abolished in 1958.

^{IX} Apart from the United States of America (with the exception of Nebraska), in Australia (except for Queensland), as well as in a few states of Argentina and India, sub-national legislatures are generally unicameral. The fact that there are no bicameral sub-national legislatures in Europe, and that a uniform pattern can thus be identified, appears to be a valid justification for focusing solely on the national level.

^X Actually, the current and pre-2006 situations of the Italian Parliament are very close to the concept of perfect bicameralism, both in terms of legal provisions and of concrete practice. On the contrary, since the entry into force of the electoral law of 2005 (Act No. 270 of 2005), and until the recent electoral law of 2017 (Act No. 165 of 2017) reestablished a similar composition for the two Chambers, the Senate could be at least partially conceived of as a 'moderation chamber', not to say a truly counter-majoritarian one. Indeed, in the Senate, the majority bonus to the most voted coalition was awarded at the Regional level: this meant that different coalitions are rewarded depending upon the outcome of the elections in any given Region. As a result, the leading coalition was weaker in the Senate than in the Chamber of Deputies, where the majority bonus was awarded at the national level. Therefore, the Senate might serve as an effective bulwark against a 'tyranny of the majority', at least when no coalition achieved a clear-cut electoral victory.

^{XI} It is noteworthy that the French Senate cannot be considered a 'territorial' chamber even though senators are elected by indirect universal suffrage, by a panel of 'great electors' that comprises members of regional and departmental assemblies and representatives of members of municipal assemblies. In fact, the pronounced representation of local communities does not imply a representation of territories, as the large number of electors (more than 160,000) emphasises the political divide, rather than any focus on territorial interests.

^{XII} Article 18 of the 1937 Irish Constitution provides for eleven senators appointed by the Taoiseach, six senators elected by the universities, and forty-three senators elected by five vocational panels.

^{XIII} See Article 51, § 1, of the Basic Law of 1949: 'The *Bundesrat* shall consist of members of the Land governments, which appoint and recall them'.

^{XIV} According to Article 35, § 1, of the Constitution of 1920, '[t]he members of the Federal Council and their substitutes are elected by the Diets for the duration of their respective legislative periods in accordance with the principle of proportional representation but at least one seat must fall to the party having the second largest number of seats in a Diet'.

^{XV} Article IV, § 1, of the Constitution of 1995: 'The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs).

'a. The designated Croat and Bosniac Delegates from the Federation shall be selected, respectively, by the Croat and Bosniac Delegates to the House of Peoples of the Federation. Delegates from the Republika Srpska shall be selected by the National Assembly of the Republika Srpska [...]'.

^{XVI} According to the Electoral Law of 1993, the legislature and executive of each of the territorial entities (22 republics, 46 *oblasts*, 9 *krails*, 3 federal cities, 4 autonomous *okrug*s, and 1 autonomous *oblast*) appoints two members of the Council.

^{XVII} Article 67 of the Constitution, as modified in 2005, provides that fifty out of sixty senators are appointed by and from the community and regional parliaments (twenty-nine by the Flemish Parliament from the Flemish Parliament or from the Dutch language group of the Parliament of the Brussels-Capital Region; ten by and from the Parliament of the French Community (which is composed of all members of the Walloon Parliament and several members of the French language group of the Parliament of the Brussels-Capital Region); eight by and from the Walloon Parliament; two by and from the French-language group of the Parliament of the Brussels-Capital Region; one by and from the Parliament of the German-speaking Community). The remaining ten senators are co-opted by their peers (six by the Dutch-language group and four by the French-language group).

^{XVIII} Article 150, § 3, of the Constitution of 1999 recognises the power of each canton to choose the system of selection of their representatives to the Council of States.



^{XIX} On the basis of Article 69 of the Constitution of 1978, 208 senators are directly elected by the people (4 senators for each peninsular province; 3 senators for each 'large' island; 1 senator for each 'small' island; 2 senators each for Ceuta and Melilla). The other members are appointed by the legislative assembly of each Autonomous Community: the number is variable, since legislatures appoint one per million citizens, rounded up (currently, 58 senators are indirectly elected).

^{XX} See Article 55 of the Constitution of the Kingdom of the Netherlands of 2008.

^{XXI} See Article 91, § 2, of the Constitution of 1996: 'The Council of the Republic is a chamber of territorial representation. The Council of the Republic consists of eight Deputies from every region [*oblast*] and the city of Minsk, elected at the meetings of Deputies of local Councils of Deputies of the basic level of every region and the city of Minsk from their ranks. Eight members of the Council of the Republic are appointed by the President of the Republic of Belarus'.

^{XXII} According to Article 96 of the Constitution of 1991, '[t]he National Council is the representative body for social, economic, professional, and local interests. The National Council has forty members.

It is composed of: - four representatives of employers; - four representatives of employees; - four representatives of farmers, crafts and trades, and independent professions; - six representatives of non-commercial fields; - twenty-two representatives of local interests'.

^{XXIII} In order to appoint Senators by the territorial assemblies, the value of a vote is determined by the population of the province in which the voter is a member of the States-Provincial; the seats are then allocated in one nationwide constituency.

^{XXIV} See above, note 21.

^{XXV} See above, note 15.

^{XXVI} See above, note 16.

^{XXVII} According to Article 150, §§ 1 and 2, of the Constitution of 1999, the twenty cantons are represented by two members of the Council of States, while the six 'Half-Cantons' are represented by one Councillor.

^{XXVIII} Each local assembly in Slovenia appoints one Councillor.

^{XXIX} Article 51, § 2, of the German Basic Law of 1949 establishes that *Länder* with less than 2 million inhabitants have 3 votes, *Länder* with more than 2 and less than 6 million inhabitants, 4, *Länder* with more than 6 million and less than 7 million inhabitants, 5, and *Länder* with more than 7 million inhabitants, 6.

^{XXX} See above, note 17.

^{XXXI} Quite interestingly, in the Spanish case, the representation weighted by population is the result of the mixed system of appointment of Senators: see above, note 19.

^{XXXII} Article 42, § 4, of the Constitution. The rule does not apply to constitutional laws or constitutional provisions contained in simple laws restricting the competence of the *Länder* in legislation, because in these cases an absolute veto is provided (Article 44, § 2, of the Constitution).

^{XXXIII} The Russian Federation Council is undoubtedly a very strong second chamber (Avakian 2006: 939-959), to the point that a comparison with the U.S. Senate can be drawn, especially taking into account some of the powers reserved to it by the Constitution: in fact, the most notable are the requirement to obtain its consent on some presidential appointments and the power to impeach the President of the Russian Federation.

^{XXXIV} To adopt the legislation, means to attempt a conciliation may be provided. For instance, in Switzerland, in case of divergence after three readings, a committee of conciliation (thirteen members from each chamber) drafts a proposition, and the bill becomes law if this proposition is adopted by the National Council and by the Council of States.

^{XXXV} This is the definition provided by the Constitution of 1814, which is still in force, although it has been much modified in time.

^{XXXVI} Both countries eventually adopted a mixed system (Romania in 2008; Italy in 2017), which replaced a proportional system.

^{XXXVII} The most recent attempt failed in 2016, when the Parliament adopted a constitutional reform that was eventually rejected by the population. Among the most important contents of the proposed reform, far-reaching changes to the Senate's role were proposed (Romeo 2017: 31-48).



References

- Avakian Suren, 2006, 'The Federation Council of the Federal Assembly of the Russian Federation', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milan, 911-960.
- Biaggini Giovanni and Sarott Chasper, 2006, 'The Swiss Council of States (Ständerat / Conseil des États)', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milan, 721-780.
- Boogaard Geerten, 2018, 'Mixed Democracy in The Netherlands', in Ferrari Giuseppe Franco, Passchier Reier and Voermans Wim (eds), *The Dutch Constitution Beyond 200 Years. Tradition and Innovation in a Multilevel Legal Order*, Eleven, The Hague, 229-242.
- Delpérée Francis, 2006, 'The Belgian Senate', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milan, 697-719.
- Di Manno Thierry, 2006, 'The Sénat of the French Republic', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milan, 153-256.
- Fitzgerald Gerald E., 1971, 'Message to the Congress of Bolivia', in Fitzgerald Gerald E. (ed), *The Political Thought of Bolivar*, Springer, Dordrecht, 95-105.
- Gamper Anna, 2006, 'The Austrian Bundesrat', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milan, 781-828.
- Garvin Tom, 1969, *The Irish Senate*, Institute of Public Administration, Dublin.
- Granat Mirosław, 2006, 'The Senate in Poland', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milan, 961-1001.
- Hathaway Oona A., 2001, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System', *Iowa Law Review*, LXXXVI(1): 101-165.
- Hawke David, 1961, *In the Midst of Revolution*, University of Pennsylvania Press, Philadelphia.
- Kotzur Markus, 2006, 'Federalism and Bicameralism – The German «Bundesrat» (Federal Council) as an Atypical Model', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milan, 257-290.
- Krynen Jacques, 1987, 'La représentation politique dans l'ancienne France: l'expérience des États généraux', *Droits*, 6: 30-44.
- Kysela Jan, 2006, 'Bicameralism in the Czech Republic: Reasons, Functions, Perspectives', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milan, 1003-1034.
- Lijphart Arend, 1999, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries*, Yale University Press, New Haven (CT).
- Llanos Mariana and Nolte Detlef, 2003, 'Bicameralism in the Americas: Around the Extremes of Symmetry and Incongruence', *The Journal of Legislative Studies*, IX(3): 54-86.
- Marongiu Antonio, 1968, *Medieval Parliaments: A Comparative Study*, Eyre and Spottiswoode, London.
- Money Jeannette and Tselis George, 1992, 'Cicero's Puzzle: Upper House Power in Comparative Perspective', *International Political Science Review*, XIII(1): 25-43.
- Norton Philip, 2007, 'Adding Value? The Role of Second Chambers', *Asia Pacific Law Review*, XV(1): 3-18.
- Palermo Francesco and Kössler Karl, 2017, *Comparative Federalism. Constitutional Arrangements and Case Law*, Bloomsbury, London.
- Passaglia Paolo, 2006, 'Suggestions to Find a «Parliament» Within the Institutional Organization of the EU', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milan, 1085-1213.
- Passaglia Paolo, 2015, 'From Qualified Unicameralism to Genuine Unicameralism: the Norwegian Experience', in Ferrari Giuseppe Franco (ed), *Two Centuries of Norwegian Constitution: Between Tradition and Innovation*, Eleven, The Hague, 85-95.
- Perceval R.W., 1953, 'The Origin and Development of the House of Lords', *Parliamentary Affairs*, VII(1): 33-48.



-
- Pinard Danielle, 2006, 'The Canadian Senate: An Upper House Criticized Yet Condemned to Survive Unchanged?', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milan, 459-520.
 - Romaniello Maria, 2016, 'Bicameralism: a concept in search of a theory', *Amministrazione in cammino*, 20 September: 1-16, <http://www.amministrazioneincammino.luiss.it/app/uploads/2016/09/Romaniello.pdf>.
 - Romeo G., 2017, 'The Italian Constitutional Reform of 2016: An 'Exercise' of Change at the Crossroad between Constitutional Maintenance and Innovation', in Passaglia Paolo (ed), *The 2016 Italian Constitutional Referendum: Origins, Stakes, Outcome*, *The Italian Law Journal*, Special Issue: 31-48.
 - Rommetvedt Hilmar, 1992, 'The Norwegian Storting: The Central Assembly of the Periphery', *Scandinavian Political Studies*, XV(2): 79-97.
 - Russell Meg, 2000, *Reforming the House of Lords. Lessons from Overseas*, Oxford University Press, Oxford.
 - Russell Meg, 2013, *The Contemporary House of Lords. Westminster Bicameralism Revived*, Oxford University Press, Oxford.
 - Scharpf Fritz W., 2007, *German Federalism: A reform that misses its mark*, *MaxPlanckResearch* 2/2007, <https://www.mpg.de/207429/federalism>.
 - Smith Eivind, 2008, 'Norway – The end of bicameralism', *Public law*: 393-395.
 - Watts Ronald L., 1989, *Executive Federalism: A Comparative Analysis*, Institute of Intergovernmental Relations – Queen's University, Kingston (Ont.).
 - Watts Ronald L., 2010, *Federal Second Chambers Compared*, Presentation at Conference on 'Federalizing Process in Italy. Comparative Perspectives' (Rome, February 17-19, 2010): 1-21 (http://pti.regione.sicilia.it/portal/page/portal/PIR_PORTALE/PIR_LaStrutturaRegionale/PIR_AssessoratoEconomia/PIR_Federalismofiscale/PIR_SeminarioIlprocessofederaleinItalia/watts%20intervento.pdf).
 - Welsh David, 1984, 'Constitutional Changes in South Africa', *African Affairs*, 331: 147-162.



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Shared Rule vs Self-Rule? Bicameralism, Power-Sharing and the ‘Joint Decision Trap’

by

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Abstract

In federal and regionalised states, bicameralism constitutes shared rule between levels of governments. At the same time, second chambers serve as a safeguard protecting self-rule of decentralised governments against the encroachments of central legislation into their areas of responsibility. Both functions seem to be best fulfilled in legislative systems requiring joint decisions of legislative chambers. Depending on particular conditions, joint decision-making involves the risk that legislation ends with ineffective compromises or even fails. Under favourable conditions, it provides a productive structure to apply shared rule and protect self-rule. Comparative studies can identify these conditions, and appropriate ways to adjust institutional designs of bicameralism accordingly, bearing in mind that significant institutional reforms of bicameral systems are difficult to achieve.

Key-words

bicameralism, federalism, joint decision-making



1. Protecting self-rule by shared rule – Functions of bicameral systems

Federalism has been defined as a polity combining self-rule of central and regional governments and shared rule among these governments (Elazar 1987: 5). This definition also applies to federalising states in which regions, or some regions, have achieved a significant extent of autonomy to govern their affairs. Self-rule rests on a separation of powers between levels of government defined by the constitution. Shared rule usually finds expression in intergovernmental relations, which exist in a variety of institutionalised or informal patterns.

Regarding these two dimensions of a vertical division of powers in federations of regionalised states, a bicameral system can fulfil two functions: First, second chambers representing regional interests should protect the autonomy of regional governments against encroachments by central legislation into their constitutionally guaranteed jurisdiction. Thus, they serve as a safeguard of self-rule (Bednar 2009). Second, bicameralism allows representatives from constituent units of a federation or from regions to participate in central legislation in order to ensure that particular interests of these units are considered. In this way, bicameral legislatures work as a core institution of shared rule. Whereas self-rule can be effectively protected by a second chamber's veto against legislation, shared rule requires the willingness of both chambers to find an agreement. Regardless of which function prevails, bicameralism essentially aims at limiting the power of the centre.

These two functions are only fulfilled in an effective way in federations where the legislative chambers actually represent both the demos and the *demos* of constituent units or their governments and where they are linked by processes of joint decision-making. Whether the first condition applies depends on the selection of representatives, their affiliation to parties, communities of citizens or governments, and the extent to which these affiliations influence debates and decision-making in a chamber. As a rule,¹ the first chamber consists of directly elected representatives of the demos, which includes citizens on an equal basis. In federations, members of second chambers are normally selected on a territorial basis and are expected to represent sub-federal units, i.e. regions, communities, states, *Länder* or provinces (Borthwick 2001; Russell 2001; Palermo 2018).



The second condition depends on the decision rules in a bicameral legislature. Effective protection of self-rule and shared rule requires that both chambers participate in legislation on an equal footing so that they have to harmonise their decisions, which actually means that they make joint decisions. Joint decision-making, which in bicameral system is attributable to the veto power of a second chamber, strongly limits central power and constraints the power of a majority in parliament. As they share legislative powers, two chambers have to vote in favour of a bill in order to pass it as law, otherwise, legislation fails, and neither the federal nor the regional governments can make law, the former because of a legislative deadlock, the latter because it has no power to legislate. In order to come to concordant votes in both chambers, a bill has to be negotiated between leaders of majority parties or groups in both chambers, often including members or groups who are pivotal for achieving the required votes.

In legislatures with second chambers having no veto rights, these latter can nonetheless compel the first chamber to a joint decision because of an overlap of tasks fulfilled by central or regional governments. This interdependence of policies, despite a separation of powers and the self-rule of governments, regularly appears in the executive, in particular when governments provide public goods or services, which generate cross-border (external) effects. In legislative decisions, both levels of governments are actually affected in matters of institutional reform or if the allocation of powers is at stake. In these policies, most second chambers with consultative rights in normal legislation have veto rights as far as a constitutional amendment is necessary. Hence, bicameralism usually institutionalises ‘intragovernmental’ joint decision-making at the federal level, whereas intergovernmental relations in the executive mostly arise to manage interdependence in an institutional setting of self-rule with shared-rule resulting from informal coordination.

In brief, bicameralism protects self-rule through shared rule; thus, it conforms to a basic principle of a constitutional government. It prevents a concentration of power and protects interests of minorities against what Alexis de Tocqueville has called a ‘tyranny of the majority’ (Tocqueville 1835: 410). Power limitation is most effective if both chambers have to come to joint decisions. Under these conditions, a second chamber can effectively protect the autonomy of regional governments by using its veto power against legislation threatening regional self-rule. Preventing a bill from becoming law can also help minorities to defend their particular interests against general regulation. Failure to pass a law on a



matter, which is on the legislative agenda, may be also be an outcome preferred by opposition parties in parliament. However, non-decisions undermine the effectiveness of a government and can destabilise a political system. If limitation of governmental power goes too far, legitimacy can suffer. A way out of this dilemma is negotiated legislation, which is regularly preferred to a deadlock, even if a compromise often is considered as a suboptimal outcome. For this reason, a bicameral system needs to optimise the limitation of power, it also must work in a way that prevents shared rule from ending in the joint decision trap.

In order to shed light on this challenge and to make recommendations for coping with them in practical politics, we need to understand how joint decision-making in bicameral legislatures works, how policies are made in the chambers and how both come to a joint decision. The theory of joint decision-making (Scharpf 1976; Scharpf 1988) has often been reduced to an explanation of the trap. However, on closer inspection, we find that it points out different modes of negotiation and various conditions affecting which negotiation mode applies, and the particular consequences on policy-making. In the following sections, I will outline the basic analytical categories and causal mechanisms, which might be useful to explain the operation of bicameral systems in federal and regionalised states. Moreover, I will explain why bicameral systems operating according to the joint decision mode are difficult to change, and why they tend to be locked in the joint decision-trap of constitutional policy.

2. Institutions and decision rules: Bicameral legislation as joint decision-making

Bicameral legislatures vary in many respects, including not only scope of legislative and supervisory powers, but also their very institutional composition (Coakley 2014; Heller and Branduse 2014; Leunig 2009; Patterson and Mughan 2001; Palermo and Kössler 2017: 165-176; Russell, 2013, 46-63; Riescher et al. 2010; Uhr 2006). In respect of the division of powers, not all bicameral legislatures establish joint-decision systems; some second chambers for instance only play a consultative role. In other cases, the vote of a second chamber can be overruled by the first chamber but nonetheless has a constraining effect, like in the British Parliament where the veto of the House of Lord can cause significant delay to the passage of legislation. We also find bicameral legislatures, with both chambers



formally having equal decision rights, but with a second chamber rarely applying its veto power in practice, as is the case in Canada where the Senate hardly ever votes against a decision the House of Commons and takes on a more advisory role (Smith 2003).

In western democracies, the power of second chambers tends to be constrained (first and foremost in fiscal policy) if they lack democratic legitimacy compared to the popularly elected chamber of parliament. In bicameral systems with a directly elected second chamber (e.g. the Senates in Australia, Brazil, Italy, Switzerland and the U.S.), both houses of the legislature usually have equal powers. To make law, both have to pass an identical bill. Accordingly, each chamber can veto a bill. In this case, decision rules require joint decision-making. In asymmetrical bicameral systems, powers of the second chamber vary depending on issues at stake. In Germany, for instance, the assent of the *Bundesrat* is only necessary whenever a law affects the jurisdiction of the *Länder*. Otherwise, the Federal Parliament has the final say in legislation (see Niedobitek 2018). In Austria, Belgium and Spain, only laws amending the constitution require the assent of the second chamber.

When both chambers are required to reach an agreement in legislation, procedures for conciliation vary among bicameral systems. Irrespective of other rules, these procedures usually provide for a particular sequence of deliberations and resolutions of the individual chambers. That sequence of the legislative process can be the same in all instances or may differ even within one bicameral system depending on specific conditions (e.g. by policy area, type of legislative act, etc.). In any case, the configuration of decision-making procedures has an impact on power relations in a bicameral system, although the consequences are ambiguous. On the one hand, the chamber where a bill is tabled, and where a first decision is made before the bill is forwarded to the other chamber, has a ‘first mover advantage’. It can constrain the discretion of the chamber that is second in turn and can at best amend the version of a bill passed by the first chamber. On the other hand, the chamber with the final decision might be able to block legislation if the proposal passed in the other chamber is considered unacceptable. This other chamber has to take into account the risk that its decision might be void if it cannot respond anymore with a revision of a bill.

Power is one consequence of sequential procedures; the effectiveness of joint decision-making is another. Those actors who initiate a bill or who are the first to decide on it are motivated to anticipate potential vetoes in the other chamber in order to reduce the risk of



a bill getting voted down. They tend toward ‘auto-limitation’ (Manow and Burkhardt 2007), i.e. to voluntarily refrain from asserting their preferences or to pre-emptively moderate them. This strategic behaviour is possible, provided that the interests and preferences of the members or coalitions forming a majority in a legislative chamber are known, or can be predicted with high probability. The type of members and the cleavage structures in a chamber constitute relevant factors that allow veto anticipation. Yet this is not always possible. Party affiliation provides a rather good indicator of voting behaviour of members, but it may only constitute one factor influencing their preferences. Moreover, since the number of parties represented in a chamber is currently increasing in many western democracies and, as in a second chamber a majority is usually not determined by coalition agreements but varies from issue to issue, the capacity to reliably anticipate vetoes is limited from the outset.

Another way to find a bicameral agreement, also requiring a sequential procedure, is mutual adjustment. If the two chambers have sufficient opportunities to respond to the decision taken by the other chamber, as provided for by the ‘navette’ procedures, they might be able to come to identical decisions through mutual adjustment. Yet this process can be time consuming, which is why the number of decisions taken in each chamber is usually limited. Another rule to avoid an endless iteration of debates and decisions applies in France, where the prime minister can request a final vote of the parliament (Money and Tsebelis 1997: 1994).

Irrespective of these decision procedures, legislative chambers usually coordinate their votes in negotiations. As a rule, agreements are negotiated informally among leaders of the majority groups, the head of government or the responsible minister and members of a second chamber, with these negotiations often concentrating on actors holding a pivotal position to form a majority. If informal negotiations fail, they might continue in joint committees set up to find a compromise between divergent bills proposed by the chambers.

More often than not, the federal executive initiates and leads informal negotiations, since the executive drafts most bills in order to achieve the governmental program or agenda. These negotiations are most intensive if the second chamber assembles representatives from regional governments, like in the German Bundesrat. Here, legislation requiring the assent of the second chamber starts with pre-legislative intergovernmental



negotiations, first among *Länder* governments who search for a common position (Hegele 2017) and second in different arenas (parties, conferences of ministers) where federal and *Länder* governments meet and take the opportunity to avoid a veto (Schmedes 2017). In other federations, members of committees or party leaders negotiate a compromise. A unique constellation can be observed in Belgium. Here the Senate lost its power of veto in 2012, except in constitutional amendments, but interests of the Regions and Communities are represented by a plurality of regional parties in the first chamber. In consequence, joint decision-making occurs in the form of inter-party negotiations, and most important laws result from accords settled by party leaders (Popelier and Lemmens 2015: 120-125). In the U.S., the President tries to convince individual members of both houses of the Congress in bilateral negotiations, while party leaders or members of committees engage in interparty and bicameral negotiations (Owens and Loomis 2006).

These informal negotiations are often criticised as non-transparent; they prevent voters from ascribing responsibility for decisions and as they allow politicians to shift the blame or to claim success, they can undermine democratic accountability. However, as long as the final decisions are made in public, informality should not be overrated since it constitutes a decisive condition of effective negotiation democracy. Agreements can hardly be achieved in public debates, not least since parties compete for electoral support. They require that actors build trust and negotiate without ‘tied hands’, i.e. without being committed to positions of a party or a government. Compromises are more likely if negotiations proceed behind closed doors among independent actors. Indeed, for this very reason, joint decision-making creates a dilemma between democratic accountability and effectiveness of policy-making, but procedures in bicameral systems can establish an appropriate balance between both exigencies.

In several bicameral legislatures, formal procedures of mediation between the two chambers exist (Tsebelis and Money 1997: 176-208). Conference committees in the U.S. Congress are a case in point, as is the mediation committee of Germany’s Bundestag and Bundesrat. These committees consist of members elected in both chambers. While the German ‘*Vermittlungsausschuss*’ is a standing institution with 16 members from each chamber, the US conference committees are established ad-hoc, with members determined by the House of Representatives and the Senate, usually selected from the responsible standing committees (Haas 2010: 46). These committees meet to negotiate a final version



of a bill, which subsequently can only be accepted or rejected, but not amended in the legislative chambers. Although existing as formal institutions, they also work in private in order to shield the members from external pressure.

Informal negotiations and negotiations in formal joint committees reduce the probability that joint decision-making ends in a deadlock. Veto anticipation and mutual adjustment also contribute to avoiding this negative outcome of legislation, although they imply higher risks of failure. In asymmetrical bicameral systems, these processes occur in the shadow of a majority decision, usually by the directly elected parliament or, as the case may be, the popular chamber. This shadow might also result from the possibility of a call for a referendum. In France, for instance, the President can submit a bill to a popular vote, whereas in Switzerland, it is left to the people to initiate a facultative referendum. While decisions of parliamentary majorities are usually known, the outcome of a referendum is uncertain. For this reason, the latter generates more incentive for members of the legislature to come to a broad-based agreement, while in cases where the first chamber has the final say, this incentive is moderate and depends on the power of the majority in parliament.

Yet even without a formal requirement of joint decision-making, bicameralism fosters negotiated legislation and consensus democracy. Second chambers without formal veto power often acquire influence in legislation as a ‘chambre de reflexion’. They constitute an arena where bills are scrutinised by experienced politicians who are legitimised by their authority rather than by their affiliation to a party, government or community. Such a deliberative chamber generally improves the quality of legislation (Smith 2003; Sturm 2015: 185-186), both by introducing what John A Macdonald, the first Canadian Prime Minister called ‘second sober thoughts’ and by counterbalancing the confrontation among parties in the parliament.

However, a consultative chamber cannot change the legislative process into a kind of deliberative democracy. Regardless of the institutional setting, whether it constitutes symmetric or asymmetric power relations between the chambers, bicameral legislation is to a considerable extent the result of inter-cameral and intra-cameral negotiations. The quality of these negotiations varies. To understand the operation of bicameral systems in general and joint decision-making in these systems in particular, it is essential to consider these variations and their causes and consequences. The following analytical categories drawn



from theories of political negotiations can guide case studies and comparative research on bicameral legislation.

3. Confrontation, bargaining or arguing: Conditions of negotiating agreements between chambers

Negotiations aim to find a common ground among actors who pursue divergent interests, but are willing or compelled to harmonise their decisions through dialogue. In general, actors taking part in negotiations wish to come to an agreement, if they voluntarily engage in these. In joint-decision systems, they are compelled to do so. Nonetheless, they are not forced to negotiate, but urged to find an agreement, since they are otherwise unable to act at all. This also applies to joint decision-making in bicameral systems, although the actors involved in legislation advocate different policies, whether for policy or vote seeking reasons. Nonetheless, members of governments and parliaments who are accountable to citizens presumably try to avoid deadlocks in legislation, and members of second chambers usually prefer a compromise to rejecting a bill passed by the directly elected parliament (or its popular chamber), even if they have the right to exercise veto power. Therefore, actors' behaviour in bicameral legislatures is guided by mixed motives. As responsible representatives of citizens, most of them prefer an agreement between both chambers over voting down a bill. Nevertheless, all of them are associated to parties or groups, which pursue different policies and want to see most of their own ideas of good regulation becoming law.

The fact that negotiations constitute a mixed-motive game among the actors involved makes agreements possible. Still, there is a chance of deadlock, depending on the intensity of conflict, the behaviour of negotiating actors, the autonomy of negotiators from external influence, their dependence on external support, or the consequences of a non-decision. But irrespective of how these conditions materialise, negotiators will aim at compromises or package deals. While strategies of brinkmanship are not uncommon, in most cases, these outcomes appear better than a deadlock, not the least from the point of view of parties holding a majority in parliament. Yet the seemingly second-best solution, compared to a deadlock, may produce a problematic outcome. Compromises exclude all matters of intractable dispute, with the consequence that a law finally passed in the legislative



chambers hardly improves the status quo. Package deals can come with high costs of an agreement, and the concessions made to achieve the required votes can imply heavy burdens for a government. This explains why empirical studies have found that joint decision-making in bicameral systems can cause ineffective legislation (Vatter 2005; Scharpf 1988; Tsebelis 2002).

This effect does not necessarily result from institutions constraining legislation, more often than not it appears for the very reason that actors want to escape impending deadlock. This is the conclusion which Fritz W. Scharpf drew from his original studies on joint decision-making in Germany and the EU (Scharpf 1988). Since then, theory has become differentiated, inspired by comparative research (Scharpf 1997, Falkner 2011; Benz 2016b). One important conclusion is that the probability of a deadlock and of ineffective decisions depends on specific conditions shaping the process of negotiations, i.e. conditions which affect how actors behave and which mode of interaction prevails in negotiations. In bicameral legislatures, two types of conditions seem to be particularly significant: One is the impact of party politics in the second chamber, the other relates to the cleavage structures which determine politics and voting in a bicameral legislature. Certainly, particular events or crises can modify the negotiation behaviour of relevant actors, but the impact of party politics and cleavage structures remains.

To explain the effect of these conditions, we can construct categories of typical modes of negotiation as confrontation, bargaining and arguing (Benz 2016a: 33). Confrontation occurs, if actors stick to their positions. In consequence, the probability of an agreement decreases to the extent that these positions diverge. Bargaining evolves, if actors pursue their interests but are willing to make concessions in order to achieve a compromise or settle conflicts by a package deal. Arguing requires actors to give reasons for their policy and to search for the solution of a problem or a conflict. If a solution can be justified on generalisable grounds, it is likely to find approval among all involved participants and the negotiations will end with a consensus.

In politics, arguing seems to be an ideal, whereas in reality bargaining and confrontation seem to prevail. By and large, this is correct, although it is worth noting that arguing should not be ruled out (Bächtiger et al. 2018; Elster 1998). Negotiations often oscillate between bargaining and arguing (Holzinger 2001; Landwehr 2009), and occasional shifts to arguing make it possible to overcome stalemate in negotiation processes.



Moreover, particular institutional conditions foster arguing behaviour. As mentioned above second chambers, mainly consulting on bills, and including senior, experienced politicians, tend to negotiate in this mode. Arguing behaviour is also likely to emerge in committees where specialists, who are motivated to solve problems, meet. The same applies to private meetings in which negotiators can discuss free from external pressure and control. Mediating committees constitute venues where representatives tend to negotiate in the arguing mode, and this explains why they often help to find a compromise between politically divided legislative chambers, as mentioned above.

However, other attributes of bicameral systems can cause a confrontation of both houses, the principal reason being party politics. Parties compete for votes and offices. The logic of party competition requires that their policies diverge, that each party provides an alternative to the policies of other parties, and that policies of other parties are depreciated and debunked. Accordingly, parties interact in an antagonistic manner, and public debates among representatives of different parties in plenary sessions of parliaments reflect this contestation. Expression of clearly contrasting positions is an essential mode of democratic politics, which allows voters to assign responsibilities and hold representatives to account. However, when compelled to negotiate, actors affiliated to different parties tend towards confrontation rather than bargaining, not to speak of arguing which seems to be unfeasible under such conditions.

It is due to this incompatibility with negotiations (Lehmbruch 2000) that party politics can turn joint decision-making into a futile effort. This applies in bicameral legislatures, if members of both chambers behave mainly as party representatives and if majorities in each chamber are controlled by opposing parties. Both conditions have shaped politics in the U.S. Congress since the 1990s. In situations of a 'divided government' when the President's party has no majority in either the Senate or the House of Representatives or both, legislation becomes difficult. Meanwhile the polarisation between the Democratic and Republican Party obstructs negotiations among members of responsible committees. Confrontation risks undermining bargaining. In the German federal legislature, like in the U.S., opposing parties often have a majority in the houses, since in *Land* elections voters tend to prefer opposition parties in the federal parliament which then have a good chance of achieving a majority of votes in the Bundesrat. Both in Germany and the U.S., voters seem to use mid-term or *Land* elections to limit the predominance of majority parties at the



federal level. The likelihood of such a constellation of a party-political divide in the legislature can apparently be reduced if both chambers in total are elected simultaneously, as it is the case in Switzerland (except one representative of Appenzell Innerrhoden) and Italy, whereas different voting systems used to elect legislative chambers can cause incongruent majorities.

However, while party politics determines policy-making in directly elected parliaments, this is not always a decisive factor in second chambers. Apparently, party politics predominates in directly elected second chambers, as is exemplified by the U.S., Australian, and Italian Senates (Breton 2014; Owens and Loomis 2006; Pasquino 2002). In Switzerland, direct democracy moderates the role of parties in the Council of the States (*Ständerat*). The British House of Lords, like the Canadian Senate, represent non-elected, consultative chambers in which party competition has limited impact, although even in the British upper chamber, party affiliation is increasingly reflected in voting behaviour of the Lords (Russell 2013: 94-124). In the French Senate, members form party coalitions, but party politics does not predominate either (Ruß 2010). In federations, second chambers generally should represent the interests of constituent units, regional communities or territories (Russell 2001). This does not mean that territorial interests prevail, yet they may affect behaviour of representatives although they are committed to political parties. The German Bundesrat, often considered a party-political body, provides an interesting example for the interplay of party and territorial cleavages. Delegates of *Land* governments are accountable to majority parties in *Land* parliaments but they also pursue interests of their *Land*, which they represent in the Bundesrat (Leunig and Träger 2012). In a similar vein, French Senators tend to deviate from the policy of their party if it is necessary to defend interests of local governments in legislation affecting the territorial structure of the state (Le Lidec 2012). Hence, beyond party politics, territorial conflicts or conflicts between distinct societies of regions shape politics in bicameral systems (Sturm 2015).

These different cleavages can reinforce each other, for instance, if the party system reflects the divide of a multinational federation or if economic disparities or fiscal policy conflicts ignite regional nationalism. If they persist for some time, such congruent cleavages find expression in a disintegration of the party system, as can be observed in Canada and in Belgium. Congruent cleavages tend to ignite confrontation, but not necessarily between legislative chambers. In Belgium, territorial conflicts shape politics in



the federal parliament, while in Canada they are expressed and managed in intergovernmental relations. The Spanish legislature on the other hand seems to represent a bicameral system burdened by mutually reinforcing territorial and party-political cleavages.

However, different patterns of conflict can also combine to crosscutting cleavages. They exist in particular in federations with integrated party systems such as Austria and Germany, where representatives of different territories may be aligned to the same party and where members from opposing parties may pursue the same territorial interests. The overlap of converging and diverging interests following from crosscutting cleavages prevents actors from maintaining their positions in negotiations and motivates them to find agreements. Under these conditions, bargaining behaviour is most likely to prevail in processes aiming at a coordination of decisions in bicameral legislatures, but arguing behaviour can also occur. Bargaining makes a deadlock unlikely, but it often ends with ineffective compromises or inefficient package deals. Crosscutting cleavages caused by two- or multidimensional patterns of conflict make package deals more complicated since the number of issues to be considered increases. Therefore, negotiations mostly result in compromises unless institutional conditions favour arguing processes.

To conclude: Bicameral systems established to constrain the power of central government and to protect self-rule of constituent units in principle fulfil their functions if they require joint decision-making in federal legislation. Given favourable conditions, joint decisions can be achieved in formal or informal negotiations: if the shadow of a majority decision drives the key actors in the chambers to find an agreement; if committees for mediating conflicts between chambers exist; or if conflicts predominating politics in each chamber combine to crosscutting cleavages. If party politics reinforces cleavages dividing a bicameral legislature, the need to come to joint decisions complicates legislation, reduces effectiveness of governance and can undermine the legitimacy of a polity. Under these adverse conditions, balancing self-rule and shared rule will most likely fail. They increase the probability of a deadlock in federal legislation; this does not imply that power migrates to lower level governments but that the governance of the federation is at risk. In this case, the joint decision trap in policy-making calls for a reform of the bicameral system. Yet, considering this special institution, a policy of constitutional reform faces even higher barriers (Russell and Sandford 2002).



4. The joint decision trap: Can bicameral systems be reformed?

Ineffective governance, legitimacy deficit and an imbalance of power in a federation give reasons for institutional reform. Changes in the composition of second chambers or of decision rules in bicameral systems require amendments of the constitution. As a rule, laws amending the constitution have to be passed in both chambers (Kemmerzell and Petersohn 2012). In other words, reforms determined to change the institutional conditions of joint decision-making or to eliminate the need for joint decisions in legislation are by themselves matters of joint decision-making. In consequence, members of second chambers can veto a reform which reduces their power or affects their other interests. For this reason, significant changes of structures or decision rules of a bicameral system are unlikely, although they are not impossible. Anyway, bicameralism can lead a government to be caught in the joint decision-trap, i.e. significantly constrained by veto players and at the same time unable to alter institutions causing these constraints (Scharpf 1988: 267-271).

There are certainly cases of reform in federations or regionalised states which passed bicameral legislation (Benz 2016a). In some states, constitutional amendments abolished second chambers altogether, in New Zealand in 1950, in Denmark in 1956, and in Sweden in 1971. In the UK, the Labour government, when returned to power in 1997, made first strides to renovate the House of Lords, although the envisaged reform remained an unfinished project. A recent reform of the Italian Senate was rejected in a referendum, after it had been approved in both chambers of parliament. In Ireland, both houses of the parliament had decided to abolish the second chamber, but as in Italy, the constitutional amendment failed in the referendum. And more examples of significant changes in bicameralism could be added. However, there are also cases demonstrating the difficulties of such a reform. In Canada, various attempts to turn the unpopular Senate into an elected chamber or to limit the Senators' term of office have failed. In Germany, a constitutional amendment reduced the Bundesrat's veto powers in quantitative terms, but in legislation affecting the jurisdiction of the *Länder*, they still exist; however, farther reaching reform proposals never made it on to the agenda of federalism reform. In Romania, a consultative referendum recommended abolishing the second chamber, but the political elite was not willing to implement the reform.



These examples suggest the hypothesis that significant reforms of bicameral systems, including their replacement by a unicameral legislature, are more likely in unitary states, in particular if second chambers appear as historical relics. In contrast, second chambers appear to be enduring institutions in federal systems. Here, they are justified on normative grounds; apart from protecting the self-rule of lower level governments, they should represent territorial interests in shared rule at the federal level. It is evident that, in reality, they do not always appropriately fulfil these functions (Russell 2001, 113-114), and this article provides theoretical reasons why this might be the case. Nonetheless, proponents of bicameralism have stronger arguments to defend them than those who make the case for unicameralism. This does not rule out initiatives to amend a federal bicameral system. Yet, whenever change occurs, it turns out to be moderate and hardly deviating from a path-dependent institutional evolution.

Path-dependency points to an explanation provided by historical institutionalism. This theory does not rule out the occurrence of change, but it is said to take place under exceptional conditions opening a critical juncture. Yet, considering bicameralism, Kathleen Thelen and Sebastian Karcher (2013) have revealed, in an instructive case study on the evolution of the German Bundesrat, that critical junctures have led to continuity while the institution changed during periods of historical evolution. The findings of their case study are in line with the theory of joint decision-making outlined in this article. Actors in federal bicameral systems can incrementally adjust their practice and may also agree on moderate changes of decision rules, but they would hardly approve a far-reaching change of structures. However, for the same reasons that explain why joint decision-making in secondary legislation constrains governance but does not prevent decisions, institutions can evolve in an incremental way, although they are caught in the joint decision trap of constitutional policy. And, in the same way that the outcome of secondary legislation in bicameral systems varies according to conditions, the success or failure of constitutional reforms depends on specific conditions, some of which are given whereas others can be shaped by governments or parliaments (Benz 2016a).



5. Conclusions

Bicameral systems, even those in federations, vary. In general, they establish institutions operating according to the logic of joint decision-making. Under unfavourable conditions, legislation can fail, ending either in a deadlock or with ineffective compromises or inefficient package deals. However, powers of both chambers may be equal or different (symmetric or asymmetric bicameralism) and the selection of members of second chambers may lead to congruent or incongruent majorities in both chambers. Therefore, the variety of bicameral systems should make scholars cautious about generalising conclusions regarding their operation or their effects on policy-making. Not all of them require joint decision-making in all legislative matters, and even in symmetric bicameral legislatures where joint decisions are the rule, their impact on legislation and on the federal balance of power depends on particular conditions. Joint decision-making is a relevant concept to understand legislation in federal systems. Here, this pattern of negotiated legislation appears as an effective safeguard to protect self-rule and to include regional government in shared rule. However, bicameral systems may cause a federation or a legislature to fall in the joint decision-trap, and they regularly prevent constitutional amendments that seek to significantly change power relations between chambers.

This conclusion eschews providing reasons for speaking for or against bicameralism. It implies that the varieties of institutions, actor constellations, processes and conditions need to be taken into account. In general, bicameralism constitutes a dilemma between constraining power and enabling policy-making by applying power. Yet in democratic government under the rule of law, politics is always about coping with such dilemmas.

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¹ Although directly elected parliaments should represent citizens on an equal basis, regional communities might find a better representation in the first than in the second chamber. This holds true in parliaments with significant regional parties, whereas the second chamber does not represent constituent units. Examples are Belgium, Canada and the UK.



References

- Bächtiger André, Dryzek John S., Mannsbridge Jane J. and Warren Mark (eds), 2018, *The Oxford Handbook of Deliberative Democracy*, Oxford University Press, Oxford.
- Bednar Jenna, 2009, *A Robust Federation: Principles of Design*, Cambridge University Press, Cambridge.
- Benz Arthur, 2016a, *Constitutional Policy in Multilevel Government. The Art of Keeping the Balance*, Oxford University Press, Oxford.
- Benz, Arthur, 2016b, 'Politikverflechtung und Dynamik des Föderalismus', in Benz Arthur, Detemple Jessica, and Heinz Dominic, *Varianten und Dynamiken der Politikverflechtung*, Nomos, Baden-Baden.
- Borthwick R.L., 2001, 'Methods of Composition of Second Chambers', *The Journal of Legislative Studies*, VII(1): 19-26.
- Brenton Scott, 2015, 'State-based Representation and National Policymaking: The Evolution of the Australian Senate and the Federation', *The Journal of Legislative Studies*, XXI(2): 270-280.
- Coakley John, 2014, 'The Strange Revival of Bicameralism', *The Journal of Legislative Studies*, XX(4): 542-572.
- Elazar Daniel J., 1987, *Exploring Federalism*, University of Alabama Press, Tuscaloosa/AL.
- Elster Jon., 1998, 'Deliberation and Constitution Making', in Elster Jon (ed), *Deliberative Democracy*, Cambridge University Press, Cambridge, 97-122.
- Falkner Gerda (ed), 2011, *The EU's Decision Traps. Comparing Policies*, Oxford University Press, Oxford.
- Haas Christoph M., 2010, 'Zweite Kammer erster Klasse: Der US-Senat', in Riescher Gisela, Ruß Sabine and Haas Christoph M. (eds), *Zweite Kammern*, München, Oldenbourg (2nd edn.), 25-60.
- Hegele Yvonne, 2017, 'Multidimensional Interests in Horizontal Intergovernmental Coordination: The Case of the German "Bundesrat"', *Publius. The Journal of Federalism*, online first <https://doi.org/10.1093/publius/pjx052>.
- Heller William B. and Branduse Diana M., 2014, 'The Politics of Bicameralism', in Shane Martin, Saalfeld Thomas and Ströhm Kare (eds), *The Oxford Handbook of Legislative Studies*, Oxford University Press, Oxford, 332-351.
- Holzinger Katharina, 2001, 'Verhandeln statt Argumentieren oder Verhandeln durch Argumentieren? Eine empirische Analyse auf der Basis der Sprechakttheorie', *Politische Vierteljahresschrift*, XLII(3): 414-446.
- Kemmerzell Jörg and Petersohn Bettina, 2012, 'Regional Actors' Participation in Constitutional Reform: Opportunities, Limits and Risks', in Benz Arthur and Knüpling Felix (eds), *Changing Federal Constitutions. Lessons from International Comparison*, Barbara Budrich Publishers, Opladen, London, Toronto, 311-319.
- Landwehr Claudia, 2009, *Political Conflict and Political Preferences. Communicative Action Between Facts, Norms and Interests*, ECPR Press, Colchester.
- Lehbruch, Gerhard, 2000, *Parteienwettbewerb im Bundesstaat. Regelsysteme und Spannungslagen im Institutionengefüge der Bundesrepublik Deutschland*, Westdeutscher Verlag, Wiesbaden (3rd edn.).
- Le Lidec, Patrick, 2012, 'Decentralisation and Territorial Reforms in France: How Constitutional Constraints Impact Strategies for Reform', in Benz Arthur and Knüpling Felix (eds), *Changing Federal Constitutions. Lessons from International Comparison*, Barbara Budrich Publishers, Opladen, Berlin, Toronto, 249-267.
- Leunig, Sven (ed), 2009, *Handbuch Föderale Zweite Kammern*, Barbara Budrich Publishers, Opladen, Farmington Mills.
- Leunig Sven and Träger Hendrik (eds), 2012, *Parteipolitik und Landesinteressen. Der deutsche Bundesrat 1949-2009*, LIT-Verlag, Münster.
- Manow Philip and Burkhart Simone, 2007, 'Legislative Self-Restraint Under Divided Government in Germany, 1976–2002', *Legislative Studies Quarterly*, XXXII(2): 167-191.
- Money Jeannette and Tsebelis George, 1995, 'The political power of the French Senate: Micromechanisms of bicameral negotiations', *The Journal of Legislative Studies*, I(2): 192-217.
- Niedobitek Matthias, 2018, 'The German Bundesrat and Executive Federalism', *Perspectives on Federalism*, X(2).



- Owens John E. and Loomis Burdett A., 2006, 'Qualified exceptionalism: The US Congress in comparative perspective', *The Journal of Legislative Studies*, XII(3-4): 258-290.
- Palermo Francesco, 2018, 'Beyond Second Chambers: Alternative Representation of Territorial Interests and Their Reasons', *Perspectives on Federalism*, X(2): 49-70
- Palermo Francesco and Kössler Karl, 2017, *Comparative federalism: Constitutional Arrangements and Case Law*, Hart, Oxford and Portland.
- Pasquino Gianfranco, 2002, 'The Italian Senate', *The Journal of Legislative Studies*, VIII(3): 67-78.
- Patterson Samuel C. and Mughan Anthony, 2001, 'Fundamentals of Institutional Design: The Functions and Powers of Parliamentary Second Chambers', *The Journal of Legislative Studies*, VII(1): 39-60.
- Popelier Patricia and Lemmens Koen, 2015, *The Constitution of Belgium. A Contextual Analysis*, Hart, Oxford and Portland.
- Riescher Gisela, Ruß Sabine and Haas, Christoph M. (eds), 2010, *Zweite Kammern*, München, Wien, Oldenbourg (2nd edn).
- Ruß, Sabine, 2010, 'Der französische Senat: die Schildkröte der Republik' in Riescher, Gisela, Ruß, Sabine, Haas, Christoph M. (eds), *Zweite Kammern*, München, Wien, Oldenbourg (2nd edn.), 261-288.
- Russell Meg, 2001, 'The Territorial Role of Second Chambers', *The Journal of Legislative Studies*, VII(1): 105-118.
- Russell Meg, 2013, *The Contemporary House of Lords: Westminster Bicameralism Revived*, Oxford University Press, Oxford.
- Russell Meg and Sandford Mark, 2002, 'Why are Second Chambers so Difficult to Reform?', *The Journal of Legislative Studies*, VIII(3): 79-89.
- Scharpf Fritz W., 1976, 'Theorie der Politikverflechtung', in Scharpf Fritz W., Reissert Bernd and Schnabel Fritz, *Politikverflechtung: Theorie und Empirie des kooperativen Föderalismus in der Bundesrepublik*, Scriptor, Kronberg/Ts., 13-66.
- Scharpf Fritz W., 1988, 'The Joint Decision Trap: Lessons from German Federalism and European Integration', *Public Administration*, LXVI(3): 239-78.
- Scharpf Fritz W., 1997, *Games Real Actors Play: Actor-centered Institutionalism in Policy Research*, Westview Press, Boulder/Col.
- Schmedes Hans-Jörg, 2017, 'Regieren im semi-souveränen Parteienbundesstaat. Die administrativen und politischen Koordinierungsstrukturen in der Praxis des deutschen Föderalismus', *Zeitschrift für Parlamentsfragen*, XLVIII(4): 899 – 921.
- Smith David E., 2003, *The Canadian Senate in Bicameral Perspective*, University of Toronto Press, Toronto.
- Sturm Roland, 2015, *Der deutsche Föderalismus. Grundlagen – Reform - Perspektiven*, Baden-Baden.
- Thelen Kathleen and Karcher Sebastian, 2013, 'Resilience and Change in Federal Institutions: The Case of the German Federal Council', in Benz Arthur and Broschek Jörg (eds), *Federal Dynamics: Continuity, Change, and the Varieties of Federalism*, Oxford University Press, Oxford, 117-139.
- Tocqueville Alexis de, 2010 [1835], *Democracy in America*, vol. I, edited by Edoardo Nolla, Indianapolis, Liberty Funds, Indianapolis.
- Tsebelis George, 2002, *Veto Players. How Political Institutions Work*, Princeton University Press, Princeton.
- Tsebelis George and Money Jeannette, 1997, *Bicameralism*, Cambridge University Press, Cambridge.
- Uhr John, 2006, 'Bicameralism', in Rhodes R.A.W, Binder Sarah A. and Rockman Bert A. (eds), *The Oxford Handbook of Political Institutions*, Oxford University Press, Oxford, 474-494.
- Vatter Adrian, 2005, 'Bicameralism and policy performance: The effects of cameral structure in Comparative Perspective', *The Journal of Legislative Studies*, XI(2): 194-215.



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Beyond Second Chambers: Alternative Representation of Territorial Interests and Their Reasons

by

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Abstract

The paper contends that bicameral systems, irrespective of their differences in composition and powers, are unfit to represent territorial interests in the national decision-making process, except in some residual cases. What subnational entities seek is participation rather than representation. This is why alternative, executive-based institutions in which also the national government is present are mushrooming and second chambers are ineffective as territorial bodies. Furthermore, there is a clear trend to move from bicameralism to bilateralism, meaning that instead of taking advantage of ineffective multilateral institutions, strong subnational units try to channel their claims through bilateral instruments. Overall, the unresolved dilemma of subnational representation has little to do with the architecture of second chambers and rather lays in the tension between individual and collective representation.

Key-words

second chambers, inter-governmental relations, representation, participation, federalism, bilateralism



1. Introduction

Second chambers are often considered the litmus test of federal systems. Based on a very partial idea of federalism as aggregative process of previously sovereign entities¹, territorial second chambers should represent the institutional compromise according to which subnational units participate in the national decision-making (mostly in legislation, but not only) in exchange of their loss of sovereignty.

Such a view is however very partial and above all it does not reflect comparative constitutional reality. It is partial, since most territorial second chambers^{II} have not been established according to this logic and are indeed composed in a way that does not fully represent subnational entities in the national level. Even more relevant is the fact that comparative constitutional reality tells a very different story as to the representation of subnational entities at the national level, which is that of unfitness of such bodies, irrespective of their set ups and powers, to serve as the voice of subnational units. This paper will start with some reflection on the widespread misunderstanding as to role and function of territorial second chambers (2.), it then looks at alternatives that have been developed in comparative perspective (3.), it focuses on the bilateral trend that is emerging as a consequence of the ineffective and merely collective representation that second chambers can offer (4.) and it concludes by arguing that territorial participation in decision-making at national level is far more relevant than territorial representation (5.). Therefore, to represent regions, a fundamental challenge of bicameralism is necessary.

2. Romanticizing and misunderstanding second chambers: the Madison's Paradox

The difficulties and even the impossibility of territorial second chambers in doing what they were supposedly designed for – i.e. represent subnational units and their interests in the national decision-making process – has emerged from the very beginning of this experiment. Based on the experience of the Philadelphia convention and the invention of the US Senate as the prototype of federal second chamber, the unfitness of such chambers



to effectively represent subnational interests at the national level has been labelled as 'Madison's paradox' (Dehousse 1989).

Although Madison claimed that the Senate 'will derive its powers from the states as political and coequal societies' (Hamilton, Jay and Madison, 1987: 122), it did not evolve as an institution representing states interests (Patterson and Mughan 1999: 11) and was probably never supposed to do so (Doria 2006). The depiction of the Senate in *The Federalist* as stronghold of states interests and, indeed, as an heir to the Congress during confederation is thwarted by a constitutional design that weakened the link between the states and their supposed representatives. Senators were appointed only until 1913 by the state legislatures and the abolition of instruction and recall shielded them from state influence, making them powerful political representatives whose influence is very little if at all dependent on their electoral constituency.

Furthermore, contrary to what the ex post justification suggested to mute anti-federalist critique, the design of the Senate did not quite result from conceptual considerations as a symbol of the states being still equal. It was rather the result of a pragmatic bargain, the so-called Connecticut Compromise (also known as the Sherman Compromise or Great Compromise), to please the smaller states so that 'it is rather muddleheaded to romanticize a necessary bargain into a grand principle of democratic politics' (Dahl 1956: 112)^{III}.

Arguably, there was, however, an element of principle insofar, as the Senate was to reflect the theory of mixed government blending aristocratic and democratic elements, as espoused by British Whigs and Montesquieu (Wood 1998). As an 'American House of Lords' (Swift 2002: 9) it had, like many other cornerstones of the new federation, the function of protecting against excesses of democracy^{IV}.

Be it as it may, the Madison's paradox tells that territorial second chambers, aimed at representing territories and more generally factors other than the democratic element, in the end turned out to do precisely what they were supposedly aimed at not doing. They became political-democratic chambers like the lower houses of parliament, even more in the case of the US Senate as it has considerably more powers than the House of Representatives. Such evolution has not been immediately perceivable, but established itself in the course of history when the democratic element eventually prevailed over any other constitutive element of constitutional democracy. The turning point in history for such development was the early 20th century: under the Australian constitution of 1900, the



Senate was designed as directly elected by popular vote and the same was introduced in the US by the XVII amendment in 1913. The same happened in the US-modelled federations in Latin America: Mexico, Argentina, Brazil.

The Madison's Paradox is confirmed by its sole (apparent) exception, the German *Bundesrat*. This is in a way the only second chamber truly representing subnational entities and it does so (at least in principle) because it is not a chamber, as confirmed by the Federal Constitutional Court in 1974^V. In fact it could not be a chamber due to its structural features: ambassadorial model (members are more similar to ambassadors rather than to members of Parliament – Doria 2006), imperative mandate and compact vote (votes are to be cast together)^{VI}. Not being constitutionally a second chamber, it politically became one such, due to the unstoppable tendency of collective bodies to act according to political rather than territorial logic (Luthardt 1999 and Hennis 1998: 159). Therefore, even functional equivalents to territorial second chambers face the same problem: the dominance of the political over the territorial element, inevitably pushed by the dominance of the democratic over the territorial legitimacy. The dominance of the democratic element is in fact a typical feature of modern and contemporary constitutionalism and parliamentarism. This is why the German model is always admired and looked at (and often overestimated) but never copied^{VII}. In the end, a chamber is simply not the right place to represent territories as it is structurally unfit to perform such function (Ruggiu 2006).

3. Alternative forms of representation: rather seeking participation?

If a territorial chamber is structurally ineffective as far as effective representation of territories is concerned, it does not mean that the problem of representing regions does not exist. To the contrary, it becomes all the more acute precisely because of the wrong expectation that this might be done through territorial second chambers. As it normally happens in law, if a problem cannot be solved using the prime instrument designed for that, other mechanisms are developed, first informally and subsequently in a more formalized way. Such instruments typically do not replace the former but coexist with them and simply take over (some of) their functions.



This is precisely what has happened with the representation of territorial claims and interests in the national decision-making. While in some exceptional cases other forms of representation have been adopted within the parliamentary system, as a rule the deficits of representation are compensated by means of inter-governmental, executive-based bodies.

3.1. Alternative forms within parliaments

In some cases the parliamentary way for territorial representation is chosen, although not by means of a dedicated chamber. This is the case of constitutionally granted representation of specific territories within unicameral Parliaments, irrespective of the numerical consistency of the territory's population. Most notable examples are islands autonomies (Ackrén and Olausson 2008 and Hepburn 2012). For instance, in the Parliament of Papua New Guinea four representatives have to come from the autonomous island of Bougainville, in the Danish Parliament two representatives are reserved to Greenland and two to the Fær Øer islands, in the Finnish Parliament one representative is assigned to the Åland islands^{VIII} and five members of the Parliament of Tanzania are elected by the Zanzibar House of Representatives. Such form of preferential representation takes place in unicameral parliaments^{IX}, which makes it a functional equivalent to territorial bicameralism, just for specific territories only that enjoy a higher degree of autonomy or are the only autonomous territories within a unitary state. A creative variation of parliamentary subnational representation can be found in Italy, where representatives of the regions might integrate the bicameral committee on regional affairs, although this procedure has never been activated^X.

These peculiar forms of territorial representation in parliaments are functional equivalents to territorial second chambers, and face precisely the same deficits: the usual dominance of the political over the territorial criterion and unfitness to effectively voice individual interests. Individual interests can sometimes be channeled through territorial second chambers, although only in exceptional and 'existential' cases, i.e. when the survival of the very representation in the second chamber is at stake. Examples can be found in article V US constitution^{XI} and, in a softer version, in article 35.4 Austrian constitution^{XII}.

Since parliamentary representation inevitably turns out to be political and not territorial in nature, effectiveness can be achieved when the territorial and the political element coincide and overlap. This is the case of strong territorial parties which appoint most or



even all members of the (first and second) chamber coming from a particular region. This is however a merely political and by no means an institutional solution.

3.2. Executive-based institutions

If parliamentary institutions are unfit to represent territories, the logical alternative are institutions representing the executives. Irrespective of the very existence and of the composition and powers of territorial second chambers, nearly everywhere, more or less institutionalized bodies have been established to link subnational entities and the centre at the governmental level.

As part of the wider inter-governmental relations, these institutions present two fundamental elements that differ from territorial second chambers and make them way more effective. First, they are executive, not parliament-based institutions, being composed of representatives of the subnational governments, i.e. of the institutions that really determine subnational policies and are responsible for their implementation (as well as, in many cases, also of considerable parts of national policies). Second, such bodies normally include representatives of the national government as well and are thus institutions that ensure primarily participation and coordination rather than mere representation.

Examples are countless and exist everywhere (Poirier, Saunders and Kincaid 2015), both in traditional (older, coming-together) federal systems and in more recent, devolutionary federal/regional systems. They exist both where traditional federal second chambers are in place, and where second chambers were not born as institutions representing subnational units (such as in devolutionary federal systems but also in Canada), and even in Germany, the only system where an executive-based (functional) second chamber is in place. This means that they are essential irrespective of the existence and of the structure, the powers and the functions of second chambers. Furthermore, such institutions might be self-explaining in cooperative federal systems and more difficult to accept, from a systematic point of view, in dual federations, but they exist even in the latter. While these institutions have somehow always existed since the inception of each federal system, they mushroomed in the past 40 years, when the era of cooperative federalism boomed, although their formalization depends on the evolution and the features of each federal system^{XIII}. There is thus an obvious link between subnational participation and cooperative federalism, which inevitably shifts the balance on the side of the executives.



Not by chance, the more cooperative the federal system, the more it is defined as ‘executive’ federalism^{XIV}. Executives have in fact a number of instruments at their disposal that can steer and value subnational participation, both directly and indirectly – examples of the latter are for instance the external activities of subnational units (state treaties with other subnational units in the same country, with national or subnational foreign governments, participation in international bodies, and the whole range of informal activities ensuring participation in an increasingly interconnected world)^{XV}.

Based on these comparative achievements, a few telling examples of such alternative forms will be briefly sketched, both in traditional, coming-together federal systems (with either a ‘traditional’ senate or with a long history of bypassing second chambers never conceived as proper territorial representation) and in more recent, devolutionary federal or regional systems^{XVI}.

3.2.1. Traditional federal systems

‘Intergovernmental relations in the United States have always been very fluid and informal. There is nothing in the U.S. system directly comparable to the executive federalism prevalent in some federal systems, such as Canada, nor is there a bevy of joint decision-making bodies common in some federations, such as Germany. Given the dualistic nature of U.S. federalism, in which the U.S. government and the states are co-sovereign, state and federal officials have resisted the establishment of formal intergovernmental institutions’ (Kincaid 2011: 181). Furthermore, the huge differences in size and claims among the various States and above all the adversarial culture between Republicans and Democrats make it very difficult to set up institutionalized forms of cooperation (O’Toole and Christensen 2013). However, ‘intergovernmental relations pervade US politics and policies’ (Smith 2015: 432). State and local officials cooperate with each other and place joint pressure on the federal government through their voluntary, nonprofit, national organizations. The oldest (1908) and most significant one is the National Governors’ Association which is a sort of political forum of governors of states, territories and commonwealth of the US and is relevant especially for territories such as Puerto Rico, which is otherwise not properly represented in federal bodies^{XVII}. Another relevant institution is the Council of State Governments, a non-partisan regional organization existing since 1933 that provides mostly expertise, coordination, training, but



little political action. It is worth noting that an Advisory Commission on Intergovernmental Relations existed for a while (1959-1996) and consisted of three members of the President's Cabinet, three U.S. House members, three U.S. senators, four governors, three state legislators, three county commissioners, four mayors, and three private citizens (Kincaid 2011).

Canada has notoriously a very different constitutional history and approach as compared to the US. Also with regard to intergovernmental relations more generally and executive-based institutions representing provincial interests in particular, the situation is different and the practice and tradition of such relations is way more developed, not only due to the Senate's incapacity to represent provincial interests and diversity. From the very beginning of the Canadian federation, provincial prime ministers started to gather together and this became a politically significant forum. Since 1887 the first ministers and the federal prime minister regularly meet a least once a year. Since 1971 this organ is called First Ministers' Conference and despite being politically extremely significant (it is for instance the prime forum to discuss aboriginal issues) it was not mentioned in the Constitution Act 1982. Parallel to the First Ministers' Conference, sectoral conferences called Ministerial Councils exist and regularly meet on specific issues, sometimes supported by permanent secretariats, such as in the case of the Council of Ministers of Education (Adam, Bergeron and Bonnard 2015: 146-153).

Also Australia, like other dual and common-law based federal systems, is generally resisting to the idea of mechanisms bringing together the levels of government, but there also, as in other systems, these have been nevertheless established (Phillimore and Harwood 2015). The most notable body in this respect is the Council of Australian Governments, in place since 1992 (replacing the previous annual Premiers' Conference), comprising the head of governments of all levels (prime minister, premiers and chief ministers) of the Commonwealth, six States and two Territories. Similar institutions exist in other federal systems with mixed or with civil law traditions, such as Argentina (Carnota 2015), Brazil (Arretche 2015), Mexico (Hopkins 1990), India (Singh and Saxena 2015), South Africa (Powell 2015) or Malaysia (Lim 2008).

Moving to Europe, the practice of intergovernmental institutions is even more widespread as the European federal systems are overall marked by greater cooperation among the tiers of government and in most cases are based on the idea of executive



federalism. In Switzerland there is a deeply rooted tradition of strongly developed horizontal (inter-cantonal) cooperation, although vertical mechanisms and processes involving federal authorities are much less developed (Pfisterer 2015). The constitutional reforms of 2000 and 2008 ‘enabled the cantons to formally establish joint organizations and institutions, although several already existed previously (Art. 48 federal constitution)’ (Pfisterer 2015: 390). The most significant ones are the conferences of the sectoral ministers, that have started to meet informally as early as 1897, and of course the Conference of the Cantonal Governments, founded in 1993 (Hänni, Belser and Waldmann 2013). In recent times, the House of Cantons, established in 2007, increased its importance as a technical secretariat of all intercantonal working groups and governmental committees (Wasserfallen 2015).

In Austria, the Conference of the *Land* Governors ‘works to compensate for the weakness of the Federal Council’. The second chamber of Austria’s Parliament ‘is an important institution in federal theory [but] its legal status is comparatively weak’ (Bußjäger 2015: 81). The Conference started to meet regularly (at least 2 times a year) as of the 1970s (Rosner and Bußjäger 2011) and was gradually formalized. Now it is mentioned in a few provisions of the federal constitution, such as article 59b B-VG, which enables it to propose legislation to the Federal Government, and article 36.4 B-VG, which allows the *Land* Presidents to participate in the debates of the *Bundesrat* (Gamper 2017b). Especially the last provision, introduced in 1984, is a prime example of integration of the executive-based cooperative institution with the second chamber. This way, the *Land* government (in particular its President) serves as a link between a weak second chamber and the subnational units (Schäffer 2007).

The most significant demonstration of the inevitable presence of executive-based participatory institutions comes from the German system, which is the only one where a purely executive (functional) second Chamber exists. Despite the presence and the significant role of the *Bundesrat*, a wide network of intergovernmental relations exist in Germany, and in particular several bodies where the regional governments, in different compositions, meet among themselves and with the federal government to coordinate policies and actions (Lhotta and von Blumenthal 2015, Benz 2007, Kropp 2010). This goes as far as to include cooperative mechanisms of control, such as the Stability Council to secure the federal and the regional budgets, composed by the federal ministers of finance



and economy and the regional ministers of finance (article 109a Basic Law) (Lhotta and von Blumenthal 2015: 229).

The reasons for establishing a parallel, highly intertwined system of executive relations are manifold (Scharpf 1976 and Scharpf 2009), including the growing complexity and the related impossibility for one institution, even if intergovernmental in nature like the German *Bundesrat*, to manage it all. For the purposes of this study, however, one reason seems particularly significant and it is the fact that the *Bundesrat* does not include representatives of the federal government, while all other intergovernmental institutions do. In other words, the *Bundesrat* is an institution for representation, while the intergovernmental bodies are institutions of participation. And contemporary federalism is marked by growing interconnection in managing powers, that are ever less exclusive and more and more shared irrespective of the formal distribution laid down in constitutions (Steytler 2017). For these reasons, effective fora for participation on both levels by means of their executives are key in coping with challenges of contemporary governance complexity (Poirier and Saunders, 2015: 491-493).

3.2.2. Countries with no (or very little) territorial link in second Chambers

The described trends are even more acute in federal or regional countries whose second chambers never had the ambition to be (fully) territorial. In such systems, subnational participation had to look for alternative channels of participation at the national level from the very beginning, not even trying to use the second chamber for that purpose. These countries are those whose territorial division of power (be it federal or regional in nature)^{xviii} originate from progressive devolution of powers from a former unitary state and/or whose second chambers were designed to represent – partly or entirely – different forms of pluralism than the territorial one: political, censal, ethnic, aristocratic. In some case, the territorial element is somehow enshrined in the second chambers, although either only formally (Italy), or ineffectively (Spain) or indirectly (Belgium).

In Spain, the ineffectiveness of the senate despite its constitutional mandate of being a chamber of territorial representation (article 69 const.), led to the establishment of a wide network of ministerial conferences linking the levels of government. The whole system of intergovernmental relations is based on sectoral conferences where ministers or civil servants of the respective ministries of the national and subnational level discuss issues of



common regional interest and prepare the ground for formal decisions to be taken by the formal (mostly legislative) bodies (García Morales and Arbós Marin 2015). Such conferences have been progressively established from the early 1980s onwards and are now as many as 47, covering all possible sectors of public administration^{XIX}.

Very similar is the situation in Italy, whose senate is elected on a regional base (article 57 const.) but apart from that it is a purely political chamber. Like in Spain, several attempts to reform the senate by transforming it into a 'proper' regional chamber (better: to enhance the link between the regions and the senate) have failed. Against this background, informal intergovernmental conferences have been set up as of the 1970s, when the ordinary regions have been established. As early as 1983, the permanent conference between the state and the regions (and the two autonomous provinces of Trento and Bolzano/Bozen) was established by a ministerial decree, it was then formally regulated by law in 1988 and enhanced in 1997. The conference is the prime institution for political negotiations between the state and the regions as well as the body in which the regions express their view on national policies (Bifulco 2006). The conference can meet in different compositions based on the matter at stake^{XX}.

Unlike in Spain and Italy, in Belgium the constitutional reforms regarding the senate have been frequent, although none has turned it into a territorial chamber. Rather, given the features of Belgian federalism, successive reforms have enhanced the role of the senate as a chamber of the linguistic groups. Furthermore, due to the ethno-linguistic cleavages in the country, formal cooperation between the groups (and the territories) as well as between the levels of government has always been quite limited. This started to gradually change towards the end of the 1980s, in preparation of the big federal reform of 1993 and has continued ever since, as a sort of compensation for further devolution of powers. In the early 1990s a study estimated such intergovernmental mechanisms to be around 100 (Lejeune 1990), most of them however procedural rather than institutional in nature. The chief body for subnational participation and conflict prevention is the Concertation Committee, a multilateral body composed of the federal Prime Minister, five federal ministers and six subnational ministers, equally divided between French and Dutch speakers. There are also interministerial conferences and several other specific cooperative organs (Poirier 2002).



Examples could be endless. From a comparative perspective, however, the trend is absolutely clear: fully irrespective of the nature of second chambers, their powers and effectiveness, alternative, executive bodies based on cooperation are established and are blooming everywhere. These, and not the second chambers (even less if not territorial, of course) are the fora for participation of subnational units in decision-making. And participation, not representation, is what subnational units need and look for at national level. These participatory bodies do exactly what second chambers do not do, i.e. negotiate issues of subnational interest with the national interlocutor, at the level where political power is allocated: the executive.

4. From bicameralism to bilateralism

Next to the growth of executive-based institutions for subnational participation at national level, an additional trend is to be noted as far as the relations between the levels of government in federal and regional systems are concerned. Whenever cooperative forms are not (perceived as) sufficient, or when certain territories present a strong (minority) identity or other factors that make them different from the rest of the country, multilateral fora are normally unfit to fulfil their claims for differential treatment. This is because such fora – second chambers or executive-based participatory institutions – work according to the majority principle, and while they often over-represent smaller units, none of them provides individual subnational units with veto rights. This means that multilateral fora cannot ensure that one subnational unit's position is upheld and an alliance among all other entities overrules any individual position.

This is why more and more frequently strong subnational units pursue bilateral instruments for negotiation and cooperation with the national level and very often such fora are legally established since the national level acknowledges that they are necessary. However, the less effective the multilateral instruments or the more adversarial the political relations between individual subnational units and the center, the more bilateral channels are pursued and the multilateral ones ignored or bypassed.

While the political and scholarly discourse too often looks at how second chambers could be made more effective in representing subnational interests, it forgets that the issue is participation, that participation takes place outside of second chambers and that in a



growing number of cases the main problem is to determine the right balance between individual and collective bargaining between the levels of government. In other words, the fundamental question for subnational representation, participation and cooperation does not concern bicameralism, but increasingly bilateralism. How much bilateralism is necessary and how much is tolerable within a constitutional framework is a matter of complex institutional engineering that depends on many variables in each constitutional system.

In general terms, the growing appeal of bilateralism is due to three main reasons: first, the ineffectiveness of multilateral fora; second, the degree of asymmetry among territories; third the adversarial rather than cooperative political culture. Of course, these factors can also be simultaneously present. By way of example, three European cases could be briefly mentioned to illustrate these underlying reasons and the very different impact of bilateralism in different constitutional and political environments.

The first and older one are the bilateral committees that exist for each of the five Italian special regions for the implementation of the respective autonomy statute^{XXI}. Since the special autonomy statutes for Sicily, Sardinia, Friuli Venezia Giulia, Trentino-South Tyrol and Aosta Valley are adopted in form of national constitutional laws (unlike the statutes of the other, 'ordinary' regions that have their own constitutional autonomy but of course are subject to the prevalence of national law), their implementation also has to be carried out in a bilateral negotiation procedure. To this end, for each region a bilateral committee is set up, composed of equal number of representatives of the respective region and of the national government, tasked with the elaboration of norms implementing the statutes. Such norms are then adopted in form of governmental decrees (i.e. they bypass the national as well as the regional parliament) and cannot be amended by laws of parliament^{XXII}. There is however a deep difference among the concerned regions as far as the use of such implementing norms is concerned, both in terms of quantity and of quality. Implementing decrees to the autonomy statute of Trentino-South Tyrol have reached so far the impressive number of 190, which is twice as much as Aosta, three times more than Friuli Venezia Giulia and more than four times the total amount of norms adopted for Sicily and Sardinia respectively. As to quality, such norms have been extensively used in Trentino-South Tyrol also in order to regulate key fields and to acquire additional competences, such as, inter alia, the production of energy, the roads and other infrastructure, national parks,



trade, teachers and personnel of justice administration (Cosulich 2017: 111). In sum, the extent to which these powerful bilateral instruments have been used very much varies among the regions due to political and other factors.

A second example of bilateralization, mostly grounded in the lack of trust between the levels of government, is the trajectory of the second autonomy statute of Catalonia as far as the relations with the Spanish state are concerned. In order to avoid, to the extent possible, judicial struggles over the delimitation of powers (that were mostly adjudicated in favour of the state and not of the Catalan government), the drafters of the revised autonomy statute adopted in 2006 decided to establish ironclad safeguards (so called ‘armor plate’) for the competences of the autonomous community against state intervention by regulating in great detail the scope of the autonomous powers (Albertí Rovira 2005 and Cruz Villalón 2006). Furthermore, to the same end of limiting the state influence on Catalan self-government, an extremely detailed regulation of ‘institutional relations of the Generalitat’ was introduced in the statute, consisting of 26 articles (174-200). In particular, article 183 established a ‘Generalitat - State Bilateral Commission’ as the ‘general and permanent framework for relations between the Government of the Generalitat and the Government of the State’. The commission should have become the chief institution for negotiations between the Catalan and the Spanish government, which would have become entirely and exclusively bilateral. For this reason, the famous and contested ruling of the Spanish constitutional court on the constitutionality of the Catalan statute of 2010^{xxiii} interpreted this provision in a constitutionally conform way by fundamentally limiting the scope of the commission and of the general principle of bilateral relations established in article 3.1 of the statute of autonomy^{xxiv}. The resulting frustration of the claim for bilateralism has been one of the reasons causing the spillover that took place in Catalonia after the ruling (Castellà Andreu 2016).

Another case worth mentioning is that of the bilateral relations between the autonomous territorial unit (ATU) of Gagauzia and the state of Moldova, to which it belongs. This peculiar case supports the achievements of this study with regard to the uselessness of parliamentary bodies to serve as fora for negotiations of subnational interests. In the Moldovan case, the parliamentary way has been pursued not by establishing a territorial second chamber, but by parliamentarising bilateral relations with the subnational autonomous entity of Gagauzia. The autonomy of the ATU of Gagauzia



was established in 1994 after some violent incidents that affected that region in the aftermath of the civil war in Transnistria that led to the de facto split of that region from Moldova in 1992. To settle down the conflict, a far-reaching territorial and cultural autonomy was granted in 1994 by means of a special law on autonomy, which however remained largely unimplemented (Protsyk 2010). To set the process in motion, a dialogue process has been started, which included the establishment of a parliamentary working group between the Moldovan Parliament and the People's Assembly of Gagauzia that has begun to work on specific legislative proposals to improve incorporation of the existing autonomous powers within the Moldovan legal and administrative system. The working group has been working for some years but has not produced tangible results so far, also due to the fact that its members changed after every national and subnational election and that the process was highly politicized.

5. Conclusions. Real vs apparent challenges

Subnational representation and participation at national level is a key issue when looking at the functioning of federal and regional systems. The comparative analysis of the instruments to (try to) achieve that aim shows interesting and challenging trends. However, they go often unnoticed in literature and in political discourse.

There is, in general, a widespread trust in second chambers that does not match reality. This is not to say that (territorial) second chambers are not useful for several purposes, but simply that they are structurally unable to become effective fora for subnational participation in the national decision-making process. They are suited, in the best case, to represent subnational entities according to a very formalistic approach to representation, but due to the prevalence of the political-parliamentary logic over the territorial one they are in practice unable to be the place where the levels of government meet and negotiate issues of subnational (and of general) interest. Very often the reform of the second chamber is presented as a solution to the problems of the federal structure in several countries, but after all no reform has succeeded to turn second chambers into something they are not designed to be^{XXV}.

For this reason, alternative institutions made up of representatives of the subnational and national executives are mushrooming, bypassing^{XXVI} second chambers as multilateral



fora for participation in decision-making. The key for success of such institutions lays precisely in these two elements: as executive-based bodies, they can politically commit their respective level, whereas a parliamentary body cannot but be based on free mandate; furthermore, and even more importantly, they do not simply represent subnational units, but bring together both levels of government, thus enabling for negotiation. In fact, in today's complex multi-level scenery, participation is way more important to subnational units than mere representation.

Participatory, multilateral bodies are effective as platforms for negotiating issues of general interest for the subnational level, much less when it comes to specific requirements of individual subnational units. Such bodies only work where subnational units have strong common interests and are ready to cooperate among themselves, i.e. in symmetric systems with a strong cooperative culture and rather homogenous territorial claims. When such conditions are not met, the need arises to establish institutions where individual subnational interests can be voiced bilaterally, since majority decisions can suppress individual claims. Rather than looking at impossible ways to make second chambers the central bodies for representing territorial interests, the really pressing issue is to find the right balance between individual and collective subnational interests. Too much of the former produces separation and alienation, too much of the latter suppresses the need for different treatment in different cases.

A wrong diagnosis produces a wrong therapy. Therefore, reflection is needed on the relations between levels of government by asking the right questions. Otherwise, law abdicates to its prime function of solving problems.

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^I For theoretical and historical considerations and further literature Palermo and Kössler 2017:24-80.

^{II} For classification of second chambers see the paper by P. Passaglia in this issue. See also Luther, Passaglia and Tarchi 2006, Schmidt 2016 and Palermo and Nicolini 2013.

^{III} The Federalists even conceded this bargain nature: 'But it is superfluous to try, by the standard of theory, a part of the Constitution which is allowed on all hands to be the result, not of theory, but 'of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable. ... A government more consonant to the wishes of the larger States is not likely to be obtained from the smaller States', Federalist No. 62.

^{IV} This is best illustrated by an anecdote of George Washington explaining to Thomas Jefferson, who had been absent from the Constitutional Convention, the function of the Senate: 'Washington asked, 'Why do you pour your coffee into your saucer?' Jefferson replied, 'To cool it.' 'Even so,' Washington responded, 'we pour legislation into the senatorial saucer to cool it'. Patterson and Mughan, 1999: 15.

^V BVerfGE 37, 363.



^{VI} In fact, especially when the political majority in the *Bundesrat* is different from the one that supports the federal government in the *Bundestag*, the Federal Council can become an instrument of political opposition. An interesting case when for political reasons even the principle of compact vote was challenged took place in 2002, when the highly contested reform of immigration law was put to a vote in the *Bundesrat* (dominated by a conservative majority) after having been passed in the Parliament (then controlled by a social-democratic and green majority). The *Land* Brandenburg, then ruled by a coalition between christian-democrats (opposition to the federal government) and social-democrats (supporting the federal government) could not agree on a common position and instead of abstaining from voting in the *Bundesrat* as it happens in such cases, decided to go ahead by splitting the four votes of the *Land* in the Council, which was subsequently considered unlawful by the Federal Constitutional Court (BVerfGE 106, 310).

^{VII} Some features of the German (ambassadorial) model can be found in the South African National Council of Provinces, although the composition is very different and the compact vote can be cast only in exceptional cases. More similarities can be found with the Council of the European Union.

^{VIII} Interestingly, since 1948 the Åland parties form a coalition for the Finnish elections and in Helsinki they normally join the parliamentary group of the Swedish people's party, thus maximizing their presence by means of political coalition with other ethnic kins in the host country, which is an option the other island autonomies do not have.

^{IX} An exception is the smallest Italian region (Aosta Valley), which by virtue of the constitution has one guaranteed senator (art. 57.3 Italian constitution).

^X Art. 11 const. Law no. 3/2001. Even if activated, however, the regional representation would remain entirely political.

^{XI} 'No state, without its consent, shall be deprived of its equal suffrage in the Senate'.

^{XII} Here the veto is not individual but by a qualified minority of *Länder* (four out of nine) and the votes are not cast *en bloc*. See Gamper 2017a.

^{XIII} For example, one would never expect to see them constitutionalized in countries such as the US, while it was quite natural that a partial constitutionalization took place in Austria a Switzerland. Poirier and Saunders, 2015: 488-489 mention six main reasons for the different degree of institutionalization of intergovernmental relations: 1) modernity (the older the federations, the less room for formalized intergovernmental relations); 2) the degree of trust between orders of government (the lower the trust, the more likely is formalization), the strength or fragility of subnational units (the more fragile, the more formalized such bodies tend to be); 4) identification of subnational units with minority groups (if so, normally more formalization is demanded); 5) legal culture (stronger formalization is to be noted in civil law countries); 6) democratic accountability (greater institutionalization may be a response to a lack of it).

^{XIV} See Watts 1989.

^{XV} See recently Medeiros (ed) 2018.

^{XVI} In all mentioned cases, also some (normally low formalized) institutions bringing together the subnational assemblies are in place. While forming part of the wider intergovernmental relations, they won't be mentioned here as they do not perform the same function of representation of subnational interests as executive-based ones.

^{XVII} More precisely, Puerto Rico has no voting representative in the US Congress but has a Resident Commissioner who has voice in congress but no vote.

^{XVIII} As mentioned, no substantial constitutional difference can be identified between the two categories, although such difference might exist in the perception of the federal ideal as well as in the historical evolution of the territorial relations. See Gamper 2005.

^{XIX} See full list at http://www.seat.mpr.gob.es/dam/es/portal/areas/politica_autonomica/coop_autonomica/Conf_Sectoriales/Documentacion/Conf_Sect_exist/parrafo/0/CONFERENCIAS-SECTORIALES_REGIMEN_JURIDICO_ACTUALIZADO0.pdf.

^{XX} For issues affecting also the local government, the conference meets in joint composition with the homologous conference between state and municipalities. In such case it is called 'unified conference'.

^{XXI} See recently Cosulich 2017. In English and with regard to the most significant experience, that of the autonomous provinces of Trento and Bolzano, see Palermo 2008.

^{XXII} As repeatedly confirmed by the constitutional court – see inter alia rulings no. 20/1956, 22/1961, 151/1972, 180/1980, 237/1983, 212/1984 e 160/1985, 213/1998.

^{XXIII} STC 31/2010. Among the countless comments to this ruling see the special issue of the *Revista Catalana*



de Dret Públic, Especial Sentència 31/2010 del Tribunal Constitucional, sobre l'Estatut d'autonomia de Catalunya de 2006, available online at <http://revistes.eapc.gencat.cat/index.php/rcdp/issue/view/23>.

xxiv STC 31/2010, para 115.

xxv Examples are countless. In Spain, since the adoption of the 1978 constitution, the reform of the senate is considered the way for a functioning territorial setting (Aja and Albertí Rovira 2005) and very recently a group of distinguished Spanish constitutional lawyers have proposed a reform to the constitution to solve the Catalan (and more generally the territorial) crisis in which the reform of the senate according to the German (or, alternatively, to the Austrian) *Bundesrat* would be the key for the change (http://idpbarcelona.net/docs/actual/ideas_reforma_constitucion.pdf). Interestingly, in Germany the *Bundesrat* has been long considered a stumbling block for an effective, accountable and speedy decision-making (Fischer, Hirscher, Margedant, Schick and Werner 2004; Sturm 2003; Lhotta 2003; Bauer 2002; Wassermann 2003), and while structural changes have turned out to be politically and constitutionally not feasible, fine-tuning on the division of powers thus reducing the number of the laws requiring *Bundesrat's* approval was the main goal of the 'Federalism reform I' adopted in 2006. In Italy the constitutional reform adopted by the Parliament in 2016 but rejected by popular referendum that same year was focused on the reform of the senate and on its supposed regionalization. In Canada the possible reform of the senate has equally been on the political agenda at regular intervals (Docherty 2002) and has recently been revived by a proposal of the government elected in 2015. In Belgium, successive federal reforms have affected the senate, most significantly the most recent one in 2012-2014 (Dandoy, Dodeigne, Reuchamps and Vandeleene 2015), but still did the Senate not become the forum for subnational participation.

xxvi Occasionally also to support, as seen for the Austrian case.

References

- Ackrén Maria, Olausson Pär M., 2008, 'Condition(s) for Island Autonomy', *International Journal on Minority and Group Rights*, XV(2): 227-258.
- Adam Marc-Antoine, Bergeron Josée and Bonnard Marianne, 2015, 'Intergovernmental Relations in Canada: Competing Visions and Diverse Dynamics', in Poirier Johanne, Saunders Cheryl and Kincaid John (eds), *Intergovernmental Relations in Federal Systems*, Oxford Univ. Press, 135-163.
- Aja Eliseo and Albertí Rovira Enoch (eds), 2005, *La reforma constitucional del Senado*, Centro de estudios constitucionales, Madrid.
- Albertí Rovira Enoch, 2005, 'El blindatge de les competències i la reforma estatutària', *Revista Catalana de Dret Públic*, no. 31: 109-136.
- Arretche Marta, 2015, 'Intergovernmental Relations in Brazil: An Unequal Federation with Symmetrical Arrangements', in Poirier Johanne, Saunders Cheryl and Kincaid John (eds), *Intergovernmental Relations in Federal Systems*, Oxford Univ. Press, 108-134.
- Bauer Hartmut, 2002, 'Entwicklungstendenzen und Perspektiven des Föderalismus in der Bundesrepublik Deutschland', *Die öffentliche Verwaltung*, 837-845.
- Benz Arthur, 2007, 'Inter-regional competition in co-operative federalism: New modes of multi-level governance in Germany', *Regional & Federal Studies*, XVII(4): 421-436.
- Bifulco Raffaele, 2006, 'Il modello italiano delle conferenze Stato-autonomie territoriali (anche) alla luce delle esperienze federali', *Le Regioni*, XXXIV(2-3): 233-268.
- Bußjäger Peter, 2015, 'Intergovernmental Relations in Austria: Co-operative Federalism as Counterweight to Centralized Federalism', in Poirier Johanne, Saunders Cheryl and Kincaid John (eds), *Intergovernmental Relations in Federal Systems*, Oxford Univ. Press, 81-107.
- Carnota Walter F., 2015, 'Intergovernmental relations in Argentina: Systematic Confusion and Predominance of the Centre', in Poirier Johanne, Saunders Cheryl and Kincaid John (eds), *Intergovernmental Relations in Federal Systems*, Oxford Univ. Press, 14-41.
- Castellà Andreu Josep Maria, 2016, 'Tribunal constitucional y proceso secesionista catalán: respuestas jurídico-constitucionales a un conflicto político-constitucional', *Teoría y Realidad Constitucional*, no. 37: 561-592.
- Cosulich Matteo, 2017, *Il decreto attuativo di attuazione statutaria nelle regioni ad autonomia speciale*, ESI, Napoli.



- Cruz Villalón Pedro, 2006, 'La reforma del Estado de las autonomías', *Revista d'Estudis Autònomic i Federals*, no. 2: 77-99.
- Dahl Robert A., 1956, *A Preface to Democratic Theory*, University of Chicago Press.
- Dandoy Régis, Dodeigne Jérémy, Reuchamps Min and Vandeleene Audrey, 2015, 'The New Belgian Senate. A (Dis)Continued Evolution of Federalism in Belgium?', *Representation - Journal of Representative Democracy*, LI(3): 327-339.
- Dehousse Renaud, 1989, 'Il paradosso di Madison: riflessioni sul ruolo delle camere alte nei sistemi federali', *Le Regioni*, XVII(6) 1365-1400.
- Docherty David, 2002, 'The Canadian Senate: Chamber of Sober Reflection or Loony Cousin Best Not Talked About', *Journal of Legislative Studies*, VIII(3): 27-48.
- Doria Giancarlo, 2006, 'The Paradox of Federal Bicameralism', 5 *European Diversity and Autonomy Papers* 1, 19-26.
- Fischer Thomas, Hirscher Gerhard, Margedant Udo, Schick Gerhard and Werner Horst, 2004, *Föderalismusreform in Deutschland. Ein Leitfaden zur aktuellen Diskussion und zur Arbeit der Bundesstaatskommission*, Bertelsmann Stiftung, Gütersloh.
- Gamper Anna, 2005, 'A "Global Theory of Federalism": The Nature and Challenges of a Federal State', *German Law Journal*, VI(10): 1297- 1318.
- Gamper Anna, 2017a, 'Artikel 35 B-VG', in Korinek Kark, Holoubek Michael et al (eds), *Österreichisches Bundesverfassungsrecht*, Verlag Österreich/C.F. Müller, Wien.
- Gamper Anna, 2017b, 'Artikel 36 B-VG', in Korinek Karl, Holoubek Michael et al (eds), *Österreichisches Bundesverfassungsrecht*, Verlag Österreich/C.F. Müller, Wien.
- García Morales Maria Jesús and Arbós Marin Xavier, 2015, 'Intergovernmental Relations in Spain: An Essential but Underestimated Element of the State of Autonomies', in Poirier Johanne, Saunders Cheryl and Kincaid John (eds), *Intergovernmental Relations in Federal Systems*, Oxford Univ. Press, 350-378.
- Hamilton Alexander, Jay John and Madison James, 1987, *Federalist Papers*, Penguin Books, London.
- Hänni Peter, Belser Eva Maria and Waldmann Bernhard (eds), 2013, *20 Jahre KdK*, Publikationen des Instituts für Föderalismus, vol. 4, Stämpfli, Bern.
- Hepburn Eve, 2012, 'Recrafting Sovereignty: Lessons from Small Island Autonomies?', in Gagnon Alain and Keating Michael (eds) *Political Autonomy and Divided Societies. Comparative Territorial Politics*, Palgrave Macmillan, London, 118-133.
- Hopkins Jack W., 1990, 'Intergovernmental Relations in Mexico and the United States: A Comparative Perspective', *International Review of Administrative Sciences*, LVI(3): 403-420.
- Kincaid John, 2002, 'Intergovernmental relations in the United States of America', in Poirier Johanne and Saunders Cheryl (eds), *Intergovernmental Relations in Federal Systems*, McGill-Queen's University Press, Montreal-Kingston, 33-44.
- Kincaid John, 2011, 'The U.S. Advisory Commission on Intergovernmental Relations: Unique Artifact of a Bygone Era', *Public Administration Review*, LXXI(2): 181-189.
- Kropp Sabine, 2010, *Kooperativer Föderalismus und Politikverflechtung*, Verlag für Sozialwissenschaften, Wiesbaden.
- Lejeune Marc, 1990, 'Les mecanismes de prevention des conflits d'intérêts', in Alen André (ed), *Les conflits d'intérêts. Quelle solution pour la Belgique de demain?*, La Charte, Namur, 40-89.
- Lhotta Roland, 2003, 'Zwischen Kontrolle und Mitregierung. Der Bundesrat als Oppositionskammer?', *Aus Politik und Zeitgeschichte*, B 43: 16-22.
- Lhotta Roland and von Blumenthal Julia, 2015, 'Intergovernmental Relations in the Federal Republic of Germany', in Poirier Johanne, Saunders Cheryl and Kincaid John (eds), *Intergovernmental Relations in Federal Systems*, Oxford Univ. Press, 206-238.
- Lim Regina, 2008, *Federalism-State Relations in Sabah, Malaysia*, ISEAS, Singapore.
- Luthardt Wolfgang, 1999, 'Abschied vom deutschen Konsensmodell? Zur Reform des Föderalismus', *Aus Politik und Zeitgeschichte*, B 13: 12-23.
- Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), 2006, *A World of Second chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milan.
- Medeiros Eduardo (ed), 2018, *European Territorial Cooperation*, Springer, New York.



- O'Toole Laurence and Christensen Robert, 2013, *American Intergovernmental Relations*, 5th ed., Sage, London.
- Palermo Francesco, 2008, 'Implementation and Amendment of the Autonomy Statute', in Woelk Jens, Palermo Francesco and Marko Joseph (eds), *Tolerance through Law*, Martinus Nijhoff, Leiden-Boston, 143-159.
- Palermo Francesco and Kössler Karl, 2017, *Comparative Federalism. Constitutional Arrangements and Case Law*, Hart, Oxford.
- Palermo Francesco and Nicolini Matteo, 2013, *Il bicameralismo. Pluralismo e limiti della rappresentanza in prospettiva comparata*, ESI, Napoli.
- Patterson Samuel and Mughan Anthony, 1999, 'Senates and the Theory of Bicameralism' in Patterson Samuel, Mughan Anthony (eds), *Senates: Bicameralism in the Contemporary World*, Ohio State University Press, Cleveland.
- Pfisterer Thomas, 2015, 'Intergovernmental Relations in Switzerland: An Unfamiliar Term for a Necessary Concept', in Poirier Johanne, Saunders Cheryl and Kincaid John (eds), *Intergovernmental Relations in Federal Systems*, Oxford Univ. Press, 379-410.
- Phillimore John and Harwood Jeffrey, 2015, 'Intergovernmental Relations in Australia: Increasing Engagement within a Centralizing Dynamic', in Poirier Johanne, Saunders Cheryl and Kincaid John (eds), *Intergovernmental Relations in Federal Systems*, Oxford Univ. Press, 42-80.
- Poirier Johanne, 2002, 'Formal Mechanisms of Intergovernmental Relations in Belgium', *Regional and Federal Studies*, XII(3): 24-54.
- Poirier Johanne and Saunders Cheryl, 2015, 'Conclusion', in Poirier Johanne, Saunders Cheryl and Kincaid John (eds), *Intergovernmental Relations in Federal Systems*, Oxford Univ. Press, 440-498.
- Poirier Johanne, Saunders Cheryl, Kincaid John (eds) 2015, *Intergovernmental Relations in Federal Systems. Comparative Structures and Dynamics*, Forum of Federations and IACFS, Oxford Univ. Press.
- Powell Derek, 2015, 'Constructing Developmental State in South Africa: The Corporatization of Intergovernmental Relations', in Poirier Johanne, Saunders Cheryl and Kincaid John (eds), *Intergovernmental Relations in Federal Systems*, Oxford Univ. Press, 305-349.
- Protsyk Oleh, 2010, 'Gagauz autonomy in Moldova: the real and the virtual in post-Soviet state design', in Weller Marc and Nobbs Katherine (eds), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts*, University of Pennsylvania Press, Philadelphia, 231-251.
- Rosner Andreas and Bußjäger Peter (eds) 2011, *Im Dienste der Länder – im Interesse des Gesamtstaates*, Braumüller, Wien.
- Ruggiu Ilenia, 2006, *Contro la Camera delle regioni: istituzioni e prassi della rappresentanza territoriale*, Jovene, Napoli.
- Schäffer Heinz, 2011, 'Reformperspektiven für den Bundesrat', *Journal für Rechtspolitik*, XV(1): 11-22
- Scharpf Fritz W., 1976, *Politikverflechtung*, Vol. 1, *Theorie und Empirie des kooperativen Föderalismus in der Bundesrepublik*, Scriptor, Kronberg.
- Scharpf Fritz W., 2009, *Föderalismusreform: kein Ausweg aus der Politikverflechtungsfalle?*, Campus-Verlag, Frankfurt-New York.
- Schmidt Jan Amilcar, 2016, 'Representation of Component Federal Units in Federal Systems', *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford University Press.
- Singh Mahendra Prasad and Saxena Rekha, 2015, 'Intergovernmental Relations in India: From Centralization to Decentralization', in Poirier Johanne, Saunders Cheryl and Kincaid John (eds), *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics*, Oxford Univ. Press, 239-271.
- Smith David E., 2003, *The Canadian Senate in Bicameral Perspective*, University of Toronto Press.
- Smith Troy E., 2015, 'Intergovernmental relations in the United States of America', in Poirier Johanne, Saunders Cheryl and Kincaid John (eds), *Intergovernmental Relations in Federal Systems*, Oxford Univ. Press, 411-439.
- Steyler Nico (ed), 2017, *Concurrent Powers in Federal Systems: Meaning, Making, Managing*, Brill, Leiden/Boston.
- Sturm Roland, 2003, 'Zur Reform des Bundesrates. Lehren eines internationalen Vergleiches der Zweiten Kammern', *Aus Politik und Zeitgeschichte*, B 29-30: 24-31.



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- Swift Elain, 2002, *The Making of an American Senate: Reconstitutive Change in Congress, 1787–1841*, University of Michigan Press, Chicago.
 - Wasserfallen Fabio, 2015, 'The Cooperative Capacity of Swiss Federalism', *Swiss Political Science Review*, XXI(4): 538-555.
 - Wassermann Rudolf, 2003, 'Droht Gesetzgebungsstillstand? – Zur Vetomacht des Bundesrates', *Neue Juristische Wochenschrift*: 331-332.
 - Watts Ronald L., 1989, *Executive Federalism: A Comparative Analysis*, Queen's University, Kingston.
 - Wilhelm Hennis, 1998, *Auf dem Weg in den Parteienstaat*, Reclam, Stuttgart.
 - Wood Gordon, 1998, *The Creation of the American Republic: 1776–1787*, University of North Carolina Press, Charlotte.



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Perfect and Imperfect Bicameralism: A Misleading Distinction?

by

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Abstract

The aim of this contribution is to make some points on the distinction between ‘perfect’ (or equal) and ‘imperfect’ (or unequal) bicameralism and its relevance to contemporary discussions about second chambers and their constitutional position. The analysis starts with an assumption that this distinction is somehow under-theorised. The distinction between perfect and imperfect bicameralism, finally resulting in a clear prevalence of the latter, mainly focuses on two aspects: the exercise of legislative function and, in parliamentary regimes, the confidence vote. In spite of the unquestionable relevance of these two components to the activity of parliaments, these analyses are incomplete. The functions and competences of a given second chamber depend on the way it represents pluralism: the weight that each legal system attaches to the representative role of its own second chamber decisively shapes the perimeter of their functions. Important evidence for validating this claim comes from the procedures for passing constitutional amendments, in which second chambers, even in a number of ‘unequal’ bicameral systems, are put on equal footing with first chambers.

Key-words

bicameralism, parliamentary systems, informal constitutional change, constitutional rationalisation, constitutional amendment rules



1. Introduction

The aim of my contribution is to make some points on the distinction between ‘perfect’ (or equal) and ‘imperfect’ (or unequal) bicameralism, its origin and its relevance to contemporary discussions about second chambers and their constitutional position. In a nutshell, I will suggest that this distinction, at least in its traditional wording, may well be partial and misleading. In focusing predominantly on just *some* aspects of the division of tasks between the two chambers of a bicameral legislature – i.e. the ordinary legislative function and, in parliamentary regimes, the confidence vote –, the distinction neglects some no less important features of their mutual interplay. As such, a multi-dimensional notion of (im)perfect bicameralism seems better suited to grasp the complexity of the distribution of powers and tasks in a bicameral system. More importantly, it makes it possible to re-establish a strong connection between the functional dimension of bicameralism and other classifications, which, for example, consider the legitimacy of the second chamber and its overall function within the constitutional order.

The paper is structured as follows. In paragraph 2 I will consider two cases, both drawn from recent constitutional developments in France and Spain, which show that traditional understandings of (im)perfect bicameralism do not fully grasp the complex interplay between the two chambers of a bicameral parliament. Paragraph 3 will look into the historical genesis of the distinction between equal and unequal bicameralisms in 19th century constitutional practice and 20th century constitution-making processes. Paragraph 4 will focus on a possible alternative reading, in which the multi-dimensional nature of (im)perfect bicameralism is considered in order to stress the link between structure and functions of second chambers. In so doing, I will rely on Palermo and Nicolini’s (2013) conception of second chambers as institutions for the representation of pluralism. Paragraph 5 will discuss the results of this study.

As regards methodological aspects, the analysis will be based on comparison of a number of, mostly, parliamentary constitutional systems. On the whole, bicameralism in non-parliamentary constitutional systems, like the United States, Switzerland and the Latin American federations, seems to be less problematic. A comparative study focusing on *federal* second chambers pointed out that there seems to be ‘a trend or, to put it more



simply, a link between having the two chambers put on equal footing with regard to the legislative function and the autonomy of the executive vis-à-vis the legislative' (Bifulco 2003: 211). Perfect bicameralism is a recurrent feature in presidential and directorial federations, like the United States, Switzerland and the Latin American federations. On the other hand, parliamentary regimes, in which the government of the day is supposed to enjoy the confidence of the legislature, are marked by extensive discussion about the appropriate role and tasks of second chambers. A final methodological remark is necessary: the analysis will not try to identify clearly distinct models of bicameralism; rather, it will focus on individual cases in order to detect general patterns of evolution. The defining traits of bicameral legislatures are often highly idiosyncratic: each bicameral legislature is the product of a specific history, so much so that in this field '[d]iversity ... has been the rule over time and among the countries' (Romaniello 2016: 2).

2. Recent developments from two imperfect bicameral systems

Since the Autumn of 2017, French President Emmanuel Macron has hinted more and more clearly at his plans for constitutional reform (see Bourmaud 2018 and de Mareschal 2018). In essence, the President's project – which, for the time being, has not been converted into a publicly available draft constitutional bill^I – aims at entrenching the constitutional position of Corsica, reducing parliamentary involvement in the legislative process and, simultaneously, strengthening parliamentary control over the executive. Other measures envisaged, like the reduction of the number of members of Parliament and the (moderate) injection of some kind of proportional inspiration into the voting system, do not need to be passed by means of constitutional amendment. On the other hand, those innovations which impose a modification of constitutional provisions currently in force have, according to Art. 89 of the Constitution of 1958, to 'be passed by the two Houses [i.e. the National Assembly and the Senate] in identical terms'. After that, the President of the Republic may either convene the Parliament in Congress or submit the constitutional bill to referendum. What should be kept in mind, however, is that the approval of the Senate is needed for the constitutional bill to be submitted either to referendum or to the Congress.^{II}



In the last few weeks, headlines in French newspapers have been dominated by President Macron's frustration with the explicit opposition of the Senate. For this reason, the President of the Republic has to strive for some kind of compromise with the upper house and, more precisely, with its President, Gérard Larcher. Occasionally, an alternative solution has been suggested by the President's camp: calling for a referendum on the organization of public authorities according to Art. 11 of the Constitution, as General de Gaulle did in 1962.^{III} However, the constitutionality of such a move would be, to say the least, controversial (see Schoettl 2018). From the viewpoint of the Constitution, at least, a compromise between the President of the Republic and the Senate would clearly be preferable. According to his supporters, the Senate and its President are endowed with a specific legitimacy. The presidential party *La République En marche!* – a centrist coalition of often unexperienced political freshmen – holds an overwhelming majority of seats in the National Assembly: conversely, the Senate embodies institutional continuity and is characterised by tighter institutional and personal ties with the interests of regional and local governments in 'deep France' (*la France profonde*). According to Art. 24 of the Constitution, which was amended in 2003, the Senate ensures 'the representation of the territorial communities of the Republic': for this reason, the upper house is supposed to play a distinctive role in the constitutional architecture of the French State.^{IV} The President of the National Assembly has also displayed his own scepticism towards some of Macron's proposals: still, the peculiar composition of the Senate and its somehow eccentric nature have made it a much stronger voice in an institutional landscape which has been profoundly shaped by the majoritarian inspiration of the 5th Republic (*le fait majoritaire*). What is particularly worth mentioning for the purposes of this paper is that the Senate is not put on equal footing with the National Assembly when it comes to other functions, e.g. the ordinary legislative function and the confidence vote. But attempts at constitutional amendment somehow 'revive' the equal bicameralism which had marked the classic age of French parliamentarism under the 3rd Republic.

Last Autumn, the Senate of Spain, which is routinely described as a very weak second chamber (Bonfiglio 2005; Castellà Andreu 2006),^V had to move to the forefront of the institutional scene when the Catalan crisis was at its peak. After the Parliament of Catalonia approved the unilateral declaration of independence, the Spanish Government triggered the special procedure under Article 155 of the Constitution of 1978, according to which



If an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way that is seriously prejudicial to the general interest of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following approval granted by the overall majority of the Senate, take all measures necessary to compel the Community to meet said obligations, or to protect the abovementioned general interest.

In light of this provision, the Senate had to decide alone on the measures envisaged by the Spanish Government, including the removal of the Catalan executive (*Generalitat*) and the dissolution of the autonomous legislature (*Parlament*). This was, however, to have important consequences. In comparison with the Congress of Deputies, the partisan composition of the Senate does overrepresent the right-of-centre *Partido Popular* (PP), which holds a majority of seats; even more importantly, none of the 21 senators elected in the four Catalan provinces or appointed by the Catalan legislature belong to the *Partido Popular*. Because of the relative weakness of the Senate^{VI} and its perceived anti-Catalan attitude, the Government felt somehow forced to seek active support from other parliamentary groups. Thus, the PP engaged in negotiations regarding the application of the procedure under Art. 155 with the main opposition party, the *Partido Socialista Obrero Español* (PSOE). To quote just an example, the Government was persuaded to give up its plan regarding Catalan public media and to accept that control over them would continue to rest with the *Parlament* (Domínguez and Alberola 2017). This example shows another peculiar situation: even weak second chambers may be entrusted with important specialised tasks, in the fulfilment of which they act alone. The respective specialisations of the two chambers of a bicameral legislature are another problematic aspect in the study of (im)perfect bicameralisms.

3. The origin of the distinction

An unquestionable character of bicameralism is that it is a classic topic for comparative constitutional studies: in fact, the rise of bicameralism and the frequent complaints about its alleged crisis or decline have coincided with successive steps in the history of constitutionalism and political representation (Bon Valsassina 1959: 207; Weber 1972: 577).



Over the last two centuries, the cyclical salience of these crises has also been a consequence of the problematic status of many second chambers and the quest for viable alternative models. In this respect, the legitimacy of second chambers (be it related to aristocratic representation, territorial representation or considered reflection: see Passaglia 2018) and the procedures for appointing or electing their members have always been at the heart of discussions about bicameralism. This has not been the case with the functions of second chambers. At the very outset these used to be put on equal footing with first chambers and to be entrusted with the same function: functional differentiation was a subsequent step in the history of bicameral legislatures, and the distinction between perfect and imperfect bicameralism is the most recent attempt at classification of bicameral legislatures (Luther 2006: 24-25, Palermo and Nicolini 2013: 73). Put differently, this criterion for classification has been heavily influenced by other, longer-established criteria: powers and functions of second chambers ‘depend on the representativeness of the elective body and the way its members are appointed’ (de Vergottini 2004: 408).

3.1. Bicameralism in the 19th century: formal equality between the two chambers

In the ‘long 19th century’, as it was labelled by Eric Hobsbawm (1962), a basic feature of bicameralism was that the two chambers, as different as they were, were put on an entirely equal footing. Basically, this meant, first, that the two chambers had equal power throughout the legislative process and, second, that the government of the day had to maintain the confidence of both the lower and the upper house. The constitutional history of the 3rd Republic in France is quite eloquent in this regard: the indirectly elected Senate pushed the Government of the day to resign in 1876, 1883, 1890, 1896, 1913, 1930, 1932, and 1938 (Goyard 1982: 61; Garrigues 2010: 1179).^{VII} Generally speaking, constitutions did not provide for mechanisms for resolving conflicts between the two chambers, either by ensuring the prevalence of the will of either house or by promoting conciliation between them. Constitutions did often entrench some kind of pre-eminence of the lower house in the budgetary process, which, however, did not affect the decision-making powers of the upper house.^{VIII}

However, constitutional practice and the development of constitutional conventions considerably affected the soundness of these assertions. Informal constitutional change is a fundamental factor when it comes to understanding the evolution of bicameralism over the



course of the 19th century. Quite soon, upper houses were denied the power to overthrow governments – but this was not a consequence of formalised constitutional change but of the development of ad hoc constitutional conventions. In the United Kingdom,

it has never been assumed since 1832 that the House of Lords could, by its vote, overthrow a Government. ‘The day is gone when a conclave of Dukes could sway a Parliament’, said Sir James Graham in a completely different connection in 1859. In 1839 the House of Lords voted for a Select Committee on Ireland. The Government then asked the House of Commons for a vote of confidence. Sir Robert Peel objected, not because the confidence of the House of Commons could not override the lack of confidence of the House of Lords, but because ‘the opinions of one branch of the Legislature ought to be inferred from its general proceedings – from the support or opposition it may give to measures of the Government – than from abstract declarations’. Again in 1850 the Government was defeated in the House of Lords, this time in a debate on the Don Pacifico dispute. A resolution of confidence was moved and passed in the House of Commons. Since then, Governments have often been defeated in the Upper House, but a resolution of confidence in the Commons is no longer regarded as necessary.

The explanation is, not that the House of Commons can stop supplies – for the House of Lords could before 1911 stop supplies as it rejected the Finance Bill in 1909 – but that the power of the Government rests on the support of the electorate. The electorate chooses the party complexion of the Government ... (Jennings 1969: 490).

In Italy, Prime Minister Agostino Depretis once stated, in face of the opposition of the Senate, that ‘the Senate cannot trigger ministerial crises (*il Senato non fa crisi*)’ (Einaudi 2012).

Similar conclusions can be drawn with regard to the legislative function. Second chambers generally refrained from engaging in open conflict with first chambers because their own institutional position and legitimacy within the system were often perceived as weaker. In this respect, it might be said that open conflict was not a plausible option for second chambers, which often preferred deferring to lower houses. It will suffice to mention an Italian example: throughout its history, the Senate of the Kingdom of Italy only engaged in open conflict with the Chamber of Deputies when the left-of-centre Government tried to introduce a bill providing for the abolition of the tax on grains (Bonfiglio 2005: 7, Palermo and Nicolini 2013: 56). Open conflict was a risky decision as the government of the day could resort to its power to nominate party loyalists for the post of senator (so-called *infornate*: see Ghisalberti 2002: 177-78). This was also the case in the



United Kingdom: after altering the balance of power within the House of Lords by creating new peerages, Herbert Asquith's Liberal government introduced a bill which later turned into the Parliament Act 1911^{IX}. This piece of (substantially) constitutional legislation also created pre-conditions for further curtailing the powers of the House of Lords without its consent, as happened in 1949 (Russell 2006: 71-72). In Canada, the institutional weakness of the appointed Senate in the legislative process was the result of a deliberate choice of the Fathers of Confederation. According to the Prime Minister of Canada, Sir John A. Macdonald, the Senate 'is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch and preventing any hasty or ill-considered legislation which may come from that body, but it will never set itself in opposition against the deliberate and well understood wishes of the people' (quoted by Vipond 2017: 95).^X

On the other hand, 19th century constitution drafters did not even perceive the regulation of mechanisms for solving conflicts between the two chambers as a real issue. In this regard, the Australian example is telling. Although the 1897-98 Australasian Federal Convention explicitly addressed that problem, '[t]he advocates of the strongest possible Senate ... had precedent on their side when they claimed that no formal mechanism was necessary and that relations between the houses could be safely left to ordinary political processes and the good sense of members of parliament' (Stone 2006: 533).

In his major study of post-war democracy, Lord Bryce aptly epitomised the result of a century of constitutional development: in his analysis of French bicameralism, he held that '[t]he relations of the Senate to the Chamber are determined by its powers, which are weaker in fact than they seem on paper. ... Not venturing to stem the current that runs strongly towards democracy, it has accepted a position inferior to that for which it was designed' (Bryce 1921: 236).

3.2. Imperfect bicameralism: an episode in the rationalisation of parliamentarism

Greater functional differentiation between the two chambers – and, more often than not, the curtailment of the powers of the second chamber – was a typical component of the constitutions enacted in the aftermath of World War I. In fact, it might be described as a 'moderate' alternative to the introduction of unicameralism (as constitution makers did in Finland, Turkey, the three Baltic countries and the 2nd Spanish Republic: see Bon Valsassina 1959: 208-09).



In his comparative analysis of the constitutional documents enacted after the end of World War I, Boris Mirkine-Guetzévitch detected an emerging trend which he defined as a rationalisation of parliamentarism, i.e. entrenching the basic features of a parliamentary regime, which had developed out of practice and custom in the United Kingdom and France. He described the diminished role and competences of upper houses as a direct consequence of rationalised parliamentarism (Mirkine-Guetzévitch 1931: 25-26, mentioning the examples of Czechoslovakia and Poland; see also Frau 2016: 8). By then, the evolutionary pattern which Lord Bryce had summarised in *Modern Democracies* resulted in the formalising of an unequal distribution of powers and competences between the two chambers of a bicameral legislature.

This trend was further confirmed in the subsequent waves of constitutionalisation after the end of World War II,^{XI} so much so that according to one scholar ‘the most massive and important display of the crisis of bicameralism is the trend, which is rapidly circulating in present-day legal orders, towards humiliating, limiting and reducing the significance of the bicameral principle in the very text of constitutions’ (Bon Valsassina 1959: 210). The preservation of equal bicameralism – as has been the case in the Italian Republic since the Constitution came into force – is not so much the product of deliberate choice as the result of cross-cutting vetoes and the impossibility of striking a compromise on a plausible rationale for differentiating the two chambers (Paladin 1984, Macchia 2018: 262). Furthermore, the Italian model of equal bicameralism was clearly at odds with any programme of rationalised parliamentarism, to which the Constituent Assembly itself was committed at the outset (so-called *ordine del giorno Perassi*, aiming at ensuring governmental stability and preventing ‘degenerations of the parliamentary system’).

Interestingly, this trend towards the curtailment of the powers of second chambers did not spare ‘federal’ second chambers. In fact, federations had (and, to a great extent, have) embraced perfect bicameralism so as to ensure equal participation of their constituent units in the federal legislative process.^{XII} This had happened not only in presidential and directorial regimes, like the United States and Switzerland, but also in Australia, which is a parliamentary federation.^{XIII} Immediately after the end of World War I and the dissolution of empires in Central Europe, the weakness of the Austrian *Bundesrat* reflected the constitutional compromise underlying the newly established Austrian (federal) Republic and the prevalence of party concerns during the discussion about the Federal



Constitutional Law of the Republic (Weber 1980: 132).^{xiv} Only in 1984 was the Austrian *Bundesrat* granted any powers of ‘absolute’ veto (Gamper 2006: 801). The 2nd Spanish Republic, which launched a kind of asymmetric regionalisation, even favoured unicameralism over a combination of regional and corporatist bicameralism (Fernández Riquelme 2009: 193-195). Indeed, in chronological terms, the rationalisation of parliamentarism went hand in hand with new constitutional experimentations in the field of vertical separation of powers: Gaspare Ambrosini’s theory of the ‘regional state’ is the most powerful attempt at theorising the implications of such a shift (Ambrosini 1944; see also Mirkine-Guetzévitch 1931: 20-25). As the Austrian example shows, second chambers were obviously affected by the emergence of those novel forms of state.

As critics have noted, functional differentiation of the chambers of bicameral legislatures has been marked by the frustrating alternative between the risk of deadlock and irrelevance.^{xv} In federal orders, this concern overlaps, at least in part, with ‘Madison’s paradox’, according to which federal second chambers, far from ensuring strong representation of the component units, have gradually turned into fora of national politics (Dehousse 1990).

Another trend which coincides with the rise of unequal bicameralism is the search for tools and procedures which seek to find a middle ground between the diverging views of the two chambers. These had already been resorted to in practice in the United States Congress, where bicameral conference committees have been used since the first Congress, thereby following a long-standing British model (Rogers 1922: 301, Oleszek 1974, García Herrera 1978: 73-75). Still, the use of conference committees has heavily declined in the last few decades because of the rise of partisanship in a bitterly divided Congress: ‘The declining use of the conference committee as well as the decline in amendment trading and post-passage bargaining reflect the lower number of bills passed by recent Congresses and the inability of the two chambers to resolve their differences on controversial bills’ (Carmines and Fowler 2017: 381). Something similar had also happened in Canada and Australia in the previous decades with the rise and subsequent decline of, respectively, the open conference procedure and conferences of members of the two houses. The idea of amending the Canadian Constitution so as to make it possible to hold mixed meetings of the two chambers was part of the unsuccessful Charlottetown Accord (Pinard 2006: 490-91; see also Stone 2006: 551).^{xvi}



However, cooperation procedures have been more clearly entrenched in 20th century constitutions: this is, for example, the case of the German Mediation Committee (*Vermittlungsausschuss*: Art. 77 of the Basic Law of 1949), the French Mixed Committee (*Commission mixte paritaire*: Art. 45 of the Constitution of 1958), the Spanish Mixed Committee (*Comisión Mixta Congreso-Senado*, only available for special purposes: Art. 74(2) of the Constitution of 1978), the Belgian Conciliation Committee (*Commission parlementaire de concertation* for settling conflicts of competence: Art. 82 of the Belgian Constitution, amended in 2014), and the South African Mediation Committee (Art. 78 of the Constitution of 1996). It might be argued that conciliation tools are part of the same rationalising effort which has been described above: still, they combine it with an attempt at reconciling the different positions of the two chambers, independently of their respective strengths.^{xvii} By the way, revitalising the role of an altogether weak second chamber in the legislative process is the reason why scholars sometimes suggest that a mediation committee be established in their constitutional order (see here the Austrian and Polish discussions as summarised by Gamper 2006: 824 and Granat 2006: 1000). But the role of conciliation committees in itself is no independent variable: a conciliation body is necessary ‘insofar as bicameralism reveals an effective potential for opposition’ (Lauvaux 2004: 96), as it is the case with the (intermittently) counter-majoritarian French Senate. A less convincing option is to provide for joint sessions of two houses whose numerical strength is clearly different, as it is the case in India (see Shastri 2006: 598).

4. From legislation to constitutional amendment rules: a multidimensional notion of imperfect bicameralism

As mentioned in paragraph 1, discussions about the classification of bicameral systems along the perfect-imperfect alternative prove ultimately unable to grasp the full picture. In fact, among parliamentary regimes perfect bicameralism only characterises the Italian Parliament – and even survived an attempt at constitutional reform in December 2016.^{xviii} In turn, both Belgium and Romania have abandoned their own models of equal bicameralism, respectively in 1993 and 2003 (see Lauvaux 1990: 32 and Selejan-Gutan 2016: chapter 2). In the light of this evolution, the heuristic potential of the distinction does not seem to be particularly strong: imperfect bicameralism is now the rule. On the



other hand, equal bicameralism is a relatively simple notion, whereas it is possible to think of a number of different models of unequal bicameralism.

Political scientists suggest that it is more appropriate to (re)conceive the alternative between perfect and imperfect bicameralism as a continuum ‘from “symmetric” (where the two houses are coequal, exercising the same powers and functions), on the one end of the continuum, to “asymmetric” (where one house is subordinate to the other), on the other end’ (Patterson and Mughan 2001: 41-42). How can this be theorized in constitutional law terms? Moving back to the starting point of this analysis is a plausible solution. As Palermo and Nicolini have suggested, it is necessary to establish a stronger link between this problem, on the one hand, and the main *raison d’être* of bicameralism i.e. representing pluralism, on the other hand:

the *representation of pluralism* provides a justification for the functions and competences which second chambers exercise in the formation of the state’s will; basically, it characterises ‘non-federal’ bicameralisms – if reference is made to the ‘traditional’ classification – in terms of *equality* or *differentiation* (Palermo and Nicolini 2013: 79).

How crucial is this representation of pluralism in the overall architecture of the constitutional system? The position of the second chamber vis-à-vis the first chamber depends on how this question is answered. The developments presented in paragraph 3.1 clearly demonstrate this: the constitutional history of the 19th century, until the wave of rationalization in the first half of the 20th century, is a story of adaptation of the constitutional framework to constitutional practice and to the constitutional conventions which had emerged out of the expectations of the main actors involved. Was it acceptable for non-elective upper houses to be involved in ordinary legislative processes on equal footing with elective lower houses? Was it acceptable for the indirectly elective French Senate to be able to overthrow the government of the day by means of a no confidence vote? As the legitimising strength of aristocratic or census-related models of bicameralism declined, second chambers became more and more reluctant to exercise powers of which, in strictly formal terms, they had not been stripped.

What comparative constitutional studies need right now is a *multidimensional* notion of imperfect bicameralism: the two chambers of a bicameral legislature may well be put on



equal footing with regard to some functions and tasks, with the lower house prevailing in all the others. Thus, traces of perfect and imperfect bicameralism may well coexist within the very same constitutional order, thus weakening rigid interpretations of this dialectic contrast. The subsequent point is to identify those functions and to assess their significance within a given constitutional order: in order to do this, it is necessary to consider the main *raison d'être* of the second chamber.

As of today, the main example of 'strong' equality between the two chambers is provided by constitution-amending processes.^{xix} A great number of comparative constitutional studies have been devoted to constitutional amendment rules and constitutional change in the last few years (Albert 2013: 227-28; see, among others, Fusaro and Oliver 2011, and Albert, Contiades and Fotiadou 2017). For the purposes of this paper, the most important point is that equality between the two chambers is more frequently than not the case when it comes to amending the highest source of law (see e.g. Venice Commission 2009: 9-10). This means that diversity and pluralism – insofar as they are represented by the second chamber and perceived as crucial in the overall architecture of the system – should be granted appropriate weight in constitution-amending procedures. In a way, this confirms the conception of constitutional amendment rules as expressing constitutional values. Among those values, it should be mentioned that formal amendment rules may serve a democracy-promoting purpose in two respects: 'The right to amend a constitution is, above all, a right to democratic choice. ... In addition to promoting the majoritarian bases of democracy, formal amendment rules may also promote the substantive dimensions of democracy, namely its counter-majoritarian and minority-protecting purposes' (Albert 2013: 235; see also Albert 2014: 913-14 and Rodean 2018: 6-7). This means that there is a tight connection between one of the functions of constitutional amendment rules and the very reason for the existence of second chambers. In empirical terms too, the bicameral structure of a legislature is generally described as a key issue for assessing the difficulty of amending a constitution. Moreover, legislative bicameralism has been found out to be one of the most decisive factors in assessing how easily a constitution can be amended: as one scholar argued, 'legislative complexity – the requirement of special majorities or separate majorities in different legislative sessions or bicamerality – is the key variable to explaining amendment rates' (Ferejohn 1997: 523; see also Lutz 1994 and Dixon 2011: 105).



The French case has already been mentioned in paragraph 2: at this stage, it should be added that the bicameral structure of the legislature has often been described as a component of the ‘republican tradition’ in French public law. At the beginning of the 3rd Republic, conservative republicans placed great importance on the new Senate, as they saw it as a bulwark for political minorities in the political process (Vimbert 1992: 98-99). Other cases of equal involvement of the lower and upper houses in amending the Constitution are Australia (S. 128 of the Commonwealth of Tradition Constitution Act 1900),^{xx} Japan (Art. 96 of the Constitution of 1946), Germany (Art. 79(2) of the Fundamental Law of 1949),^{xxi} India (Art. 368(2) of the Constitution of 1950), Spain (Art. 167(1) of the Constitution of 1978),^{xxii} the Netherlands (Articles 137(4) and 138(1)(a) of the Constitution of 1983), Romania (Art. 151(1) and (2) of the Constitution of 1991), the Czech Republic (Art. 39(4) of the Constitution of 1992), and Poland (Art. 235(4) of the Constitution of 1997). In South Africa, the involvement of the National Council of Provinces is the rule, with minor exceptions provided for at S. 74(3) of the Constitution of 1996: indeed, the approval of six Provinces in the Council is needed for all amendments affecting the founding provisions, the Bill of Rights, all the Provinces or the Council itself, altering provincial boundaries, powers, functions or institutions, or amending a provision with specifically deals with a provincial matter (see de Vos 2006: 642-46). In some jurisdictions, like Belgium, the abolition of equal bicameralism and six waves of “State reform” have had no impact on constitutional amendment rules (Art. 195 of the Belgian Constitution, unchanged since 1831, if not for the transitional provision added in March 2012: see Behrendt 2003: 280, and Dumont, El Berhoumi and Hachez 2016: 27-30). In Italy, the unsuccessful Renzi-Boschi constitutional reform also preserved equal bicameralism with regard, among other issues, to constitutional reform (see Romeo 2017: 37). On the other hand, in some constitutional systems the analysis of the position of the second chamber with regard to constitutional amendment simply confirms what can be inferred with regard to ordinary legislation. This is e.g. the case of Austria, where the weakness of the *Bundesrat* in the Constitution amending process confirms the problematic nature of Austrian federalism (Pernthaler 2004: 294-98): according to Article 44(1) of the Federal Constitutional Law of 1920, ‘[c]onstitutional laws or constitutional provisions contained in simple laws can be passed by the National Council’. However, constitutional laws curtailing the competence of the *Länder* in legislation or execution ‘require



furthermore the approval of the *Bundesrat*, in the presence of at least one-half of the members, by a two-thirds majority of the votes cast' (Art. 44(2), as amended in December 1984). This limited exception is consistent both with the marginal position of the *Bundesrat* in the Austrian constitutional order and the status of the former as the parliamentary organ in which 'the *Länder* are represented' (Art. 34(1) of the Federal Constitutional Law). The Canadian case is somehow similar: unless a constitutional amendment bill affects the executive government of Canada, the Senate itself or the House of Commons, Canada's upper house only has a suspensive veto of 180 days (see Pelletier 2017: 259). This circumstance is telling and illustrates the unfitness of the Senate to represent the Provinces and Territories of Canada: indeed,

'[t]he *Constitution Act, 1982* creates five formal amendment thresholds, each requiring an escalating measure of federal or provincial legislative action, sometimes in tandem, with the applicable threshold rising in difficulty according to the function or symbolic importance of the entrenched provision to be amended. ... This reflects a hierarchy of constitutional importance: The quantum of political agreement rises according to the importance assigned to the matter to be amended' (Albert 2016: 411-12).

However, the consent of the Senate is only needed with regard to the federal institutions; this is not the case with the core of Canadian statehood and Canadian federalism (including e.g. the office of the Queen, the Governor General and provincial Lieutenant Governors, the use of the English or French language, the composition of the Supreme Court, and the principle of proportionate representation of the Provinces in the House of Commons).^{XXIII}

5. Specialisation of the second chamber and emergence of the multi-level dimension

This paper has mainly focused on situations in which the two chambers of a bicameral legislature co-operate or, possibly, have to deal with conflict. The perfect-imperfect alternative is shaped by how the two chambers co-operate and conflicts between them are solved. This reflects the origin of bicameralism in the 19th century: in light of their different composition and legitimacy, the two chambers were called upon to jointly approve pieces of legislation (see Palermo and Nicolini 2013: 52). However, the current constitutional



scene includes a number of situations in which either chamber acts alone. A significant example has already been cited in paragraph 2: second chambers perform a decisive role in extreme conflicts between institutional layers in federal and multi-level orders.

Another trend deserves mention, although in practice its impacts have been quite modest so far: providing second chambers with a privileged position for introducing legislative proposals related to their main ‘focus’. In 2003, Art. 39(2) of the French Constitution was amended in order to strengthen the role of the Senate as chamber of territorial representation: ‘bills primarily dealing with the organisation of territorial communities [i.e. Communes, Departments, Regions, special status communities and overseas territorial communities] shall be tabled first in the Senate’. The *Conseil constitutionnel* has already struck down a couple of ordinary laws because they had been adopted in violation of Art. 39(2) of the Constitution.^{XXIV}

Even more interestingly, it should be mentioned that the multi-level dimension – most notably, European integration – provides second chambers with a formidable option to escape the traditional dilemmas between equality and subordination, or between conflict and cooperation. This relates to both general and specific reasons. In general terms, the peculiar (and controversial) features of the ‘form of government’ of the Union have possibly led to a reappraisal of the role of second chambers within the constitutional orders of the Member States:

bicameralism more than emphasizing the principle of the separation of powers, is an efficient tool to give voice to territorial entities and social bodies that would be underrepresented, both in the Lower House and in the European institutions. Particularly in the EU, this role for Upper Chambers should be considered far from out dated: the ‘European blindness’ makes Upper Houses a pressing need to reconnect the different layers of the European composite Constitution, through a successful integration of territorial political representation (Faraguna 2016: 20; see also critical assessment by Fasone 2017: 48-60).

In a way, this is the same reason why equal bicameralism is preserved when it comes to constitutional amendment rules (see above in paragraph 4).

In less generic terms, the entry into force of the Lisbon Treaty was marked by an attempt at strengthening the democratic bases of the Union, with an eye both to representative and participatory democracy. In this respect, the contribution of national



parliaments ‘to the good functioning of the Union’ (Art. 12(1) TEU) was seen as a key issue. Among the ‘European powers’ of national parliaments (as defined by Lupo and Piccirilli 2017), those related to ensuring compliance of draft legislative acts with the principles of subsidiarity and proportionality are clearly crucial. The relevant provisions in Protocol no. 2 somehow take into account the intimate complexity of many national parliaments: ‘Any national Parliament or any chamber of a national Parliament’ may submit a reasoned opinion stating why it considers that a draft legislative act does not comply with the principle of subsidiarity. This means that even very weak upper houses may take autonomous initiative and ‘participate in the EU decision-making on equal footing with the lower ones’ (Romaniello 2015: 1). Empirical evidence considering the thirteen bicameral national legislatures in the European Union even shows that ‘upper houses – in absolute terms – were much more active than lower houses’ (Romaniello 2015: 9, also pointing at the considerable impact of the idiosyncrasies of each Member State and ‘the contrast between the blind and equal approach adopted by the EU and the complexity of national constitutional settings’). Thus, second chambers may take the initiative in a way which completely escapes the traditional alternative between perfect and imperfect bicameralism: both chambers may act – and their action obviously impacts on the domestic setting – but they can do so independently from one another.

6. Concluding remarks

Comparative analysis in the previous paragraph has pointed to the decline of equal bicameralism both in institutional practice and in formal constitutional provisions. Meanwhile, it has shown that the contemporary scene is marked by a number of phenomena and trends which somehow escape a too rigid dichotomy. For the purposes of a concluding assessment, the first point which deserves attention is the depth of change over the last two centuries. The issues underlying the distinction between perfect and imperfect bicameralism are less stable than those related to the legitimacy and institutional position of second chambers: ‘The structures and functions of second chambers always differ but it seems to be the functions and not the structures that are more susceptible to change’ (Luther 2006: 25). Two examples will suffice. The powers and competences of the French Senate have considerably evolved since 1875, but its structure, which makes it a



‘Great Council of the Communes of France’, has not changed considerably since Léon Gambetta gave his Belleville speech (see Laffaille 2016: 44-45). In Belgium, equal bicameralism was abandoned two decades before the composition and structure of the Senate were modified (see discussion by Delpérée 2006: 716-19).

In light of that evolution, the traditional distinction between equal and unequal bicameralism does not seem to be able to grasp the current complexity of the distribution of powers and tasks within a bicameral legislature. Indeed, the two chambers of the very same parliament may well be placed on equal footing in some respects, whereas the will of the lower house generally prevails on all other occasions. Because of its genetic relationship with Mirkin-Guetzévitch’s theory of rationalised parliamentarism (see above in paragraph 3.2), the distinction, in its classical meaning, almost exclusively focuses on two decisive features of parliamentary regimes, i.e. the ordinary legislative process and the confidence vote. On a different note, equal bicameralism is now an exception, while there are multiple models of bicameralism, ranging from ‘almost equal’ to the actual subordination of the second chamber. That is why constitutional law analyses need a multidimensional analysis of unequal bicameralism, which allows the complexity of the tasks of present-day-parliaments to be grasped. Furthermore, as has been argued in paragraph 4, a more complex understanding of unequal bicameralism makes it possible to do justice to the link between the structure and functions of second chambers. In doing so, the great diversity of contemporary constitutional arrangements should always be kept in mind: indeed, ‘there is no one model of bicameralism, neither is there any unique institutional arrangement, but each model is the outcome of national constitutional designers for maximizing the benefits’ (Romaniello 2016: 2). In sum, like unhappy families in Tolstoy’s *Anna Karenina*, each model of unequal bicameralism is unequal in its own way.

As mentioned above, 20th century scholars like Mirkin-Guetzévitch and Bon Valsassina tended to describe imperfect bicameralism as a milder alternative to embracing unicameralism altogether. As of today, the overall picture seems to be different. The existence of second chambers is generally subject to controversy in most constitutional orders, as the Irish and Italian referendums in 2013 and 2016 clearly showed. Meanwhile, they are often very willing to perform their constitutional role actively (see above in paragraphs 2 and 5). Even second chambers which are generally seen as weak, like the British House of Lords, are part of this trend: ‘In total the Parliament Acts have run their



full course on only seven occasions since 1911. However, these occasions seem to be becoming more frequent' (Russell 2006: 79; see also Russell 2013: 81-82 and 134), and the handling of the Brexit may well add to this list.

In a way, the vitality of second chambers against a very diverse background confirms that any discussion whatsoever about representation and representativeness (and their crises) has to consider parliamentary functions in their entirety and, if this is the case, the impact of the second chamber on those functions (Lupo 2017: 40-41). For constitutional law scholars to measure up to those intellectual challenges, a multidimensional notion of imperfect bicameralism is needed.

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^I Nevertheless, the newspaper *Le Monde* has succeeded in getting access to a preliminary draft, which has been submitted to the *Conseil d'État* for advice and is due to be discussed at a meeting of the Council of Ministers on 9 May 2018: see Roger and Lemarié 2018.

^{II} Attempts at changing the current balance between the National Assembly and the Senate in Constitution-amending procedures, e.g. the proposals submitted by the Vedel Committee in 1993, have ultimately been unsuccessful (see Di Manno 2006: 221-22).

^{III} On that occasion too, General de Gaulle was also trying to impose his will against the opposition of the Senate.

^{IV} French senators are elected by indirect universal suffrage. Its members are elected in each Department (*Département*) by an electoral college composed of members of the National Assembly from that Department and delegates from regional and local government councils. Senatorial elections are held every three years to renew half of the members of the Senate.

^V These authors, like the overwhelming majority of scholars both in Spain and elsewhere, generally stress the inability of the Spanish Senate to fulfil its institutional mission as 'the house of territorial representation' (Art. 69(1) of the Constitution of 1978). According to Art. 69 of the Constitution of 1978, the Senate is predominantly composed of directly elected members. Each Province elects four senators, with special arrangements for the insular Provinces in the Balearic and Canary Islands and the Autonomous Cities of Ceuta and Melilla. Moreover, the legislatures of the sixteen Autonomous Communities appoint one senator each and a further Senator for every million inhabitants in their respective territories. To date, the Senate is composed of 266 members, with 208 senators elected by popular vote and 58 appointed by autonomic legislatures.

^{VI} Scholars have generally highlighted the similarities between the procedure under Art. 155 of the Spanish Constitution and the German 'federal coercion' (*Bundeszwang*) regulated by Art. 38 of the Fundamental Law: still, a major difference between the Spanish and German procedures 'is to be found in the considerable difference between the Spanish Senate and the German *Bundesrat* with regard to their status as chambers of territorial representation. ... the significance of the Spanish Senate is radically different from that of the *Bundesrat* as guarantor of the rights and interests of the *Länder* in the application of constitutional provisions regarding federal coercion. The consequence of this is that two virtually identical provisions in terms of their formal drafting ultimately have in their practical application very different characteristics in the application of an extraordinary measure such as federal coercion' (López-Basaguren 2017: 310).

^{VII} There had been disagreement among 3rd Republic public law scholars with regard to the power of the Senate to overthrow the Government of the day, with Adhémar Esmein favouring the negative interpretation and Léon Duguit claiming that the sitting Government should resign after being defeated in the Senate (see



Esmein 1896: 623-26 and Duguit 1896). As said, Duguit's interpretation finally prevailed in constitutional practice (Goyard 1982: 61).

^{viii} See, among others, Art. 17 of the French *Charte constitutionnelle* of 1814; Art. 15 of the French Constitution of 1830; Art. 27 of the Belgian Constitution of 1831 (later modified); Art. 10 of the Sardinian (and later Italian) *Statuto albertino* of 1848; Art. 42 of the Spanish Constitution of 1876.

^{ix} However, Maitland (1909: 348) also refers that the creation of new peers was discouraged in late 19th century: 'The power of creating new peers is obviously an important engine in the hands of a minister. During the last century peerages were lavishly created for political purposes. ... In much more recent times the power of creating new peers has been used for a great end. In 1832 the House of Lords was practically coerced into the passing of the Reform Bill by the knowledge that if they again rejected it the king was prepared to consent to the creation of eighty new peerages. Thus a threat to create new peerages may be a potent political instrument; but for obvious reasons a minister would shrink from using it save in an extreme case – he could not see the end of his action; he would be creating heritable rights, and the political opinions of heirs are not always those of their ancestors'.

^x 'As an appointed body, the Senate was simultaneously enabled *and* constrained. Which is to say that the Senate was deliberately designed to allow competing principles – democratic and anti-democratic – to co-exist over the long term. And, indeed, despite many attempts either to reform or abolish it, the Senate remains largely intact – sustained by the ambivalence with which it was designed' (Vipond 2017: 95). Still, some examples of successful opposition of the Senate can be found even in the second half of the 20th century (see Brun, Tremblay et Brouillet 2008: 339-40).

^{xi} It will suffice to mention the British Parliament Act 1949 and the initial text of the Constitution of the 4th French Republic, which considerably diminished the role of the Senate, by then relabelled 'Council of the Republic'.

^{xii} Still, recent studies have showed that the original intent of the drafters of the Constitution of the United States was to entrust the Senate with the task of both representing the States and providing second thought to the law-making process – but this nuance has greatly lost its significance (Beaud 2007: 357-63, Palermo and Kössler 2017: 75-76).

^{xiii} The German 'ambassadorial' model of representation of the interests of the *Länder* has always been an outlier.

^{xiv} The Catholic and Pan-German parties were successful in supporting the idea of a bicameral parliament for a federal Austria, but the Social Democrats finally succeeded in weakening the position of the *Bundesrat* in the constitutional order.

^{xv} This reflects the structural alternative – which can ultimately be traced back to the Abbé Sieyès – between the dubious legitimacy of non-democratic second chambers and the risk of transforming them into mere duplicates of first chambers (see Mirkin-Guetzévitch 1931: 25).

^{xvi} In Canada, current parliamentary practice is rather based on the exchange of messages between the House of Commons and the Senate (Pinard 2006: 491).

^{xvii} Interesting evidence from the third (and, to date, last) *cobabitation* in France (1997-2002) suggests that the activities of the Mixed Committee quite often allowed the Senate and the National Assembly to reach an agreement on a common text (Bernard 2001: 451).

^{xviii} Another example of the conundrum underlying the Italian model of equal bicameralism can be found in the controversial message which Francesco Cossiga, then President to the Republic, sent to Parliament on 26 June 1991: the President argued that 'the principle of bicameralism, and perhaps even so-called *equal bicameralism*' amounted to an unamendable principle of the Italian constitutional order. According to critics, however, the President purposefully overemphasised the width of the area of the untouchable core of the Italian Constitution in order to hint at the inherent limitations of the constitutional amendment power and to promote the launch of a fully-fledged constituent process (see Luciani 2010: 592).

^{xix} Another plausible example is provided by states of emergence and declarations of war: see e.g. Articles 35 and 36 of the French Constitution and Art. 39(3) of the Czech Constitution.

^{xx} However, according to scholars, first reading impression is incorrect: 'A proposed law approved by the Senate but not by the House, wherein the government controls a majority of votes, will not be permitted by the prime minister to go to referendum. But in the reverse situation, a Governor-General would be compelled to act on a prime minister's advice to submit to the electors a proposed law approved only by the House' (Stone 2006: 561-62).

^{xxi} For the purposes of this paper, it is not necessary to look into the nature of the German *Bundesrat* and the



possibility to classify it as a second chamber or simply as a constitutional organ performing tasks similar to those of a parliamentary assembly (but see Herzog 2005: 955-56).

XXII In fact. Art. 167(2) provides for a limited exception: if a constitutional amendment bill has not been approved by a majority of three-fifths of members of each house, and provided that the text has been passed by a majority of the members of the Senate, the Congress may pass the amendment by a two-thirds vote (see also Castellà Andreu 2006: 890).

XXIII In the *Reference re Senate Reform*, the Supreme Court interestingly held that '[a]mendments to the Constitution of Canada are subject to review by the Senate. The Senate can veto amendments brought under s. 44 and can delay the adoption of amendments made pursuant to ss. 38, 41, 42, and 43 by up to 180 days: 2. 47, *Constitution Act, 1982*. The elimination of bicameralism would render this mechanism of review inoperative and effectively change the dynamics of the constitutional amendment process. ... The effects of Senate abolition on Part V [regulating the procedure for amending the Constitution of Canada] are direct and substantial. While it is true that the Senate's role in constitutional amendment is not as central as that of the House of Commons or the provincial legislatures, its ability to delay the adoption of constitutional amendments nevertheless provides an additional mechanism to ensure that they are carefully considered. Indeed, the Senate's refusal to authorize an amendment can give the House of Commons pause and draw public attention to amendments: Smith, at p. 152' (Supreme Court of Canada, *Reference re Senate Reform* [2014] 1 S.C.R. 704, 755-56).

XXIV See Decision no. 2011-632 DC of the *Conseil constitutionnel (Loi fixant le nombre des conseillers territoriaux de chaque département et de chaque région)*: 'Considering that the applicant Members of Parliament have referred to the *Conseil constitutionnel* the law determining the number of local councillors of each Department and each Region; that they challenge the procedure by which it was adopted ... Considering that the draft bill tabled in the National Assembly, as the first house to be seized, had the sole objective of determining the number of local councillors comprising the deliberative assembly of each Department and of each Region; that the rules governing the organisation of local authorities include the determination of the number of members of their deliberative assembly; that accordingly, the draft bill that resulted in the law referred was incorrectly tabled first other than in the Senate; that consequently, the law was adopted according to an unconstitutional procedure; that, without any requirement to examine any other complaint, it must be ruled unconstitutional'.

References

- Albert Richard, 2013, 'The Expressive Function of Constitutional Amendment Rules', *McGill Law Journal*, LIX(2): 225-281.
- Albert Richard, 2014, 'The Structure of Constitutional Amendment Rules', *Wake Forest Law Review*, XLIX(4): 913-975.
- Albert Richard, 2016, 'The Conventions of Constitutional Amendment in Canada', *Osgoode Hall Law Journal*, LIII(2): 399-441.
- Albert Richard, Contiades Xenophon and Fotiadou Alkmene (eds), 2017, *The Foundations and Traditions of Constitutional Amendment*, Hart Publishing, Oxford.
- Ambrosini Gaspare, 1944, *Autonomia regionale e federalismo. Austria, Spagna, Germania, URSS*, Edizioni Italiane, Roma.
- Beaud Olivier, 2007, *Théorie de la Fédération*, Presses universitaires de France, Paris.
- Behrendt Christian, 2003, 'La possible modification de la procédure de révision de la Constitution belge', *Revue française de droit constitutionnel*, no. 54: 279-308.
- Bernard Sébastien, 2001, 'La commission mixte paritaire', *Revue française de droit constitutionnel*, no. 47: 451-478.
- Bifulco Raffaele, 2003, 'Il bilanciamento dell'oratio. Appunti per la riforma del Senato', *Politica del diritto*, XXXIV(2): 207-229.
- Bon Valsassina Marino, 1959, 'Il bicameralismo imperfetto o limitato nelle costituzioni contemporanee', *Rassegna di diritto pubblico*, XIV: 207-334.
- Bonfiglio Salvatore, 2005, *Il Senato in Italia. Riforma del bicameralismo e modelli di rappresentanza*, Laterza, Roma-Bari.



- Bourmaud François-Xavier, 2018, 'Réforme constitutionnelle: Macron entame une difficile négociation', *Le Figaro*, 24 January.
- Brun Henri, Tremblay Guy and Brouillet Eugénie, 2008, *Droit constitutionnel*, 5th edition, Éditions Yvon Blais, Cowansville, Québec.
- Bryce James, 1921, *Modern Democracies*, vol. I, Macmillan, New York.
- Carmines Edward G. and Fowler Matthew, 2017, 'The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power', *Indiana Journal of Global Legal Studies*, XXIV(2): 369-397.
- Castellà Andreu Josep Maria, 2006, 'The Spanish Senate after 28 Years of Constitutional Experience. Proposals for Reform', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milano, 859-909.
- de Vergottini Giuseppe, 2004, *Diritto costituzionale comparato*, 6th edition, Cedam, Padova.
- de Vos Pierre, 2006, 'The Role of the National Council of Provinces in the Governance of South Africa', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*, Milano, Giuffrè, 613-664.
- Dehousse Renaud, 1990, 'Le paradoxe de Madison: réflexions sur le rôle des chambres hautes dans les systèmes fédéraux', *Revue du droit public et de la science politique*, CVI(3): 643-676.
- Delpérée Francis, 2006, 'The Belgian Senate', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milano, 697-719.
- Di Manno Thierry, 2006, 'The Sénat of the French Republic', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milano, 153-256.
- Dixon Rosalind, 2011, 'Constitutional amendment rules: a comparative perspective', in Ginsburg Tom and Dixon Rosalind (eds), *Comparative Constitutional Law*, Edward Elgar Publishing, Cheltenham, 96-111.
- Domínguez Íñigo and Alberola Miquel, 2017, 'El Senado aprueba aplicar el artículo 155 en Cataluña', *El País*, 27 October 2017.
- Duguít Léon, 1896, 'Le Sénat et la responsabilité politique du ministère', *Revue du droit public et de la science politique*, V: 426-433.
- Dumont Hugues, El Berhoumi Mathias and Hachez Isabelle (eds), 2016, *La sixième réforme de l'État: l'art de ne pas choisir ou l'art du compromis?*, Larcier, Bruxelles.
- Einaudi Luigi, 2012, 'Governo parlamentare e presidenziale' [1944], in *Il buongoverno. Saggi di economia e politica (1897-1954)*, Laterza, Roma-Bari, 79-84.
- Esmein Adhémar, 1896, *Éléments de droit constitutionnel*, Larose, Paris.
- Faraguna Pietro, 2016, *How Does the EU Challenge Bicameralism? First Reflections from the Italian Constitutional Experience*, at www.papers.ssrn.com, 2 May 2016.
- Fasone Cristina, 2017, 'Secession and the Ambiguous Place of Regions Under EU Law', in Closa Carlos (ed), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership*, Cambridge University Press, Cambridge, 48-68.
- Ferejohn John, 1997, 'The Politics of Imperfection: The Amendment of Constitutions', *Law and Social Inquiry*, XXII(2): 501-530.
- Fernández Riquelme Sergio, 2009, 'Ángel Ossorio y Gallardo ante la "solución corporativa" (1913-1931). El impacto histórico de la representación política del trabajo', *Historia Constitucional*, X: 181-200.
- Frau Matteo, 2016, 'L'attualità del parlamentarismo razionalizzato', *Nomos: le attualità nel diritto*, XXIX(3), www.nomos-leattualitaneldiritto.it.
- Fusaro Carlo and Oliver Dawn (eds), 2011, *How Constitutions Change: A Comparative Study*, Hart Publishing, Oxford.
- Gamper Anna, 2006, 'The Austrian Bundesrat', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*, Milano, Giuffrè, 781-828.
- García Herrera Miguel Ángel, 1978, 'La Comisión Mixta Congreso-Senado', *Revista de Estudios Políticos*, no. 4: 67-95.



- Garrigues Jean, 2010, 'Le Sénat de la Troisième République 1875-1914. Réflexions sur une chambre méconnue', in Garrigues Jean et al. (eds), *Assemblées et Parlements du Moyen-Âge à nos jours*, Assemblée nationale, Paris, 1169-1180.
- Ghisalberti Carlo, 2002, *Storia costituzionale d'Italia 1848-1994*, 2nd edition, Laterza, Roma-Bari.
- Goyard Claude, 1982, "La critique parlementaire des administrations sous la III^e République", in Bruguière Michel et al., *Administration et parlement depuis 1815*, Librairie Droz, Genève, 59-76.
- Granat Mirosław, 2006, 'The Senate in Poland', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milano, 961-1001.
- Herzog Roman, 2005, 'Stellung des Bundesrates im demokratischen Bundesstaat', in Isensee Josef and Kirchhof Paul (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. III, *Demokratie – Bundesorgane*, 3rd edition, C.F. Müller, Heidelberg, 943-964.
- Hobsbawm Eric, 1962, *The Age of Revolution: Europe 1789-1848*, Weidenfeld & Nicholson, London.
- Jennings Ivor, 1969, *Cabinet Government*, 3rd edition, Cambridge University Press, Cambridge.
- Laffaille Franck, 2016, 'Le président du Sénat', *Pouvoirs*, no. 159: 41-52.
- Lauvaux Philippe, 1990, 'L'évolution du régime parlementaire depuis 1944', *Pouvoirs*, no. 54: 25-36.
- Lauvaux Philippe, 2004, 'Quand la deuxième chambre s'oppose', *Pouvoirs*, no. 108: 81-99.
- López-Basaguren Alberto, 2017, 'Regional Defiance and Enforcement of Federal Law in Spain: The Claims for Sovereignty in the Basque Country and Catalonia', in Jakab András and Kochenov Dimitry (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford University Press, Oxford, 300-315.
- Luciani Massimo, 2010, 'Governo (forme di)', in *Enciclopedia del diritto*, Annali III, Giuffrè, Milano, 538-596.
- Lupo Nicola, 2017, 'La rappresentanza politica oggi: sfide esistenziali e snodi concettuali', *Percorsi costituzionali*, X(1): 37-52.
- Lupo Nicola and Piccirilli Giovanni, 2017, 'Introduction: The Italian Parliament and the New Role of National Parliaments in the European Union', in Lupo and Piccirilli (eds), *The Italian Parliament in the European Union*, Hart Publishing, Oxford, 1-16.
- Luther Jörg, 2006, 'The Search for a Constitutional Geography and Historiography of Second Chambers', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milano, 3-31.
- Lutz Donald S., 1994, 'Toward a Theory of Constitutional Amendment', *The American Political Science Review*, LXXXVIII(2): 355-370.
- Macchia Marco, 2018, 'Le "instabili" fundamenta del bicameralismo costituzionale', *Rivista trimestrale di diritto pubblico*, LXVIII(1): 233-267.
- Maitland F.W., 1909, *The Constitutional History of England*, Cambridge University Press, Cambridge.
- de Mareschal Édouard, 2018, 'Ce que contient la réforme constitutionnelle d'Emmanuel Macron', *Le Figaro*, 10 March.
- Mirkin-Guetzévitch Boris, 1931, *Les nouvelles tendances du droit constitutionnel*, Marcel Giard, Paris.
- Oleszek Walter J., 1974, "House-Senate Relationships: Comity and Conflict", *The Annals of the American Academy of Political and Social Science*, CDXI(1): 75-86.
- Paladin Livio, 1984, 'Tipologia e fondamenti giustificativi del bicameralismo. Il caso italiano', *Quaderni costituzionali*, IV(2): 219-241.
- Palermo Francesco and Kössler Karl, 2017, *Comparative Federalism: Constitutional Arrangements and Case Law*, Hart Publishing, Oxford.
- Palermo Francesco and Nicolini Matteo, 2013, *Il bicameralismo. Pluralismo e limiti della rappresentanza in prospettiva comparata*, Edizioni Scientifiche Italiane, Napoli.
- Passaglia Paolo, 2018, 'Unicameralism, Bicameralism, Tricameralism: Evolution and Trends in Europe', paper presented at the conference 'Representing Regions, Challenging Bicameralism', University of Innsbruck, 22-23 March 2018.
- Patterson Samuel C. and Mughan Anthony, 2001, 'Fundamentals of Institutional Design: The Functions and Powers of Parliamentary Second Chambers', *Journal of Legislative Studies*, VII(1): 39-60.



- Pelletier Benoît, 2017, 'Amending the Constitution of Canada', in Oliver Peter, Macklem Patrick and Des Rosiers Nathalie (eds), *The Oxford Handbook of the Canadian Constitution*, Oxford University Press, Oxford, 253-275.
- Pernthaler Peter, 2004, *Österreichisches Bundesstaatsrecht. Lehr- und Handbuch*, Verlag Österreich, Wien.
- Pinard Danielle, 2006, 'The Canadian Senate: An Upper House Criticized yet Condemned to Survive Unchanged?', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milano, 459-520.
- Rodean Neliana, 2018, 'Upper Houses and Constitutional Amendment Rules. In search of (supra)national paradigm(s)', *federalismi.it*, XVI(8), www.federalismi.it.
- Roger Patrick and Lemarié Alexandre, 2018, 'Le plan de Macron pour réduire les pouvoirs du Parlement', *Le Monde*, 14 April 2018.
- Rogers Lindsay, 1922, 'Conference Committee Legislation', *The North American Review*, CCXV(796): 300-307.
- Romaniello Maria, 2015, *Assessing Upper Chambers' Role in the EU Decision-Making Process*, SOG-WP 26/2015.
- Romaniello Maria, 2016, 'Bicameralism: a concept in search of a theory', *Amministrazione in cammino*, 20 September 2016, www.amministrazioneincammino.luiss.it.
- Romeo Graziella, 2017, 'The Italian Constitutional Reform of 2016: An "Exercise" of Change at the Crossroads between Constitutional Maintenance and Innovation', *Italian Law Journal*, special issue *The 2016 Italian Constitutional Referendum: Origins, Stakes, Outcome*, 31-48.
- Russell Meg, 2006, 'The British House of Lords: A Tale of Adaptation and Resilience', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milano, 65-96.
- Russell Meg, 2013, *The Contemporary House of Lords: Westminster Bicameralism Revived*, Oxford University Press, Oxford.
- Schoettl Jean-Éric, 2018, 'Non aux "fake news" sur la révision constitutionnelle', *Le Figaro*, 30 January.
- Selejan-Gutan Bianca, 2016, *The Constitution of Romania: A Contextual Analysis*, Oxford, Hart Publishing.
- Shastri Sandeep, 2006, 'Representing the States at the Federal Level: The Role of the *Rajya Sabha*', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milano, 587-611.
- Stone Bruce, 2006, 'The Australian Senate: Strong Bicameralism Resurgent', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milano, 529-585.
- Venice Commission (European Commission for Democracy through Law), 2009, *Report on Constitutional Amendment*, adopted by the Commission at its 81st Plenary Session, Venice, 11-12 December 2009.
- Vimbert Christophe, 1992, *La tradition républicaine en droit public français*, Publications de l'Université de Rouen-Librairie générale de droit et de jurisprudence, Rouen-Paris.
- Vipond Robert, 2017, '1867: Confederation', in Oliver Peter, Macklem Patrick and Des Rosiers Nathalie (eds), *The Oxford Handbook of the Canadian Constitution*, Oxford University Press, Oxford, 83-101.
- Weber Karl, 1980, *Kriterien des Bundesstaates. Eine systematische, historische und rechtsvergleichende Untersuchung der Bundesstaatlichkeit der Schweiz, der Bundesrepublik Deutschland und Österreichs*, Wilhelm Braumüller, Wien.
- Weber Yves, 1972, 'La crise du bicaméralisme', *Revue du droit public et de la science politique*, LXXXVIII(3): 573-606.



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History of a (Limited) Success: Five Points on the Representativeness of the Committee of the Regions

by

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Abstract

This article briefly explores the reasons why the Committee of the Regions (CoR) has only partially accomplished its representative function. It is divided into three parts. In the first part I argue that the ambiguous nature of the CoR is the consequence of the polysemous notion of ‘region’ in EU law (Palermo, 2005) and of the very heterogeneous approach to the ‘federal issue’ in Europe. In the second part of the article I look at the recent developments that have given the CoR new powers, for instance in light of Art. 263 TFEU in order to defend its own prerogatives and Art. 8 of Protocol No 2 on the application of the principles of subsidiarity and proportionality. This will be done by looking at a recent resolution of the CoR on a proposal made by the EU Commission to amend Regulation (EU) No 1303/2013.

Finally, I deal with some proposals that have been advanced to strengthen the role of the CoR, and their feasibility.

Key-words

regions, Committee of the Regions, subsidiarity, Lisbon Treaty



1. Goals and Structure of the Research

This article briefly explores the reasons why the Committee of the Regions^I (CoR) has only partially accomplished its representative function. In this respect the rhetoric about the CoR as a Third Chamber or a Senate of the Regions at the EU level is very telling of the debate about the ambiguities surrounding this body. However, this work is not about the desirability of a tricameral solution at the EU level, rather in this piece I try to explore some of the options proposed to reinforce the role of the CoR. In recent years lawyers have not paid much attention to the functioning of the Committee apart from a remarkable piece of work by Vandamme in 2013. Going beyond the legal literature it can be seen how scholars have presented different accounts of the work of the Committee itself. According to some scholars the non-binding nature of its opinions does not give CoR any possibility of substantially changing the direction already given to the legislative act (Simonato 2013), while others have stressed the important cooperation between the Commission and the CoR, triggered as a result of these consultative procedures (Neshkova 2010).

This article is divided into three parts. In the first part I argue that the ambiguous nature of the CoR is the consequence of the polysemous notion of ‘region’ in EU law (Palermo 2005) and of the wide ranging and heterogeneous approach to the ‘federal issue’ in Europe. An explanation for this is that regions do not have a common position, and this is, again, the product of constitutional heterogeneity at the national level (see Gamper 2005; Russo 2012), where regions have a strong constitutional status in some legal orders, while this is not the case in other contexts. This also explains the difficulties of the CoR and, to a certain extent at least, the reasons why the Conference of European Regional Legislative Assemblies (CALRE) was launched in 1997.^{II} This is a confirmation of the existence of a sort of two speed (regional) European Union (legislative regions versus administrative regions, two actors with different priorities and interests). Indeed, according to authors like Skoutaris, one of the reasons that still justifies the existence of what Ipsen (1966) called *Landesblindheit* is that federalism is an ‘uncommon principle in European constitutional law’ (Skoutaris 2012).

In the second part of the article I look at the recent developments that have given the CoR new powers, for instance in light of Art. 263 TFEU, in order to defend its own prerogatives,^{III} and Art. 8 of Protocol No 2 on the application of the principles of subsidiarity



and proportionality.^{IV} This will be done by looking at a recent resolution of the CoR on a proposal made by the EU Commission to amend Regulation (EU) No 1303/2013.

Finally, I deal with some proposals that have been advanced to strengthen the role of the CoR, and examine their feasibility.

2. The Idea of the Committee of the Regions as a Third Chamber in the EU

Scholars interested in EU studies have been debating whether the EU is a bicameral system (see Norton 2006) for a long time, and even after the entry into force of the Lisbon entry research has suggested that the European Parliament and the Council are not put on equal footing in the co-decision procedure (Hagemann and Høyland 2010). Against this background some scholarly works have sometimes treated the EU as a sort of tricameral system, by describing either the national parliaments (although in ‘virtual’ terms, Cooper, 2012), after the introduction of the Early Warning System (EWM) or the Committee of the Regions, as the third chamber of the Union. The CoR itself has sometimes referred to this idea in some official documents, this is the case, for instance, of the White Paper on multilevel governance adopted by the Committee on 16 June 2009.^V Drawing from this, and other documents, scholars have described this idea in the following terms:

‘The CoR is saying that, given the representative and political mandate of its members, it cannot simply be considered as a technical consultative body but it must be given a central role in EU policy-making as is appropriate for a representative, political chamber. It is saying, even more boldly, that the CoR is the third representative chamber of the Union after the chamber that represents the citizens of the Union (the Parliament) and the chamber that represents the Member States of the Union (the Council). Multi-level governance, thus, acquires a more precise meaning, because the levels to be considered in the future Europe cannot be just two, but three and more’ (Piattoni 2013).

However, on closer inspection there is no comparative model behind this reference to tricameralism. In other words, those (including the CoR itself) who speak of the Committee as a third chamber of the EU were not advocating the transplant of some tricameral experience, present elsewhere, into the supranational context. The origin of this idea is therefore connected to a particular political atmosphere that characterised the EU after



c.1988 and belongs to a time which was very rich in political announcements. This article explores the main reasons that have led to such a scenario focusing in particular on five factors.

The **first** factor is the polysemous notion of ‘region’ in the EU. As Conzelmann wrote, this concept ‘is not necessarily tied to any sort of constitutional or administrative structure but is rather a socially constructed concept: A region emerges where actors are coming together on the basis of geographic proximity and a shared problem or opportunity’ (Conzelmann 2008). In this sense we can say that the composition of the Committee does not correspond exactly to the notion of Region adopted by the NUTS (‘Nomenclature of territorial units for statistics’), because of the lack of correspondence between the legal notion and the economic notion of Region. This issue is also connected with the ambiguous terminology employed in EU cohesion policies, where terms like ‘region’ or ‘regionalism’ are used in several contexts: regional community, regional society, region-state, regional complex (Hettne and Söderbaum 2002).

Nevertheless, it must be said that in the past scholars have noticed a process of (partial) adaptation of the internal territorial configuration of the legal order to the criteria used by the NUTS to identify the regions (Brusis 2002). However, these initiatives have been only partially accepted in the new Member States (for the difficulties connected with the affirmation of federalism in the new Member States, see Palermo 2012).

These considerations are related to the **second** reason behind the limited success of the Committee, namely the constitutional diversity present at the national level. Indeed, As Gamper (2005) and Palermo (2005) have argued some EU Member State do not have a federal or regional structure, and in fact many of them barely know forms of administrative decentralisation. This is what Skoutaris meant when defining federalism as the ‘(un)common constitutional principle’ (Skoutaris 2012). This is no mere detail, since one of the many fractures present within the Committee is the difference in terms of interests between legislative and non-legislative regions. The **third** factor is a structural consequence of the first two factors above and is due to the heterogeneous composition of the Committee, a composition which results from another important divide, amplified after the 2004 and 2007 enlargements, namely the so called ‘regional local divide’ (Vandamme 2013). As Vandamme pointed out: ‘Discussions over the distinct dominance of ‘regional’ over ‘local’ Europe started immediately in early 1992’ however: ‘It is an undisputed fact that the 2004 and 2007



rounds of EU enlargement had an impact on the composition of the Committee in terms of the local – regional divide. None of the new Member States maintain a federal or strongly decentralised state structure’ (Vandamme 2013).^{VI}

The **fourth** reason is of course the legacy of what scholars call the ‘territorial blindness’ (Ipsen 1966; Weatherill and Bernitz 2005) of the EU. The ‘legal’ territorial blindness (*Landesblindheit*) of the Union towards the regions finds its confirmation in the wording of the Treaties (specifically in former Art. 10 TEC), where it is clear that the (original, at least) subjects of the Community legal order are the States, as bearers of the duty of cooperation in order to guarantee the effectiveness of supranational law. It is possible to find many confirmations of this approach both in the wording of the Treaties and in the case law of the Court of Justice of the EU (CJEU). This is also connected with the international law ‘matrix’ of the EU. For instance, the CJEU once argued that:

‘It is apparent from the general scheme of the treaties that the term ‘Member State’, for the purposes of the institutional provisions and, in particular, those relating to proceedings before the courts, refers only to government authorities of the Member States of the European Communities and cannot include the governments of regions or autonomous communities, irrespective of the powers they may have. If the contrary were true, it would undermine the institutional balance provided for by the Treaties, which govern the conditions under which the Member States, that is to say, the States party to the Treaties establishing the Communities and the Accession Treaties, participate in the functioning of the Community institutions. It is not possible for the European Communities to comprise a greater number of Member States than the number of States between which they were established’.^{VII}

Since the founding Treaties were signed by the Member States, they are the reference mark of the EU legal system and the holders of duties and rights. This is in a nutshell the reasoning of the CJEU in that case.

The ‘indifference’ of the EU with regard to the domestic territorial organisation of their Member States (an aspect of what scholars call territorial blindness) presents two sides, as Lenaerts pointed out:

‘EU law does not interfere with the internal division of powers between national and regional authorities within a Member State. Regions exercising their own constitutional powers must however do so in a manner consistent with EU law’ (Lenaerts 2012).



This is the good side, which results in a sort of respect of the domestic vertical division of powers between center and periphery; we could call it ‘territorial autonomy’.

However, there is also a negative side of the coin, represented by the impossibility of using the domestic separation of powers as a shield to justify non-compliance with EU law:

‘A Member State is thus not entitled to hide behind the domestic division of powers or federal structure in order to avoid the CJEU making a finding of an infringement or to escape its obligation to bring such infringement to an end’ (Lenaerts 2012).

In this sense this indifference towards the territorial organisation established by domestic constitutional law can be linked to the need for a uniform interpretation and application of EU law, as expressed in the famous (and ambivalent) *Internationale Handelsgesellschaft* decision. I am referring to the very famous point in which the CJEU argued that: ‘The validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of its constitutional structure’.^{viii} Nevertheless, the CJEU has partially reconsidered its own position following the increasing importance of decentralisation processes within domestic systems in recent years (Saggio 2001; Thies 2011; Caruso 2011; Cygan 2014). After the Lisbon Treaty it has been argued that the principle of territorial blindness would have been partly overcome thanks (also) to the introduction of art. 4.2 TEU which *expressis verbis* refers to the regional and local levels:

‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, **inclusive of regional and local self-government**. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State’.

In the light of this and other important novelties introduced by the Reform Treaty (main text and Protocols), Fasone wondered whether it is now possible to speak of ‘A Regionally Oriented EU’ and noticed that these provisions appear ‘finally to overturn the dogma of “regional blindness” which so far has characterised the EU approach towards the constitutional architecture of the Member States’ (Fasone 2017: 57).



The **fifth** reason, perhaps the most intriguing one, is related to what Piattoni called the ‘the problematic coexistence of functional and territorial representation in the EU’ (Piattoni 2011). This leads us to the heart of the problem and to the schizophrenia that has characterised- since its inception - the CoR. In other words,

‘The CoR was caught between two potentially conflicting visions: on the one hand, it was seen as a representative chamber of regional interests and minority nationalisms; on the other, it was seen as consultative committee of regional and local experts’ (Piattoni and Schönlau 2015).

This also explains the limited success of the Committee, and why regional actors over the years have diversified their strategy, given the ‘inefficiency of institutional channels of territorial representation and the progressive inclusion of broad civil society in new systems of consultation and cooperation with EU institutions’ (Trobbiani 2016). For this scholar:

‘Regions in Brussels are increasingly acting as actors of functional representation, in a cooperation with private stakeholders from within and outside their territories, partly redefining the concept of regional interest from a purely institutional one (MLG I) to a broader representation of the regional level as a unit of production (MLG II)’ (Trobbiani 2016).

As we shall see in the next section, these are long standing problems that find their origin in the first years of the Committee (Falcone 2003); I now examine some pivotal moments in the history of the CoR.

3. A Concise History of the Committee of the Regions

3.1. The Pre-Lisbon Scenario

The relevant legal discipline of the CoR can be found in some provisions of the European Treaties (for instance Art. 13 TEU,^{IX} Arts. 305 - 307 TFEU^X), in its Rules of Procedure^{XI} and in other pieces of legislation (see the Council Decision 2014/930/EU).^{XII}

This legal framework has been the product of a series of incremental adjustments, including for instance the relevant innovations of the Nice Treaty involving the structure of the Committee.^{XIII} As written at the beginning of this article many of the reasons behind the limited success of the CoR can be seen as long-standing problems; in this sense it is useful



to briefly relate the history of the body to identify important turning points that have shaped the Committee that we know today. The Committee was the direct offspring of an enthusiastic era starting with the 1988 reform of the European structural funds and the introduction of the concept of partnership. This concept ‘redesigned a system which was until then based on an almost total control by Member States of the process of allocation of funds’ since ‘the principle empowered the regional actors by allowing them to take part to the bargaining and decision-making phase’ (Bailey and De Propris 2002). In that reform we can indeed find the origins of a period that led some authors to argue that the regions were going to become the most important actors in the EU by replacing the States.^{xiv} The 1988 reform paved the way for the beginning of the rhetoric of the ‘Europe of Regions’ which was subsequently replaced by another intriguing formula, that of a ‘Europe with the Regions’. The Committee was introduced by the Maastricht Treaty and started in 1994, replacing the Consultative Council of Regional and Local Authorities established by Commission Decision 88/487 (Vandamme 2013; Simonato 2013).^{xv}

As scholars have pointed out, countries with legislative regions (Germany and Belgium above all) have had a crucial role in launching the Committee and giving it ‘their imprint’.^{xvi}

This trend would be radically changed by the 2004 and 2007 enlargement, as discussed above, but also by the progressive politicisation of the members of the Committee which has steadily altered the dynamics of vote within the Committee, since ‘the representatives are divided into political groups and have progressively gotten used to voting according to party lines rather than country of origin’ (Trobbiani 2016). The ‘local regional divide’, which has grown after the enlargements, can be traced back to even earlier roots, as scholars pointed out (Vandamme 2013).

If this phenomenon has produced fragmentation in a body which was supposed to act with a unitary voice, it is also true that within the regional component there has always been a range of positions. This also explains the launch of understandings and networks such as the REGLEG (The Conference of Regions with Legislative Power) in 2001 and the CALRE (*supra*) even earlier in 1997. This search for ‘alternative channels to influence the EU institutions’ included ‘the possibility of some of the legislative regions to delegate a regional minister to the Council, transnational networks ... and through Members of the European Parliament that are elected in regional constituencies (and possibly with a stronger sensitivity to regional issues)’ (Vandamme 2013).



Nevertheless, over the years the Committee has benefitted from a progressive reinforcement thanks to the expansion of the areas where its consultation is necessary (mandatory consultation),^{xvii} or possible (voluntary consultation), and to the increase of its budget. The Lisbon Treaty introduced important innovations in this respect. Nowadays the CoR acts in a space characterised by the coexistence of different potential channels and fora that could be used by regions. This has led to the need to rethink its role, as the partnership concluded with CARLE and REGLEG confirms.

3.2. The Importance of the Lisbon Treaty

Lisbon did not give the CoR the status of a Union institution, but however granted it important powers, especially in respect of changes introduced to reinforce the principle of subsidiarity.

The literature on subsidiarity is massive (Estrella 2002; Syrpis 2004; Davies 2006a; Schütze 2009; Fasone 2013) and there is no need to rehearse it for the purpose of this article. However, it is possible to argue that one of the goals of the Lisbon Treaty was to strengthen the principle, and this has been done by clarifying the competences of the EU and by introducing some political safeguards capable of ensuring its – so to say – physiological functioning. Indeed, the subsidiarity principle, on the one hand, needs an arrangement of competences at least tending towards a clear sharing of tasks, and, on the other hand, also presupposes an ‘integrated’ system like, for example, that of a federal arrangement of a cooperative type (Schütze 2009). As a matter of fact, the principle, as regulated in Art. 5.3 TEU, refers to a relationship between two institutional actors (a lower actor, the ‘regional and local level’, and a higher actor, the ‘central level’) sharing the same power. However, the exercise of this power is preferentially given to the subject which is closer to the citizens (i.e. the regional or local level). Scholars usually label this first instance as the negative side of subsidiarity since it implies the duty of non-intervention by the centre. At the same time, this principle allows for the possibility for the centre to replace the ‘peripheral actor’ if the same power can be exercised in a better or in a more efficient way by the higher subject (the Union). Against this background subsidiarity works as an elevator (Bin 2002, Panara 2015) with regard to certain fungible acts that can be exercised by two institutional subjects and the centripetal substitution and exercise of this power can be caused only by an objective impossibility to ‘sufficiently’ carry out the requested action for the peripheral actor.



Another important fact is that such an impossibility to carry out the functions must be temporal. In this respect, it has been pointed out that the subsidiarity principle works, actually, as a criterion for shifting, although not in a definitive way, the level that is supposed to intervene (Massa Pinto 2003). Moreover, because of its constitutional relevance, it also serves as an element of flexibility in the system (Bin, 1999).

This would explain why, within the Community context, subsidiarity has operated as a 'method of policy centralisation' (Davies 2006b) rather than as a validating factor for de-centred realities, in the absence of a formal catalogue of competences. Subsidiarity and competence are not, nevertheless, in a relationship of identity: in fact, it has been said that the principle of subsidiarity is not intended so much for an *a priori* formal allocation of competences, but rather for an *a posteriori* legitimization of the exercise of competences beyond those formally attributed (Massa Pinto 2003).

Subsidiarity has successfully operated in a context such as Germany, which does not define competences in a finalistic manner (Carrozza 2003) as the European Treaties did in the pre-Lisbon phase. This worrying mingling of legal styles explains the destabilisation factor that may be introduced by the subsidiarity principle, and that is why when it was introduced Toth described it as 'totally alien' to the EU, since it 'contradicts the logic, structure and wording of the founding treaties and the jurisprudence of the European Court of Justice' (Toth 1993). This is mainly because of its 'surreptitious' substitution of the flexibility clause, which has allowed the Union (and before it the Community) to acquire 'slices of competence', indirectly instrumental to the achievement of the declared objectives, without the procedural guarantee of unanimity.

The matter for discussion remains the high level of political discretion which would characterise the application of such a principle, because of the political nature of the control base and the difficult verification of the efficiency and context of the action. This reading has been confirmed by the case law of the CJEU which has traditionally avoided dealing with the issue head on. More recently scholars have noticed some progress in this field, but the approach of the CJEU has remained quite hesitant (Öberg 2017a). The most telling example of this trend is an old case - *United Kingdom v. Council*^{XVIII} - where *de facto* the subsidiarity control was seen as a kind of *extrema ratio* exploitable solely in the case of manifest error or misuse of power. More generally, according to the CJEU, since the control on subsidiarity touches the sensitive field of the legislative discretion, this reveals the 'political' nature of this



test. Keeping this in mind, one can understand the rationale behind the introduction of the EWM. This case law explains why in the last few years all attempts to reform the principle of subsidiarity have attempted to emphasise the procedural side of such a control, entrusting a crucial role to the national legislatures, as the provisions included in the (defunct) Constitutional Treaty and in the Lisbon Treaty demonstrate. The only way to limit legislative discretion seems to be to impose procedural guarantees such as those contained in the Protocol on the application of the principles of subsidiarity and proportionality. Moreover, a similar procedural shift can be found even in the case law of the CJEU (Öberg 2017b).

As a result, the EWM, as a form of political monitoring, was provided in that Protocol. This idea confirms the deference shown by the CJEU towards the legislatures; since subsidiarity involves political control, the best option is to entrust its control to the political/legislative competitors of the European Parliament and Council: the national parliaments, tasked with the mission of watchdog of subsidiarity. This idea relies on the view that the primary democratic organs in Europe are the national parliaments but, as the German Constitutional Court recently pointed out in its *Lissabon Urteil*,^{XXIX} sometimes the national parliaments underestimate this role, giving up competences or not fully understanding the importance of their role.

In this respect the Lisbon Treaty offers some important elements in this field: the codification of a list of competences (although it is not a hard list) and that of the principle of sincere cooperation.

As we saw, subsidiarity and competence are two distinct yet strongly related concepts and, in this respect, a detailed distribution of powers in the configuration of the Union might be useful for the CJEU, since it might help the latter to implement the constitutional nature of the subsidiarity principle under lesser political pressure. However, perhaps the most important innovation is represented by the principle of loyal cooperation (Art. 4.3 TEU).^{XX} One could argue that this principle was already present in the spirit of former Art. 10 TEC,^{XXI} but in that case the provision focused much more on the loyalty duty of the States; while, according to this new text, the loyalty duty is bi-lateral, involving the necessity to respect national identities ‘inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’.^{XXII} The combination of the recognition of the regional and local level as stated in Art. 4.2 TEU and this new understanding of the



principle of loyal cooperation as stated in Art. 4.3 TEU justifies the (potentially) important role granted to the CoR in the preservation of the principle of subsidiarity^{XXIII}.

As anticipated in the very first part of this work, in a recent resolution the CoR threatened to use, for the first time, its new power granted by the Lisbon Treaty. The resolution is about a Commission's proposal for a regulation aimed at amending the Common Provisions Regulation (EU) No 1303/2013 of 6 December 2017.^{XXIV}

Within the text of its proposal the Commission itself declared that this initiative was consistent with the subsidiarity principle, 'to the extent that it provides continued increased support through cohesion policy for certain Member States which opt for the use of the performance reserve for structural reform support. This mechanism needs to be established at European level.'^{XXV}

The resolution of the CoR followed an initiative of its political groups, after having recalled several previous opinions,^{XXVI} contained a direct attack on the Commission's proposal by arguing that:

'The reasoning given for compliance with the subsidiarity principle, since the objective of cohesion policy, as implemented by the European Structural and Investment Funds for which the Common Provisions Regulation (CPR) provides the overall legal framework, is not to support structural reforms in the Member States but to reduce disparities between the levels of development of the various regions and the backwardness of the least favoured regions'.^{XXVII}

In addition, the CoR argued that this proposal would risk distorting the real goals of the EU cohesion policy since the latter 'does not include an obligation to finance general structural reforms in the Member States'^{XXVIII} but to 'to reduce disparities between the levels of development of the various regions and the backwardness of the least favoured regions'.^{XXIX}

In order not to violate the principle of subsidiarity, moreover, the proposal should clarify in rigorous terms the exact 'notion and scope of 'structural reforms' eligible for European financial support'.^{XXX} On a different note, according to the Committee, this proposal also undermined the principles of partnership and multi-level governance. Finally, the CoR added that:



‘The opt-in clauses and voluntary participation in an EU scheme cannot be used as an argument to claim that the proposal has no subsidiarity relevance as long as this scheme involves EU funding aimed at achieving objectives set in the Treaties that are relevant to all EU Member States. Indeed, any EU funding must be granted with a view to objectives set in the EU Treaties and have a legal basis directly relating to the objectives that it is intended to achieve’.^{xxxI}

In light of these considerations the resolution sent a warning to the Commission by concluding that the CoR ‘stands ready to make full use of its prerogative to challenge the legislative act before the Court of Justice of the European Union’.^{xxxII}

To my knowledge the CoR has not yet concretised this menace but it is evident from these lines that it would be eager to do that if necessary.

4. Final Remarks

In this article I tried to explain the main reasons behind the limited success - or, according to another terminology - the failure of the CoR, looking at five main reasons: the polysemous notion of region in EU law; the legacy of the *Landesblindheit*, the horizontal diversity present at national constitutional level with regard to the powers and competences of the regions; the heterogeneous composition of the Committee; and the coexistence of functional and territorial representation in the Committee. I then tried to find the origin of these factors in the history of the Committee by identifying some turning points in order to show how these are long standing problems that have always accompanied the Committee and that have later been amplified by the 2004 and 2007 rounds of enlargement.

As said, the Lisbon Treaty presents both continuity and discontinuity with the past since, on the one hand, it has contributed to the expansion of the areas where the opinion of the Committee is compulsory, and its budget, respecting a trend that started with the Amsterdam Treaty. On the other hand, it has also invested a lot in the Committee by conferring new powers to it, including the status of semi-privileged plaintiff.

In light of this, some have called for the abolition of the Committee, including, recently, a motion for a European Parliament resolution on the abolition of the CoR presented by Philip Claeys and Marine Le Pen.^{xxxIII} A solution like this does not seem feasible and realistic nowadays, although it has been said that:



‘Given the European Parliament’s increased role in shaping EU legislation, the CoR’s envisioned role is also no longer a valid justification for its existence. A growing number of officials and politicians are realising that having two committees which together cost €215m but which deliver no clear added value is simply unsustainable in such economically challenging times’ (Open Europe 2012).

These comments do not take into account that, actually, according to some studies ‘opinions of the CoR do often produce effects in particular *vis-a-vis* the European Commission. Especially in certain areas of policy, the Commission proves quite willing to take on board suggestions of the Committee’ (Vandamme 2013).^{xxxiv}

The second proposal frequently evoked concerns the creation of two separate chambers devoted, respectively, to the representatives of regions and to those of local authorities. The model in this sense would be represented by the Congress of Local and Regional Authorities of the Council of Europe, but the added value of this proposal has been questioned by scholars for at least two reasons. First of all because the growing importance of political groups^{xxxv} within the Committee has perhaps become more important than the regional – local divide, second for the doubts expressed about a solution like this in light of the lesson coming from the Council of Europe, on the wasteful duplication of activities.^{xxxvi}

However, it is also true that there a need for new equilibria within the Committee, if once the fact that the top positions are still held by representatives of regions in spite of the growing relevance of the local level, especially after the 2004 and 2007 enlargements.^{xxxvii}

An intervention in the so called ‘double mandate’ of its alternate members has been also suggested, but it is undeniable that this contributes to the legitimacy of the CoR by somehow reducing the distance between the EU and its territorial actors.^{xxxviii}

Finally, the ‘promotion’ of the Committee from body to full-fledged institution has once again been suggested, but I do not think this would really solve the ambiguities present in its functioning and activity. Instead of claiming an ‘institutional upgrade’ the Committee should take advantage and exploit the new window of opportunity offered by the Lisbon Treaty. In this sense the post-Lisbon phase should be seen as a sort of waiting room to test how a reinforced – in terms *locus standi* before the Court of Justice- will interpret its role.

If the Committee was conceived – in a particular cultural and political atmosphere as recalled in the second part of this contribution – as a privileged arena to give a voice to the



regions, nowadays the situation has changed, since regions tend to think more in terms of functional representation and this makes the Committee part of a broader constellation.

At the same time the partnership concluded with the legislative regions' transnational networks (CALRE and REGLEG) shows the pivotal role that the CoR still plays for the regional level:

'Yet, they also stressed that this form of horizontal cooperation between the (self-proclaimed) legislative regions should not be regarded as the evidence that the CoR is becoming increasingly passé for them. These same respondents stressed the fact that the CoR has concluded strategic partnership agreements with both REGLEG and CALRE so as to maximise the complementarity between these two networks. The Committee was said to maintain its 'main hub' function for both these selective networks. In this regard attention was also drawn to the fact that both CALRE and REGLEG are networks that lack the resources such as those available to the CoR and that the yearly rotating presidency of these two networks sometimes hampers their effectiveness (depending on the presidency). The institutional embedding in the CoR of CALRE and REGLEG is thus welcomed by the legislative regions.' (Vandamme 2013).

What Vandamme wrote five years ago is still absolutely valid even in a context where regions have progressively experimented alternative strategies and channels to express their concerns and where the idea itself of territorial representation has been accompanied by the progressive rise of a regional interest in 'functional representation' (Trobbiani 2016). It is up to the CoR to adapt itself to this new context, by renouncing its claim over a monopolistic representation of the subnational dimension in the EU, and accepting that it must transform itself into the most important piece of a variegated representative puzzle where regions can modulate their voice depending on the concrete challenge they want to address.

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^I See the official website: <http://cor.europa.eu/en/Pages/home.aspx>. For an overview see: http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.3.14.html.

^{II} See the official website: <https://www.calrenet.eu/>.

^{III} Art. 263 TFEU: '*The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.*

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.



Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them. The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

^{IV} Art. 8 Protocol 2: *'The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof. In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.'*

^V For the text of the White Paper go to: <http://cor.europa.eu/it/activities/governance/Pages/white-pape-on-multilevel-governance.aspx>. See also Valcárcel Siso 2014.

^{VI} Besides that, there is also another important divide that has been introduced at that time, namely the East West divide: *'Based on the outcome of the interviews, one effect from the expansion of the EU towards the east and south in 2004 and 2007 did transpire. Several respondents voiced concerns about the large number of regional and local authorities from the new Member States that are, in terms of administrative capacity, relatively weakly developed in comparison to their 'Western' counterparts. Thus, for the functioning of the Committee the 2004 and 2007 accessions were deemed to have a large impact although not, as was the hypothesis of this contribution, in relation to the local – regional divide. Rather, one might speak of the 'East – West' divide in this respect. This comes especially to the fore when the Committee is to advise on the issues of implementation/application of EU law. Since the vast majority of EU legislation is to be implemented on the regional and/or the local level, there is an interest in this issue across all levels of sub-national government. Yet, whereas the more highly developed entities (and these may range from federated states to municipalities) quite often prefer that the responsibility for implementation / application is diverted to them, the sub-national entities of the new Member States often prefer EU legislation to call for central implementation by the Member State' authorities as they often lack the expertise and / or the means to implement new EU policies'* (Vandamme 2013).

^{VII} CJEU, Case C-95/97, Région wallonne v Commission of the European Communities, ECR, 1997, I-01787

^{VIII} CJEU, 11/70, Internationale Handelsgesellschaft, ECR 1970 1125.

^{IX} Art. 13 TEU: *'4. The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity.'*

^X Art. 305 TFEU: *'The number of members of the Committee of the Regions shall not exceed 350.*

The Council, acting unanimously on a proposal from the Commission, shall adopt a decision determining the Committee's composition. The members of the Committee and an equal number of alternate members shall be appointed for five years. Their term of office shall be renewable. The Council shall adopt the list of members and alternate members drawn up in accordance with the proposals made by each Member State. When the mandate referred to in Article 300(3) on the basis of which they were proposed comes to an end, the term of office of members of the Committee shall terminate automatically and they shall then be replaced for the remainder of the said term of office in accordance with the same procedure. No member of the Committee shall at the same time be a Member of the European Parliament.

Art. 306 TFEU: *'The Committee of the Regions shall elect its chairman and officers from among its members for a term of two and a half years. It shall adopt its Rules of Procedure. The Committee shall be convened by its chairman at the request of the European Parliament, the Council or of the Commission. It may also meet on its own initiative.'*

Art. 307 TFEU: *'The Committee of the Regions shall be consulted by the European Parliament, by the Council or by the Commission where the Treaties so provide and in all other cases, in particular those which concern cross-border cooperation, in which one of these institutions considers it appropriate.*

The European Parliament, the Council or the Commission shall, if it considers it necessary, set the Committee, for the submission of its opinion, a time limit which may not be less than one month from the date on which the chairman receives notification to this effect. Upon expiry of the time limit, the absence of an opinion shall not prevent further action. Where the Economic and Social Committee is consulted pursuant to Article 304, the Committee of the Regions shall be informed by the European Parliament, the Council or the Commission of the request for an opinion. Where it considers that specific regional interests are involved, the Committee of the Regions may issue an opinion on the matter. It may issue an opinion on its own initiative in cases in which it considers such action appropriate.

The opinion of the Committee, together with a record of the proceedings, shall be forwarded to the European Parliament, to the Council and to the Commission.'

^{XI} Available at the following link: <https://cor.europa.eu/en/documentation/Documents/Rules-of-Procedure-of-the-Committee-of-the-Regions/EN.pdf>. See also the Council Decision 2014/930/EU <https://eur->



lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014D0930.

^{xii} Council Decision 2014/930/EU

[https://eur-lex.europa.eu/legal-](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014D0930)

[content/EN/TXT/?uri=CELEX%3A32014D0930](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014D0930).

^{xiii} 'It states that members of the CoR must hold a local or regional electoral mandate or be politically accountable to an elected local or regional assembly. It also lays down that members can now be appointed by qualified majority vote at the Council, rather than requiring unanimous backing. Membership of the CoR will terminate automatically if members lose the mandate on the basis of which they are appointed. The Treaty sets the maximum number of members of the CoR at 350, with the number of members standing at 317 for an EU of 25 countries' (Committee of the Regions 2010)

^{xiv} As Loughlin wrote: 'Some enthusiasts proclaimed in the early nineties that the regions were to become the most important 'units' of the European integration process⁵ even bypassing the Member States by 'bringing together federalist and regionalist opponents of the nation state' (Loughlin 2002).

^{xv} Commission Decision 88/487/EEC of 24 June 1988 OJ 1988, L 247, 23, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31988D0487>.

^{xvi} 'The historic significance of the EU's legislative regions for the CoR as a EU body cannot easily be overestimated. Without them the EU, in particular the German Länder, the Belgian Régions and Communautés and the Spanish Comunidades Autónomas, the CoR would never have seen the light of day. Consequently their imprint on the Committee in its early days was considerable. This drives home the main reason to revisit the CoR: the dramatic geographic expansion of the EU after 2004 and 2007' (Vandamme 2013).

^{xvii} See Arts. 165 TFEU, 167 TFEU, 168 TFEU, 172 TFEU, 175, 177 and 178 TFEU.

^{xviii} CJEU, C-84/94 United Kingdom v. Council, ECR, 1996 I-5755.

^{xix} Lisbon Case, BVerfG, 2 BvE 2/08 from 30 June 2009, available at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html.

^{xx} Art. 4 TEU: '3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.

^{xxi} Art. 10 TEC: 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty'.

^{xxii} Art. 4. TEU.

^{xxiii} The CoR has a key role in this sense and its task builds upon the expertise created thanks to the 'Subsidiarity Monitoring Network' that was launched in April 2007 (<https://portal.cor.europa.eu/subsidiarity/thesmn/Pages/default.aspx>). In 2013 the Committee of the Regions also published its first 'Subsidiarity Work Programme' and, finally, three members of the Task Force on Subsidiarity, Proportionality and 'Doing Less More Efficiently' come from the CoR. This task force was established by Decision C(2017)7810 of the President of the Commission (https://ec.europa.eu/info/sites/info/files/2017-c-7810-president-decision_en_1.pdf) and has the mission to propose "how the EU could take better into account the principles of subsidiarity and proportionality, both with regard to the attribution and the exercise of its competences" (<https://portal.cor.europa.eu/subsidiarity/TaskForce/Pages/welcome.aspx>). Another important network is REGPEX. 'This network has a more exclusive character compared with the SMN as it provides a database for only those governments and parliaments of regions that have legislative powers. The REGPEX partners submit opinions on EU draft legislative acts and exchange information with their counterparts' (Granat, 2018)

^{xxiv} For the text of the European Commission's proposal go to: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017PC0826> and for the text of the CoR's resolution: <https://mempportal.cor.europa.eu/Handlers/ViewDoc.ashx?doc=COR-2017-06173-00-00-PRES-TRA-EN.docx> <https://mempportal.cor.europa.eu/Handlers/ViewDoc.ashx?doc=COR-2017-06173-00-00-PRES-TRA-EN.docx>.

^{xxv} Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017PC0826>.

^{xxvi} Namely the CoR opinions : 1) on 'the proposal by the Commission for a General Regulation on the funds covered by the Common Strategic Framework of 4 May 2012'; 2) on 'the Structural Reform Support Programme for the period 2017 to 2020 of 8 April 2016'; 3) on 'the future of cohesion policy beyond 2020 "For a strong and effective European cohesion policy



beyond 2020" of 12 May 2017'; 4) on 'Improving the governance of the European Semester: a Code of Conduct for the involvement of local and regional authorities of 11 May 2017'; 5) on 'the Reflection Paper on the Deepening of the Economic and Monetary Union by 2025 of 1 December 2017'.

XXVII <https://mempportal.cor.europa.eu/Handlers/ViewDoc.ashx?doc=COR-2017-06173-00-00-PRES-TRA-EN.docx>.

XXVIII Ibidem.

XXIX Ibidem.

XXX Ibidem.

XXXI Ibidem.

XXXII Ibidem.

XXXIII Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B7-2014-0270+0+DOC+XML+V0//EN>.

XXXIV See also Neshkova 2010.

XXXV 'Another conclusion that could be drawn from the responses was that over the years the regional-local division within the CoR was gradually overshadowed by the political divisions in political groups' (Vandamme 2013).

XXXVI Second because as empirical research has suggested: 'Hereby the example of the Congress of Local and Regional Authorities of the Council of Europe was invoked. This body has been sub-divided into two separate chambers... the interviewee in practice this resulted in 'different people ending up doing the same work' (Vandamme 2013).

XXXVII 'Yet, the prominent role of the legislative regions who form after the 2004 and 2007 enlargements of the EU a 'numerical minority' in the CoR also leads one to question the Committee's representative function. In this context, attention was also drawn to the fact that many key positions in the CoR are still held by politicians from the legislative regions despite the change in the Committee's composition after the enlargements' (Vandamme 2013).

XXXVIII 'An exceptional aspect of the CoR is the 'double mandate' for its (alternate) members. The (alternate) members of the CoR are appointed by the Council of Ministers of the EU. However, they lose their (alternate) membership of the CoR if they lose the national mandate. On the one hand, this rule seems to strengthen the legitimacy of the CoR as a EU body. Yet, on the other hand, it also seems to cause (practical) problems' (Vandamme 2013).

XXXIX Trobbiani 2016.

References

- Bailey David and De Propriis Lisa, 2010, 'EU Structural Funds, Regional Capabilities and Enlargement: Towards Multi-Level Governance?', *Journal of European Integration*, XXIV(4): 303-324.
- Bin Roberto, 1999, 'I decreti di attuazione della «legge Bassanini» e la "sussidiarietà verticale"', in Rinella Angelo, Coen Leopoldo and Scarciglia Roberto (eds), *Sussidiarietà e ordinamenti costituzionali*, Cedam, Padova, 1999, 183-193.
- Bin Roberto, 2002, 'La funzione amministrativa nel nuovo titolo V della Costituzione', *Le Regioni*, XXX(2-3): 365-382.
- Brusis Martin, 2002, 'Between EU requirements, competitive politics and national traditions: re-creating Region in the Accession Countries of Central and Eastern Europe', *Governance*, XV(4): 531-559.
- Carrozza Paolo, 'Le 'materie': uso delle tecniche di enumerazione materiale delle competenze e modelli di riferimento del 'regionalismo di esecuzione' previsto dal nuovo Titolo V della Costituzione', in Ferrari Giuseppe Franco and Parodi Giampaolo (eds), *La revisione costituzionale del titolo V tra nuovo regionalismo e federalismo. Problemi applicativi e linee evolutive*, Cedam, Padova, 69-124.
- Caruso Daniela, 2011, 'Direct Concern in Regional Policy: The European Court of Justice and the Southern Question', *European Law Journal*, XVII(6): 804-827.
- Committee of the Regions, 2010, *The Committee of the Regions: Key dates*, Committee of the Regions, Bruxelles, available at: <http://cor.europa.eu/en/documentation/brochures/Documents/cdr-key-dates-2010/EN.pdf>.
- Conzelmann, Thomas, 2008, 'Towards a new concept of multi-level governance', available at: <http://cor.europa.eu/en/activities/governance/Documents/Conzelmann.pdf>.
- Cooper Ian, 2012, 'A 'Virtual Third Chamber' for the European Union? National Parliaments after the Treaty of Lisbon', *West European Politics*, XXXV(3): 441-465.



- Cygan Adam, 2014, 'The Regions Within Multi-Level Governance: Enhanced Opportunity for Improved Accountability?', *The Maastricht Journal of European and Comparative Law*, XXI(2): 265-280.
- Davies Gareth, 2006a, 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time', *Common Market Law Review*: 63 et seq.
- Davies Gareth, 2006b, 'Subsidiarity as a Method of Policy Centralisation', *Hebrew University International Law Research Paper* No. 11-06, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921454.
- Estella Antonio, 2002, *The EU Principle of Subsidiarity and Its Critique*, Oxford University Press, Oxford.
- Fabbrini Federico and Granat Katarzyna, 2013, 'Yellow card, but no foul: the role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike', *Common Market Law Review*, L(1): 115-143.
- Falcone Vincenzo, 2003, 'Il Comitato delle Regioni: esperienze e prospettive', in D'Atena Antonio (ed), *L'Europa delle autonomie. Le Regioni e l'Unione europea*, Giuffrè, Milano, 247-254.
- Fasone Cristina, 2013, 'Competing Concepts of Subsidiarity in the Early Warning Mechanism', *LUISS Guido Carli School of Government Working Paper* No. SOG-WP4/2013, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243503.
- Fasone Cristina, 2017, 'Secession and the Ambiguous Place of Regions Under EU Law', in Closa Carlos (ed), *Secession from a Member State and Withdrawal from the European Union Troubled Membership*, Cambridge University Press, Cambridge.
- Gamper, Anna, 2005, 'A "Global Theory of Federalism": The Nature and Challenges of a Federal State', *German Law Journal*, VI(10): 1297-1318.
- Granat Katarzyna, 2018, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order The Role of National Parliaments in the Early Warning System*, Hart Publishing, Oxford.
- Hagemann Sara and Høyland Bjørn, 2010, 'Bicameral Politics in the European Union', *Journal of Common Market Studies*, XLVIII(4): 811-833.
- Hettne Bjørn and Söderbaum, Frederik, 2000, 'Theorizing the Rise of Regionness', *New Political Economy*, V(3): 457-472.
- Ipsen Hans Peter, 1966, 'Als Bundesstaat in der Gemeinschaft', in Caemmerer Ernst von., Schlochauer Hans Jürgen and Steindorff Ernst (eds), *Probleme des Europäischen Recht. Festschrift für Walter Hallstein zu seinem 65. Geburtstag*, Klostermann, Frankfurt am Main, 248-265.
- Iurato Giovanna, 2006, 'L'UE e la rappresentanza territoriale regionale', *Le Regioni*, XXXIV(4): 679-710.
- Lenaerts Koenraad, 2012, 'The law of the European Union and the exercise by regions of their tax powers', in Flemish Department of Finance and Budget (ed), *Fiscal Federalism in the European Union: EU Presidency Seminar*, Groep De Boeck Departement Larcier, Gent, 15-38.
- Loughlin John, 1994, 'Nation, state, and region in Western Europe', in Bekemans Léonce (ed), *Culture: Building stone for Europe 2002: Reflections and perspectives*, Peter Lang Publishing, Bruxelles, 229-248.
- Massa Pinto Ilenia, 2003, *Il principio di sussidiarietà- Profili storici e costituzionali*, Jovene, Napoli.
- Neshkova Milena, 2010, 'The Impact of subnational interests on supranational regulation', *Journal of European Public Policy*, XVII(8): 1193-1211.
- Norton Philip, 2006, 'How many bicameral legislatures are there?', *The Journal of Legislative Studies*, X(4): 1-9.
- Öberg Jacob, 2017a, 'Subsidiarity as a Limit to the Exercise of EU Competences', *Yearbook of European Law*, XXXVI(1): 391-420.
- Öberg Jacob, 2017b, 'The Rise of the Procedural Paradigm: Judicial Review of EU Legislation in Vertical Competence Disputes', *European Constitutional Law Review*, XIII(2): 248-280.
- Open Europe, 2012, 'The Rise of the EU Quangos', available at: <http://archive.openeurope.org.uk/Content/Documents/Pdfs/RiseoftheEUquangos2012.pdf>.
- Palermo Francesco, 2005, *La forma di Stato dell'Unione europea. Per una teoria costituzionale dell'integrazione sovranazionale*, Cedam, Padova.
- Panaro Carlo, 2015, *The Sub-national Dimension of the EU: A Legal Study of Multilevel Governance*, Springer Verlag, Heidelberg.
- Piattoni Simona, 2009, 'The Committee of the Regions White Paper on Multilevel Governance: Some Reflections', available at: <http://cor.europa.eu/en/activities/governance/documents/3e92ec7e-8a35-495a-ace8-b23b12783a6a.pdf>.



- Piattoni Simona, 2011, 'The Problematic Coexistence of Functional and Territorial Representation in the EU', *Journal of European Integration*, XXXIII(4): 369-384.
- Piattoni Simona and Schönlau Justus, 2015, *Shaping EU Policy from Below: EU Democracy and the Committee of the Regions*, Edward Elgar, Cheltenham.
- Russo Anna Margherita, 2012, 'La Distribución Territorial del Poder en los Estados Miembros de la Unión Europea: El 'Federalizing Process' en Acción', *Revista de Derecho Constitucional Europeo*, no. 17: 385-468.
- Saggio Antonio, 2001, 'La responsabilità dello Stato per violazione del diritto comunitario', *Danno e responsabilità*, VI(3): 223-242.
- Schütze Robert, 2009, *From Dual to Cooperative Federalism. The Changing Structure of European Law*, Oxford University Press, Oxford.
- Simonato Alessandro, 2013, 'Il rapporto tra Regioni, Stato ed UE alla luce della crisi economica, dell'attualità istituzionale, del dibattito sul paradigma della multilevel governance', *federalismi.it. Rivista di diritto pubblico italiano, comparato, europeo*, XI(9), available at: http://federalismi.it/nv14/articolo_documento.cfm?artid=22327.
- Skoutaris Nikos, 2012, 'Federalism: The European Union's Uncommon Principle', paper presented at York University, on 6 March 2012, <http://euce.apps01.yorku.ca/2012/02/lecture-federalism-the-european-unions-uncommon-principle-march-6-2012/>.
- Syrpis Phil, 2004, 'In Defence of Subsidiarity', *Oxford Journal of Legal Studies*, XXIV(2): 323-334.
- Thies Anne, 2011, 'The Locus Standi of the Regions before Community Courts', in De Becker Alexander and Panara Carlo (eds), *The Role of the Regions in the European Governance*, Springer Verlag, Heidelberg, 25-53.
- Toth Akos, 1993, 'The Principle of Subsidiarity in the Maastricht Treaty', *Common Market Law Review*, XXIX(6): 1079-1105.
- Trobbiani, Riccardo, 2016, 'European regions in Brussels: towards functional interest representation?', *Bruges Political Research Papers* 53/2016, available at: https://www.coleurope.eu/system/files_force/research-paper/wp53_trobbiani.pdf?download=1.
- Valcárcel Siso Ramón Luis, 2014, *Towards a European Senate of the Regions Report on the Future of the Committee of the Regions: 50 Recommendations*, Committee of the Regions, Bruxelles, available at: <http://cor.europa.eu/en/documentation/brochures/Pages/towards-a-european-senate-of-the-regions.aspx>.
- Vandamme Thomas, 2013, 'Still the Committee of 'Legislative Regions'? On Heterogeneity, Representation and Functionality of the Committee of the Regions after 2004', *Amsterdam Centre for European Law and Governance Working Paper Series* 2013-03, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229734.
- Weatherill Stephen and Bernitz Ulf (eds), 2005, *The role of regions and subnational actors in Europe*, Hart Publishing, Oxford.



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Legislative Functions of Second Chambers in Federal Systems

by

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Abstract

Legislative functions of federal second chambers are not a homogeneous set of powers, but require comparison and classification. First, the paper will examine the legislative functions of the second chambers of those European states that have a federal or quasi-federal character (Austria, Belgium, Bosnia and Herzegovina, Germany, Italy, Russia, Spain, Switzerland, United Kingdom). Second, the paper addresses the normative concept of the legislative functions of federal second chambers: what is the particularly federal rationale behind these legislative powers, and are there other constitutional rationales as well? Do some legislative functions serve purposes of federalism better than others and does a dichotomy between ‘weak-form’ and ‘strong-form’ veto powers apply in this context? This will also require some discussion on whether perfect or imperfect bicameralism and the requirements of internal decision-making play a role in this regard.

Key-words

bicameralism, federalism, legislative functions, second chambers



1. Introduction

In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.¹

It was James Madison who thus explained bicameralism in federal context. But even earlier than the era of federalism, bicameralism connoted legislatures with two branches (Luther 2006: 3; Shell 2001: 18; Uhr 2008: 474). In accordance with this concept, the term ‘second chamber’ does not indicate a qualitative standard – as the terms ‘lower’ or ‘upper’ chamber –, but refers to the chronology of legislative processes.^{II} While it is true that second chambers are today vested with much more than just legislative functions – as indeed first chambers are –, legislation is still what matters most.^{III} This is especially so in the case of federal second chambers, since federalism requires the participation of the component units in the very process that determines, *inter alia*, their own status and future (Palermo and Kössler 2017: 164). In states governed by the rule of law, this requires participation in legislation, including, above all, constitutional legislation. But even though there is a plethora of literature on second chambers, including those existing in federal systems, little attention has been paid to their legislative functions as a particular constitutional species that requires a more differentiated analysis.

Legislative functions of federal second chambers are, however, not a homogeneous set of powers, but require comparison and classification, which this paper undertakes. First, an empirical survey will examine the legislative functions of the second chambers of those European states that have a federal or strongly regionalised character (Austria, Belgium, Bosnia and Herzegovina, Germany, Italy, Russia, Spain, Switzerland, United Kingdom), which is mainly due to the law-making powers of their respective component units. Moreover, with the exception of the UK’s House of Lords (which is still included in this study due to the strong degree of autonomy in the devolved regions), all of these second chambers are organisationally and/or functionally strongly related to the subnational level, even though this may have little impact in political practice. Second, the paper addresses the normative concept of the legislative functions of federal second chambers: what is the



particularly federal rationale behind these legislative powers, and are there other constitutional rationales as well? Do some legislative functions serve purposes of federalism better than others and is a dichotomy between ‘weak-form’ and ‘strong-form’ veto powers useful in this context? This will also require some discussion on whether perfect or imperfect bicameralism and the requirements of internal decision-making play a role in this regard.

2. Types of Legislative Functions

In almost all federal states, federal parliaments have a bicameral structure (Watts 2008: 147; 2010: 33-34); in some of these states, even the component units’ parliaments, or part of them, are bicameral.^{IV} At the federal level, the respective second chamber represents the component units, while the first chamber, as a rule, represents federal citizens directly.

In a majority of cases, second chambers are constitutionally vested with fewer and weaker powers than first chambers (Patterson and Mughan 2001: 41-44). The same observation applies to federal second chambers, also with regard to their legislative functions (Watts 2010: 39-40). All federal second chambers participate in legislation to some degree; however, they may or may not have other, non-legislative functions, such as, *inter alia*, the parliamentary scrutiny of the executive, appointments, impeachment, constitutional interpretation, international treaties, EU affairs or the dissolution of bodies pertaining to the component units (Watts 2008: 153-154; Luther 2006: 25-28; Palermo and Kössler 2017: 193-200). Their core function nevertheless is legislation.

Legislative functions are sometimes equalised with veto rights in legislative processes. From a broader perspective, however, there is a much more complex variety of legislative functions,^V such as the following:

- (1) the right to enact quasi-legislative rules autonomously, which mostly applies to the second chamber’s Standing Orders
- (2) the right to initiate legislation
- (3) the right to veto bills passed by the first chamber, with different ensuing options:
 - (a) an absolute veto that successfully stops the enactment of the bill
 - (b) a suspensive veto that may be overruled by the first chamber
 - (c) a suspensive veto that is submitted to a mediation committee for final resolution
- (4) the right to modify bills passed by the first chamber, irrespective of the consequence



- (5) the right to demand a referendum on a bill passed by the first chamber
- (6) the right to appeal to (constitutional) courts for the pre-enactment scrutiny of a bill
- (7) the right to challenge enacted laws before (constitutional) courts

The legislative functions of federal second chambers may have a ‘positive’ or ‘negative’ impact on legislation – not in a moral sense, but with regard to the question of whether law is created or abolished (or prevented from being created, respectively).^{VI} Federal second chambers may thus appear as positive or negative law-making bodies, irrespective of whether their ‘positive’ or ‘negative’ act is decisive or not.^{VII} Some of these rights have, however, a Janus-faced character inasmuch as it depends on their exercise whether they contribute to a law in a ‘positive’ or ‘negative’ sense. For example, veto rights are mostly connoted as ‘negative’ legislative function, but this depends on the kind of veto: a suspensive veto could perhaps entail further discussion and a modification of a bill that is ultimately enacted. Vice versa, even the right to initiate legislation which appears to be the paradigm of ‘positive’ legislation may, in effect, bear a negative character inasmuch as the second chamber could propose a repealing law with the sole effect of abolishing an existing law.

3. Empirical Survey

The comparison between the federal second chambers selected for this study shows that, even though all of them participate in legislative functions in principle, they usually do not take part in the same type of legislative functions.^{VIII}

All of the (quasi-)federal second chambers^{IX} selected for this survey are vested with the right to initiate legislation (in all or some fields)^X and with the right to enact their own Standing Orders.^{XI} As far as the possibility of challenging federal laws before constitutional courts is concerned, all of these second chambers except the House of Lords,^{XII} the Italian *Senato* and the Swiss *Ständerat*^{XIII} are entitled to do so.^{XIV} The second chambers in Italy, Switzerland and Bosnia and Herzegovina have absolute veto powers regarding all kinds of legislation (even though a mediation process may apply previously) due to the perfectly bicameral system. All other federal second chambers only enjoy absolute veto powers in some fields of legislation or are not even entitled to exercise a (any) veto at all, where certain areas of legislation – typically, if they do not particularly concern the component units – are



reserved to the first chamber.^{XV} Some significant differences apply with regard to suspensive veto rights, since in some cases, such as Austria,^{XVI} this simply amounts to a vote that can be overruled by the first chamber in a repeated decision.^{XVII} In other cases, such as Belgium^{XVIII}, Spain^{XIX} or the UK, however, the respective second chambers may not just disapprove a bill, but actively propose modifications to a bill that have to be considered (though not necessarily adopted) by the first chamber. A similar option is a joint mediation committee consisting of members of both chambers, such as in Germany, Switzerland, Russia or Spain,^{XX} namely a body in which negotiations take place and in which compromises on bills may be found that are submitted to the chambers for their approval or rejection in a prolonged legislative process.^{XXI} The compared systems differ as to whether mediation is only provided for certain pieces of legislation and what the entailing consequences are if the federal second chamber does not approve the compromise submitted by the mediation committee – in particular, whether it may finally be overruled by the first chamber or not.

Both pre-legislative scrutiny on the appeal of a second chamber^{XXII} and the possibility^{XXIII} that the federal second chamber may separately demand a referendum on certain bills are only provided in rare cases.

4. Weak-form and Strong-form Powers: a Meaningful Concept for Federal Second Chambers?

The core of legislative functions of the compared federal second chambers consists of the right to initiate legislation and the right to veto bills passed by the first chamber. The traditional classification of second chambers as ‘strong’ or ‘weak’ is primarily concerned with their veto powers: the more (absolute) veto powers they have, and the wider the fields are to which they apply, the stronger these chambers are considered to be. This assessment emanates from the view that federal second chambers serve to defend and protect the component units from federal interference. At first glance, an absolute veto power is surely the most efficient tool to accomplish this function since it successfully prevents bills from being enacted. Whether this is a successful model in the long run, is a different question though. Transplanting Tushnet’s^{XXIV} categories of weak-form and strong-form judicial review onto the legislative functions of federal second chambers, even weak-form functions may have certain strengths. While the exercise of strong-form veto rights may produce



blockades and conflicts between the chambers, weak-form rights such as suspensive veto rights or (federal second chambers' or mediation committees') rights to propose modifications to bills passed by the first chamber may trigger political dialogue. Even a 'mere' suspensive veto, that simply entails a second resolution by the first chamber on whether to uphold the original bill, might stimulate the first chamber to further discuss and reflect on the content of a bill. Weak-form powers of federal second chambers could thus promote the efficiency of legislative procedures, political compromise and co-operation between both chambers. Absolute veto powers amount to a 'yes-no' vote which, depending on the political decision in the second chamber, either absolutely impede or unconditionally accept bills passed by the first chamber. They do not allow for a third option, namely to reflect, discuss and eventually modify such bills. Indirectly, the mere threat of an absolute veto could, however, also motivate the first chamber to pre-consider the second chamber's interests in the early phase of a legislative process. Moreover, federal second chambers might be vested with absolute veto rights and still not use them in order to protect the component units if their political intentions are in line with those of the respective first chambers.^{xxv} And even the exercise of an absolute veto could be followed by a total restart or second stage^{xxvi} of the legislative process.

Weak-form legislative powers are, however, not sufficient safeguards for the protection of component unit interests, since the first chamber may not be willing to enter into negotiations or to reach a compromise with the second chamber if it is not formally required to do so. It largely depends on the concrete political attitudes of both chambers whether suspensive vetoes sufficiently protect component unit interests and whether they really enable serious dialogue between the chambers.

Neither absolute nor suspensive veto powers can, therefore, guarantee that a federal second chamber either represents component unit interests efficiently or, in turn, may expect the first chamber to reach a compromise 'voluntarily'. The only certainty seems to be that absolute veto powers will serve as better protective shields than suspensive veto powers *if* a federal second chamber wants to use that shield. For the purposes of federalism, moreover, absolute veto powers seem to be advisable at least in cases where the federal constitution is amended or where laws with particular focus on the component units are concerned.

Still, theory on second chambers should be more mindful of the question of what the federal rationale behind federal second chambers really is. If the rationale is more or less



understood to be the protection and defense of the component units, veto rights – and, among these, absolute veto rights in particular – will be considered to be the strongest and most important instruments pertaining to a federal second chamber’s legislative functions. Using absolute veto rights, federal second chambers would not even need the power to challenge laws before constitutional courts, because they could perfectly well prevent them from being enacted at all – and, what is more, not just for constitutional reasons. If, however, the federal rationale behind these chambers is rather understood to lie in their active contribution to the design of federal laws (with whatever content) and to advise, reflect or instigate further discussion, the right to initiate bills, the right to propose modifications and, indeed, even ‘mere’ suspensive veto powers might be seen as the more constructive tool.^{xxvii}

It would be a misconception, however, to suggest that imperfect bicameralism would be a better option for federal systems than perfect bicameralism. Imperfect bicameralism means that (usually) the second chamber, and (usually) not the first chamber, has fewer and weaker powers (Patterson and Mughan 2001: 41-44). With regard to legislative powers, this implies that the second chamber has fewer and weaker powers in the legislative process than the first. This deficit may apply to the initiative power as well as the respective type of veto power or any other of the aforementioned legislative functions.

When the Italian Government first proposed its ideas on a new Senate – which was finally rejected by Italian voters in the constitutional referendum of 4 December 2016 –,^{xxviii} the suggestion was made that the new Senate would be better suited to regional or quasi-federal needs when compared to the prevailing system of perfect bicameralism.^{xxix} However, what they planned to introduce was not a ‘federal’ Senate but a Senate with reduced powers (and a new organization); indeed powers so reduced that one could seriously question whether to uphold the bicameral system at all. Put very simply, purposes of federalism are not served by the mere reduction of a second chamber’s powers, even when the remaining powers are embedded in a federal context – unless the ‘lost’ powers were given to alternative bodies of component representation.



5. The Federal Rationale behind Legislative Powers of Federal Second Chambers

In federal systems, self-rule, namely the legislative, administrative and judicial competences of the component units, must be accompanied by shared rule.^{xxx} Shared rule allows the component units to take part in federal legislation on any or at least some matters that affect them particularly. This latter participation is the more important when it comes to federal constitutional law-making or other pieces of federal legislation that concern the very existence and status of the component units as such. Thus, federalism requires that the component units have a decisive say in the determination of their own future, although shared rule and the legislative powers emanating from it is not necessarily restricted to this issue alone. Accordingly, the common federal rationale behind the legislative powers of federal second chambers is the possibility to co-determine federal legislation.

The discussion on the federal function of legislative powers of federal second chambers, however, does not stop at the threshold of the power question *as such*. Early theorists, like the authors of the Federalist Papers,^{xxxI} focused on the second chamber's powers vis-à-vis the first chamber, but also on the kind of (symmetric or asymmetric) representation of the component units, which has coined the mainstream of theory on bicameralism in federal systems. However, the representation of component units has usually been regarded as some sort of 'blocked' interest, realised through the initiation of laws as well as the vetoing or amending of bills. The issue of heterogeneity between the component units has mostly been treated from an organizational perspective, i.e. whether the component units are represented by an absolutely equal number of delegates or not.^{xxxII}

It is questionable, however, whether the federal function of legislative powers of second chambers is adequately treated by this view. Rather, the question of how decisions in the federal second chamber are made also seems to be of interest here: can we, when discussing the federal function of federal second chambers and their legislative powers, simply regard the component units as some sort of consolidated body that is (symmetrically or asymmetrically) represented in the federal second chamber? While theory has lately attached much weight to other issues of asymmetric federalism,^{xxxIII} less thought has been given to the internal decision-making of federal second chambers. Ultimately, it is the protection of individualism that lies at the bottom of asymmetric federalism. It will be adequate, therefore,



to also take the individual component unit view into account when the federal function of legislative powers of second chambers is examined.

Legislative powers of federal second chambers do not necessarily guarantee that they are truly exercised for purposes of federalism. This may be partly due to the politics of second chambers, since some federal second chambers merely operate in line with the interests of political parties, whatever their effects on federalism are (Palermo and Kössler 2017: 185). But federal legislation may also have different implications on the component units. While some of them (and their delegates in the federal second chamber respectively) may therefore agree with a bill, others may not.

Unlike the right to initiate laws, to which even individual members of parliament are often entitled, decision-making in the legislative process usually depends on majority votes. Unanimity, either between delegates or the component units' delegations, is not a typical requirement, even if in some cases qualified majorities apply. As a consequence, a single component unit will not be able to enforce its will even in federal second chambers where the component units are represented symmetrically. A qualified majority ensures, however, that the consent of more component units (and their respective delegates) is needed. The federal character of these majorities will be evident if they are required when federal legislation puts federalism at risk, e.g. when a federal constitutional bill targets the allocation of powers, the organisation or functions of the second chamber or other elements essential to the federal system (Kincaid 2005: 419). It will be less probable that a bill of centralistic purport is successful in the federal second chamber if a large majority of component units have to approve and not just some of them. On the other hand, qualified majorities may slow down or even produce deadlocks to the legislative process, since it will be more difficult to reach consensus between the delegates of the component units.

In this context, the direct participation of the component units either instead of or in addition to the involvement of the federal second chamber could be contemplated.^{xxxiv} Direct participation means that each individual component unit is allowed to participate in the legislative process, that it has a direct say in the legislative process without being represented by a 'chamber' or similar institution. Normally, the component units in these cases decide on bills passed by the first or even the federal second chamber, but in some countries they may even initiate certain pieces of legislation.^{xxxv} The German model according to which members of the *Länder* governments sit in the *Bundesrat* seems to combine



both approaches. Nevertheless, the Bundesrat is a body of its own, irrespective of whether its members have a ‘double’ function as members of the *Länder* governments and even though the German *Bundesverfassungsgericht*^{xxxvi} disqualified it as a ‘second chamber of a uniform legislative organ which, on a level of parity with the first chamber, would decisively participate in the legislative process’.^{xxxvii}

Direct participation of the component units, however, neither excludes weighted voting nor does it necessarily require unanimity. It depends on the respective constitution whether each and every component unit has one and the same vote and whether decisions can only be taken unanimously or not.^{xxxviii} The question of whether voting has a representative or directly democratic basis, does not matter in this context. It seems to be more usual, though, that the vote of the component unit is exercised by a representative body, such as the respective parliament, government or governor of that unit. However, federal constitutions might also provide (or empower the component constitutions to provide) that each component people expresses its will on a legislative matter in a referendum, as the Australian or Swiss Federal Constitution prescribe with regard to federal constitutional amendments.^{xxxix}

From an empirical perspective, most federal constitutions establish federal second chambers, although they often do not provide for direct component unit participation in legislative processes. Where this is the case, however, it is largely the federal constitutional amendment process that is concerned (Palermo and Kössler 2017: 179-183): mostly, the need for approval by the federal second chamber is not replaced by direct participation, but the latter serves as an additional ingredient required for amendments to the federal constitution.^{xl} In rarer cases, direct component unit participation is not required for federal constitutional amendments, but for ordinary federal laws in certain fields that are sensitive to component unit interests.^{xli}

A very special opportunity to allow the component units to participate in legislative processes is provided in Belgium^{xlii} and Bosnia and Herzegovina,^{xliii} where the linguistic groups (Belgium) or ethnic groups (Bosnia and Herzegovina) are given particular representation even in the first chamber of the federal parliament (Bosnia and Herzegovina) or where special majorities of them are needed for certain legislation in the first chamber as well (both countries).^{xliiv} While such a system is linked to multiethnic or multilingual societies, it has nevertheless not replaced federal second chambers and their legislative



functions. A unique example is, moreover, the new EVEL (English Votes for English Laws) system in the House of Commons, where English (or English and Welsh) members are allowed to veto bills relating to England (or England and Wales).^{XLV}

6. Non-federal Rationales Behind Legislative Powers of Federal Second Chambers

Lastly, it should not be forgotten that some non-federal rationales also lie behind the legislative functions of federal second chambers. Probably the most important of these was formulated by James Madison very clearly, namely that the Senate, ‘as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government’^{XLVI} doubling ‘the security to the people’.^{XLVII XLVIII} The establishment of a federal second chamber was thus considered to be an ‘introduction of legislative balances and checks’.^{XLIX} It is remarkable that second chambers have a stronger position in constitutional amendment procedures than in others, which also gives weight to the rigidity of a constitution (Palermo and Kössler 2017: 178-179). While non-federal second chambers, too, contribute to an ‘internal’ separation of powers vis-à-vis the first chamber within the legislative power, a federal second chamber additionally guarantees checks and balances within the vertical separation of powers.

The effectiveness of such checks and balances of course depends on many uncertain factors, such as party politics (Watts 2010: 41-43) and the selection and qualification of members and the type of legislative power. Other bodies committed to checks and balances may, however, be exposed to similar risks.^L This is no compelling reason, therefore, why federal second chambers should not exercise checks and balances,^{LI} not only with regard to issues pertaining to federalism, but also other issues. One particular function that could be mentioned here is the pre-enactment scrutiny of bills regarding their constitutionality.^{LII} Where federal second chambers may employ veto rights without being restricted to particular arguments related to federalism, they could indeed practice a kind of *ex ante* judicial review of legislation.^{LIII} Such a function cannot be achieved easily, though. Apart from the possible absence of a political intention to exercise this function, members would need to be qualified lawyers (as the former Law Lords of the House of Lords were) or at least to rely on adequate legal services – which is not often the case.^{LIV} Normally, federal second chambers cannot



themselves take on the role of quasi-constitutional courts. Even the Federalist Papers admit that it ‘must be acknowledged that this complicated check on legislation may in some instances be injurious as well as beneficial’.^{LIV} But federal second chambers could be given the right to appeal to a (constitutional) court for pre-enactment scrutiny of a bill. A reflected, well-argued veto against unconstitutional bills would not only enhance checks and balances, but also the rule of law. A related role could be the ‘authentic’ interpretation of the constitution, such as that exercised by the Ethiopian House of Federation.^{LVI}

A final aspect to be considered here is democracy. Although even federal second chambers have been accused of limiting democracy vis-à-vis first chambers that are elected by all federal citizens,^{LVII} this view is short-sighted. Federalism and democracy are strongly intertwined principles, irrespective of whether the component units are represented by directly or indirectly elected delegates (Luther 2006: 22; Watts 2010: 43-45). Ultimately, the respective component peoples are represented in the second chamber, and these peoples are the *demos* of which the federal *demos*, as represented by the first chamber, is composed. Whether the representation of the component peoples follows the same democratic pattern as the composition of the first chamber, may differ from system to system. But even the mandates belonging to a first chamber are not always distributed on a completely proportional basis, depending on the nationwide electoral system. While it is possible, therefore, that the first and second chamber follow different proportions or that a proportional model does not apply for the second chamber at all, it is, at any rate, an additional representative body of *peoples* and no oligarchic body.

7. Conclusions

Legislative functions of component units, not just those within their own sphere of competences, but also those targeted at the co-determination of federal legislation, are indispensable ingredients of all federal systems. Whether they are exercised by a federal second chamber or directly by the component units, by other special representative bodies and in whatever (symmetric or asymmetric) composition, is rather a matter of choice. Still, federal second chambers have become the most regular type of a component representative body; they are, moreover, democratic bodies which cannot be said of all second chambers.



Leaving aside questions of political efficiency, which may turn out differently from system to system, one should be aware that legislative functions comprise much more than just the function of a veto player. Even though veto rights are important because they ultimately protect the very constitutional status of the component units, it is not the only legislative function that matters in a federal system. Inherent in these functions are, moreover, other, non-federal functions of constitutional importance. Whatever type of legislative function a federal second chamber exercises, its decision-making is, however, largely majoritarian. Even where the component units enjoy equal representation, the larger states will, according to the Federalist Papers, ‘always be able, by their power over the supplies, to defeat unreasonable exertions of this prerogative of the lesser States’.^{LVIII} That only larger component units are the ‘true defenders’ of federalism in federal law-making, may, however, be doubted.

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^I Federalist Papers No 51.

^{II} An attribution of ‘quality’ is rather suggested by the term ‘upper house’; see Uhr (2008: 478).

^{III} Watts (2008: 153; 2010: 40), Palermo and Kössler (2017: 193). See, with some reservations, Patterson and Mughan (2001: 51-52) and Bradley and Pinelli (2012: 665-667).

^{IV} With examples, Palermo and Kössler (2017: 137).

^V In an even wider sense, the right to participate in the ascending phase of EU legislation, the approval of international treaties that amend domestic laws or functions that affect the government or parliaments of the component units (and, indirectly, their legislative powers), such as the notorious Art 155 of the Spanish Constitution or Art 100 of the Austrian Federal Constitutional Act, could be mentioned as well, but are neglected for the purposes of this paper. Outside Europe, the Ethiopian House of Federation’s power to interpret the constitution in a ‘quasi-authentic’ manner is worth mentioning.

^{VI} See, more generally on ‘positive’ and ‘negative’ lawmaking, Gamper (2016: 14).

^{VII} Kelsen’s functional attribution of ‘positive lawmaking’ to parliaments and ‘negative lawmaking’ to constitutional courts (Kelsen 1929: 56) is, thus, too little differentiated.

^{VIII} A general survey on the functions of federal second chambers is given by Watts (2008: 153-154; 2010: 39-41) and Palermo and Kössler (2017: 178-200). Palermo and Kössler (2017: 178-193) further distinguish between ‘constitutional amendments’, ‘territorial changes’ and ‘legislative functions’ (apart from other, non-legislative functions) as primary functions of federal second chambers. But both constitutional amendments and (possibly) territorial changes rely on legislative functions as well.

^{IX} Sometimes, these powers are not just those of the federal second chamber as such, but of their individual members or committees; for the purposes of comparison, this difference is neglected here.

^X Art 41 para 1 of the Austrian Federal Constitutional Act, Art 75 para 1 of the Belgian Constitution, Art 76 para 1 of the German Basic Law, Art 71 para 1 of the Italian Constitution, Art 87 para 1 of the Spanish Constitution, Art 160 para 1 of the Swiss Constitution, Art 104 para 1 of the Russian Constitution. With regard to the possibility of ‘private members’ bills proposed by members of the House of Lords under the ‘unwritten’ UK constitution see Russell (2006: 78). The Constitution of Bosnia and Herzegovina does not explicitly regulate the right of initiative, but refers to the respective Standing Orders of both chambers, each of which is empowered to initiate legislation.

^{XI} Art 37 para 2 of the Austrian Federal Constitutional Act, Art 60 of the Belgian Constitution, Art IV Sec 3 para b of the Constitution of Bosnia and Herzegovina, Art 52 para 3 of the German Basic Law, Art 64 para 1 of the Italian Constitution, Art 72 para 1 of the Spanish Constitution, Art 101 para 4 of the Russian Constitution, Art 36 of the Swiss Parliament Act. See, with regard to the House of Lords’ Standing Orders



under the ‘unwritten’ UK constitution, Russell (2006: 76-77).

^{xii} Due to the absence of a written constitution and a constitutional court with the power to review Acts of Parliament.

^{xiii} Due to the absence of a constitutional court with the power to review federal laws on a formal basis.

^{xiv} Art 140 para 1 no 2 of the Austrian Federal Constitutional Act, Art 93 para 1 no 2a and para 2 of the German Basic Law, Art 2 no 3 of the Belgian Special Act on the Constitutional Court (against federal and component legislation), Art 125 para 2 of the Russian Constitution, Art 162 para 1 subpara a of the Spanish Constitution. Art VI Sec 3 of the Constitution of Bosnia and Herzegovina provides this possibility only against component legislation.

^{xv} See, eg, Art 42 para 5 of the Austrian Federal Constitutional Act.

^{xvi} Art 42 para 4 of the Austrian Federal Constitutional Act.

^{xvii} From a wider comparative perspective, Russell (2012: 121-126).

^{xviii} Art 78 para 2 of the Belgian Constitution.

^{xix} Art 90 para 2 of the Spanish Constitution.

^{xx} A special case of mediation within the first or second chamber due to its multiethnic composition is constituted by Art IV Sec 3 para d and f of the Constitution of Bosnia and Herzegovina.

^{xxi} Palermo and Kössler (2017: 192-193). See, more generally, Russell (2012: 126-127).

^{xxii} See Art 79 para 3 of the Spanish Organic Law 2/1979 on the Constitutional Court or, under very limited conditions, Art IV Sec 3 para f of the Constitution of Bosnia and Herzegovina.

^{xxiii} Art 44 para 3 of the Austrian Federal Constitutional Act (in case of so-called ‘partial constitutional revisions’), Art 138 para 2 of the Italian Constitution (in case of constitutional amendments), Art 167 para 3 of the Spanish Constitution.

^{xxiv} See, specifically, Tushnet (2008); furthermore Tushnet (2003: 2781-2802; 2006: 1-22; 2011: 321-333; 2013: 2249-2263).

^{xxv} On the political inefficiency of several federal second chambers, Kincaid (2005: 430), Russell (2001a: 113-115; 2001b: 66), Watts (2010: 40).

^{xxvi} See, eg, Art 138 of the Italian Constitution.

^{xxvii} On the importance of ‘legislative activity’, Patterson and Mughan (2001: 48-49).

^{xxviii} „Disposizioni per il superamento del bicameralismo paritario, la riduzione del numero dei parlamentari, il contenimento dei costi di funzionamento delle istituzioni, la soppressione del CNEL e la revisione del titolo V della parte II della Costituzione’, G.U. n. 88 of 15 April 2016.

^{xxix} Critically, Gamper (2009: 229-236).

^{xxx} On the importance of both aspects, Watts (2005: 322); see, with much detail, Palermo and Kössler (2017: 125-320).

^{xxxi} See, in particular, Federalist No 22 and Nos 62-66.

^{xxxii} Gamper (2005: 153-165) with more references; Gamper (forthcoming).

^{xxxiii} See, eg, Palermo et al (2009: 21-35), Palermo et al (2007: 9-21), Watts (2008: 125-130), Bußjäger (2017: 63-73).

^{xxxiv} On the representative, though often informal role of other intergovernmental bodies Palermo and Kössler (2017: 177-178).

^{xxxv} See, with examples, Russell (2001a: 112) and Palermo and Kössler (2017: 179-183).

^{xxxvi} BVerfGE 37, 363 (380); see also Palermo and Kössler (2017: 172).

^{xxxvii} Similarly, Luther (2006: 4) and Palermo and Kössler (2017: 174). The difference between the ‘senate model’ and the ‘council model’ (Palermo and Kössler 2017: 165) has only limited significance here: it is mainly concerned with the question whether members of federal second chambers exercise legislative functions differently due to the mode of their selection.

^{xxxviii} See, with examples, Palermo and Kössler (2017: 179-183). The consent of each state is, eg, demanded by Art 5 US Constitution with regard to federal constitutional amendments depriving a state of its equal suffrage in the Senate.

^{xxxix} See Palermo and Kössler (2017: 182-183).

^{xl} In some cases, however, only the component units (directly) and not the federal second chamber co-decide on federal constitutional amendments; see Palermo and Kössler (2017: 179-183).

^{xli} See, eg, in Austria: Art 14b para 4, Art 94 para 2, Art 102 para 1 and 4, Art 130 para 2 no 3, Art 131 para 4, Art 135 para 1 B-VG.

^{xlii} In some fields of legislation, Art 4 para 3 of the Belgian Constitution, to which other provisions refer, requires a law passed by a majority of the votes cast in each linguistic group in each House, on condition that a majority of the members of each group is present and provided that the total number of votes in favour that



are cast in the two linguistic groups is equal to at least two thirds of the votes cast.

^{XLIII} Art IV para 2 of the Constitution of Bosnia and Herzegovina, according to which the House of Representatives shall comprise 42 Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska.

^{XLIV} A particularly interesting case is constituted by Art IV Sec 3 para d (see also para e and f, with regard to special majorities in the Second Chamber) of the Constitution of Bosnia and Herzegovina, according to which the delegates and members shall make ‘their best efforts’ to see that the majority includes at least one-third of the votes of delegates or members from the territory of each entity. If a majority vote does not include one-third of the votes of delegates or members from the territory of each entity, the chair and deputy chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If those efforts fail, decisions shall be taken by a majority of those present and voting, provided that the dissenting votes do not include two-thirds or more of the delegates or members elected from either entity.

^{XLV} See, with more detail, Tierney et al (2017: 222-223).

^{XLVI} Federalist No 62.

^{XLVII} Federalist No 62.

^{XLVIII} See also Uhr (2008: 485-487).

^{XLIX} Federalist No 9.

^L This is why particular professional qualification is usually required for constitutional judges despite their often ‘political’ appointment.

^{LI} See also Baldwin (2001: 172-175), Luther (2006: 21).

^{LII} On the safeguard-function of second chambers in constitutional matters, see also Russell (2011: 61-74).

^{LIII} See James Madison in Federalist No 62: ‘Another advantage accruing from this ingredient in the constitution of the Senate is, the additional impediment it must prove against improper acts of legislation.’

^{LIV} In an extremely idealistic vision, James Madison (Federalist No 62) expects from a ‘well-constituted’ senate aids in order to overcome the ‘blunders of our governments’, ‘all the repealing, explaining, and amending laws, which fill and disgrace our voluminous codes, but so many monuments of deficient wisdom’. Even though this reflective function of a second chamber seems to be highly-overestimated when compared to bicameralism in practice, it could nevertheless play an important role for good governance.

^{LV} Federalist No 62.

^{LVI} Art 62 para 1 of the Ethiopian Constitution. See also Watts (2008: 154).

^{LVII} On this critique, Watts (2008: 154; 2010: 43-45) and Uhr (2008: 474).

^{LVIII} Federalist No 62.

References

- Baldwin Nicholas D.J., 2001, ‘Concluding Observations’, in Baldwin Nicholas D.J. and Shell Donald (eds), *Second Chambers*, Frank Cass, London, 171-180.
- Bradley Anthony W. and Pinelli Cesare, ‘Parliamentarism’, in Rosenfeld Michael and Sajó András (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 650-670.
- Bußjäger Peter, 2017, *Föderale Systeme*, Jan Sramek Verlag, Wien.
- Gamper Anna, 2005, ‘“Arithmetische” und “geometrische” Gleichheit im Bundesstaat’, in Weber Karl and Wimmer Norbert (eds), *Vom Verfassungsstaat am Scheideweg - FS Peter Perenthaler*, Verlag Springer, Wien, 143-166.
- Gamper Anna, 2009, ‘Remodelling the Italian Senate: New Challenges for a Mixed Constitution?’, *Percorsi costituzionali*, II(1): 229-236.
- Gamper Anna, 2016, *Verfassungsgerichtsbarkeit und Gewaltverbindung*, Verlag Österreich, Wien.
- Gamper Anna, 2018, ‘*Suum Cuique Tribuere* – a Common Narrative of Federalism and Equality?’ (forthcoming).
- Kelsen Hans, 1929, ‘Wesen und Entwicklung der Staatsgerichtsbarkeit’, *VVDStRL*, V: 30-88.
- Kincaid John, 2005, ‘Comparative Observations’, in Kincaid John and Tarr Alan G. (eds), *Constitutional Origins, Structure, and Change in Federal Countries. A Global Dialogue on Federalism*, vol 1, McGill-Queen’s University Press, Montreal, 409-448.



- Luther Jörg, 2006, 'The Search for a Constitutional Geography and Historiography of Second Chambers', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers*, Giuffrè Editore, Milan, 3-31.
- Palermo Francesco, Hrbek Rudolf, Zwilling Carolin and Alber Elisabeth (eds), 2007, *Auf dem Weg zu asymmetrischem Föderalismus?*, Nomos, Baden-Baden.
- Palermo Francesco, Zwilling Carolin and Alber Elisabeth (eds), 2009, *Asymmetries in Constitutional Law. Recent Developments in Federal and Regional Systems*, EURAC, Bozen.
- Palermo Francesco and Kössler Karl, 2017, *Comparative Federalism*, Hart, Oxford.
- Patterson Samuel C. and Mughan Anthony, 2001, 'Fundamentals of Institutional Design: The Functions and Powers of Parliamentary Second Chambers', in Baldwin Nicholas D.J. and Shell Donald (eds), *Second Chambers*, Frank Cass, London, 39-60.
- Russell Meg, 2001a, 'The Territorial Role of Second Chambers', in Baldwin Nicholas D.J. and Shell Donald (eds), *Second Chambers*, Frank Cass, London, 105-118.
- Russell Meg, 2001b, 'Responsibilities of Second Chambers: Constitutional and Human Rights Safeguards', in Baldwin Nicholas D.J. and Shell Donald (eds), *Second Chambers*, Frank Cass, London, 61-76.
- Russell Meg, 2006, 'The British House of Lords: A Tale of Adaptation and Resilience', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers*, Giuffrè Editore, Milano, 65-96.
- Russell Meg, 2012, 'Elected Second Chambers and Their Powers: An International Survey', *The Political Quarterly*, LXXXIII(1): 117-129.
- Shell Donald, 2001, 'The History of Bicameralism', in Baldwin Nicholas D.J. and Shell Donald (eds), *Second Chambers*, Frank Cass, London, 5-18.
- Tierney Stephen, Welikala Asanga and Daly Tom G., 2017, 'United Kingdom', in Albert Richard, Landau David, Faraguna Pietro and Drugda Simon (eds), *2016 Global Review of Constitutional Law*, The Clough Center for the Study of Constitutional Democracy, Boston, 221-226.
- Tushnet Mark, 2003, 'Alternative Forms of Judicial Review', *Michigan Law Review*, CI(8): 2781-2802.
- Tushnet Mark, 2006, 'Weak-Form Judicial Review and "Core" Civil Liberties', *Harvard Civil Rights-Civil Liberties Law Review*, XLI(1): 1-22.
- Tushnet Mark, 2008, *Weak Courts, Strong Rights*, Princeton University Press, Princeton.
- Tushnet Mark, 2011, 'The rise of weak-form judicial review', in Ginsburg Tom and Dixon Rosalind (eds), *Comparative Constitutional Law*, Edward Elgar Publishing, Cheltenham/Northampton, 321-333.
- Tushnet Mark, 2013, 'The Relation Between Political Constitutionalism and Weak-Form Judicial Review', *German Law Journal*, XIV(12): 2249-2263.
- Uhr John, 2008, 'Bicameralism', in Rhodes R.A.W., Binder Sarah A. and Rockman Bert A. (eds), *The Oxford Handbook of Political Institutions*, Oxford University Press, Oxford, 474-494.
- Watts Ronald L., 2005, 'Comparative Conclusions', in Majeed Akhtar, Watts Ronald L. and Brown Douglas M. (eds), *Distribution of Powers and Responsibilities in Federal Countries. A Global Dialogue on Federalism*, vol 2, McGill-Queen's University Press, Montreal, 322-350.
- Watts Ronald L., 2008, *Comparing Federal Systems*, 3rd edition. McGill-Queen's University Press, Montreal.
- Watts Ronald L., 2010, 'Federal Second Chambers Compared', in Hrbek Rudolf (ed), *Legislatures in Federal Systems and Multi-Level Governance*, Nomos, Baden-Baden, 33-45.



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Extra-legislative Functions of Second Chambers in Federal Systems

by

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Abstract

Discussions regarding the functional design of second chambers in federal or quasi-federal systems seem to focus mainly on legislative functions. Thus, extra- or non-legislative functions related to the executive branch or the judiciary have been rather neglected in the literature. This paper will examine the extra-legislative functions of second chambers which include Austria, Belgium, Germany, Italy, Spain, Switzerland and the United Kingdom. By grouping the functions into different categories (relations with the Government, appointment functions and functions in the field of international affairs, powers in relation to the European Union and functions granted to maintain the legitimate constitutional order), their effectiveness in serving the purposes of bicameralism, and of regional representation, will be explored.

Key-words

bicameralism, extra-legislative functions, federal second chambers, appointments, scrutiny, international affairs, guarantor of the constitutional order, subsidiarity, European Union, regional representation



1. Introduction

Bicameralism as a model of parliamentary design has been adopted in many parliamentary democracies (Russell 2001a: 442). Among the justifications put forward for a second chamber are the separation of powers to avoid the risk of abuse entailed by concentrating power into a single body and the enhancement of democracy by drawing on a broader and more diversified base (Luther 2006: 20-21). By representing ‘different interests from those represented in the first chamber’ (Russell 2001a: 443) and by providing for more independent scrutiny of the executive (Russell 2001a: 447-448), the value of checks and balances is enhanced (Watts 2006: 14). The importance of check and balances holds true not only for legislative functions, but also for extra-legislative functions attributed to Parliaments and underlines the essential role of control in a parliamentary democracy.

In federal (and in regionalised) states, which almost all feature second chambers (Watts 2006: 2), the different interests represented by a second chamber are those of the subnational units and are therefore of a territorial nature (Palermo and Kössler 2017: 164). The main reason for this is that participation in central decision-making compensates for subnational units’ loss of sovereignty (Palermo and Kössler 2017: 164). In addition, a second chamber provides a forum for debate among the different territorial levels and directly or indirectly links the national Parliament to regional legislatures and executives (Russell 2001b: 109).

When discussing the functions of federal or non-federal second chambers the focus is mostly on legislative powers, including powers of constitutional amendment and in financial and budgetary matters. Much less attention is given to extra-legislative functions, for example scrutiny of the Government, or participation in international affairs or appointment powers.

Against this background, the paper examines non-legislative powers of second Chambers in federal or quasi-federal systems by looking at the German and the Austrian *Bundesrat*, the Swiss Council of States, the Senates of Belgium, Spain and Italy and the House of Lords as a case of its own. Firstly, extra-legislative powers will be grouped into different categories such as relations with the Government, appointment functions and functions in the field of international affairs, powers in relation to the European Union and functions granted to maintain the legitimate constitutional order. Secondly, considerations will be made on the



effectiveness of extra-legislative powers attributed to federal or quasi-federal second chambers in representing territorial interests.

2. Functions *vis-à-vis* the Government

Functions of second chambers *vis-à-vis* the Government mainly include oversight and control functions of governmental activities, but can also themselves be of an administrative nature. Instruments may vary from the vote of confidence (or no confidence), essential for the Government to remain in power, to general or more specific scrutiny powers towards governmental actions including means to voice (non-binding) suggestions for the Government.

Generally, a confidence vote, as the strongest means of parliamentary control over governmental actions, is a prerogative of parliamentary chambers elected directly by the people. Therefore, it is not typically a function of second chambers in federal or regionalised systems that are supposed to represent the interests of the territorial level (Russell 2001b: 447). This is clearly shown by the example of the Italian Senate which holds the power of the confidence vote.^I Italian Senators are directly elected, albeit on a regional basis, but this criterion refers only to the delimitation of the constituencies.^{II} The Constituent Assembly rejected the idea of a body representing vocational categories or regional interests, therefore construing the Italian Senate as a popular second chamber of reflection (Ferrara 1984: 23-25).

The means to scrutinise and monitor the activities of the Government include questions put to the Government, motions approved to give political directions to the executive or enquiries conducted and reports elaborated by committees, generally in addition to their legislative work. Through these instruments, second chambers can exert political pressure and shape the political mood by tackling specific matters of relevance to the regional level. An example is the General committee for the Autonomous Communities in the Spanish Senate: in addition to its legislative work in the area of territorial issues, the General committee carries out inquiries and conducts debates in relation to the regions (Russell 2001: 111-112). The same applies for the UK House of Lords Committees which conduct in-depth analysis of public policies, also on behalf of territorial issues (Russell 2006: 83-86), thereby not only gaining the basis for their legislative work but also making suggestions for future



governmental action. The 2017 Brexit Devolution report of the European Union Committee can be cited as example.^{III} The report clearly underlined the potentially dangerous effects of Brexit on the devolution settlements and recommended that the Government develop a coherent strategy and framework of guiding principles together with the devolved institutions,^{IV} therefore not only scrutinising the activities of the Government, but also suggesting a certain course of action to the executive. In some cases, Committees have powers similar to the judiciary exercising truly investigative powers, as is the case for the Italian Senate.^V Nevertheless, investigative powers seem more linked to a general function of oversight than to the specific function of representing territorial interests (Dickmann 2009: 181-184).

These instruments of oversight seem less important if the relationship between the Government and the second Chamber is based on mandatory and regular information rights, thus allowing for comprehensive control of the executive's activities. This is the case of the German *Bundesrat*. The Basic Law states in Article 53(3) that the *Bundesrat* has the right to be informed by the Federal Government fully and on an ongoing basis in regard to all Government business and is entitled to summon members of the Federal Government to attend its meetings.^{VI} In addition, members of the Federal Government are individually entitled to attend all meetings and are allowed to speak. However, it must be pointed out that in regard to the representation of the territorial element these information rights are of minor importance; the composition of the German *Bundesrat* by delegates of the subnational executives secures an efficient information exchange between the regional and the federal executives (Herzog 2008: 977).

Coming to the area of administrative functions exercised by second chambers, the German *Bundesrat* must again be cited. In particular, the *Bundesrat* participates in the federal administration by consenting to regulations at the federal level.^{VII} In contrast to the legislative level, there is no mediation committee^{VIII} to decide on conflicts with the federal Government. Therefore, the *Bundesrat* has an absolute veto right in this regard, which allows the *Bundesrat* substantial influence on the content of such regulations (Kloepfer 2011: 520). The same rights apply to general administrative provisions affecting the competencies of the *Länder*.^{IX} This sort of administrative power is somewhat exceptional and can be considered a distinctive element of German federalism which features an ambassadorial second Chamber. In combination with the particular institutional design of the German *Bundesrat* which implies



that the delegates vote *en bloc* according to the instructions of the Governments of their respective *Länder*^x (Palermo and Kössler 2017: 165), the administrative power of the German *Bundesrat* enhances its role as the representative of the *Länder*.

3. Appointment Functions

Second chambers may exercise, alone or together with other constitutional organs, a range of appointment rights with regard to the executive branch and to the judiciary (Palermo and Kössler 2017: 193).

Second chambers can have the right to appoint high executive offices as is the case for the Spanish Senate, which appoints six members of the Court of Auditors.^{xI} Appointment rights may extend to key figures of the constitutional order. In Italy, according to Article 83 (1 and 2) Constitution, the Head of State is elected in a joint meeting by the Senate and the Chamber of Deputies in which regional delegates participate to represent the territorial element, although only symbolically (Rescigno 1978: 3).

In the context of territorial representation, the appointment of constitutional judges is of particular interest. According to Article 84 (1) Basic law, the German *Bundesrat* elects half of the members of the German Constitutional Court by a two-thirds majority. The Austrian *Bundesrat* proposes three members and one substitute member of the Constitutional Court to the Federal President who nominates them, the other members being proposed by the National Council and the Federal Government.^{xII} The Belgian Senate, alternatingly with the Chamber of Deputies, proposes candidates for the Constitutional Court to the King who appoints them for life.^{xIII} Due to the specific features of Belgian federalism, which accommodates not only territorial interests but linguistic group interests as well, six judges must belong to the Dutch language group, six to the French language group and one of the judges must have an adequate knowledge of German.^{xIV} The Spanish Senate appoints one third of the twelve Constitutional Court judges from a list of candidates proposed by the Assemblies of the Autonomous Communities.^{xV} The right of the Autonomous Communities to propose candidates was established to enhance the territorial element of the Senate, considered to be too weak due to its mixed composition of senators elected in direct universal suffrage and a only a minority of one fifth appointed by the Assemblies of the Autonomous Communities^{xVI} (Palermo and Nicolini 2013: 195). Nevertheless, if the



proposed candidates fail to reach the majority required, the Spanish Senate can proceed to nominate other candidates without the contribution of the Autonomous communities.

4. Functions Related to International Affairs

In the area of international affairs, second chambers can be involved in the ratification and implementation of international treaties, thus participating in national treaty-making power (Palermo and Kössler 2017: 199). In Austria, pursuant to article 50(2 subsection 2) Federal Constitutional Law, the *Bundesrat* has to consent to each ‘political’ or legislation-affecting treaty concerning the powers of the *Länder*. This function is interpreted in extensive manner, covering all treaties with a potential to curtail or influence *Länder* powers (Öhlinger 2013: 2). Similarly, the German Basic Law states in Article 59(2) that treaties are incorporated by federal law into the German legal system and thus require the consent or participation of the bodies responsible for their enactment – including potentially that of the German *Bundesrat* in accordance with the respective subject-matter. Therefore, the German *Bundesrat* retains a veto right in the area of international treaties which parallels its powers in the legislative area.

In some cases, second chambers exercise their treaty making powers together with the first chamber. This is the case in Spain where, according to Article 94(1) of the Constitution, treaties related to subject-matters of some importance, such as treaties of a political nature, treaties affecting the territorial integrity of the state, or treaties implying the amendment or the repeal of laws can be only ratified by prior authorization from the *Cortes Generales*, composed of the Congress and the Senate.^{xvii} The decision is taken in a joint session by a majority vote in each of the Houses, the procedure being initiated by the Congress.^{xviii} Although at first sight the Senate appears to be on equal footing with the Congress, should the Senate not agree to ratify the treaty, a Mixed Committee between both chambers is set up in order to reach an agreement and, if no agreement is reached, the Congress overrides the Senate by overall majority (Castellà Andreu 2006: 891-892).

Another example can be found in the Swiss Constitution. According to Article 166 Swiss Constitution, the Federal Assembly, composed of the directly elected National Council and the Council of States representing the Cantons,^{xix} participates in foreign policy, supervises foreign relations and approves international treaties. Both chambers are of equal standing^{xx}



and exercise their functions in separate proceedings and by separate votes.^{xxi} Therefore, the approval of a treaty requires the agreement of both chambers.^{xxii} If they disagree, a conciliation procedure aims at reaching an agreement. When one of the two chambers still does not approve, the rejection is final,^{xxiii} thus giving the Council of States an absolute veto power (Biaggini and Sarott 2006: 753 -756).

5. Functions Related to the European Union

The functions of second chambers related to the European Union stem originally from their participation in national treaty-making power (Palermo and Kössler 2017: 199). Traditionally, special provisions safeguard the role of Parliaments in relation to the treaties constituting the basis of the European Union, acknowledging their particular nature and their effects on the constitutional order of the Member States linked to the transfer of sovereignty. From a regional point of view, the transfer of sovereignty leads to an erosion of the powers constitutionally conferred on the subnational units. Therefore participation and control in the process of European integration represents a necessity for the subnational level. As an example, Article 50 (1 subsection 2 and 4) of the Austrian Federal Constitutional Law can be given, which defines treaties modifying the treaties constituting the basis of the European Union as a particular category which require the consent of the Austrian *Bundesrat* with a qualified quorum and majority.

Until the Treaty of Maastricht of 1992, national Parliaments were absent from the European integration process except for their role in the treaty-making process. The Maastricht treaty generated a series of constitutional amendments to accommodate the new role of national Parliaments, for example in Germany, which introduced Article 23 Basic Law (Badura 2015: 491). With the entry into force of the Treaty of Lisbon in 2009, national Parliaments acquired an important role in the European Union. According to Article 10 Treaty of the European Union, they represent together with the European Parliament the two pillars of democracy in the European Union and contribute actively to its good functioning. Likewise, until the Maastricht Treaty the regional element had been absent in the architecture of the European Union. Today, according to Article 4(2) Treaty of the European Union, the European Union respects the national identities of the Member States, ‘inherent in their fundamental structures, political and constitutional, inclusive of regional



and local self-government'. Pursuant to Article 13(4) of the Treaty on European Union, the EU-organs are advised by a Committee of the Regions, representing the regional and local element.^{XXIV}

One of the more prominent prerogatives granted to national Parliaments by European Union law is the mechanism of subsidiarity scrutiny, according to article 5 (3) of the Treaty of the European Union and the Protocol on the application of the principles of subsidiarity and proportionality (Protocol No. 2 to the Lisbon Treaty). It entitles the chambers of national Parliaments to scrutinise draft EU-legislation on its compliance with the principle of subsidiarity by giving a reasoned opinion within eight weeks. If a certain threshold of negative opinions by national Parliaments is reached, the legislative procedure may even be stopped. To date, territorial second chambers have been far more active in this regard than the first chamber, for example the Austrian *Bundesrat* (Gamper 2016: 356-357). This tendency is confirmed by the latest data on reasoned opinions given in 2016 (European Commission 2017:8). Nevertheless, efficient regional involvement in subsidiarity scrutiny depends on a strong representation of regional interests in the second chamber, or, if this is not the case, on mechanisms set up at the national level to involve the regional level in the drafting of the opinion (Popelier and Vandenbruwaene 2017: 213-216).

EU-Member States have introduced explicit obligations for their Governments to inform and consult both chambers about all aspects relating to matters of European integration, and have entitled the Parliament to bind the Government to a certain position at the European level, in particular within the Council of Ministers. As far as second chambers are concerned, the example of the Austrian *Bundesrat* can be mentioned. According to Article 23e(4) of Austrian Federal Constitutional Law, the Austrian *Bundesrat* can give an opinion on a proposal of a binding legal act at the European level requiring national provisions if it would curtail the powers of the *Länder*. The opinion basically binds the Austrian Government in the Brussel's negotiation process; the federal minister representing Austria in the negotiations may depart from this opinion only for 'compelling integration and foreign policy reasons' and if the Austrian *Bundesrat* does not object within an adequate timeframe. The power confirms the idea of the *Bundesrat* as a protective body of the Austrian *Länder* – although this role is not exercised in practice (Gamper 2006: 808). The Austrian provisions are similar to the German model in relation to the powers of the German *Bundesrat*. In addition, the German *Bundesrat* has the right to nominate a representative of the *Länder*, who represents



Germany in the Council of Ministers and can vote on behalf of Germany in cases where the subject matter discussed concern primarily legislative powers of the *Länder*.^{xxv} Such powers emphasise the federal character of the state and provide the subnational units with the chance of influencing the European decision-making process in an indirect way through the second chamber (Kloepfer 2011: 526).

In other cases, an ordinary law determines specific procedural rules concerning the participation of the Parliament in European decision-making in general and therefore also in regard to the second Chamber. This is the case in Italy, where State law n. 234 of 2012 vests Parliament and thus its two chambers with information rights, and rights to oversee and direct the activities of the Government, and provides the procedural rules for enacting subsidiarity control at the national level.^{xxvi}

Although all second chambers of the federal EU-Member States are involved in the European decision-making process through the procedures set out above, it must be pointed out that the extra-legislative functions of second chambers with regard to territorial interest are overlapped by procedures of intergovernmental cooperation set up between the national and the regional executive which supplement regional participation through second chambers. This is due to the role of the Council of Ministers which, according to Art 16 (2) Treaty of the European Union, represents the Member States in the European decision-making process. For example, in Austria, a constitutional agreement between the *Länder* and the Federation, and an agreement between the *Länder* themselves, determines the *Länder's* right to bind the Federation by a uniform opinion given by the *Länder*, and to participate in the meetings of the European Council of Ministers when subject-matters within the provincial competencies are concerned. Even if these provisions are considered to be of a rather symbolic nature (Öhlinger and Konrath 2013: 33), they reflect the federal organisation of the state. In Italy, the right of the regions to participate in the decision-making process at the European level, according to Article 117 (5) of the Italian Constitution (introduced by the 2001 constitutional reform), offers the legal basis to conclude an agreement on the regional participation in the European decision process between the Government and the Presidents of the regions (Happacher 2012: 386-392).



6. Second Chambers as Guarantors of the Constitutional Order

The last category of extra-legislative functions is linked to guaranteeing the constitutional order. In addition to their role in processes of constitutional amendment, second chambers may also be provided with powers in relation to sustaining the legitimate constitutional order, including functions in constitutionally defined emergency situations like breaches of the constitutional duties by constitutional organs or by the subnational units themselves. In this regard, the additional role of second chambers, in maintaining the principle of separation of powers from a territorial point of view, is of particular importance, constituting an additional form of control over the executive vested with emergency powers.

In some cases second chambers may initiate or take part in impeachment procedures. Pursuant to Article 61 Basic Law, the German *Bundesrat*, by a majority of two thirds, can impeach the Federal President for wilful violation of the Basic Law or of any other federal law. In Italy, according to Article 90 (2) of the Constitution, the President of the Republic can be impeached before the Constitutional Court by a joint vote of the Chamber of Deputies and the Senate.

Another power of second chambers regards the referral of laws to the Constitutional Court. This power can be granted to the second chambers as a plenary or to a certain number of their members. In this way, they contribute to the maintenance of the constitutional legal order, either with the specific view to protect the constitutional status of territories, or to protect the constitution generally. Austria and Germany can be cited as examples. In Austria, Article 140 (1 subsection 2) Federal Constitutional Law gives one third of the members of the *Bundesrat* the right to file an application for reviewing a Federal law with the Constitutional Court, by claiming it to be contrary to federal constitutional law. In this case, a political minority in the *Bundesrat* is entitled to supervise federal legislation, even irrespective of territorial interests (Rohregger 2003: 84). In Germany, according to Article 93(1 subsection 5) Basic Law, the *Bundesrat* has the power to file an application to the Federal Constitutional Court for reviewing federal laws on their alignment with concurrent legislative powers, thus safeguarding the constitutional order in respect of territorial interests.

As guarantors of the constitutional legal order, some federal second chambers have the power to consent to national measures directed at subnational entities which fail to fulfil their constitutional obligations. If a German *Land* were to fail to comply with its obligations



under the Basic Law or other federal laws, according to Article 37 Basic Law the Federal Government may take the necessary steps to compel the *Land* to comply with its duties on condition that the *Bundesrat* consents. When exercising this power of the Federal Government, known as *Bundeszwang* – which until now has never been applied – measures must be necessary and proportional (Kloepfer 2011: 992-993).

Similar to Article 37 German Basic Law, Article 155 of the Spanish Constitution gives the Government the power to take all necessary measures if an Autonomous Community does not fulfil obligations imposed by the Constitution or laws, or acts in a way that seriously prejudices the general interest of Spain (Uriarte Torrealday 2013: 172). These measures are considered to be of an exceptional nature (*Ibid.*) and can be only envisaged after the Government has lodged a complaint with the President of the Autonomous Community, and this has not been correctly attended to. According to Article 155 Spanish Constitution, the Senate has to approve these measures by an absolute majority, after having heard the Autonomous Community. The fact that the power of approval is exclusively assigned to the Spanish Senate emphasises its role as a representative and guardian of the territorial element in situations of political crisis, such as, most recently, the first application of Article 155 *vis-à-vis* Catalonia on October 27th, 2017 in reaction to a declaration of independence by the Catalan Assembly.^{xxvii}

Another example is Article 100 Austrian Federal Constitutional Law, enabling the Federal Government to request the dissolution of a *Land* Parliament by the Federal President with the consent of the *Bundesrat*, for example if the regional assembly is no longer able to form a political majority (Liehr 2001: 5).

7. Extra-legislative Functions and Effective Territorial Representation: Some Reflections

As one can easily see from this certainly not exhaustive overview of extra-legislative functions of second chambers, these powers cover a wide range of subjects. In addition, chambers matching both the ambassadorial and senatorial models are provided with such powers. Thus, to answer the question if they entail an effective representation of subnational interests, other aspects must be considered.



The first criterion that comes to mind is the nature of the functions in regard to their exclusivity. Palermo and Nicolini (2013: 192-201) classify the powers of federal second chambers into parallel, shared, joint and exclusive functions. Parallel functions are functions attributed to both chambers but exercised separately. If powers are attributed to more than one constitutional organ, they can be of shared or joint nature. If they are shared, they are exercised by distinct acts or decisions of each organ. If they are joint functions, they are again attributed to more than one organ but exercised through joint decisions regularly taken by an organ composed of the second Chamber and other constitutional organs, in most cases the First Chamber. Exclusive functions are powers attributed to second chambers only and therefore can be qualified as specialised powers.

Most control and oversight powers concerning the national executive are exercised separately by both chambers and can therefore be classified as parallel functions. By exercising these powers, federal second chambers, independently from the first chamber, contribute to the scrutiny of the executive with a view to protect the separation of powers and checks and balances.

Appointment functions are often joint or shared functions. For example, Article 157 of the Swiss Constitution requires the National Council and the Council of States to join, under the umbrella of the United Federal Assembly, for, *inter alia*, elections of the judges of the Federal Supreme Court or the members of the Federal Council. In such cases of joint action, the number of members of each chamber plays a significant role: if the second chamber is numerically disadvantaged, the first chamber will prevail, which weakens the territorial element. The appointment of Austrian Constitutional Court judges is an example of a shared function insofar as it is not only the *Bundesrat* that proposes members, but also the National Council as first chamber and the Federal Government, while the Federal President appoints them. When looking at appointment functions, the influence of second chambers appears of a very indirect nature as usually the nominees are not held accountable to the second chamber (or to any other organ detaining similar appointment powers). But nevertheless, they enhance the territorial element within the state and fulfil a guaranteeing function, in particular with regard to the appointment of constitutional judges (Doria 2006: 35).

The strongest representation of regional interests usually manifests itself when exclusive functions of territorial second chambers are concerned. In general, these functions are granted as a substitute for the powers transferred to the federal level by the constituent units



and aim to secure the 'statehood' of the subnational entities (Palermo and Nicolini 2013: 200-201). Among them are the powers of second chambers in international affairs and in European affairs, the right to challenge federal laws at the Constitutional Court and powers linked to the role of guarantor of the constitutional order.

Nevertheless, it must be pointed out that the role of second chambers as guardians of the constitutional order can also imply supervision and control over subnational units. This is the case when Article 155 of the Spanish Constitution seeks to force subnational entities into fulfilling their constitutional obligations in the general interest of Spain. In this perspective, it even allows for the extreme measure of ceding the Government the power to remove the President of an Autonomous Community and to dissolve its Regional Assembly.^{xxviii}

The application of Article 155 of the Spanish Constitution shows that, when the territorial impact of extra-legislative functions of second chambers is evaluated, the property of exclusivity of the function is not sufficient. Other elements have to be taken into account, such as the genesis of the federal or regional element and the party system. As far as the first variable is concerned, Article 155 of the Spanish Constitution, although a legal transplant of the German *Bundeszwang*, lacks the strong federal background of the corresponding German rule, characterised by the principles of federal comity and trust, federal cooperation and the *Bundesrat's* role of safeguarding the cultural identities of the *Länder* (Kotzur 2006: 261-264).

As far as the party system is concerned, the role and character of the political parties, in particular with regard to the presence or absence of regional parties and the degree of symmetry or asymmetry between them and national parties, represent important factors of any federal second Chamber (Watts 2006: 10). This was shown clearly when Article 155 of the Spanish Constitution was applied for the first time. Due to a strong asymmetry between national and regional parties linked to weak representation of the regional element, the vote was taken along national party lines and not according to territorial interests.^{xxix} Thus, party politics can have a major influence in weakening the effective representation of territorial interests, in particular if the second chamber does not stand for effective territorial representation as in the case of the Spanish Senate (Virgala Foruria 2013: 66).

Therefore, the capacity of second chambers to grant effective representation of subnational interests depends not only on their functions, but also on their institutional design in relation to elements such as composition, appointment methods and procedures



or the possibility to impose mandatory instructions on the delegates (Palermo and Kössler 2017: 169-177). Without doubt, an institutional design with mandatory instructions and accountability to territorial institutions – as it is the case for the German *Bundesrat* (Russell 2001b: 112; 115) – provides more effective representation of territorial interests.

Even where a second chamber is reorganised into territory-based institutions, however its role in representing territorial interests at the central level is not always strengthened. This is the case of the Belgian Senate after its last reform, which enhanced the territorial element on the institutional level but reduced the legislative powers of the Senate at the same time (Goossens and Cannoot 2016: 38-42). A similar situation would have emerged in case of a reformed Italian Senate if the 2016 Constitutional reform^{xxx} had successfully passed the referendum. The reform would have transformed the Italian Senate into a body representing the territories of the Italian Republic, but without the power of a confidence vote, while its legislative powers would have been abolished except for a few subject-matters, among them constitutional amendments in restricted fields of interest at the subnational level (Bertolini 2016: 6-24). In sum, the Senate would have been given a primarily consultative role with some vague oversight powers on public policies.

In the context of the European Union, functions assigned to second chambers cover controlling the activities of the national Government on the European level and the activities of the European Union itself, in particular in regard to the subsidiarity principle. However, the scrutiny of subsidiarity has an only indirect impact on the constitutional position of the subnational units inasmuch as the subsidiarity principle aims at maintaining the powers of the Member States and not directly the powers of the regions set out at constitutional level (Calliess 2016: 134).

Generally, extra-legislative functions of federal second chambers complement their legislative powers. Irrespective of whether second chambers are vested with strong or weak legislative powers, extra-legislative powers offer additional channels to represent territorial interests at the central level, thus contributing to the separation of power and democracy. This can enhance the federal element but also serve other constitutional interests. The strongest representation of subnational interests is vested in exclusive powers of second chambers with a strong federal institutional design, which generally parallel a strong position in relation to the legislative, as the German *Bundesrat* proves. However, extra-legislative functions can also be attributed to second chambers to supplement a weaker role at the



legislative level, at the same time satisfying a more general interest of maintaining the legitimate constitutional order, as the case of the Spanish Senate shows.

Nonetheless, extra-legislative and legislative functions are not the only way for subnational units to participate in the central decision-making process and to represent the interests of the territorial level. As Palermo and Kössler have pointed out (Palermo and Kössler 2017: 177-178), participation of the subnational units through intergovernmental relations and thus outside the Parliament is increasing, not only in the field of European integration. Therefore, the role of second chambers in federal or quasi-federal systems as representatives of the regions is also being challenged by these developments.

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^I Article 94 (1) Italian Constitution.

^{II} Article 57 (1) and Article 58 (1) Italian Constitution.

^{III} European Union Committee, 2017, Brexit: devolution; 4th Report of Session 2017-19 - published 19 July 2017, available at <https://www.parliament.uk/brexit-devolution-lords-inquiry>.

^{IV} See European Union Committee, 2017, Brexit: devolution. Summary of conclusions and recommendations, points 27 to 48, available at https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/9/911.htm#_idTextAnchor113.

^V Article 82 Italian Constitution.

^{VI} For details, see Badura 2015: 613-614.

^{VII} Article 80 (2) Basic Law.

^{VIII} See Article 77 Basic Law on the Mediation Committee in the legislation process.

^{IX} Articles 82 and 88 Basic Law.

^X Article 51 (3) subsection 2 Basic Law.

^{XI} Organic Act 2/1982, of May 12th, section 30.

^{XII} Article 147 (2) Austrian Federal Constitutional Law.

^{XIII} Article 142 (1) Belgian Constitution; Articles 31 and 32 Special Act of 6 January 1989 on the Belgian Constitutional Court.

^{XIV} On the specific features of Belgian federalism, see Popelier and Lemmens, 2015: 75 -84.

^{XV} Article 159 (1) Spanish Constitution, Organic Law n.6/2007.

^{XVI} Article 69 Spanish Constitution, see in detail Castellà Andreu 2006: 872 -875.

^{XVII} Article 66 (1) Spanish Constitution.

^{XVIII} Article 74 Spanish Constitution.

^{XIX} Article 148 (2) Swiss Constitution. For the composition of the directly elected National Assembly see article 149 Swiss Constitution, for the composition of the indirectly elected Council of States see Article 150 Swiss Constitution.

^{XX} Article 148 (2) Swiss Constitution.

^{XXI} Article 156 (1) and (2) Swiss Constitution.

^{XXII} Article 156 (2) Swiss Constitution.

^{XXIII} Article 156 (3) Swiss Constitution; Article 95 Federal Act on the Federal Assembly 2002.

^{XXIV} Articles 300 and 305 – 307 Treaty on the Functioning of the European Union.

^{XXV} Article 23 subsection 6 Basic Law.

^{XXVI} In particular Articles 4 to 16.

^{XXVII}

See <http://www.senado.es/web/actividadparlamentaria/iniciativas/detalleiniciativa/index.html?legis=12&id1=596&id2=000001>.

^{XXVIII}

See <http://www.senado.es/web/actividadparlamentaria/iniciativas/detalleiniciativa/index.html?legis=12&id1=596&id2=000001>.



[96&id2=000001.](#)

XXIX For the voting results of October, 27th 2017 see <http://www.senado.es/web/actividadparlamentaria/sesionesplenarias/pleno/rwdsesionespleno/detalle/index.html?id=30&legis=12>.

XXX See the text of the constitutional reform bill at <http://www.gazzettaufficiale.it/eli/id/2016/04/15/16A03075/sg>.

References

- Badura Peter, 2015, *Staatsrecht*, C.H. Beck, München
- Bertolini Francesco, 2016, 'Le funzioni delle Camere (art.55 Cost.)', in Marini Francesco Saverio and Scaccia Gino (eds), *Commentario alla riforma costituzionale del 2016*, Edizioni scientifiche italiane, Napoli: 1-24
- Biaggini Giovanni and Sarott Chasper, 2006, 'The Swiss Council of States (Ständerat / Conseil des Etats)' in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers. Handbook for Constitutional studies on Bicameralism*, Giuffrè, Milano, 721-779.
- Calliess Christoph, 2016, 'Art 5', in Calliess Christoph and Ruffert Matthias (eds), *EUV/AEUV*, C.H. Beck, München, 124-154.
- Castellà Andreu Josep Maria, 2006, 'The Spanish Senate after 28 Years of Constitutional Experience. Proposado for reform', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers. Handbook for Constitutional studies on Bicameralism*, Giuffrè, Milano, 859-909.
- Dickmann Renzo, 2009, 'Tratti comuni e profili originali della funzione parlamentare d'inchiesta nel diritto comparato', in Dickmann Renzo (ed), *L'inchiesta parlamentare nel diritto comparato*, Jovene, Napoli, 175-184.
- Doria Giancarlo, 2006, *The Paradox of Bicameral Federalism*, European Diversity and Autonomy Papers, available at www.eurac.edu/edap.
- European Commission, 2017, *Annual report 2016 on subsidiarity and proportionality*, COM(2017)600 final.
- European Union Committee, 2017, *Brexit: devolution. Summary of conclusions and recommendations*, available at https://publications.parliament.uk/pa/ld201719/ldselect/ldecom/9/911.htm#_idTextAnchor113.
- European Union Committee, 2017, *Brexit: devolution; 4th Report of Session 2017-19 - published 19 July 2017*, available at <https://www.parliament.uk/brexit-devolution-lords-inquiry>.
- Ferrara Gianni, 1984, 'Art.55', in Branca Giuseppe (ed), *Commentario della Costituzione, Le Camere Tomo I*, Zanichelli/Foro Italiano, Bologna/Roma, 1-42.
- Gamper Anna, 2006, 'The Austrian Bundesrat', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers. Handbook for Constitutional studies on Bicameralism*, Giuffrè, Milano, 781-827.
- Gamper Anna, 2016, 'Mitwirkung des nationalen Parlaments an der Subsidiaritätskontrolle', in Griller Stefan et al. (eds), *20 Jahre EU-Mitgliedschaft Österreichs*, Verlag Österreich, Wien, 339-358.
- Goossens Jurgen and Cannoot Pieter, 2015, 'Belgian federalism after the Sixth Reform', *Perspectives on Federalism*, VII(2): 29-55
- Happacher Esther, 2012, *Südtirols Autonomie in Europa*, Jan Sramek, Wien.
- Herzog Roman, 2008, 'Der Bundesrat', in Isensee Josef and Kirchhof Paul (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland, III*, C.F. Müller, Heidelberg, 943-990.
- Kloefer Michael, 2011, *Verfassungsrecht, Band I*, C.H.Beck, München.
- Kotzur Markus, 2006, 'Federalism and Bicameralism – The German “Bundesrat” (Federal Council) as an Atypical Model', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers. Handbook for Constitutional studies on Bicameralism*, Giuffrè, Milano, 65-95.
- Liehr Willibald, 2001, 'Artikel 100', in Korinek Karl and Holoubek Michael (eds), *Österreichisches Bundesverfassungsrecht*, C.F. Müller, Heidelberg.
- Meli Andreis B. and Schwab Philippe, 2009, 'Il controllo parlamentare in Svizzera', in Dickmann Renzo (ed), *L'inchiesta parlamentare nel diritto comparato*, Jovene, Napoli, 141-158.
- Öhlinger Theo and Konrath Christoph, 2013, 'Art 23e', in Korinek Karl and Holoubek Michael (eds), *Österreichisches Bundesverfassungsrecht*, C.F. Müller, Heidelberg.
- Palermo Francesco and Kössler Karl, 2017, *Comparative Federalism. Constitutional Arrangements and Case Law*, Hart Publishing, Oxford – Portland, Oregon.



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- Palermo Francesco and Nicolini Matteo, 2013, *Il bicameralismo*, Edizioni scientifiche italiane, Napoli.
 - Popelier Patricia and Lemmens Koen, 2015, *The Constitution of Belgium*, Hart Publishing, Oxford – Portland, Oregon.
 - Popelier Patricia and Vandenbruwaene Werner, 2017, ‘The Subsidiarity Mechanism as a Tool for Inter-Level-Dialogue in Belgium: On “Regional Blindness” and Co-operative Flaws’, *European Constitutional Law Review*, VII: 204-228
 - Renwick Alan, 2017, *The process of Brexit: what comes next?*, available at <https://www.ucl.ac.uk/constitution-unit/news/the-process-of-brexit>.
 - Rescigno Giuseppe Ugo, 1978, ‘Art.83-86’, in Branca Giuseppe (ed), *Commentario della Costituzione, Il Presidente della Repubblica*, Zanichelli/Foro Italiano, Bologna/Roma, 1-222.
 - Rohregger Michael, 2003, ‘Art 140’, in Korinek Karl and Holoubek Michael (eds), *Österreichisches Bundesverfassungsrecht*, C.F. Müller, Heidelberg.
 - Russell Meg, 2001a, ‘What are Second Chambers for?’, *Parliamentary Affairs*, LIV: 442-458.
 - Russell Meg, 2001b, ‘The Territorial role of Second Chambers’, in Baldwin Nicholas D. J. and Shell Donald (eds), *Second Chambers*, Frank Cass, London-Portland, Oregon, 105-118.
 - Russell Meg, 2006, ‘The British House of Lords: A Tale of Adaption and Resilience’, in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers. Handbook for Constitutional studies on Bicameralism*, Giuffrè, Milano, 65-95.
 - Uriarte Torrealday Roberto, 2013, ‘Some Questions Regarding Responsibility for Non-compliance with International Obligations in Federal States and in Spain’, in López-Basaguren Alberto and Escajedo San Epifanio Leire (eds), *The Ways of federalism in Western Countries and the Horizons of Territorial Autonomy in Spain*, vol. 1, Springer, Heidelberg/New York/Dordrecht/London, 165-178.
 - Vírgala Foruria Eduardo, 2013, ‘The Participation of Autonomous Communities in the Central Bodies of State’, in López-Basaguren Alberto and Escajedo San Epifanio Leire (eds), *The Ways of federalism in Western Countries and the Horizons of Territorial Autonomy in Spain*, vol. 2, Springer, Heidelberg/New York/Dordrecht/London, 63-82.
 - Watts Ronald L., 2006, ‘Federal Second Chambers compared’, *federalismi.it*, n.15/2006, available at www.federalismi.it.



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The Swiss Ständerat: a Model of Perfect Bicameralism

by

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E -152



Abstract

This paper presents the Swiss Ständerat as a model of perfect bicameralism. It looks at the constitutional design of the second Chamber, examines the evolution of the Ständerat and critically assesses its current functioning. The author claims that the Swiss Federal Assembly is still based on almost perfect bicameralism but that the second Chamber only very imperfectly represents the regions. Having highlighted the current role and justification of the second Chamber, the paper will raise the question whether the Ständerat fulfils other useful functions justifying its existence. Does the sheer fact of having two differently composed Chambers prevent capricious and precipitous decision-making? The paper then turns to alternative mechanisms of representing regions at the federal level, briefly looks at other mechanisms available to Cantons to make their voices heard in the capital and presents the House of the Cantons as an evolving third Chamber complementing the Ständerat.

Key-words

bicameralism, Ständerat, regional representation, Swiss federalism, intergovernmental relations



1. Introduction

It would most likely come to a great surprise to most Swiss that the Council of States, the *Ständerat* (Conseil des Etats, Consiglio degli Stati), is linked to the notion of perfection in a conference on “Representing Regions, Challenging Bicameralism”. The Swiss Council of States, in recent years, has been strongly criticized precisely for its lack of representing the regions, so strongly that few people still think of it as a model of perfection in any possible meaning of the term.

If today’s Council of States no longer represents the regions, or does so rather ineffectively, what could it possibly be good for? Is the Council of States consequently not just an outdated Chamber favouring grand old parties and backward people at the expense of democracy and innovation? These are the kind of questions Swiss members of the second Chamber are more familiar with. The old institution today seems to be trapped in Abbé Sieyès famous epigram: “If the second Chamber dissents from the First, it is mischievous; if it agrees with it, it is superfluous.”

This paper is not an attempt to solve the Council of States’ identity crisis but will nevertheless defend its existence. If one understands the purpose of a bicameral system solely in representing the regions at the federal level and in safeguarding meaningful participation of the constituent units at the centre, one cannot help but conclude that the Swiss Council of States of today is, at least in part, a failure. Members of the Council of States sit and vote accordingly to party alliances and follow party programs which may or may not converge with the interests of the Cantons. It is only when the interest of one particular Canton or a geographic or linguistic region is at stake, that the members of the second Chamber overcome party politics and favour their Canton or region – but in such a case, the members of the National Council do just the same.

In this paper, I will first present the Swiss Council of States as a model of perfect bicameralism and lay out the main features of the Swiss institutional set-up. For this purpose, I will explore the origins of Swiss bicameralism as an institutional compromise to accommodate the conservatives, the composition of the Federal Assembly and the reform proposals relating to the *Ständerat*. I will then turn to the main question of the extent to which the Council of States takes the interests of the Cantons or regions into account and



effectively fulfils its role of representing them. If we cannot help but conclude that the Swiss Council of States of today is, at least in part, failing in representing the Cantons, inevitably three further questions arise: Firstly, if the Council of States is not very effective in representing the Cantons and their interests in Bern, does it fulfil any other useful function to justify its existence? Is it fair to assume that, as generally acknowledged, bicameral law-making and bicameral decision-making beyond law-making as such improve the quality of decision-making in the Federal Assembly? Does the Swiss Council of States live up to the role of the *chambre de réflexion* or Chamber of reason in which it likes to portray itself? Secondly and closely linked to that: Does the separation of powers within the legislative branch provide a useful safeguard against unfettered majoritarianism and prove itself a valuable counterbalance to the democratic majority rule? Lastly, if the Council of States is not in a position to forcefully represent cantonal interests at the federal level, who else is? In this part, I will present other mechanisms available to Cantons and I will in particular introduce the House of the Cantons as an evolving third Chamber.

2. The Federal Compromise: Accommodating the Conservatives

2.1. Integrating Losing Forces into the New Federal System

The emergence of Switzerland as a federal state in 1848 is closely linked to the Sonderbund War of November 1847, a short civil war opposing the confederated Cantons. The liberal, urban and dominantly protestant forces had obtained the majority in the *Tagsatzung*, the Federal Diet, and proposed a new, more centralized constitution for the Swiss Confederation. As a consequence, in 1845 seven conservative, rural and dominantly catholic Cantons formed a separate alliance, the Sonderbund, to jointly defend their interests and oppose centralisation. When Lucerne recalled the Jesuits to take charge of the education system, as a reaction to measures taken by the Federal Diet against the Roman Catholic Church, armed radicals invaded the Canton and caused turmoil. To prevent a spreading of the conflict, the liberal majority of the Federal Diet decided to dissolve the separate alliance, which was in violation of the Federal Treaty of 1815, and to militarily enforce its decision. The not very bloody war ended with the defeat of the Cantons united by the Sonderbund and paved the way for the revision of the Federal Treaty of 1815 (Pahud de Mortanges 2017: 205; Heger 1990: 63-64).



The design of the new state, however, proved to remain controversial. The Constitution of 1848, transforming the Swiss Confederacy into a federal state, emerged as a strongly debated compromise between the liberal majority, advocating a unitary state and a powerful national government, and a conservative minority fighting for cantonal sovereignty and the preservation of a system of loose confederal cooperation (Jaag 1976: 10; Heger 1990: 65). In order to integrate the losing side in the civil war into the new political system, it was deemed necessary to preserve very far-reaching autonomy of the Cantons and to only centralise few matters of utmost importance to the rapidly industrialising state. Hence, the result of the constitution of 1848 was the creation of only a weak central state, and the preservation of strong cantonal independence (Linder and Vatter 2001: 96). While this vertical power-sharing structure allowed for the peaceful coexistence of communities – still not fully trusting each other, agreeing on the design of federal institutions posed a further challenge. Whereas the larger Cantons with thriving urban centres (the unionists) favoured parliamentary representation based on population size, the smaller rural Cantons (the federalists) insisted on upholding the intergovernmental system of the Federal Diet, characterised by unanimity requirements in most fields and by an equal number of delegates from each Canton acting on cantonal instructions (Pahud de Mortanges 2017: 208; Jaag 1976: 10; Marti 1990: 19). The conflict was rightly perceived as particularly menacing for the country, as the cleavage between large and small, urban and rural, catholic and protestant Cantons – and winners and losers in the war – largely coincided, and peace and stability was at risk (Linder and Vatter 2001: 96).

The way out of the controversy was a constitutional transplant: The introduction of the US model of bicameralism, combining a Chamber based on the equal representation of the constituent units with a Chamber based on population and giving both Chambers equal standing (Jaag 1976: 10; Heger 1990: 64-69).^I Just like the US Senate, the Council of States mirrors the federal structure of the country. It is composed of 46 “representatives of the Cantons”^{II} and stands for the principle “every Canton an equal vote”. Just like the US House of Representatives, the National Council ensures a democratic representation of the people based on population size (Vatter 2014: 312).^{III} The losing side of the Sonderbund, fearing a total loss of sovereignty by means of majoritarian decision-making, had successfully insisted on constraining majoritarianism by creating a second Chamber based



on equal representation and endowing it with equal prerogatives (Ebnöther 2017: 125; Bütikofer 2014: 21; Linder and Vatter 2001: 96).

From the beginning, the Swiss Council of States was seen less as a Chamber representing cantonal interests, than as a major concession to the catholic-conservative Cantons in curbing democratic majoritarian rule and enabling political cohesion (Heger 1990: 142). The counter-majoritarian elements introduced by the bicameral system and the requirement of a qualified majority for all constitutional changes ensured an appropriate representation of majority and minority views and conferred on the small cantons – when acting jointly – veto powers over centralizing forces (Ebnöther 2017: 122). The institutional compromise was not motivated by the need to protect linguistic minorities such as the French- or the Italian-speakers. This was not the salient cleavage of the time. There was no concern raised about the fact that German-speaking representatives were in a position to easily overrule the French- and Italian-speaking members of parliament; it seemed unlikely that the strongly opposing political camps within the German-speaking community would agree on crucial issues in the foreseeable future.

In the ratification process for the federal constitution, all the French-speaking, and all liberal Cantons opted in favour whereas five German-speaking, rural and conservative Cantons remained fiercely opposed to it (Marti 1990: 25). As unanimity would have been required to transform a confederacy into a federal state, the coming into being of the new state was severely flawed. The refusal of several small, rural, catholic, conservative and German-speaking Cantons to join the new state and the rejection of limitations of their sovereignty illustrates the depth of the cleavage and the necessity of considering the losing side's interests.

2.2. Providing 46 Seats for 26 Cantons

The Council of States is composed of 46 delegates of the Cantons. All Cantons are represented by two delegates but six by one only.^{IV} This inequality does not reflect differences in size or population but takes into account the fact that three Cantons went through a process of division before the establishment of the federal state. They were not allowed to double their voices accordingly and were referred to as half-cantons.^V Ever since the 1999 constitutional revision, the six Cantons with only one delegate no longer carry the



diminutive label, but still count as half in the Council of States and for proposals submitted to the vote of the People and Cantons.

In the past, it has repeatedly been requested that the six former half-cantons be upgraded to units with equal voice. In 1981, on the occasion of the establishment of the new Canton of Jura, the six half-cantons demanded by means of a parliamentary initiative to receive the status and prerogatives of fully-fledged Cantons. The reform proposal was, however, not pursued. The main reason for this was that all half-cantons are German-speaking and that the amendment would have increased the veto powers of German-speaking, mostly small and rural Cantons, at the expenses of the French-speaking west and the more populated urban Cantons.^{VI} The change would not only have affected the composition of the Council of States but also the qualified majority needed for constitutional amendments and for the accession to organisations of collective security, such as the NATO, or to supranational communities, such as the EU.^{VII} It did therefore not come as a surprise that the issue of upgrading the six former half-cantons to Cantons with full voice was again raised later in the context of the highly controversial debates of Switzerland's integration into the EU. While this debate is politically sensitive and characterized by deep cleavages between the French-speaking west and the German-speaking east of the country, it also illustrates the enduring urban-rural division. A close analysis of voting outcomes relating to the role of Switzerland in Europe and the world and the preferences for integration or a Swiss *Sonderweg* shows that most cities in the German-speaking part of the country vote in line with their French-speaking counterparts but are overruled by the rural parts of the Cantons. Increasing the votes of half-cantons would undoubtedly put strain on the century-old compromise.

When the Council of States was established, the counter-balancing effect of the Council of States and the qualified majority requirement was already quite significant: One representative of the Council of States from the Canton of Zurich represented 17 times as many people as his counterpart from the half-canton of Appenzell Innerrhoden. While the population size in the urban Cantons of Basel-Stadt, Geneva and Zurich has increased significantly over the last 170 years, it has remained almost static in rural Cantons (Sager and Vatter 2013).^{VIII} Thus, the substantial voting power of a Swiss citizen residing in today's large and densely populated Cantons has become even weaker. The voting weight of a citizen of Zurich is nowadays about 44 times less than of a Swiss citizen living in one



of the very small Cantons (Sager and Vatter 2013). If the proposal of upgrading half-cantons was accepted the sparsely populated and rural half-cantons would receive two seats in the Council, and the difference in representation would increase to 88 times.

Another reform proposal seeking to alter the current scheme of how seats are allocated in the Council of States goes in the opposite direction: It recommends the introduction of one or two extra seats for big cities, arguing that 70 per cent of the Swiss live in urban centres but only represent 30 per cent of the votes in the Council of States (Vatter 2014: 325). Proponents of the change also draw attention to the fact that the population size of the city of Zurich, for example, exceeds by far the total population size of the six smallest Cantons (Ebnöther 2017: 125). While these Cantons together hold eight seats in the Council of States, the city of Zurich and other important urban centres have none. The proposal aims therefore at giving an institutional voice to densely populated areas and at increasing the impact of hubs for political, social, economic, and cultural innovation. Until now, these and similar proposals failed in the preparatory committee stages of parliament. In 2010, National Councillor Hans Jürg-Fehr submitted a parliamentary initiative with the aim of allocating cities of more than 100,000 inhabitants one seat each. The idea subsequently also failed in the National Council with 113 to 41 votes.^{IX}

Lastly, another reform proposal aimed at weighting the votes in proportion to population size. The idea was to allocate three seats to large, two seats to medium sized and just one seat to small Cantons (Linder and Vatter 2001: 118). The proposal would thereby solve the issue of the half-cantons by replacing the historic criteria by a demographic one and simultaneously take account of the since 1848 rapidly increasing *de facto* inequality of Cantons. The proposal has repeatedly been raised and discussed, most prominently in the context of the total revision of the Constitution in 1999, but has been shelved for the time being. As any change in the composition of the Council of States would require a constitutional amendment accepted by the majority of the Swiss population and the majority of the Cantons, proposals limiting the veto power of small (rural, German-speaking) Cantons are unlikely to be garner support in the near future as it is improbable that the small Cantons would volunteer to limit their own power.



3. The Two Chambers of the Federal Assembly: Unequal Partners with Equal Rights

3.1. Guaranteeing Symmetric Powers to the Council of States and the National Council

The two parliamentary Chambers of the Swiss Federal Assembly, the National Council and the Council of States, are of equal standing (Ebnöther 2017: 121; Häfelin et al. 2016: N 1438).^x The Swiss bicameral system is a model of ‘perfect’ symmetry in the sense that both Chambers enjoy exactly the same responsibilities, competences and powers (Ebnöther 2017: 121; Thurnherr 2015: Art. 148 Cst. No. 16; Bütikofer and Hug 2010: 178). Each Chamber can initiate constitutional amendments, laws and regulations as well as propose revisions of existing laws or regulation – there is no link to cantonal matters required. The same is true for all other competences and functions such as, *inter alia*, ratifying international treaties, giving budgetary authorisations, exercising political oversight over the actions of government and administration, validating popular initiatives and approving cantonal Constitutions (Häfelin et al. 2016: No. 1447).^{xi}

For each and every decision of Parliament, the approval by a majority of the votes casted in both Chambers is required.^{xii} Deliberations by the National Council and the Council of States are usually held separately.^{xiii} Following the principle of equal standing, there is no priority rule in place as to which Chamber receives business for prior consideration (Thurnherr 2015: Art. 148 Cst. No. 18).^{xiv} After the Council which had received business for prior consideration has dealt and voted on it, the issue is passed on to the other Chamber for consideration.^{xv} A proposal is normally not considered for the first time by both Chambers in the same session.^{xvi} This delay in law-and decision-making is institutionally entrenched and designed to allow for further reflection, to prevent overhasty decision-making and to provide for a cooling-off period before the other Chamber starts working.

The joint proceedings of the National Council and the Council of States as the United Federal Assembly constitute a departure from the principle of separated deliberations.^{xvii} The most important power of the United Assembly is the appointment of the members of the Federal Council, the Federal Chancellor, the judges of the Federal Supreme Court and, in times of war, the Commander-in-Chief of the armed forces.^{xviii} These joint proceedings



not only depart from the principle of separated proceedings but also from the principle of equal footing.^{XXIX} The sessions of the United Federal Assembly are held in the Assembly Hall of the National Council and operate under the presidency of the President of the National Council.^{XXX} The particular parliamentary setting illustrates an underlying power shift: Since decisions made by the Federal Assembly are taken by the majority of those who vote,^{XXXI} and given the numerical superiority of the National Council, the votes of the delegates of the Cantons are diluted in the United Assembly. The National Council brings together more than 80% of the total number of votes to be cast and can therefore easily outvote the Council of States (Thurnherr 2015: Art. 157 Cst. No. 4; Häfelin et al. 2016: N 1507; Rhinow: 16).^{XXXII} The principle of equal standing between the two Chambers is therefore severely compromised when it comes to the elections mentioned above. From a federal point of view, the dilution of cantonal votes (and the lack of counter-majoritarian mechanisms) seems particularly problematic when federal counsellors and judges are appointed. Due to the operating of the United Assembly, both national bodies are more strongly legitimised by the representatives of the people than by those of the Cantons. The appointment process also affects the outcome. As there is a constitutional custom requiring that both federal bodies reflect the political composition of parliament (“magic formula”), the dilution of the votes of Council of States leads to the result that the federal executive and judiciary more accurately mirror the political landscape of the larger Chamber – at the expense of the smaller one which, as will be shown below, differs importantly in its political composition. In contrast to other federal states, the way of appointing Swiss federal judges does not provide for mechanisms guaranteeing that members of the Supreme Court enjoy double legitimacy (by the people and by the Cantons); this fact negatively affects the role of the court as a neutral arbiter capable of legitimately umpiring disputes between the two tiers of the state.

3.2. Resolving Disputes between the Chambers

If the decisions of the National Council and the Council of States differ following their initial consideration of the same proposal, the divergent decisions of each Council are referred to the other one for reconsideration. The draft law or proposal then goes back and forth between the Chambers until an agreement is reached between the two.^{XXXIII} In cases where both Chambers reach an agreement during the first three discussion rounds, a final



vote on the proposal is held in each Council. If differences still remain, the business is submitted to a conciliation committee.^{xxiv} The latter proposes a compromise motion that is resubmitted to the two Chambers. If the compromise motion is not accepted by both Chambers, it is abandoned entirely.^{xxv} The National Council, even by qualified majority, has no means to overrule the Council of States.

Because its (smaller) size and flexibility, it would seem that the Council of States is the more influential of the two. A study carried out in 2008 by Linder and Schwarz, analysing the common procedure to eliminate differences between the two Chambers from 1996 to 2005, showed that the Council of States has indeed greater influence on law-making than its (larger) counterpart. The authors trace this back to the fact that given its smaller size, more homogeneous composition and the more conciliatory approach, the Council of States and its parliamentary committees are quicker in settling businesses and, therefore, receive more often business for prior consideration. As the Council which acts first, the Council of States thus gains greater influence through agenda-setting powers (Linder and Schwarz 2008: 32).

In contrast to other countries, the lack of success of the procedure used to reconcile differences between the Chambers is usually not perceived as a sign of an institutional trap, or a political blind alley. In most cases, the incapacity of the two Chambers to agree is rather seen as demonstrating the fact that the bill at stake did not strike the balance needed to make the deal acceptable to the representatives of the people and the delegates of the Cantons – and therefore should not pass. The willingness to accept institutional blockage and delay is closely linked to the direct-democratic rights of the Swiss people. As 50,000 citizens or *any eight Cantons* can request an optional referendum on federal acts, the necessity to find acceptable compromises and to negotiate moderate deals acceptable to most political actors involved is obvious to all. If this is not achievable in parliament, the bill is unlikely to succeed at the polls.

4. The Councillors of State: Cantonal Delegates without Instructions

4.1. Appointing the Councillors of State

The bicameral system of the Swiss Federal Assembly reflects the democratic principle of ‘one person one vote’ in one Chamber and the federalist principle of ‘every Canton an



equal vote' in the other (Linder and Vatter 2001: 98). The National Council is composed of 200 representatives who are directly elected by the people according to a system of proportional representation.^{xxvi} Currently, the number of seats allocated to a Canton ranges from 35 representatives from the most populous Canton of Zurich to one (constitutionally guaranteed)^{xxvii} representative from each of the six least populous Cantons.^{xxviii} In the Council of States, each Canton is represented by two delegates except for the six half-cantons which only elect one representative (Biaggini 2007: Art. 150 Cst. No. 2).^{xxix}

As much as the two Chambers enjoy the same prerogatives, the way they are constituted differs. Whereas the election of the National Council is largely determined by federal law, the Cantons decide autonomously on the election of their representatives.^{xxx} When the first Council of States was elected in 1848, all Cantons provided for an indirect election through the parliaments of the Cantons (Heger 1990: 68). This way of proceeding ensured deep linkages between the cantonal legislatures and federal delegates. However, over time, Cantons introduced direct elections for members of the Council of States, thereby loosening these linkages. Nowadays all the representatives of the Cantons are directly elected by the people. The Canton of Bern was the last Canton to switch from an election by parliament to a popular election in 1977 (Sciarini 2013: 104; Marti 1990:36). Nothing in the federal constitution would prevent Cantons from returning to indirect elections – and to more closely link cantonal representation at the federal level to what a cantonal parliament wants – but no Canton is currently considering such a change.

While proportionate representation is compulsory for the election of the National Council since 1918, a system change which revolutionised the composition of parliament, all Cantons, except Neuchâtel and Jura, have opted to continue to rely on a system of first-past-the-post when electing members of the Council of States (Thurnherr 2015: Art. 150 Cst. No. 14). Other cantonal peculiarities still remain; the Cantons of Neuchâtel and Jura, for example, confer voting rights under certain circumstances to foreigners (Caroni 2013: 35-37).^{xxxi} The Canton of Glarus used its room for manoeuvre to introduce an age limit by stating that a representative of the Council of States cannot be older than 65. Some scholars, however, argue that such upper age limit infringes upon the prohibition of discrimination and is therefore unconstitutional (Federal Council's report 2004: 2136, 2137; Aubert 1995: 1013 No. 1285; Waldmann 2003: 475; Thurnherr 2015: Art. 150 Cst. No. 11).



The Constitution does not provide for a specific legislative period. In practice, elections of the representatives of the Council of States are usually held at the same time as the elections for the National Council and the term of office is equally aligned (Häfelin et al. 2016: N 1501). Therefore, all Cantons have limited the term of office to four years (Thurnherr 2015: Art. 150 Cst. No. 12, 13).

Federal incompatibility rules prohibit that members of the Council of States are at the same time members of the National Council, the Federal Government or a Federal Court.^{xxxii} The Cantons are bound by these restrictions enforcing personal power separation at the federal level. They are, however, entitled to go beyond them and introduce additional restrictions. Some Cantons have used this leeway and decided to offset power concentration vertically, too, by providing that none, only one or only two members of the collegial cantonal government can at the same time hold an office in the Federal Assembly (Thurnherr 2015: Art. 150 Cst. No. 15).^{xxxiii} Other Cantons do not provide for such rules and do not prevent deep personal linkages between the cantonal executive and the federal legislatives.

Historically, a number of members of cantonal governments simultaneously held a seat in the Federal Assembly and served as liaison between cantonal interests and federal decision-making (Bienlein 2000: 54). During the early decades of the Swiss federal state, a large number of members of cantonal governments also sat in the National Council or in the Council of States, giving the latter a flavour of the German Bundesrat. Heger (1990: 114) affirms that between 1848 and 1920 there have constantly been more than 10 members of the Council of States who were at the same time part of a cantonal government. The personal linkages between cantonal and federal tiers of government have declined over time, not only as a result of the introduction of direct elections, but also due to an increase of workload in all spheres of government. The Swiss Federal Assembly is still a militia parliament; most members of parliament have a professional life outside parliament. Today, however, parliament work, narrowly understood (sessions, meetings and committee work) takes up between 40-60% for members of the National Council, and 60-80% for members of the Council of States. The different workload results from committee work: The two Chambers have an almost equal number of committees, but the 200 members of the National Council can more easily distribute these among each other than the 46 members of the Council of States (Bütikofer 2013: 80). As a consequence of



this, members of the cantonal government no longer sit in the Council of States and have, more recently, also disappeared from the lists of the National Council. Some members of the Federal Assembly still work as mayors of smaller municipalities and provide for personal interconnections between local executives and the federal legislative.

4.2. Providing for a Free Mandate

As much as the Cantons are free to shape the election of their representatives, they cannot go further than this: The federal Constitution prohibits them from instructing delegates^{xxxiv} and guarantees free mandates to members of both Chambers alike. Just like members of the National Council (which are also elected by their cantonal constituencies),^{xxxv} members of the Council of States freely represent the population of their respective Cantons. While it is true that members of the Council of States regularly confer with their cantonal governments, any attempt to impact on free voting rights is prohibited (Ebnöther 2017: 125). In spite of their constitutional denomination as “delegates of the Cantons”, members of the Council of States therefore do not cast their vote as delegates or ambassadors of the Canton, who would be bound to instructions of the cantonal government or parliament, but as politicians and members of the federal parliament (Aubert and Mahon 2003: Art. 149 Cst. No. 5; Auer 2016: 31). Thus, they are not accountable to the cantonal governments or the cantonal parliaments,^{xxxvi} and are representatives of the Cantons only by name (Häfelin et al. 2016: N 1492; Heger 1990: 114).

Given the limited role of the Cantons in the election process, and the lack of direct influence on their representatives, a reform proposal has been made for the conversion of the Council of States into a chamber of Cantons analogous to the German Bundesrat (Rhinow: 34). This model would not only profoundly affect the institutional set-up but practically also require a transition to the parliamentary system of government or other profound adjustments of the functioning of cantonal collegial governments. It seems to stand very little chance of being seriously considered.

4.3. Voting in the Council of States

Results from research on the extent to which the Council of States effectively takes cantonal interests into account are inconsistent. A study from the 1970s shows that two



thirds of the members of the Council of States see themselves as delegates of the Cantons while only a quarter of the members of the National Council do so (Kerr 1981: 191). A similar outcome was reached in a study conducted in 2000 (Wiesli and Linder 2000; Vatter 2014: 325). Hence, subjectively at least, the members of the Council of States are conscious of their role as representatives of the Cantons and tend to pay greater attention to political issues sensitive to federalism.

However, closer examination of actual decision-making and voting behaviour reveals that neither of the Chambers effectively represents cantonal interests. Empirical investigations clearly show that the Council of States does not defend cantonal autonomy in a more significant way than the National Council (Vatter 2014: 326-328; Bienlein 2000: 60, 61). Just like the members of the National Council, the members of the Council of States vote according to party affiliations in most situations. Moreover, there is ample evidence to support the argument that neither of the Chambers has been effective in preventing or slowing down ongoing centralising processes. Few of the Federal Council's legislative proposals have been altered by either of the Chambers in order to uphold or strengthen federal power sharing. It is true, however, that in the rare cases when modifications in favour of a more federalist solution have been made, they more often have originated in the Council of States (Vatter 2014: 327). Yet, in sum, it is safe to say that the Chamber does not fully fulfil its prime role of representing the cantonal interests (Vatter 2014: 326) – if such a role has ever been its prime function. This conclusion is further confirmed by recently issued federalism monitoring reports. According to these reports, regularly published by the Conference of cantonal governments (CCG), both Chambers are by and large centralizing forces but differ in degree. Of all initiatives taken by the National Council, 71% showed centralising tendencies. This differs, but not greatly, from the Council of States where the figure amounts to 57%. At the other end of the spectrum, only 5% of the initiatives launched by the first Chamber have taken a decentralising approach. In the Council of States this was the case in 18% of all initiatives taken (Monitoring Report 2017: 21).

The reasons for these findings lie mainly in the election process and the constitutional prohibition of instruction. Members of the Council of States do not represent the cantonal authorities but the population of the Canton. In order to be re-elected, delegates must show success at the federal level – which is more easily done by pointing to laws and



policies initiated and supported than to effective prevention of centralising federal action. In addition, one has to keep in mind that it is erroneous to assume that all Cantons unequivocally oppose centralisation. This is especially not the case in the Swiss context of strong reliance on the principle of fiscal equivalence, where cantonal competencies weigh heavily on cantonal households regulated by debt brakes, and provide for financial incentives to accede to centralisation, especially for small and resource-poor Cantons.

When stating that the Council of States is rather ineffective in representing Cantons, we have to keep in mind that this was never really its mandate in the first place. The point that the Council of State is not a chamber of the regions is illustrated by the fact that, just like in the National Council, Councillors in the Council of States are seated according to their party affiliation – left and right party members sit together, not easterners and westerners or French- and German-speaking. The vocation of the Council of States has always been to provide for an overrepresentation of the population of small Cantons, the losing side in the Sonderbund war, and to serve as a counter-majoritarian mechanism. Ample empirical research illustrates that the Council of States still fulfils its essential function of providing for a federal counterweight in comparison to democratic majority rule (Vatter 2014: 327; Huber-Hotz 1991: 171). It is true that the denominational differences between Catholics and Protestants, salient in 1848, no longer threaten the political cohesion of the country. Yet, the smallest Cantons still have a blocking minority with 23 votes even though they only represent roughly a fifth of the Swiss population (Ebnöther 2017: 125; Linder and Vatter 2001: 100). Considering the massive demographic changes through urbanisation and strong but very uneven population growth, the counter-majoritarian effect has increased tremendously since 1848, and its legitimacy is being questioned. Today, it is not the inhabitants of the formerly catholic *Sonderbundskantone* that fear being outvoted, but the urban areas of the country (often voting in line with the French and Italian minorities), which feel dominated by the more conservative Cantons of central and eastern Switzerland. In theory, reforms often claimed to be of marginal importance to rural Cantons, such as immigration, socio-economic and political cooperation and international integration, can fail even though they are supported by 75% of the population. In practice, however, it is fair to say that such blockages challenging the institutional set-up rarely occur. Except for very few exceptions, failed constitutional reform projects have fallen short of majorities of both the people and the Cantons.



5. The Councillors of State: Actors of Compromise

By establishing a separation of power within the federal legislative branch bicameralism originally served to counterbalance the dominant weight of the liberal Protestants and, more recently, of the densely populated urban Cantons. Like most other second Chambers, the Council of States also fulfils other functions. By delaying federal decision-making processes, it buys room for further reflection and offers the chance to improve law and policy-making. By implementing a procedure of institutional cooperation and mutual checks and balances, bicameralism has allegedly a conflict-diffusing effect and plays a stabilising role (Rhinow: 9).

A bicameral system with two Chambers of equal standing compels the two Councils to negotiate a consensus on political issues. As the majority in both Chambers can effectively exercise veto powers, both shape federal politics (Rhinow: 12). Numerous authors claim that the quality in parliamentary debates and in law-making is considerably enhanced through the common procedure to eliminate differences^{xxxvii} when the two Chambers come up with different propositions on the same bill (Rhinow: 9; Linder and Vatter 2001: 98).

Even more importantly, bicameralism provides for two different fora of deliberation and thereby offers effective mechanisms for finding broad compromise, a particular characteristic of Swiss consensus democracy. The different forms of deliberations and negotiations in the National Council and in the Council of States are a product of the distinct features of the two Chambers; these are of more import than the differences in numbers. While proceedings are simultaneously interpreted into all three official languages in both the National Council and the United Federal Assembly,^{xxxviii} there is, for instance, no simultaneous interpretation in the Council of States' proceedings. As a consequence, members of the National Council speak from the speaker's desk, use microphones and address an audience which, when present, wears headphones and waits for their turn to speak. Speaking time is restricted; speeches in the large Chamber are typically made for official protocol, the media and the respective constituencies and only very rarely lead to discussions. In contrast, members of the Council of States speak their mother tongue or the national language of their choice, mostly German and French, and rightly expect their



audience to understand.^{xxxix} Delegates of the Cantons speak from their seat to their colleagues, more often present, and real debates can evolve. While in the National Council there are sometimes up to 20 to 30 speakers in a row regarding one item of business in a Council debate (Neidhart 2005), it is best practice for a member of the Council of States to only speak up if they can introduce new arguments (Ebnöther 2017: 126). The openness for dialogue and the willingness to take new arguments into consideration is also highlighted by the fact that despite preliminary examinations by committees, deliberations in the Council of States are considered to be crucial with regard to decision-making,^{xl} which is less the case in than National Council where opinions are typically made before discussions begin (Ebnöther 2017: 126; Marti 1990: 42).

For these and other reasons, the Council of States claims to be the *chambre de reflexion*, or Chamber of reason, significantly improving the quality of the decision-making and fulfilling the role of guaranteeing and implementing the federal Constitution, a particularly crucial function in a country with only limited judicial review of constitutionality (Rhinow: 8). The reason for the Council of States fulfilment, at least in part, of this role, stems from its election process. The proportionate voting used in the election of the National Council leads to a rather heterogeneous and fragmented Chamber. This large Chamber reacts very rapidly to changes in society and is very open to new trends as there are no legal thresholds in the election process. While in small Cantons with only one seat, candidates need to pass the *de facto* threshold of 50% such is not the case in Cantons with lots of seats to fill where the natural quorum is very low. In a large canton with 30 seats, new, small and splinter parties can end up in parliament when they reach three percent of the votes. As a consequence, the National Council is polarised and vocal. Due to limited seats, this is not the case for the Council of States. The overarching political compositions in both Chambers therefore differ importantly. While the Swiss People's party, a right-wing party with a national-conservative program, is by far the strongest party in the National Council, it only holds five seats in the Council of States. Due to majority voting, delegates of the Cantons need very broad backing in their constituencies, and depend on the support of more than one party in order to be elected. Candidates of polarising parties find it hard to pass the post. The mode of election therefore proves paramount for the political composition of the Council of States in which the moderate Christian Democratic People's Party is still the strongest party. A party operating flexibly between the right- and left-wing



parties is obviously more successful than its competitors with more pronounced party programs when it comes to proposing candidates capable of attracting voters beyond their own party basis (Ebnöther 2017: 125). The Council of States is thus composed of more moderate candidates with a greater capacity to debate, negotiate and compromise. The Chamber, home to politicians willing to reconcile and overcome differences in party programs, is therefore less likely to be caught in disputes resulting from partisan politics (Häfelin et al. 2016: 1492; Vatter, p. 319). The fact that the Council of States is characterised by some degree of homogeneity is best illustrated by the fact that between 2003 and 2011 80 per cent of the final votes in the Council of States were unanimous, while the National Council reached unanimity in less than 30 per cent of the cases (Vatter 2014: 319; Bütikofer 2014: 119 Fn. 134; Hug et al. 2011). The different election processes, however, also affect the age and gender balance. While the representation of younger people and of women is appallingly low in the National Council (roughly 30 per cent), average age is even higher in the Council of States and women still represent only roughly 20 per cent of the votes: The Chamber of reason is dominated by the minds of men turned grey.

The greater ease of members of the Council of States to agree is also linked to the fact that its members usually serve for longer periods and more intensively cooperate in committees. As each Council features almost the same number of committees, members of the Council of States typically sit in a number of working committees and intensively cooperate with their peers on a daily basis on various issues (Rhinow: 23). This creates scope for cross-party cooperation and supports a culture of consultation, dialogue and package deals. Cooperation is further facilitated by the fact that members of a given party in the Council of States enjoy more independence from their parliamentary group; they are not elected based on a party list but on candidate-centred elections (Rhinow: 23). Additionally, members of the Council of States have more political leverage given the small number of total members in the Council of States and the fact they are part of two or more parliamentary committees which automatically reinforces their political influence (Ebnöther 2017: 125, 136). Last but not least, the small number of Council members requires delegates to avoid conflicts and to cooperate more frequently and closely (Ebnöther 2017: 126).



However, in recent times, party politics have also become more prevalent in the Council of States to the detriment of cantonal interests. Whilst it is still not very much appreciated when the representatives pursue party politics, it does, in reality, play an increasingly dominant role and representatives belonging to the same party coordinate their opinions more often than before. Non-partisan representatives have become rare. As in the National Council, different political alliances are formed in the different policy areas (Ebnöther 2017: 127). This is in line with a study showing that Council members of the same party in the two Chambers do not differ with regards to their political position (Bütikofer and Hug 2010: 188).

6. The Representation of Cantons: Looking beyond Parliament

6.1. Making Cantonal Voices Heard

Apart from the Council of States, there are other mechanisms which ensure that Cantons participate at the federal level. The Cantons and their institutions have a constitutionally enshrined right to participate in the federal decision-making process, in particular in the legislative process. Furthermore, they also have a constitutionally guaranteed right to be informed fully, and in good time, of the federal government's intention and to be consulted when their interests are affected,^{XLI} including in the field of foreign policy decisions.^{XLII} This has opened a wide spectrum for cantonal governments and cantonal officials to impact on federal decision-making at the early stages and to make their voices heard throughout the decision-making processes, from agenda setting to implementation (Schweizer and Brunner 1998: 64, 65).

In addition, cantonal institutions also benefit from the general consultation process during which the Cantons, the political parties and interested groups are invited to express their views on important legislation, other projects of substantial impact and on significant international treaties.^{XLIII} Just like the right of Cantons to participate, the right to be consulted is a decisive power of Cantons and offers ample opportunities to initiate, amend or oppose federal bills. Most importantly, the consultation processes allow Cantons to use soft veto powers, to express dissatisfaction with federal projects and to attempt to stop them. Thanks to the hard power of requesting a referendum – which is available to 50,000



people *or eight cantons* – serious concerns expressed by at least a handful of Cantons are taken seriously and often lead to the amendment or renunciation of the project.

It is interesting to note that until now the Cantons have only once launched an optional referendum.^{XLIV} Back in 2003 they opposed a tax package which would have provided for revisions on the taxation of marriages, families and residential property as well as stamp duties. The Cantons successfully defended their cause in the 2004 vote when the tax reform was rejected by 65.9 per cent of the people (Ehrenzeller and Nobs 2014: Art. 141 Cst. No. 11; Sciarini 2013: 104).^{XLV} While cantonal referendums are rare, their threat is always clearly present and usually sufficient for the federal tier to take cantonal concerns into account (Sager and Vatter 2013). The fear of cantonal opposition reveals its effect at the stage of the preliminary proceedings and compels federal authorities to give great importance to cantonal views in order to develop a proposal capable of reaching a consensus (Ehrenzeller and Nobs 2014: Art. 141 Cst. No. 12).^{XLVI}

6.2. Requiring a Double Majority

Similar to the role of the Council of States, the requirement of the double majority for constitutional amendments operates in a way that restrains the democratic principle of the majority in favour of federal considerations. In doing so, it continues to effectively fulfil its historical core function of protecting the less populous and more rural conservative Cantons from being outvoted by the population of large ones. However, this mechanism has been questioned against the backdrop of demographic changes and the legitimacy of a blocking cantonal vote in the light of an overall approving people's will (Kley 2014: Art. 142 Cst. No. 10). While some authors claim that the counter-majoritarian effect of the qualified majority goes too far nowadays, others no longer see any reason to protect the populations of small Cantons against those of urban centres. In theory, the smallest blocking minority representing 51 per cent of the votes in the smallest Cantons can be reached with only 9 per cent of the total Swiss population today (Linder and Vatter 2001: 98).

One must keep in mind, however, that disagreements between the people and the Cantons are extremely rare. Only nine out of several hundred proposals to amend the federal constitution were approved by the people but failed because of a lack of agreement from the Cantons. Nevertheless, the fact that seven out of these nine cases occurred in the



past 50 years highlights the growing significance that the requirement for the double majority has acquired in recent times (Linder and Vatter 2001: 98). In 1994, for instance, a constitutional amendment in favour of a simplified naturalisation procedure for young immigrants was rejected by less than 18 per cent of the votes – and failed (Sager and Vatter 2013).^{XLVII} While events such as these take a toll on democratic decision-making, it is still important to keep in mind that the requirement of the double majority was established to protect cantonal autonomy and that all nine proposals rejected by a majority of the Cantons were indeed related to an expansion of federal competences (Kley 2014: Art. 142 Cst. No. 10; Aubert and Mahon 2003: Art. 142 Cst. No. 6; Biaggini, 2007, Art. 142 Cst. No. 13). In the case of the naturalisation of foreign nationals, for example, legislative powers remain to a considerable extent in the realm of the Cantons, whereas the federal state may only enact minimum requirements in this area (Achermann and von Rütte 2015: Art. 38 No. 33).^{XLVIII}

The question remains, however, whether the Cantons on the losing side in of the Sonderbund war are still in need of the protection provided by the double-majority rule. First, their political integration at the federal level is no longer a current need. Second, political cohesion is today more often put under stress by disagreements between urban centres with large populations and the French- or Italian-speaking Cantons which are considered to be underrepresented in the current system. In 2002, for example, Switzerland voted in favour of joining the United Nations Organization (UNO) with 54.6 per cent to 45.4 per cent of the votes of the people. The vote of the Cantons was not as clear though. A blocking minority was only missed by one cantonal vote, with 12 Cantons in favour of accession and 11 Cantons against. It would have been difficult to justify why a smaller, rural and German-speaking minority might have a bigger say and can overrule an urban and French-speaking democratic majority which is usually more inclined to pursue an integrationist foreign policy (Aubert and Mahon 2003: Art. 142 Cst. No. 6 Fn. 5; Linder and Vatter 2001: 98, 99). Neither the urban regions, which are characterised by a politically more progressive stance, nor the language minorities, are protected by the counter-majoritarian design of the vote of the Cantons (Linder and Vatter 2001: 98).

Even though the double-majority fulfils a counter-majoritarian role, it is not designed in such a way as to confer veto powers on individual Cantons. Unanimity is not a requirement, even for the most fundamental changes, and it is obvious that the Swiss



Confederation is confederal by name only and not by fact. This is best illustrated by the point that the establishment of the first federal Constitution in 1848 and both total revisions of 1874 and 1999 were rejected by the five small, predominantly rural and catholic Cantons of Uri, Schwyz, Unterwalden, Obwalden and Appenzel Innerrhoden – and nevertheless entered into force (Kley 2011).

6.3. Observing the Making of a Third Chamber

The Conference of cantonal governments was founded in the wake of the referendum on Swiss membership in the European Economic Area in 1992, where 50.3 per cent of the public vote and 19 Cantons rejected the treaty. Its foundation was related to the growing awareness of a loss of cantonal autonomy, due to an institutional trend towards centralisation, and against the backdrop of foreign policy gaining an increasingly important dimension for domestic politics (Sciarini 2013: 103; Kolarov 2015: 232). In order to ensure participation at the federal level and retain cantonal influence, closer cooperation among the Cantons was deemed necessary (Kolarov 2015: 232). The Conference of cantonal governments is composed of the 26 cantonal governments and therefore directly represents their interests.^{XLIX} Thus, the Conference serves as a forum for promoting cooperation between Cantons on matters falling within their competence, or concerning federal competences having implications for the Cantons. In doing so, it effectively coordinates the Cantons' formation of opinion and ensures the representation of their interests towards the Federal Government (Kolarov 2015: 222).

The emergence of the Conference of cantonal governments can also be understood as an attempt to step in and assert cantonal interests more actively at the federal level precisely because of the lack of direct representation by the Council of States and the prohibition of voting instructions by cantonal authorities (Vatter 2006: 41; Sciarini 2013: 104).

The office of the Conference is located in the House of Cantons in the city of Berne, situated in the immediate vicinity of the Federal Palace where the Federal Assembly and the Federal Council are located. Apart from the Conference of cantonal governments (CCG) the building hosts several inter-cantonal governmental and directorial boards and other political institutions related to cantonal politics. The House of Cantons therefore serves as a crucial hub in coordinating and promoting cantonal interests at the federal level.



The way in which the conferences exercise their influence is, in part, informal. There is hardly any new legislation passed to the two Councils without prior consultation of the Cantons or the CCG. The Cantons still hold a big share of public spending and most federal policies are executed on cantonal level (Ladner: 2014). Just like in German federalism, federal competences are, as a rule, limited to law-making; implementation is the task of the constituent units. This gives Cantons significant political leverage and latitude to pursue their own interests. As the federal tier relies on the Cantons for the execution of its policies, it has a strong interest in working with cantonal governments in approving plans and bills. The more the Cantons role is reduced to that of an enforcer of federal laws and regulations, the more important it becomes for Cantons to impact on federal policy making and to compensate centralisation by strengthened participation (Biaggini 2007: Art. 5a Cst. No. 9). This evolution from cantonal independence to cantonal participation is among the reasons why the House of Cantons is evolving into an informal German Bundesrat-style third Chamber.

As mentioned above, it is important to keep in mind that the crucial soft power of cantonal governments is complemented by hard power: The demand for an optional referendum. It is generally acknowledged that the CCG played an active and leading role in the referendum campaign of 2003 against the tax reform and the successful outcome underlined the high political significance of the CCG (Ehrenzeller and Nobs 2014: Art. 141 Cst. No. 11; Sciarini 2013: 103). The tax reform proposal also made it apparent that the Council of States had not represented the interests of the Cantons, as it had been the Council of States itself which had proposed the introduction of new provisions on the taxation of residential property in the tax package – even though this was the issue which upset the Cantons the most (Sciarini 2013: 104). Officially upgrading the CCG to a Chamber of the Cantons would, however, create controversy. Federalism is not solely limited to the representation of the cantonal governments, but requires the representation of the entire Canton, including the parliaments and peoples. There are some justified concerns about paying a price for further impact in the capital in terms of transparency, equality and democracy.



7. Conclusions

In granting equal rights and duties to both Chambers of the federal parliament the Swiss bicameral system does not guarantee the representation of cantonal interests at the national level. As the so-called Swiss Confederation is, in reality, a federation, any Canton's delegates can easily be overruled. There are no qualified majority requirements, even for issues of the most crucial relevance for one or several Cantons. As a consequence, objections submitted by the Italian-speaking southern Canton of Ticino or the French-speaking Cantons of the country's western region can be outvoted by the German-speaking majority of delegates. The role of the Council of States in protecting the views and concerns of linguistic minorities is therefore severely limited. In addition to majority decision-making, the direct election of the members of the Council of States within their cantonal constituencies and the constitutional prohibition of instruction further limit the effectiveness of the representation of cantonal interests – at least as far as they are expressed by the views of cantonal parliaments and governments.

The fact that the Council of States fails in defending cantonal autonomy and other cantonal interests, despite its equal rights and privileges to those of the National Council, and ensuing veto powers, does not come as a surprise. Historically, the Council of States served a different function: It was designed as an institutional mechanism to politically integrate Cantons unwilling to join the new federal state and to guarantee their overrepresentation. This counter-majoritarian role of the second Chamber is nowadays still the dominant one: The Ständerat serves as an institutional guarantee to the populations of smaller Cantons and prevents them from ending up as permanent losers of national decision-making. It functions as an institutional device protecting the populations of rural Cantons from being dominated by the ever-growing urban centres, more and more distinctly underrepresented in the Council of States. While some voices raise the concern that bicameralism negatively affects democracy and excessively disadvantages highly populated Cantons, others claim that the institutional compromise continues to serve the political cohesion of the country and to effectively deal with the salient rural-urban divide.

As a counter-majoritarian Chamber, the Council of States and its specific features undoubtedly strongly contribute to the consensual model of democracy specific to Switzerland (Rhinow, p. 36). The Swiss system strongly relies on compromise and is



fundamentally opposed to the concept of “winner-takes-all”; the Council of States plays a decisive role in entrenching this governance model.

Taken into consideration the functioning of the Council of States and the fact that its members mostly act according to party affiliation, the cantonal institutions depend on alternative mechanisms to represent their interests at the federal level. On the one hand, they rely on the qualified majority required for constitutional amendments and on the possibility of requesting a referendum to oppose federal statutes and international treaties. The constitutional right of any group of eight Cantons to demand a vote on any federal statute serves as an effective preventive device requiring law-making actors to take cantonal concerns seriously. Cantonal governments therefore play a decisive role in the preparation of federal bills and increasingly often participate in working groups and preparatory committees. In some fields, the loss of cantonal autonomy is therefore rather effectively compensated by increased participation in the capital.

On the other hand, the Cantons have increased their influence on federal decision-making by strengthening horizontal intergovernmental relations. The Conference of cantonal governments and all the other cantonal conferences based in the House of Cantons in Bern have become crucial actors in Swiss federalism. By harmonising cantonal actions in matters of cantonal competence, they have found persuasive ways of preventing or limiting federal interference. Just as importantly, these intergovernmental institutions have evolved into actors decisively impacting on federal policy- and law-making by coordinating the views of Cantons in consultation and other participatory processes. In this field, the institutions united in the House of the Cantons, most of all the Conference of cantonal governments, are evolving into a German-style Bundesrat which has an important say in all matters of interest to the Cantons. *De facto*, federal statutes and international treaties, requiring cantonal implementation, are no longer adopted without the approval of the Cantons. Informally, the Swiss system therefore is evolving into a new form of tricameralism whereby the Council of States serves political moderation, helps consensus finding and limits majoritarian decision-making, while the House of Cantons powerfully represents cantonal interests. Such an evolution matches the mixed form of Swiss federalism in which the Cantons on the one hand enjoy distinct competencies and legislative powers (dual federalism), and on the other hand are also mandated to implement federal decisions and laws (integrated federalism). It is therefore reasonable to expect



further strengthening of intergovernmental decision-making combining horizontal and vertical cooperation. The main challenges resulting from this evolution are related to the rule of law and democracy: The future legitimacy of this complex system will depend on its capacity to guarantee transparency and clear responsibilities, to prevent scapegoating and excessive power-shifts to governments and administrations, thus reducing cantonal parliaments to institutions which merely rubber stamp decisions that have already been taken elsewhere.

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^I The constitutional transfer was almost a “copy and paste” process to the extent that Switzerland in the early years was often referred to as being the twin republic of the USA – a non-identical twin of course, given the differences in size and character.

^{II} Art. 150 para. 1 of the Swiss Constitution.

^{III} Art. 149 of the Swiss Constitution.

^{IV} Art. 150 para. 2 of the Swiss Constitution.

^V The same treatment was not applied when the French-speaking and catholic Jura population voted to separate from the mostly German-speaking and protestant Canton of Bern in 1977 as it later received two seats in the Council of States.

^{VI} See the interpellation by National Councillor David Zuberbühler, available at <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20161055> (last access 27th April 2018).

^{VII} Art. 140 para. 1 of the Swiss Constitution.

^{VIII} Sager and Vatter estimate that the population size in Basel City has risen by a factor of seven, in Geneva by a factor of six and in Zurich by a factor of five. In the same period of time the population size in Appenzell Innerrhoden remained almost exactly the same while in Appenzell Ausserrhoden it only increased by a factor of 1.2.

^{IX} See the parliamentary initiative put forward by National Councillor Fehr Hans-Jürg, <https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=21012> (last access 27th April 2018).

^X Art. 148 para. 2 of the Swiss Constitution.

^{XI} Art. 163-173 of the Swiss Constitution.

^{XII} Art. 156 para. 2 of the Swiss Constitution; Art. 83 para. 1 of the Federal Act on the Federal Assembly.

^{XIII} Art. 156 para. 1 of the Swiss Constitution.

^{XIV} Art. 84 para. 1 of the Federal Act on the Federal Assembly.

^{XV} Art. 86 para. 1 of the Federal Act on the Federal Assembly.

^{XVI} Art. 85 para. 1 of the Federal Act on the Federal Assembly.

^{XVII} Art. 156 para. 1 of the Swiss Constitution.

^{XVIII} Art. 168 para. 1 of the Swiss Constitution.

^{XIX} Art. 148 para. 2 of the Swiss Constitution.

^{XX} Art. 157 para. 1 of the Swiss Constitution and Art. 39 para. 2 of the Federal Act on the Federal Assembly.

^{XXI} Art. 159 para. 2 of the Swiss Constitution.

^{XXII} Moreover, the meeting is chaired by the presidency of the President of the National Council who must abstain from voting unless the taking of votes by the Federal Assembly results in a tie when the President has the casting vote, see Art. 80 para. 1 of the Federal Act on the Federal Assembly.

^{XXIII} Art. 89 para. 1 of the Federal Act on the Federal Assembly.

^{XXIV} Art. 91 para. 1 of the Federal Act on the Federal Assembly.

^{XXV} Art. 92 and Art. 93 of the Federal Act on the Federal Assembly.

^{XXVI} Art. 149 para. 1 and 2 of the Swiss Constitution.

^{XXVII} Art. 149 para. 4 second sentence of the Swiss Constitution.



xxviii The six least populous Cantons are Uri, Obwalden, Nidwalden, Glarus, Appenzell Innerrhoden and Appenzell Ausserrhoden.

xxix The six half-cantons are the Cantons of Obwalden, Nidwalden, Basel-Stadt, Basel-Landschaft, Appenzell Ausserrhoden and Appenzell Innerrhoden.

xxx Art. 150 para. 3 of the Swiss Constitution.

xxxi Art. 37 of the Cantonal Constitution of Neuchâtel and Art. 73 of the Cantonal Constitution of Jura.

xxxii Art. 144 para. 1 of the Swiss Constitution.

xxxiii See for example Art. 22 para. 4 of the Cantonal Constitution of Grison or Art. 63 para. 3 of the Cantonal Constitution Zurich.

xxxiv Art. 161 para. 1 of the Swiss Constitution.

xxxv Art. 149 para. 2 of the Swiss Constitution.

xxxvi Art. 161 para. 1 of the Swiss Constitution.

xxxvii Art. 89 para. 1 of the Federal Act on the Federal Assembly.

xxxviii Art. 37 para. 2 of the Standing Orders of the National Council.

xxxix In 1991, legislative amendments provided for simultaneous translations for parliamentary committee meetings – as a rule for committees of the National Council and on request for committees of the Council of States. With regards to the Council of States committee's deliberations the possibility was removed from the standing orders in 2003 again as it had not been evoked a single time through this entire time; see parliamentary initiative regarding the total revision of the bylaws of the Council of State, BBL 2003 3508: 3519 available at <https://www.admin.ch/opc/de/federal-gazette/2003/3508.pdf> (last access 27th April 2018).

xl See press release issued by the Secretariat of the Office of the Council of States, 'Medienmitteilung vom 27. September 2016, Bekräftigung und Präzisierung der Grundsätze zum Ratsbetrieb' available at <https://www.parlament.ch/press-releases/Pages/mm-bue-s-2016-09-27.aspx> (last access 26th April 2018).

xli Art. 45 of the Swiss Constitution.

xlii Art. 55 of the Swiss Constitution.

xliii Art. 147 of the Swiss Constitution.

xliv See BBl 2003 4498 for the draft Federal Act available at <https://www.admin.ch/opc/de/federal-gazette/2003/4498.pdf> and BBl 2003 7056 for the holding of the referendum available at <https://www.admin.ch/opc/de/federal-gazette/2003/7056.pdf> (last access 27th April 2018).

xlv See for the result, BBl 2004 3943 available at <https://www.admin.ch/opc/de/federal-gazette/2004/3943.pdf> (last access 27th April 2018).

xlvi Similar Epiney and Diezig 2015: Art. 141 Cst. N 14, they, however, give less weight to the cantonal referendum in emphasizing that it has been only used once and that the short time of request provided presents a considerable obstacle of its use in practice.

xlvii The proposal was, however, approved by 52.8 per cent of the population.

xlviii Art. 38 para. 2 of the Swiss Constitution.

xlix Art. 2 para. 1 of the Agreement on the Conference of Cantonal Governments of 8 October 1993.

References

- Albert Richard, 2013, 'The Expressive Function of Constitutional Amendment Rules', *McGill Law Journal*, LIX(2): 225-281.
- Albert Richard, 2014, 'The Structure of Constitutional Amendment Rules', *Wake Forest Law Review*, XLIX(4): 913-975.
- Achermann Alberto and von Rütte Barbara, 2015, 'Kommentar zu Art. 37, 38', in Waldmann et al. (eds), *Basler Kommentar, Bundesverfassung*, Helbing Lichtenhahn, Basel.
- Aubert Jean-François and Mahon Pascal (eds), 2003, *Petit commentaire de la Constitution fédérale de la Confédération suisse du 18 avril 1999*, Schulthess, Zurich-Basel-Geneva.
- Aubert Jean-François, 1995, *Bundesstaatsrecht der Schweiz, Band II*, Helbing Lichtenhahn, Basel-Frankfurt am Main.
- Auer Andreas, 2016, *Staatsrecht der schweizerischen Kantone*, Stämpfli Verlag, Bern.



- Bernhard Ehrenzeller and Nobs Roger, 2014, 'St. Galler Kommentar zu Art. 141 BV, Rz. 5–22', in Ehrenzeller Bernhard et al. (eds), *Die schweizerische Bundesverfassung, St. Galler Kommentar*, Dike and Schulthess, Zurich-Basel-Geneva-St. Gallen.
- Biaggini Giovanni, 2007, *BV Kommentar, Bundesverfassung der Schweizerischen Eidgenossenschaft und Auszüge aus der EMRK, den UNO-Pakten sowie dem BGG*, Orell Füssli, Zurich.
- Bienlein Martin, 2000, *Die Vertretung der Kantone im Ständerat, gemessen an parlamentarischen Vorstößen*, Institut für Politikwissenschaft, Bern.
- Bütikofer Sarah, 2014, 'Das Schweizer Parlament, Eine Institution auf dem Pfad der Moderne', in Helms Ludger et al. (eds), *Politics and Governance in the Smaller European Democracies, Vol. 9*, Nomos, Baden-Baden.
- Bütikofer Sarah and Hug Simon, 2010, 'The Swiss Upper House: 'Chambre de Réflexion' or Conservative Renegades?', *The Journal of Legislative Studies*, XVI(2): 176-194.
- Caroni Martina, 2013, 'Herausforderungen Demokratie', *Zeitschrift für Schweizerisches Recht*, CXXXII(II): 9-93.
- ch Stiftung für eidgenössische Zusammenarbeit (ed), 2017, *Monitoringbericht Föderalismus 2014-2016*, Bern.
- Ebnöther Christoph, 2017, *Leitfaden durch das politische System der Schweiz*, Orell Füssli, Zurich.
- Epiney Astrid and Diezig Stefan, 2015, 'Kommentar zu Art. 138-142, 192-194', in Waldmann et al. (eds), *Basler Kommentar, Bundesverfassung*, Helbing Lichtenhahn, Basel.
- Federal Council's report on age limits, 2004, in *Bundesblatt Nr. 17 vom 4. Mai 2004*, available at <https://www.admin.ch/opc/de/federal-gazette/2004/2113.pdf> (last access 27th April 2018).
- Häfelin Ulrich, Haller Walter, Keller Helen and Thurnherr Daniela, 2016, *Schweizerisches Bundesstaatsrecht*, Schulthess, Zurich-Basel-Geneva.
- Heger Matthias, 1990, *Deutscher Bundesrat und Schweizer Ständerat, Gedanken zu ihrer Entstehung, ihrem aktuellen Erscheinungsbild und ihrer Rechtfertigung*, Duncker u. Humblot, Berlin.
- Huber-Hotz Annemarie, 'Das Zweikammersystem – Anspruch und Wirklichkeit', in *Parlamentsdienste* (ed), *Das Parlament – «Oberste Gewalt des Bundes»? Festschrift der Bundesversammlung zur 700-Jahr-Feier der Eidgenossenschaft*, Haupt, Bern-Stuttgart.
- Hug Simon, Bütikofer Sarah and Martin Danielle, 2011, 'Koalitionen im Stöckli', *Neue Zürcher Zeitung vom 13.10.2011*, available at https://www.nzz.ch/koalitionen_im_stoeckli-1.12964320 (last access 27th April 2018).
- Jaag Tobias, 1976, *Die Zweite Kammer im Bundesstaat, Funktion und Stellung des schweizerischen Ständerates, des deutschen Bundesrates und des amerikanischen Senats*, Schulthess, Zurich.
- Kerr Henry H., 1981, *Parlament et société en Suisse*, Editions Georgi, Saint-Saphorin.
- Kley Andreas, 2011, 'Bundesverfassung (BV)', in *Historisches Lexikon der Schweiz (HLS) 03.05.2011*, available at <http://www.hls-dhs-dss.ch/textes/d/D9811.php> (last access 27th April 2018).
- Kley Andreas, 2014, 'St. Galler Kommentar zu Art. 142 BV', in Ehrenzeller Bernhard et al. (eds), *Die schweizerische Bundesverfassung, St. Galler Kommentar*, Dike and Schulthess, Zurich-Basel-Geneva-St. Gallen.
- Kolarov Ana, 'Der koordinierte Pluralismus in der schweizerischen Aussenpolitik, Die völkerrechtliche Vertragsschlussfähigkeit der schweizerischen Kantone in verfassungsgeschichtlicher Perspektive', *Zürcher Studien zum öffentlichen Recht*, Vol. 226, Schulthess, Zurich-Basel-Geneva.
- Ladner Andreas, 2014, 'The Swiss Federal Assembly: Limited power but strong members of parliament', in *The Political Studies Association, 8 July 2014*, available at <https://www.psa.ac.uk/psa-communities/specialist-groups/parliaments-and-legislatures/blog/swiss-federal-assembly-limited> (last access 27th April 2018).
- Linder Wolf and Schwarz Daniel, 2008, *Das Verhältnis von National- und Ständerat im Differenzbereinungsverfahren 1996-2005, Eine Analyse von Einflusspotenzial und Koalitionsverhalten, Studie im Auftrag der Parlamentsdienste der Schweizerischen Bundesversammlung*, IPW Universität, Bern.
- Linder Wolf and Vatter Adrian, 2001, 'Institutions and Outcomes of Swiss Federalism: The Role of Cantons in Swiss Politics', *West European Politics*, XXIV(2): 95-122.
- Marti Urs, 1990, *Zwei Kammern – ein Parlament, Ursprung und Funktion des schweizerischen Zweikammersystems*, Huber, Frauenfeld.



- Neidhart Leonhard, 2005, 'Der diskrete Charme des Ständerats', *Neue Zürcher Zeitung vom 18.12.2005*, available at <https://www.nzz.ch/articleDF86J-1.191682> (last access 26th April 2018).
- Pahud de Mortanges René, 2017, *Schweizerische Rechtsgeschichte, Ein Grundriss*, Dike, Zurich-St. Gallen.
- Rhinow René, 'Bundesrat und Ständerat, Die föderalistischen Kammern Deutschlands, Österreichs und der Schweiz', available at <http://wp.rene-rhinow.ch/wp-content/uploads/2017/03/3-c-8-Bundesrat-und-Sta%CC%88nderat-zur-Funktion-zweiter-Kammern-2007.pdf> (last access 25th April 2018).
- Sager Fritz and Vatter Adrian, 2013, 'Föderalismus contra Demokratie', *Neue Zürcher Zeitung vom 06.03.2013*, available at <https://www.nzz.ch/schweiz/foederalismus-contra-demokratie-1.18041403> (last access 26th April 2018).
- Schweizer Rainer J. and Brunner Stephan C., 1998, *Die Mitwirkung der Bundesländer an EU-Vorhaben in der Bundesrepublik Deutschland und Österreich, Ein Modell für die Mitwirkung der Kantone in der Aussenpolitik*, Stämpfli Verlag and Schulthess, Bern-Zürich.
- Sciarini Pascal, 2013, 'Le rôle de la CdC dans la représentation des intérêts des cantons face à la Confédération', in Hänni Peter et al. (eds), *Publikationen des Instituts für Föderalismus Vol. 4, 20 Jahre KdK – Les 20 ans de la CdC – 20 anni delle CdC – 20 onns CdC*, Stämpfli Verlag, Bern, 103-105.
- Thurnherr Daniela, 2015, 'Kommentar zu Art. 148-162', in Waldmann et al. (eds), *Basler Kommentar, Bundesverfassung*, Helbing Lichtenhahn, Basel.
- Vatter Adrian, 2006, 'Der Ständerat: Wirkungsweise und Reformansätze', in Vatter Adrian (ed), *Föderalismusreform, Wirkungsweise und Reformansätze föderativer Institutionen in der Schweiz*, NZZ Libro, Zürich, 40-72.
- Vatter Adrian, 2014, *Das politische System der Schweiz*, Nomos, Baden-Baden.
- Waldmann Bernhard, 2003, 'Altersgrenzen im Recht', in Hänni Peter (ed), *Mensch und Staat, Festgabe der Rechtswissenschaftlichen Fakultät der Universität Freiburg für Thomas Fleiner zum 65. Geburtstag*, Universitätsverlag, Freiburg, 470-483.
- Wiesli Reto and Linder Wolf, 2000, *Repräsentation, Artikulation und Durchsetzung kantonaler Interessen in National- und Ständerat, Studie im Auftrag der Eidgenössischen Parlamentsdienste*, Institut für Politikwissenschaften, Bern.



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The Austrian Bundesrat – Imperfect and Unreformed

by

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E -182



Abstract

According to many legal and political scientists the Austrian Bundesrat is generally considered to be a paradigmatic example of a politically and legally weak second chamber embedded in a strongly centralised federal system. This view is justified. However, there is the need for a more differentiated view with regard to Austria's federal system and its second chamber.

Key-words

bicameralism, Austria, Bundesrat



1. Introduction

According to many legal and political scientists the Austrian Bundesrat is generally considered to be a paradigmatic example of a politically and legally weak second chamber embedded in a strongly centralised federal system (see Schäffer 1999: 38, Fallend 2015: 34). This view is justified. However, as I will explain later throughout this paper, there is the need for a more differentiated view with regard to Austria's federal system and its second chamber.

At first (paragraph 2) I describe the discussions on the Bundesrat in the context of the long and complicated elaboration process of the Federal Constitution (B-VG), which lasted from the beginning of the First Republic in November 1918 to October 1920.

Then I analyse how participation rights in federal legislation and other instruments of the Bundesrat, representing Länder interests at the federal level, have evolved over time (paragraph 3). In paragraph 4 I discuss the impact of this process on the role of the Bundesrat in Austrian politics and federalism.

2. The Austrian Bundesrat in the debate on the Federal Constitution 1918-1920

2.1. The history of the second chamber in Austria before 1918

Federal institutions always have a historical background; their roots sometimes even lie in pre-federal times. This can be illustrated by the example of second chambers functioning as representational bodies of clerical and aristocratic elites during the era of constitutionalism.

The idea of a bicameral parliament in Austria can be traced back to the year 1848. At that time, several constitutions, that were adopted or at least drafted, provided for a second chamber as a representative body of either the Crown Länder or the estates (Gamper 2010: 46).

Based on the Constitution of December 1867, the Austrian part of the Austro-Hungarian Empire had two chambers of Parliament (Reichsrat): On the one hand the Abgeordnetenhaus, with deputies representing people of the various Länder of the empire,



elected by an ever-growing number of (male) people, resulting in a general electoral system in 1907, and on the other hand the Herrenhaus with deputies of the clerical and aristocratical elites, installed by the emperor.

In terms of legislation, both chambers had more or less the same legal position. A law passed by the first chamber needed the consent of both the Herrenhaus and the Emperor; it can thus be said that there was 'perfect bicameralism' in Austria from 1867 to 1918. Notwithstanding this, Austria-Hungary was not a federation in a strict sense, but the empire had rather moved in the direction of a decentralised unitary state (Karlhofer 2017: 12).

After the democratic revolution of 1918, the Herrenhaus was abolished, as the previous system with one chamber of parliament, which was not democratically legitimated, was unacceptable.

In a federal system the second chamber might regain a certain function, namely in representing the interest of the Länder and participating in federal law-making. After the breakdown of 1918, in the course of the debates between the Central Government and the Länder on the future structure of the Republic, the vision of a second chamber, the Bundesrat, was soon under discussion.

2.2. Kelsen's and other experts' views on the Bundesrat as an organ of the Federation

Hans Kelsen is generally considered the author of the Austrian Federal Constitution. A detailed discussion of this thesis, however, would exceed the scope of this paper.

Undoubtedly, *Kelsen* played an important role in the process of developing the Austrian Federal Constitution, namely as an advisor of the Government and Parliament in these matters (Schefbeck 1997: 317).

Across *Kelsen's* drafts (there were about six) the role of the Bundesrat differs significantly. Obviously, he tried to propose several alternatives concerning the degree of Länder participation in federal legislation via a second chamber of Parliament. Regarding the composition of the Bundesrat, it is remarkable that *Kelsen* proposed in Drafts I, II and IV that the members of the Bundesrat should be elected by the Land parliaments, which corresponds with the provision of Art. 34 par. 1 B-VG, which eventually entered into



force;^I whereas in Drafts III, V and VI the Bundesrat was composed of the Land Governors, eventually with participation of other members of the Land Governments.

In an alternative variant to Drafts I and IV, a bill objected to by the Bundesrat could only enter into force if the Federal Assembly, an organ composed of the Nationalrat and the Bundesrat, repeated the resolution of the first chamber three times, or the bill was approved by the people in a referendum.^{II} In Drafts III and V, in the case of the objection of the Bundesrat the bill only needed the approval of the people.^{III} In the first variants of Drafts I and IV, however, the first chamber was entitled to overrule an objection of the Bundesrat with a resolution repeating the original legislative act.^{IV} In contrary to the later legal situation in the Constitution of 1920, this resolution needed a majority of 3/4 (Draft III) respectively 2/3 (Draft V) of the votes of the members of the Nationalrat (cf. Bußjäger 2004: 5-6).

Similarly, the draft of *Mayr*, a Tyrolean historical scientist, who soon after became federal chancellor of Austria for several months, provided in various options that a resolution of the Nationalrat, repeating its origin bill would need the consent of 3/4 respectively 2/3 in the Nationalrat, respectively. a referendum, if the resolution would find only a simple majority (Kathrein 1983: 17).

2.3. Positions of political parties

During the political negotiations that preceded the enactment of the Federal Constitution of 1920, the question of the second chamber became a crucial issue. Whereas the Social Democrats initially opposed the idea of a representative body of the Länder at the level of federal legislation, the conservative party insistently approved of a strong federal chamber. This might be due to the Länder that had voluntarily agreed to join the new Republic in 1918 (Gamper 2006: 782).

In a draft of the conservative western Länder (the '*Falser*-draft') the Bundesrat had the same legal position as the Nationalrat; as such the perfect bicameralism of the Monarchy would have been transposed to the new federation. Conversely, for the first time the Social Democrats abandoned their former position, that there should be only one chamber of parliament, in the context of the '*Danneberg*-draft' (named after a leading Social Democratic politician).



2.4. The Bundesrat as a compromise and Danneberg's prophecy

The Social Democrats were ultimately successful in the debates in the sub-committee of the constitutional committee of the provisional national assembly. The compromise, that mainly corresponded to the concept of the Social Democrats, established the Bundesrat in the B-VG as a representative body, rather ill-suited to represent Länder interests effectively (Gamper 2006: 783, Fallend 2015: 39). However, without this compromise the Austrian Federal Constitution would not have been established in 1920. Even though the Bundesrat was organised in a way that it could be called a chamber representing interests of the Länder, it could not gain a strong position. This is often (somewhat incorrectly) referred to as the 'congenital defect' of the Bundesrat (Schäffer 1999: 38). It was clear from the beginning that the Bundesrat was an imperfect organ of the federation. *Danneberg*, deputy of the Social Democrats, who was responsible for the compromise, described the competences of the Bundesrat in his speech from September 29 1920 - two days before the Federal Constitution entered into force – as follows:

We still consider the Bundesrat as a totally unnecessary institution. But as it was not possible for us, to prevent it, its competences are reduced to a minimum and its composition will not be able to prevent legislation (of the Nationalrat) from entering into force. (Bußjäger 2004: 6).

3. Evolution of the legal status of the Bundesrat

3.1. Composition of the Bundesrat

In Austria, as well as in many other federal systems, a geometric system prevails: the number of members of Land representatives to the Bundesrat differs according to the population size of each Land. Art. 34 B-VG provides that the Land with the largest population is represented by 12 members and the other Länder proportionally by as many members as reflects their respective proportion size. These provisions have not changed since 1920.

3.2. Rights and Instruments

The Federal Constitution of the 1st Oct 1920 only provided a suspensive veto of the Bundesrat in respect of legislative acts of the Nationalrat : There was no difference



between constitutional and ordinary federal laws. If the Nationalrat repeated its resolution, the veto of the Bundesrat was repealed; as such the Nationalrat could overrule any veto of the Bundesrat.

The consent of the Bundesrat was only needed if an international treaty touched the autonomous sphere of competences of the Länder according to Art. 50 B-VG. Furthermore, the Bundesrat was entitled to submit bills via the Federal Government to the Nationalrat, which was free to take these bills into consideration or not.

Further, veto-rights of the Bundesrat were provided in two contexts. The first, in Art. 100 par. 1 B-VG, concerning the dissolution of a Landtag by the Federal President, which needs the consent of the Bundesrat. The second, according to Art. 15 par. 2 (now par. 6), was in respect of matters falling into the competence of the federation concerning framework legislation, if the deadline for the implementation of the laws of the Länder set by the Nationalrat was shorter than six months or longer than one year.

Concerning the legal status of the Bundesrat, there was a long status quo of nearly 65 years. In the era of the First Republic, from 1920 to 1934, provisions regarding the Bundesrat were only subject to two minor amendments, in the given context not even worth mentioning.^V Somewhat more important was that in 1929 the Bundesrat indirectly lost its right to elect the Federal President together with the Nationalrat in the so-called Federal Assembly; because from that date the Federal President has been elected by the people (Gamper 2006: 783).

In 1934 the Austrian Bundesrat was abolished by the regime of Austro-fascism and re-established after the breakdown of the Nazi empire in 1945. Two other modifications of the legal status of the Bundesrat in 1979 und 1981 also had minor importance.^{VI}

With the modification of the Federal Constitution in 1984¹ a new Art. 44 par. 2 B-VG was introduced, the former par. 2 changed to par. 3. The new provision stipulated that a modification of the Federal Constitution, which transferred competences from the Länder to the federal level in both legislation and execution, would need the consent of the Bundesrat. With this modification, interventions of the federal level into the autonomous sphere of competences of the Länder could not be realised without the consent of the Bundesrat. Given the complicated and casuistic distribution of competences, this provision



had considerable practical relevance: it can be argued that the Länder's position in federal law-making became strengthened. The justification for this argument will be discussed below.

Another modification concerned Art. 36 par. 4 B-VG, according to which the Länder Governors are entitled to attend all meetings of the Bundesrat and, on their request, to be heard on matters relating to their respective Land according to the provisions of the Bundesrat's Standing Orders (Gamper 2006: 784). Since 1988 the Bundesrat has also been entitled to submit bills directly to the Nationalrat, and not via the Federal Government,^{VII} and international treaties affecting the Land competences have needed the approval of the Bundesrat.

With Austria's accession to the European Union, the Bundesrat gained the right to pass a binding statement towards the Federal Government concerning a project of the European Union, which either requires the passing of Federal Constitutional regulations limiting the autonomous sphere of competences of the Länder or contains regulations which can be only passed by such regulations (Art. 23d par. 3 B-VG). However, this provision is without any practical relevance.

In 2008 another amendment of the Federal Constitution stated that all treaties concerning the basics of the EU would need not only the consent of the first chamber of Parliament, but also of the Bundesrat by a two-third majority (Art. 50 par.1 n. 1 B-VG).

Much more important is the fact that, with the implementation of the Lisbon Treaty in 2009, the Federal Constitution was amended in such a way that the Bundesrat could participate in the new early warning mechanism of the Lisbon Treaty concerning the monitoring of the subsidiarity principle (Art. 23g and 23h B-VG) (see also Fallend 2015: 48). Since then, no further modifications of the instruments and rights of the Bundesrat have taken place.

3.3. Organisational structure

The Länder succeed each other in the chairmanship of the Bundesrat in alphabetical order every six months (Art. 36 par. 1 B-VG). The top-listed representative of the respective Land is designated as the chairman, whose mandate goes to the party having the largest number of seats in the Landtag or, if several parties have an equal number of seats, to the party with the highest number of voters in the most recent elections of the Landtag.



Following a modification of the constitution in 2005, the Landtag can resolve that the chairmanship shall be held by another representative of the Land, whose mandate in the Bundesrat is with the same party (Art. 36 par. 2 B-VG).^{VIII}

The Land Governors are entitled to participate in all proceedings of the Bundesrat. In practice, they make use of this instrument at the beginning of their respective chairmanships in the conference of Land Governors, which lasts six months and usually begins with the chairmanship of the respective Land in the Bundesrat. With one exception, in 1994, they have not made use of this instrument to make statements on legislative acts debated in the Bundesrat, because it would be too late for effective political lobbying.

The chairman is bound to immediately convoke the Bundesrat if at least one quarter of its members or if the Federal Government requests it (Art. 36 par. 3 B-VG).

4. The political role and status of the Bundesrat since 1920

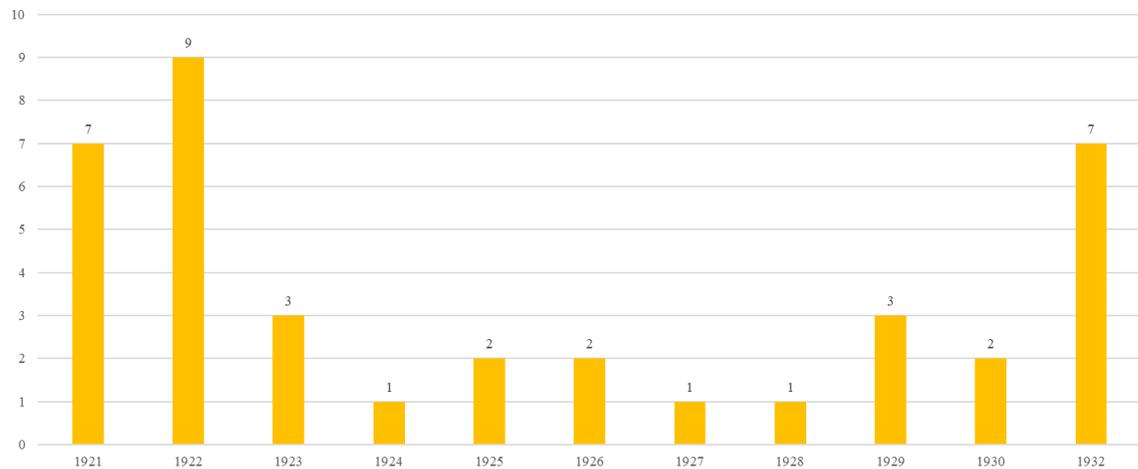
4.1. First Republic 1920-1934: Confirmation of Danneberg's prophecy

The first period of activities of the Bundesrat did not even last 14 years, as the Bundesrat was abolished with the authoritarian Austro-fascist constitution of 1934 (Kathrein 1983: 35).

According to *Rath-Kathrein*, the Bundesrat raised 38 objections during the democratic period of the First Republic from 1920 to 1934. This accounts for a c. 0,4% share of all bills passed by the Nationalrat (Kathrein 1983: 35, Hummer 1997: 374 counts 35 objections). In only 10 cases was the reason behind the objection grounded in the particular interests of the Länder; the Bundesrat mostly objected for formal reasons or arguments concerning the execution of laws (Kathrein 1983: 38). Nevertheless, in 19 cases the Bundesrat was successful and the Nationalrat abstained from overruling the second chamber:



Objections of the Bundesrat: First Republic



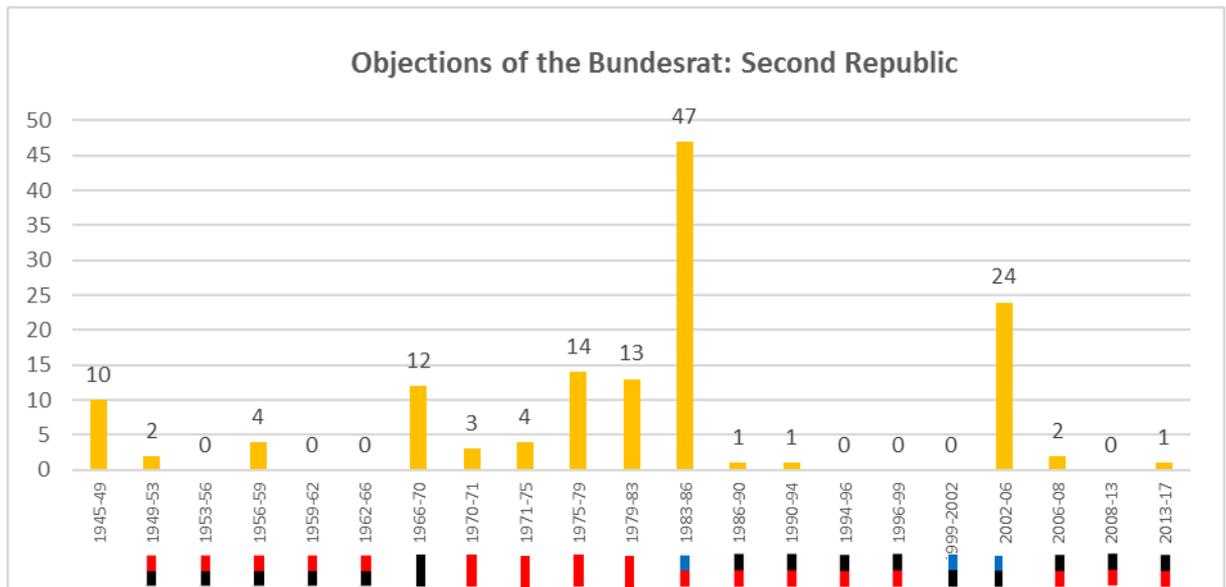
Source: Institute of Federalism based on Hummer 1997: 374

The Nationalrat overruled the veto of the Bundesrat in all cases, which not only confirmed *Danneberg's* prophecy, but also underlined that the Bundesrat was not able to gain any significance in political proceedings.

4.2. Second Republic since 1945: Nothing has changed

Even after the November 1945 re-establishment of the Federal Constitution, and elections at the federal and Land level, the Bundesrat played only a minor role as a weak chamber. In fact, the Bundesrat was rarely recognised as a lawmaker. According to *Gamper*, the Bundesrat objected to a federal law 111 times in the period from 1945 to November 2004 (Gamper 2006: 819, see also Bußjäger 2004: 7). The Nationalrat abstained from overruling the Bundesrat's objections in only 12 cases (Gamper 2006: 819).

From 2005 to November 2017 27 objections were raised by the Bundesrat, whereby the Nationalrat overruled the objections of the Bundesrat in 24 cases. About 14 of them dealt with concrete Länder interests.^{IX}



Source: Institute of Federalism based on Hummer 1997: 375

In the course of this period the Bundesrat represented the interests of the Länder less, but acted more as an organ of correction (see Hummer 1997: 382-398). Table 2 (see above) shows that objections were mostly raised in legislative periods in which the majority in the Bundesrat differed to the governing coalition parties in the Nationalrat.^x This indicates that the majority in the Bundesrat acts primarily in the interest of party politics of the respective parties on federal level and less than an organ of Länder interests (Pernthaler 2004: 355).

Moreover, the Bundesrat has never made use of its Art. 44 par. 2 B-VG absolute veto acquired in 1985, giving its consent in 263 cases, or of its veto under Art. 50 par. 1 B-VG (international treaties) in 236 cases.^{xi}

Until 1970 the Bundesrat had never made use of its right to submit a bill to the first chamber. Since that time this has happened about one or two times a year (Fallend 2015: 46). Since 1999 the Bundesrat submitted 14 bills, three of them were successful.

Objections towards legislative acts of the Nationalrat usually only take place in cases of different majorities between the two houses of Parliament when party competition defines the relations between the Nationalrat and the Bundesrat (Erk 2004: 8).

In general, it can be noted that the Bundesrat not had the best reputation. As *Gamper* wrote,



on the one hand, the Federal Council is so much less recognized than the National Council that is directly elected by the federal citizens and thus comes to the fore much more. Neither, moreover, is the mode of the Federal Council's selection suited to create identity between the Federal Council's members and the citizens nor is the Federal Council vested with powers that fully deserve the appreciation of the public. The very existence of the Federal Council is therefore hardly known to a large number of citizens or regarded as useless by many (2006: 819).

Thus, it may not be a surprise that the members of the Bundesrat often complain that their political work is frustrating (Fallend 2015: 46).

The roots of the weakness of Austria's second chamber lie both in the nomination procedure and in its limited powers as well as – and above all – in the political system of Austria. The members of the Bundesrat are elected by the Landtage according to the proportional strength of the parties represented in each diet. This institutional construction, and political practice, have led to a Bundesrat that is completely dominated by the political parties (Schäffer 1999: 35).

It is also characteristic that the members of the Bundesrat do not even sit as Länder delegations, but as political groups overlapping Länder boundaries, and that they join their respective political clubs with their counterparts in the Nationalrat. Because of that, the members of the Bundesrat neither feel responsible to the delegating Landtage, nor to the Länder governments (Schäffer 1999: 36). The members of the Bundesrat also lack essential influence on the decisions passed in the meetings of the party divisions of the Austrian parliament. They are only rarely able to exercise effective lobbying for Länder interests in their respective parties.

From a certain point of view, the Bundesrat is partly considered as a preparatory school for young party members or as a place of rest for merited party-veterans (Schäffer 1999: 35). Thus, the relations of power dominating in the Bundesrat are rather similar to those of the Nationalrat.

This failure of the Bundesrat's designated function, as an organ of representation of Länder interests, is one of the most important reasons that the Länder seek to influence federal politics via the conference of Land Governors (Gamper 2006: 820). Over time the conference of the Land Governors has consolidated itself successfully, as a compensation for the weakness of Austria's second chamber, and for the lack of an effective institutionalised body representing Länder interests in federal policymaking processes



(Karlhofer 2017: 23). The evidence for this can be seen in the important role Land Governors play in party politics, even though the conference of Land Governors is not explicitly mentioned in the Federal Constitution (Bußjäger 2015: 19-21).

4.3. The other side of the coin

While some would frankly argue that the bundesrat is worthless from a federal perspective, its veto-right concerning modifications of the Federal Constitution has been sufficient to prevent more severe damage to the Lands' competences. Another point is that the Bundesrat actively participates on the subsidiarity monitoring of projects of the European Commission; here the Austrian Bundesrat is one of the most active chambers of national parliaments of the European Union.

Furthermore, it should be mentioned that the Bundesrat initiated a modification of the Federal Constitution in order to strengthen and facilitate municipal cooperation in 2011. Another initiative concerning the abolishment of various veto-rights of the Federal Government on Land organisation and vice versa will soon be discussed in the parliament.

Finally, it must not be overlooked that in the present situation the Social Democrats and members of the Green Party could make use of the minority right of one-third of the members of the Bundesrat to call for a referendum on modifications of the Federal Constitution. The Social Democratic Party has announced its intent to make use of this instrument, which has never been exercised over nearly a hundred years.

5. Ideas of reform

Even though the deficits of the present system are obvious, ideas for reform of the Bundesrat have, until recent, remained vague. Even a constitutional draft of an overall reform, which was tabled in the Nationalrat in the 1990s, postponed the question of the Bundesrat. Many recommendations for reform only included the relatively vague demands of either strengthening or abolishing the Bundesrat. The government program of the present ÖVP-/FPÖ-coalition at the federal level does not contain a single mention of a reform of the Bundesrat. On the other hand, it has been the practice for many years that the party discipline of the government parties is exercised not only in the Nationalrat but also in the Bundesrat.



In recent years several reform ideas have been presented (Wittmann 2012: 417-529), in which various different types can be distinguished:

The first type refers to those proposals that seek to organisationally reform the Bundesrat, for example to bind members to instructions of the Länder parliaments, or to instructions of the Länder governments (Gamper 2006: 823; see also Schäffer 2007: 20).

Another idea was that the citizens of the Länder should be entitled to elect their delegates directly. Nevertheless, this would probably not bring about any change in the context of representing Länder interests on the federal level. Finally, it was proposed that the Bundesrat should be composed of the Land Governors or delegations of the respective Länder including the Land governors, the presidents of the Landtage and one additional member of the Landtag concerned.^{XII}

The second type of proposals focused on the functions of the Bundesrat. Irrespective of organisational problems, the Bundesrat could operate more efficiently if it had more and stronger powers, or at least more specific and at the same time more powerful competences (Gamper 2006: 823). One proposal was to give the Bundesrat a veto-right over all modifications of the Federal Constitution, as well as over all bills passed by the Nationalrat which have to be executed by organs of the Länder, or which would impose costs on the Landtage (see e.g. Prior 2004: 97).

These ideas for the reform of the power of the Bundesrat are insufficient. As long the members of the Bundesrat do not act as representatives of the Länder, instead of following party discipline, the strengthening of the rights and instruments of the Bundesrat will be insufficient. Thus, a reform of the Bundesrat must have both aspects in mind: Composition and organisational structure of the Bundesrat on the one side and powers and rights of the Bundesrat on the other side.

6. Conclusion

The Austrian Bundesrat was a historical compromise between two parties with profound disagreement on the necessity of a second chamber of parliament. All deputies who took part in the decision on the Federal Constitution in September 1920 were aware of the fact that the Bundesrat would never be able to play an essential role in lawmaking.



Since 1920 the Austrian Bundesrat has remained a legally and politically weak institution. The Bundesrat has self-restricted the exercise of its rights and instruments, and was not able to emancipate itself from the Nationalrat.

On the other hand, there is proof of a slight movement into the direction of the legal strengthening of the Bundesrat since 1984. Nevertheless, the Bundesrat remains under the dominance of the First Chamber. A greater role, reasonably independent from influences from the Nationalrat and party discipline, could only be reached through subsidiarity monitoring in European context. Over the past years many reform ideas have been formulated. The present Federal Government and the political parties, however, seem to have lost any vision for the future of the Bundesrat.

The Austrian Federal Constitution will celebrate its hundredth anniversary in two years. At least until then the situation will remain unchanged.

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^I Art. XXVI, resp 23 and XXVI. See Ermacora 1990: 78-79.

^{II} Art. XXXI; see Ermacora 1990: 92.

^{III} Art. 34; see Ermacora 1990: 90.

^{IV} Art. XXXI; see Ermacora 1990: 92 and 93.

^V See Gamper 2006: 783 for more details. These amendments concerned the right of the Bundesrat to elect members of the joint committee pursuant § 9 Fiscal Constitutional Act in 1922 and to take part in the appointment procedure of judges belonging to the Administrative Court.

^{VI} See Gamper 2006: 784. These modifications concerned the establishment of a Parliamentary Administration in 1973 also competent for the Bundesrat and new provisions in 1981 facilitating interaction between the two chambers of Austrian parliament.

^{VII} BGBl. Nr. 341/1988.

^{VIII} BGBl. I Nr. 54/2005.

^{IX} Source: Institute of Federalism.

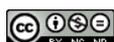
^X See also Ennser-Jedenastik, who shows that 81 percent of the objections were raised in periods in which the ruling government parties had no majority in the Bundesrat. <https://derstandard.at/2000079047574/Bundesrat-Parteipraeferenzen-dominieren-gegenueber-Laenderinteressen?blogGroup=1>.

^{XI} Source: Institute of Federalism; Fallend 2015: 46.

^{XII} The draft paper of an expert group, established by the Federal Government in 2007, proposed such a composition of the Bundesrat (see Institut für Föderalismus 2009: 12).

References

- Bußjäger Peter, 2004, 'Die Instrumente der Mitwirkung der Länder an der Bundesgesetzgebung in Theorie und Verfassungswirklichkeit', in Bußjäger Peter and Weiss Jürgen (eds), *Die Zukunft der Länder an der Bundesgesetzgebung*, Wilhelm Braumüller Universitäts-Verlagsbuchhandlung, Wien, 3-16.
- Bußjäger Peter, 2015, 'Austria's Cooperative Federalism', in Bischof Günther and Karlhofer Ferdinand (eds), *Austrian Federalism in Comparative Perspective*, University of New Orleans Press, Innsbruck University Press, 11-33.
- Erk Jan, 2004, 'Austria: A Federation without Federalism', *Publius*, XXXIV(1): 1-20.





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- Ermacora Felix, 1990, *Die Entstehung der Bundesverfassung 1920. Die Sammlung der Entwürfe zur Staats- bzw. Bundesverfassung*, 9/IV, Wilhelm Braumüller Universitäts-Verlagsbuchhandlung, Wien.
 - Fallend Franz, 2015, 'A Redundant Second Chamber? The Austrian Bundesrat in Comparative Perspective', in Bischof Günther and Karlhofer Ferdinand (eds), *Austrian Federalism in Comparative Perspective*, University of New Orleans Press, Innsbruck University Press, 34-53.
 - Gamper Anna, 2006, 'The Austrian Bundesrat', in Luther Jörg et al (eds), *A World of Second Chambers*, Giuffè, Milano, 781-828.
 - Gamper Anna, 2010, 'Imperfect Bicameralism in Austria: The Role of the Bundesrat', in Hrbek Rudolf (ed), *Legislatures in Federal Systems and Multi-Level-Governance*, Nomos, Baden-Baden, 46-65.
 - Hummer Günther, 1997, 'Der Bundesrat und die Gesetzgebung', in Schambeck Herbert (ed), *Bundesstaat und Bundesrat in Österreich*, Verlag Österreich, Wien, 367-398.
 - Institut für Föderalismus, 2009, *33. Bericht über den Föderalismus in Österreich (2008)*, Wilhelm Braumüller Universitäts-Verlagsbuchhandlung, Wien.
 - Karlhofer Ferdinand, 2017, 'Austria: Federal Politics within and beyond the Constitutional Frame', in Karlhofer Ferdinand and Pallaver Günther (eds), *Federal Power-Sharing in Europe*, Nomos, Baden-Baden, 11-37.
 - Kathrein Irmgard, 1983, *Der Bundesrat in der Ersten Republik. Studie über die Entstehung und die Tätigkeit des Bundesrates der Republik Österreich*, Wilhelm Braumüller Universitäts-Verlagsbuchhandlung, Wien.
 - Pernthaler Peter, 2004, *Österreichisches Bundesstaatsrecht*, Verlag Österreich, Wien.
 - Prior Walter, 2004, 'Die Mitwirkung an der Bundesgesetzgebung aus der Sicht eines Landtages und vor dem Hintergrund des Österreich-Konvents', in Bußjäger Peter and Weiss Jürgen (eds), *Die Zukunft der Länder an der Bundesgesetzgebung*, Wilhelm Braumüller Universitäts-Verlagsbuchhandlung, Wien, 91-100.
 - Schäffer Heinz, 1999, 'The Austrian Bundesrat: Constitutional Law – Political Reality – Reform Ideas', in Karpen Ulrich (ed), *Role and Function of the Second Chamber*, Nomos, Baden-Baden, 25-55.
 - Schäffer Heinz, 2007, 'Reformperspektiven für den Bundesrat', *Journal für Rechtspolitik*, XV: 11-22.
 - Schefbeck Günther, 1997, 'Zur Entstehung des Bundesrates', in Schambeck Herbert (ed), *Bundesstaat und Bundesrat in Österreich*, Verlag Österreich, Wien, 299-345.
 - Wittmann Martin C., 2012, *Der Senat der Italienischen Republik und der Bundesrat der Republik Österreich. Ein rechts- und politikwissenschaftlicher Vergleich*, Wilhelm Braumüller Universitäts-Verlagsbuchhandlung, Wien.



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The German *Bundesrat* and Executive Federalism

by

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E -198



Abstract

The German Basic Law constitutes federalism as a unique political system which is characterised by intertwined decision-making of the Federation (*Bund*) and the component units (*Länder*). The executives of the two federal tiers and the *Länder* executives within the *Bundesrat* play a major role in making joint decisions. They are forced to make decisions in the ‘joint-decision mode’ (*Politikverflechtung*) which is detrimental to accountability. Reform efforts were made to unbundle competences and to reduce the number of bills which require the *Bundesrat*’s consent. Due to the dominance of the executives and the distribution of powers between the federal tiers (legislation is dominated by the *Bund*, execution is dominated by the *Länder*), German federalism is rightly called ‘executive federalism’. German federalism can even be regarded as an embodiment of that concept since it covers all possible aspects of ‘executive federalism’. The *Bundesrat* has an important share in that classification.

Key-words

executive federalism, second chamber, German parliament, distribution of legislative powers, asymmetric federalism



1. Introduction. The main characteristics of German federalism

The Basic Law establishes Germany as a federal state (*Bundestaat*, cf. Article 20 para. 1 BL). As a federal state, Germany consists of two federal tiers, both of which have state character: The Federation and the individual *Länder*. The statehood of the German *Länder* is reflected in many provisions in the Basic Law as well as in the fact that all the *Länder* have adopted their own written constitutions.

Besides the two federal tiers there is no third federal tier representing the entirety of *Bund* and *Länder*, a so-called ‘entire state’ (*Gesamtstaat*). Rather, the *Bund* combines two qualities: (a) internally, in its relationship to the *Länder*, it is a ‘central state’; (b) externally, in its relationship to third countries, international organisations etc. it is the ‘entire state’, now including the *Länder* (cf. Niedobitek 2001: 52 et seq.)

Without doubt, the *Länder* are subordinate to the *Bund* insofar as the Basic Law provides for a hierarchical order between the *Bund* and the *Länder* (cf. BVerfGE¹ 13, 54/78 et seq.). To mention only a few examples: (a) Pursuant to Article 31 BL federal law shall take precedence over *Land* law; (b) Article 72 para 1 BL stipulates that on matters within the concurrent legislative power, the *Länder* shall have power to legislate only so long as and to the extent that the Federation has not exercised its legislative power by enacting a law; (c) international treaties of the *Länder* require the consent of the Federal Government pursuant to Article 32 para 3 BL; (d) territorial reform of the *Länder* can be enacted by a federal law pursuant Article 29 para 2 BL.

But apart from this, the *Bund* and the *Länder* are on an equal footing as the Federal Constitutional Court has constantly held (cf. Niedobitek 2013, no. 43, 73). Accordingly, the Court has confirmed that the *Länder* are not derived from the Federation but are rather recognised by it (BVerfGE 60, 175/207).

As a rule, the exercise of state powers and the discharge of state functions are matters for the *Länder* (Article 30 Basic Law). However, as a result of the constitutional distribution of competences between the *Bund* and the *Länder*, the *Bund* is dominant in the field of legislation while the *Länder’s* domain is execution of federal laws (alongside *Land* laws). This division of responsibilities is, however, not as clear as it may seem at first glance. Rather, ‘it is a system of cooperation, interconnections, and interrelationships’ (Gunlicks



2003: 61): On the one hand, the *Länder* take part in federal legislation via the *Bundesrat*; on the other hand, when carrying out federal laws the *Länder* ‘may be subject to many federal instructions and restrictions which they can usually influence via the *Bundesrat*’ (Gunlicks 2003: 61; cf. Articles 84, 85 BL).

The unique features of the German federal system have created a particular mode of decision-making which Fritz W. Scharpf and others have called *Politikverflechtung* (Joint-Decision Mode). The Joint-Decision Mode applies to bills that require the *Bundesrat*’s consent (Benz, Detemple and Heinz 2013: 155). This mode, which cannot be dealt with in detail here (cf. the contribution of Benz in this volume), is a particular form of coordination between the *Bund* and the *Länder* which compels the legislative actors to perform their shared competences jointly (Benz 2015: 196 et seq.). It is argued that performing public tasks in the Joint-Decision Mode results in inefficient decisions (although according to Sturm 2009, p. 147, this is not proven). Therefore, the unbundling of legislative competences between the *Bund* and the *Länder* and between the *Bundestag* and the *Bundesrat* has become a constant issue on the German federalism reform agenda (Benz, Detemple and Heinz 2013: 155 et seq.).

Questions of symmetry in German federalism continue to be raised. Generally speaking, it is clear that all federal systems comprise more or less elements of symmetry and asymmetry (Burgess 2008: 105). But from a *de-jure* standpoint the German federal system must be classified as a symmetric system since all German *Länder* have basically the *same legal status* under the Basic Law (Sturm 2008: 31 f.). It goes without saying that modifications such as differences of votes in the *Bundesrat* (cf. below, 3.) are implied. If one, however, considers other elements of the German federal system such as the role of the *Bundesrat* it clearly has asymmetrical tendencies (Sturm and Winkelmann 2014: 61).

This article concentrates on the German *Bundesrat* as a unique manifestation of German federalism. It aims at a description of the *Bundesrat*’s present constitutional design with a view to allowing a comparison with other bicameral systems. It first points to the legislative function of the *Bundesrat* and its political clout (2.). Next, it outlines the *Bundesrat*’s characteristic features (3.) which make it a qualified form of ‘territorial representation’. This, subsequently, enables us to qualify the *Bundesrat* as the second chamber of the German parliament and, thus, to classify German federalism as a bicameral system (4.). Furthermore, it is possible to localise the *Bundesrat* within the multifaceted concept of



‘executive federalism’ which among other concepts characterises German federalism particularly accurately (5.). The *Bundesrat*’s constitutional design as outlined in the previous sections is not unchallenged. Reform efforts are, however, improbable (6.). The main findings are summarised in the concluding section (7.).

2. The two legislative bodies of the German federation

The German constitution, the *Grundgesetz* (Basic Law = BL), provides for two ‘legislative bodies’ (cf. Articles 55, 59 para. 2, 122 para. 1 BL): the *Bundestag* and the *Bundesrat*. While the *Bundestag* is the main legislative body whose primary task is to adopt bills (Article 77 para. 1 BL), the *Bundesrat*’s task as a legislative body is either to give or to refuse its consent or – depending on the constitutional arrangement – to object to the bill in question if necessary (Article 77 paras 2–4 BL). Thus, bills are not jointly adopted by the *Bundestag* and the *Bundesrat* but by the *Bundestag* alone with, however, different forms of participation of the *Bundesrat* (cf. Article 78 BL).

Depending on the constitutionally stipulated form of participation of the *Bundesrat* in the law-making procedure – either a necessity for consent or the possibility to object to a bill – the political composition of the *Bundesrat* may become important. In the early years of the German constitution, the *Bundesrat* was considered ‘unpolitical’: a *bureaucratic* institution without strong political power. But this changed in the early 1970s; from that time on, the *Bundesrat* emerged as a ‘politicised’ institution, a (potential) opponent to the federal government (Oeter 1998: 322 et seq.).

However, compared to the *Bundestag*, the *Bundesrat* is still an institution that is dominated by administrative expertise rather than by political debate (Sturm 2009: 147). The reason for this is the composition of the *Bundesrat*, which consists of members of the *Land* governments, which are not necessarily – and are often not – composed in the same way as the federal government or the majority in the *Bundestag*. Rather, depending on the outcome of the *Land* elections, the *Bundesrat* may form a forum for the federal opposition (Oeter 1998: 322 et seq.). Irrespective of its composition, the *Bundesrat* is a federal institution (Risse 2005: 11) and as such not only dedicated to the *Länder*’s interests but also to the interests of the Federation.



Federal elections last took place on September 24, 2017. After lengthy negotiations among several parties, a new ‘grand’ coalition was formed on March 14, 2018, consisting of the CDU, the CSU and the SPD.ⁱⁱ

Elections within the *Länder* do not take place at the same time as the federal elections; this follows, *inter alia*, from the fact that the legislative period in the *Länder* lasts five years (except Bremen) while federal elections take place every four years. The coming *Land* elections are scheduled as follows: Bavaria: 14 October 2018; Hesse: 28 October 2018; Bremen: Spring 2019; Saxony: Autumn 2019; Thuringia: Autumn 2019; Brandenburg: Autumn 2019; Hamburg: Spring 2020.ⁱⁱⁱ Each election can change the composition of the *Bundesrat* and, thus, its general political attitude towards the federal governments’ politics.

Today (April 30, 2018), the composition of the German *Land* governments and the number of votes in the *Bundesrat* (in brackets) are as follows:

Baden-Württemberg (6)	Grüne / CDU	Lower Saxony (6)	SPD / CDU
Bavaria (6)	CSU	North Rhine-Westphalia (6)	CDU / FDP
Berlin (4)	SPD / LINKE / Grüne	Rhineland-Palatinate (4)	SPD / FDP / Grüne
Brandenburg (4)	SPD / LINKE	Saarland (3)	CDU / SPD
Bremen (3)	SPD / Grüne	Saxony (4)	CDU / SPD
Hamburg (3)	SPD / Grüne	Saxony-Anhalt (4)	CDU / SPD / Grüne
Hesse (5)	CDU / Grüne	Schleswig-Holstein (4)	CDU / Grüne / FDP
Mecklenburg Western-Pomerania (3)	SPD / CDU	Thuringia (4)	LINKE / SPD / Grüne

Source: Own table on the basis of the *Bundesrat*’s website: <https://www.bundesrat.de/DE/bundesrat/verteilung/verteilung-node.html> (accessed on April 28, 2018).

The above table shows that at least six *Land* governments are likely to support the federal government’s legislative proposals in the *Bundesrat* given that their composition by and large conforms with the composition of the federal government (*Bundesrat*-votes in brackets): Bavaria (6), Mecklenburg Western-Pomerania (3), Lower Saxony (6), Saarland



(3), Saxony (4), maybe also Saxony-Anhalt (4). The number of votes in favour of the federal government would be 26, which is not a majority (= 35). However, the member parties of the new ‘grand’ coalition also participate individually in other *Land* governments. Thus, currently a clear ‘blocking potential’ cannot be deduced from the above table.

The ‘politicisation’ of the *Bundesrat* and the – prior and continuing – increase in the number of bills requiring the *Bundesrat*’s consent has raised concerns. Depending on its political composition the *Bundesrat* was ascribed the putative power to block the legislative activities of the *Bundestag*, or the Federation as such, and to cause legislative gridlock. Even though no empirical verification has been provided for this assumption (cf. Schöbener 2010, Article 50 BL mn. 129; Eith and Siewert 2010: 116; Sturm 2009: 145), the *Bundesrat*’s potential for blockade was seen as problematic. Therefore, reform efforts were made to reduce that potential. Those efforts will be dealt with below (6.).

3. The German *Bundesrat* as a federal constitutional body representing the German ‘regions’

3.1. The *Bundesrat*’s functions

From the perspective of European Union law the German *Länder* are ‘regions’ (Blanke 2016, Artikel 300 AEUV mn. 92) albeit with legislative competences. The *Bundesrat* primarily serves to represent the interests of the *Länder* on the federal scene. The *Länder* are territorial (and political) sub-units of the Federation and their representation must thus be classified as ‘territorial’ (cf. Sturm 2009, p. 148). In that perspective, the distinction between ‘federal’ and ‘territorial’ representation (cf. Groß 2003: 36, Kotzur 2006: 272) is not relevant. The concepts of ‘federal’ or ‘territorial’ representation are not categorically different; rather, ‘federal’ representation must be regarded as a qualified form of ‘territorial’ representation.

More generally, the *Bundesrat* is also regarded as an element of vertical separation of powers between the *Bund* and the *Länder* (Robbers 2018, Artikel 50 GG mn. 11). Others stress the relationship between the *Bundesrat* and the *Bundestag* as federal organs and consider the *Bundesrat* as an element of horizontal separation of powers (Leunig 2009b: 15).



3.2. The *Bundesrat's* tasks

The German 'regions' are represented in, and by, the *Bundesrat*. Article 50 BL says: 'The *Länder* shall participate through the *Bundesrat* in the legislation and administration of the Federation and in matters concerning the European Union.' This wording makes it clear that the German *Länder* do not participate in the Federation's legislation or administration directly but are, as a rule (exception e.g. Article 138 BL), mediated by the *Bundesrat*. This is confirmed by Article 23 para. 2 sentence 1 BL with regard to matters concerning the European Union.

As a 'legislative body' the *Bundesrat's* task is to take part in the Federation's legislation. As already mentioned above (2.), in that regard the Basic Law (Article 77) provides for two kinds of bills: (a) bills that need the *Bundesrat's* consent in order to become law (veto option); (b) all other bills against which the *Bundesrat* can raise objections (suspensive veto that can be outvoted by the *Bundestag*). The requirement of the *Bundesrat* to give its consent to a bill must explicitly be provided for in the Basic Law (*numerus clausus*). The original idea of the authors of the Basic Law was to construe the 'consent option' as the exception while the 'objection option' was to be the rule (Oeter 1998: 159). Surprisingly, however, as of the early years the number of bills that required the *Bundesrat's* consent, exceeded the number of bills that could be objected to. One important reason for this situation was the then Article 84 BL which required the consent of the *Bundesrat* for federal bills which provided for the establishment of administrative authorities or which regulated administrative procedures (Oeter 1998: 159).

The description of the legislative task of the *Bundesrat* would be incomplete without mentioning its right to legislative initiative as provided for in Article 76 BL. Importantly, the right of the *Bundesrat* to legislative initiative is not substantially limited; in particular it is not restricted to *Länder* interests (Reuter 2007, Artikel 50 GG mn. 127). The number of legislative initiatives of the *Bundesrat*, however, is comparatively small (Reuter 2007, Artikel 50 GG mn. 130).

Besides legislation the *Bundesrat* fulfills many other tasks (for an overview cf. Schmidt 2012, p. 674 et seq.) among which its participation in the administration of the Federation is a particularly important role (Robbers 2018, Artikel 50 GG mn. 29). Furthermore, the *Bundesrat* is involved in matters concerning the European Union (cf. Article 23 BL).



3.3. Composition of the *Bundesrat*

The *Bundesrat* has no legislative period: instead, like the Council of the EU or the European Council, it is an ‘eternal’ institution (Kotzur 2006: 273 et seq.). Pursuant to Article 51 para. 1 BL the *Bundesrat* ‘shall consist of members of the *Land* governments, which appoint and recall them’. The composition of the *Bundesrat* distinguishes it from ‘real’ second chambers. This is an (*almost*; cf. Russell 2001: 108 et seq.) unique feature of the German federal system. In fact, the ‘real members’ of the *Bundesrat* are not its determined members pursuant to Article 51 BL but the *Länder* themselves (cf. Schöbener 2010, Article 51 BL, mn. 14). Thus, the *Länder*, or rather the *Land* governments, have the right – and duty – to instruct their members of the *Bundesrat*. This does not follow from the wording of the Basic Law but from an interpretation of its provisions. Furthermore, some *Land* Constitutions confirm that interpretation (cf. Leunig 2009a: 98).

An *asymmetric* element of German federalism is the unequal (over- or under-) representation of the *Länder* in the *Bundesrat*. Pursuant to Article 51 para. 2 BL each *Land* shall have at least three votes; *Länder* with more than two million inhabitants shall have four, *Länder* with more than six million inhabitants five, and *Länder* with more than seven million inhabitants six votes. This provision amounts to the number of votes of each *Land* as demonstrated in the table above (2.). In European Union law the principle described here is called ‘degressive proportionality’ (cf. Article 14 para. 2 TEU). It provides for a compromise between federative and democratic representation (Eith and Siewert 2010: 105). Thus, an exception to the general principle of *equality* of the *Länder* applies.

The governmental (or executive) composition of the *Bundesrat* continues through to its committees. Article 52 para. 4 BL assigns a large margin of discretion to the *Länder* in that it entitles the *Länder* to send not only other members but also ‘representatives’ (*Beauftragte*) of the *Land* governments into the committees of the *Bundesrat*. The term ‘representatives’ is not defined and implies no particular personal requirements (Reuter 2007, Artikel 52 GG mn. 56). In practice, work in the committees of the *Bundesrat* is dominated by the *Land* bureaucracy and its (executive) expertise (cf. Kluth 2011: 214; Leunig 2009a: 97 et seq.). The primary role of the *Land* bureaucracy in the decision-making process of the *Bundesrat* is evidenced by the huge number of meetings of the committees and subcommittees of the *Bundesrat* compared to its plenary sessions (Sturm 2009: 147). Unlike in the plenum of the *Bundesrat*, in its committees each *Land* has one vote (cf. § 42 para. 2 of the *Bundesrat*’s Rules



of Procedure). This may lead to committee decisions which do not anticipate the plenum's decision (Leunig 2009a: 99).

3.4. Voting in the *Bundesrat*

Pursuant to Article 52 para. 3 sentence 1 BL decisions of the *Bundesrat* shall require at least a majority of its votes (35 of 69). The members of each *Land* must cast the *Land* votes as a unit (Article 51 para. 3 sentence 2 BL). It suffices that one *Bundesrat* member of a *Land* is present in the meeting. This member is entitled, and obliged, to cast all votes of the *Land*. This provision proves to be problematic in coalition governments which may have split opinions on an issue which is on the *Bundesrat's* agenda. In fact, today all *Land* governments are coalition governments except Bavaria (cf. the table above, 2.). Usually, coalition agreements provide for the possibility of diverging opinions within the government in that the *Bundesrat* members have to abstain from voting if no prior agreement has been reached (Schmidt 2012: 673; cf., e.g., the coalition agreement between the LINKE, SPD and Bündnis 90/Die Grünen of December 4, 2014, p. 95). The requirement to cast all votes as a unit was infringed in 2002 when the *Land* Brandenburg, when voting on the Immigration Act (*Zuwanderungsgesetz*) did not cast its votes uniformly but openly differently. After reprimanding the *Land*, the then President of the *Bundesrat* Klaus Wowereit asked the Minister President of Brandenburg, Manfred Stolpe, to clarify the *Land's* position, which he did ('yes'). The Federal Constitutional Court subsequently declared the Immigration Act void (BVerfGE 106, 310). It stated that the President of the *Bundesrat* was not permitted to count the casting of the votes for the *Land* Brandenburg by the Minister President as an agreement of the *Land* to the Immigration Act. The Minister President, the Court said, cannot be regarded as the holder of the block votes if a *Bundesrat* member of the *Land* in question contradicts.

3.5. Role and constitutional status of the Conciliation Committee (*Vermittlungsausschuss*)

It is clear that the Basic Law does not provide for a classic two-chamber parliament; however, the Conciliation Committee can be regarded as a sort of 'nucleus' of a 'German Diet' (cf. Kotzur 2006: 267 and 281: '... the '*Vermittlungsausschuss*' can become the true legislator'). The Conciliation Committee (cf. Schmedes 2017: 279 et seq.) is neither an



institution of the *Bundestag*, nor of the *Bundesrat*, but a joint institution of both legislative bodies, a ‘sui generis’ institution (Kokott 2014, Artikel 77 GG mn. 91; Schöbener 2010, Artikel 50 GG mn. 21). According to its Rules of Procedure (§ 1) the Committee is composed in parity: It consists of 16 members of the *Bundestag* and 16 members of the *Bundesrat*. The Conciliation Committee’s task is to jointly consider a bill (cf. Article 77 para. 2 sentence 1 BL). This is particularly important when the *Bundesrat*’s consent is required. In that case the *Bundesrat*, the *Bundestag* and the Federal Government are entitled to convene the Committee. When the *Bundesrat* can only raise objections to a bill, solely the *Bundesrat* can convene the Committee. To object to a bill requires the prior convention the Committee (Eith and Siewert 2010: 108).

4. The *Bundesrat* as a ‘second chamber’ of the German parliament

As already mentioned (cf. above, 3.5.), it is obvious that the Basic Law doesn’t provide for a classic two-chamber parliament. No mention is made in the Basic Law of a ‘parliament’ that incorporates the *Bundestag* and the *Bundesrat* as two chambers or houses. Rather, the Basic Law establishes two legislative bodies (cf. Articles 55 para. 1, 59 para. 2, 122 para 1 BL) of which the *Bundestag* is the main legislator while the *Bundesrat*’s involvement in legislation is reduced (cf. above, 3.2.). Formally, thus, the *Bundesrat* is not a classic second chamber.

This was confirmed by the Federal Constitutional Court which argued in its decision of June 25, 1974 (BVerfGE 37, 363/380) that ‘pursuant to the Basic Law, the *Bundesrat* is not a second chamber of a uniform legislative organ that participates in the legislative process on an equal footing with the first chamber’ (translation from German by the author). What the Court, however, did not do, was to rule out categorically the possibility of classifying the *Bundesrat* as a second chamber. With its statement the Federal Constitutional Court allowed for the fact that the ‘*World of Second Chambers*’ (cf. Luther, Passaglia and Tarchi 2006) is colourful and highly differentiated (Leunig 2009b, p. 16). Only a broad definition such as that given by *Thomas Groß* (Groß 2003: 31) is adequate to grasp the manifold manifestations of second chambers in the world. Thus, irrespective of its atypical composition, its reduced participation in federal law-making and other features, the *Bundesrat* must functionally be regarded as a second chamber (Leunig 2009: 16).



The constitutional role of the *Bundesrat*, expressed in its functions, tasks and rights, is not dependent on it being classified as a second chamber. In that regard, the second-chamber question is purely terminological in nature (Schöbener 2010, Artikel 50 GG mn. 19) and without legal significance. However, from the perspective of EU law the classification of the *Bundesrat* as a second chamber is legally important in order to justify the inclusion of the *Bundesrat* in the task assigned to the national parliaments of ‘seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality’ (Article 12 lit. b) TEU). For this purpose, the *Bundesrat* must be, and is in fact, viewed as a ‘chamber of a national Parliament’ in the meaning of Protocol No. 2 on the application of the principle of subsidiarity and proportionality annexed to the Lisbon Treaty.

To conclude, German federalism is constituted as a bicameral system with two legislative bodies which are functionally the two chambers of the German parliament.

5. The German *Bundesrat* and ‘executive federalism’

The German constitutional system is often referred to as ‘executive federalism’; it even seems that German federalism can be regarded as an embodiment of that concept, and the *Bundesrat* plays an important role in that characterisation. Before dealing with the concept of ‘executive federalism’ it must be distinguished from other types of federalism. *Dann* (2004: 40 et seq.) has identified three structural types of federalism: (1) separative federalism (*Trennföderalismus*; example: USA); direct democratic interlaced federalism (*direktdemokratischer Verflechtungsföderalismus*; example: Switzerland); executive federalism (*Exekutivföderalismus*; example: Germany).

It goes without saying that the three types mentioned above represent very broad concepts. As Federico Fabbrini has stated, the notion ‘executive federalism’ is multifaceted (Fabbrini 2015: 289). Not surprisingly, the definitions proposed by scholars from several disciplines differ considerably in detail but have a common core in that they stress the modes of execution of laws or the dominant role of the executive branch. All in all, it seems that scholars use their own definition tailored for their particular purposes. This is reflected in the following definitions.



Robert Schütze calls ‘executive federalism’ a decentralised model which ‘entrusts the execution of federal law principally to the Member States’ (Schütze 2010: 1389). This model, as Schütze correctly says, characterises German federalism. *Federico Fabbrini* finds that Schütze’s definition is specific (Fabbrini 2015: 289 et seq.). Referring to *Ronald Watts*, he applies a ‘more general’ definition that points to the modes of intergovernmental negotiations which are dominated by the executives of the governments of the federal tiers. A similar definition is applied by *Philipp Dann* (2004: 41). *Hans-Jürgen Papier* stresses the process of strengthening of the *Land* governments at the cost of the *Land* parliaments: The former receive participatory rights at the federal level (within the *Bundesrat*) in exchange for a loss of legislative competences of the *Länder* (Papier 2012: 370). He also calls this compensatory mechanism ‘Beteiligungsföderalismus’ (*participative federalism*). *Jacques Ziller* submits an approach, that, he says, ‘is more appropriate for a legal analysis than the usual political science perspective’ (Ziller 2010: 261). He calls ‘executive federalism’ the ‘organization of the executive function amongst levels of government’. *Ines Härtel*, to mention a last example, conceives ‘executive federalism’ as bargaining of the executive in *Bund-Länder* or *Länder* commissions which, even though regularly not legally binding, are *de facto* binding for the *Land* parliaments (Härtel 2012: 439).

The *Bundesrat*’s significance within the definitions listed above differs. Some definitions primarily refer to the distribution of powers between the Federation (legislation) and the *Länder* (execution) and, thus, affect the *Bundesrat* only indirectly. Others stress the need for intergovernmental coordination and bargaining between the federal tiers. The narrowest definition refers to the existence of a Council that consists of members of the component units and takes part in federal legislation (Dann 2004: 41) which is, of course, modelled on the German system. However, it is not necessary to apply the narrowest possible definition of ‘executive federalism’ in order to include the *Bundesrat*. Rather, most definitions mentioned above describe features which refer, directly or indirectly, to the German *Bundesrat*.



6. Implications of German federalism reform for the German *Bundesrat*

Over the course of time, German federalism has repeatedly been subject to reform efforts (cf. Gunlicks 2012: 115 et seq.). Inevitably, those reforms did not leave the *Bundesrat* unaffected, sometimes only by reflection, sometimes by intention. Major criticism was raised concerning the *Bundesrat's* power to veto the *Bundestag's* legislative decisions. Before the federalism reform of 2006 more than 60 % of federal bills were estimated to have required the *Bundesrat's* consent (Sturm 2009: 145). In recent times the number of legislative cases that have required the consent of the *Bundesrat* have reduced significantly (cf. Benz, Detemple and Hein 2013: 155; Sturm 2012: 737). From then on, for example, the Federation could regulate the establishment of *Land* authorities and their administrative procedure without the consent of the *Bundesrat* (cf. new Article 84 BL). In return, the *Länder* were assigned the right to deviate from federal legislation enacted in that field (cf. Niedobitek 2013: no. 9 et seq.). The third and last part of the recent federalism reform, which essentially concerned the introduction of a new model of fiscal equalisation, (Amendment of the Basic Law of July 13, 2017, BGBl. 2017 I 2347) reversed the trend, increasing requirements for the *Bundesrat's* consent and the joint-decision mode (Gamper 2017: 121 and 123).

There is no lack of reform options and proposals for the German *Bundesrat* as such, however improbable they may be. A few examples may suffice. *First*, it has been proposed to replace the *Bundesrat* by a 'Senate' whose members are elected by the *Land* parliaments or directly by the *Land* people (Papier 2012: 381 et seq.). This proposal refers to the discussions that took place when the Basic Law was founded (cf. Eith and Siewert 2010: 101). *Second*, a change of the voting requirements has been proposed, from absolute majority voting to a relative majority (Eith and Siewert 2010: 118). *Third*, a proposal to allow the *Länder* to no longer cast their votes *en bloc* but in accordance with their political affiliation has been made (cf. Eith and Siewert 2010: 118 et seq.). This could avoid abstentions, as provided for in coalition agreements in the case of split opinions with the government. *Fourth*, territorial reform of the *Länder* is being discussed (cf. Papier 2012: 379 et seq.). The issue is important for the composition of the *Bundesrat* since it could justify an equal distribution of the votes of the *Bundesrat*. However, in the light of previous federalism



reforms, it is doubtful whether fundamental changes of the constitutional design of the *Bundesrat* will happen in the near future.

7. Summary

Germany is a federal state with two state tiers: the *Bund* (federation) and the *Länder* (component units). As a rule, the exercise of state powers and the discharge of state functions is a matter for the *Länder* (Article 30 Basic Law). A closer look at the German Basic Law reveals, however, that the *Bund* dominates legislation while the *Länder's* domain is execution. This is a first justification to call German federalism 'executive federalism'. Legislation of the *Bund* is not protected from *Länder* influence. This influence is, however, only indirect. The *Länder* are represented (mediated) in the *Bundesrat* which is, legally speaking, a federal organ, not a *Länder* organ. The *Bundesrat* consists of appointed members of the *Land* governments who are (to be) instructed by their respective *Land* government. This is a second, and the most convincing, justification to speak of 'executive federalism' in the German context. Thus, the existence of the *Bundesrat* and its constitutional design justify German federalism's appellation of 'executive federalism'.

The *Bundesrat* takes part in the legislation and administration of the *Bund*. As regards legislation, the powers of the *Bundesrat* are strong when its consent is required; against other laws the *Bundesrat* can raise objections (which can be outvoted by the *Bundestag*). The number of laws requiring the consent of the *Bundesrat* was reduced by Federalism Reform I (2006) in order to unbundle the competence spheres of the *Bund* and the *Länder*.

The legislative function of the *Bundesrat* makes it a 'legislative body' (Article 55; cf. also 59 para. 2 Basic Law). However, the question of whether to call the *Bundesrat* a 'second chamber' of a German parliament is disputed; formally, this is not the case but functionally the *Bundesrat* must be regarded as a 'second chamber'. However, to call the *Bundesrat* a 'second chamber' or not is not significant for the legal scope of its constitutional role. At the EU level, though, it is important for the *Bundesrat* to be regarded as a second chamber.

The constitutional design of the *Bundesrat* has necessarily led to intertwined (joint) decision-making (according to Fritz W. Scharpf) which has frequently drawn criticism, and reform efforts are aimed at unbundling legislative competences of the two federal tiers as well as at reforming the *Bundesrat* itself. The latter proposals include the introduction of a



Senate model of territorial representation, new voting mechanisms in the *Bundesrat* or the abolishment of the requirement to cast the votes of each *Land* as a unit. In the light of the long tradition of the *Bundesrat* model and its close relationship with German federalism as such, however, it is doubtful whether fundamental changes of the constitutional design of the *Bundesrat* will occur.

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¹ BVerfGE = Decisions of the Federal Constitutional Court.

ⁱⁱ Cf. the coalition agreement on the federal government's website: <https://www.bundesregierung.de/Content/DE/Anlagen/2018/03/2018-03-14-koalitionsvertrag.html>.

ⁱⁱⁱ Cf. <https://www.bundeswahlleiter.de/service/wahltermine.html>.

References

- Basic Law, English version of the *Grundgesetz* provided by Christian Tomuschat, David P. Currie and Donald P. Kommers (https://www.gesetze-im-internet.de/englisch_gg/index.html).
- Benz Arthur, 2015, 'Föderalismus und Demokratie – Anmerkungen zu einem Spannungsverhältnis', in *Jahrbuch des Föderalismus 2015*, Nomos, Baden-Baden, 192–201.
- Benz Arthu, Detemple Jessica and Heinz Dominic, 2013, 'Varianten und Dynamiken der Politikverflechtung', in *Jahrbuch des Föderalismus 2013*, Nomos, Baden-Baden, 155–165.
- Blanke Hermann-Josef, 2016, 'Artikel 300 AEUV', in Grabitz Eberhard, Hilf Meinhard and Nettesheim Martin (eds), *Das Recht der Europäischen Union*, looseleaf, Verlag C. H. Beck, München.
- Burgess Michael, 2008, 'Das Paradox der Diversität: Asymmetrischer Föderalismus aus vergleichender Perspektive', in *Jahrbuch des Föderalismus 2008*, Nomos, Baden-Baden, 103-116.
- Coalition agreement between the LINKE, SPD and Bündnis 90/Die Grünen of December 4, 2014, https://www.die-linke-thueringen.de/fileadmin/LV_Thuringen/dokumente/r2g-koalitionsvertrag-final.pdf (accessed on April 30, 2018).
- Dann Philipp, 2004, *Parlamente im Exekutivföderalismus*, Springer, Berlin et al.
- Eith Ulrich and Siewert Markus B., 2010, 'Das "unechte" Unikat: der Deutsche Bundesrat', in Riescher Gisela, Ruß Sabine and Haas Christoph M. (eds), *Zweite Kammern*, 2nd ed., Oldenbourg Wissenschaftsverlag, München.
- Fabbrini, Federico, 2015, 'From Executive Federalism to Executive Government: Current Problems and Future Prospects in the Governance of EMU', in Fabbrini Federico, Hirsch Ballin Ernst and Somsen Han (eds), *What Form of Government for the European Union and the Eurozone?*, Hart Publishing, Oxford, 289-306.
- Groß Thomas, 2003, 'Zwei-Kammer-Parlamente in der Europäischen Union', *ZaöRV*, no. 63: 29-57.
- Gunlicks Arthur B., 2003, *The Länder and German federalism*, Manchester University Press, Manchester and New York.
- Gunlicks Arthur B., 2012, 'Reforming German federalism', in Appleby Gabrielle, Aroney Nicholas and John Thomas (eds), *The Future of Australian Federalism*, Cambridge University Press, Cambridge, 115-140.
- Härtel Ines, 2012, 'Der staatszentrierte Föderalismus zwischen Ewigkeitsgarantie und Divided Government. Genese, Ausprägung und Problemhorizonte des Bundesstaatsprinzips', in Härtel Ines (ed), *Handbuch Föderalismus, Band I: Grundlagen des Föderalismus und der deutsche Bundesstaat*, Springer, Heidelberg et al., 387-476.
- Kluth Winfried, 2011, 'Gesetzgebung im Spannungsfeld von Parlamentarismus und Föderalismus – Reformperspektiven für das Vermittlungsverfahren', in Baumeister Peter, Roth Wolfgang and Ruthig Josef (eds), *Staat, Verwaltung und Rechtsschutz – Festschrift für Wolf-Rüdiger Schenke zum 70. Geburtstag*, Duncker & Humblot, Berlin, 213-232.



- Kokott Juliane, 2014, 'Artikel 77 Grundgesetz', in Kahl Wolfgang, Waldhoff Christian and Walter Christian (eds), *Bonner Kommentar zum Grundgesetz*, loose-leaf edition, Heidelberg.
- Kotzur Markus, 2006, 'Federalism and Bicameralism – The German "Bundesrat" (Federal Council) as an Atypical Model', in Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè Editore, Milano, 257-290.
- Leunig Sven, 2009a, 'Der deutsche Bundesrat: Einzigartig, einflussreich, aber nicht unumstritten', in Leunig Sven (ed), *Handbuch Föderale Zweite Kammern*, Verlag Barbara Budrich, Opladen & Farmington Hills, 95–113.
- Leunig Sven, 2009b, 'Einführung', in Leunig Sven (ed), *Handbuch Föderale Zweite Kammern*, Verlag Barbara Budrich, Opladen & Farmington Hills, 15–18.
- Luther Jörg, Passaglia Paolo and Tarchi Rolando (eds), 2006, *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè Editore, Milano.
- Niedobitek Matthias, 2001, *Das Recht der grenzüberschreitenden Verträge – Bund, Länder und Gemeinden als Träger grenzüberschreitender Zusammenarbeit*, Mohr Siebeck, Tübingen.
- Niedobitek Matthias, 2013, 'Germany – Sub-national Constitutional Law' (update August 2012), in *International Encyclopaedia of Laws* (general ed.: Roger Blanpain), Constitutional Law – Sub-national Constitutional Law (eds: André ALEN and David Haljan), Wolters Kluwer, Alphen aan den Rijn.
- Oeter Stefan, 1998, *Integration und Subsidiarität im deutschen Bundesstaatsrecht*, Mohr Siebeck, Tübingen.
- Papier Hans-Jürgen, 2012, 'Steuerungsprobleme und die Modernisierung bundesstaatlicher Ordnung', in Härtel Ines (ed), *Handbuch Föderalismus, Band I: Grundlagen des Föderalismus und der deutsche Bundesstaat*, Springer, Heidelberg et al., 361-385.
- Reuter Konrad, 2007, *Praxishandbuch Bundesrat*, 2nd ed., C. F. Müller Verlag, Heidelberg.
- Risse Horst, 2005, 'The Bundesrat in the federal legislative process', in Robbers Gerhard (ed), *Reforming Federalism – Foreign Experiences for a Reform in Germany*, Verlag Peter Lang, Frankfurt/Main, 11–16.
- Robbers Gerhard, 2018, 'Artikel 50 Grundgesetz', in Sachs Michael (ed), *Grundgesetz – Kommentar*, 8th ed., Verlag C. H. Beck, München.
- Russell Meg, 2001, 'The Territorial Role of Second Chambers', *Journal of Legislative Studies*, VII(1): 105-118.
- Schmedes Hans-Jörg, 2017, 'Zwischen Konkurrenz und Konkordanz: Der Vermittlungsausschuss von Bundestag und Bundesrat in Zeiten gegenläufiger Mehrheiten', in *Jahrbuch des Föderalismus 2017*, Nomos, Baden-Baden, 279-294.
- Schmidt Thorsten Ingo, 2012, 'Der Bundesrat. Geschichte, Struktur, Funktion', in Härtel Ines (ed), *Handbuch Föderalismus, Band I: Grundlagen des Föderalismus und der deutsche Bundesstaat*, Springer, Heidelberg et al., 651-689.
- Schöbener Burkhard, 2010, 'Artikel 50–53 Grundgesetz' (*Grundgesetz*), in Kahl Wolfgang, Waldhoff Christian and Walter Christian (eds), *Bonner Kommentar zum Grundgesetz*, loose-leaf edition, Heidelberg.
- Schütze Robert, 2010, 'From Rome to Lisbon: "Executive Federalism" in the (new) European Union', in *Common Market Law Review*, XLVII(5): 1385-1427.
- Sturm Roland, 2008, 'Von der Symmetrie zur Asymmetrie – Deutschlands neuer Föderalismus', in *Jahrbuch des Föderalismus 2007*, 27-41.
- Sturm Roland, 2009, 'Der Bundesrat im Grundgesetz: falsch konstruiert oder falsch verstanden?', in *Jahrbuch des Föderalismus 2009*, Nomos, Baden-Baden, 137-148.
- Sturm Roland, 2012, 'Zweite Kammern in Deutschland und Europa: Repräsentation, Funktion, Bedeutung', in Ines Härtel (ed), *Handbuch Föderalismus, Band I: Grundlagen des Föderalismus und der deutsche Bundesstaat*, Springer, Heidelberg et al., 723-742.
- Sturm Roland and Winkelmann Thorsten, 2014, 'Symmetrie und Asymmetrie im deutschen Föderalismus – übliche Missverständnisse und übersehene Folgen', in *Jahrbuch des Föderalismus 2014*, Nomos, Baden-Baden, 46-62.
- Ziller, Jacques, 2010, 'Multilevel Governance and Executive Federalism: Comparing Germany and the European Union', in Birkinshaw Patrick and Varney Mike (eds), *The European Union Legal Order after Lisbon*, Wolters Kluwer, Austin et al., 257-275.



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Bicameralism in Belgium: the dismantlement of the Senate for the sake of multinational confederalism

by

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Abstract

Belgium was established in 1830 as a unitary state with a bicameral parliament, with symmetrical powers for the upper and the lower house. While federalism and bicameralism are often considered a pair, the Belgian system shows an inverse relationship. The Senate gradually turned into a house representative of the sub-states, but its powers declined inversely proportional to the level of decentralisation of the Belgian state. This paper inquires how the dismantling of the Belgian Senate fits in the increasingly devolutionary nature of the Belgian state structure. First, it nuances the link between bicameralism and federalism: bicameralism is an institutional device for federalism, but not by necessity, and only under specific conditions. The official narrative is that the Belgian Senate was reformed to turn it into a house of the sub-states in line as a federal principle, but in reality the conditions to fulfil this task are not fulfilled. Instead, the paper holds that bicameralism in Belgium is subordinate to the needs of multinational conflict management, and that complying with the federative ideal of an upper house giving voice to the collective needs of the sub-states would stand in the way of the evolution of the Belgian system towards confederalism based on two major linguistic groups.

Key-words

Bicameralism, parliamentary systems, federalism, confederalism, multinationalism



Even before its establishment, when Belgium's founders discussed the design of the new Belgian State, the upper chamber was highly contentious in Belgium. While the National Congress was like-minded on most issues to be dealt with in the new constitution, the choice of unicameralism or bicameralism was subject of intense debate (Huyttens 1844: 412-501). This discussion has never faded over time, leading to multiple reforms. The most fundamental reforms took place in 1993 and 2012. The common thread in both reforms was the narrative of sub-state representation combined with declining powers inversely proportional to the level of decentralisation of the Belgian state. Considering that federalism and bicameralism are often considered a pair, the research question is how the dismantling of the Belgian Senate fits in the increasingly devolutionary nature of the Belgian state structure. In this paper the Belgian case is used as an illustration for a more general proposition on the relevance of bicameralism for multi-tiered systems. The proposition is twofold: first, it states that bicameralism is an institutional device for federalism, but not by necessity, and only under specific conditions; second, it holds that in multinational states, bicameralism is subordinate to the needs of multinational conflict management.

The paper is structured as follows. The first section gives an overview of the Belgian Senate throughout history, with emphasis on the 1993 and 2012-2014 reforms. The second section substantiates the proposition by listing the functions of bicameralism in multi-tiered systems. The third section returns to the Belgian case, explaining Belgium's characteristics in the light of the theoretical findings.

1. An overview of the evolution of the Belgian Senate

1.1. Origins: the Senate in a unitary state

The constitution that gave birth to the Belgian State established bicameralism in a unitary state structure. Opponents argued for unicameralism as symbol of national unity and equality (Huyttens 1844: 458-459). The same argument underpinned the choice for unicameralism in Finland, Norway and Iceland and initially also France (Mastias and Grange 1987: 460; 218). However, historical, societal and political context favoured the



choice for an upper chamber. Historically, Belgium was already familiar with bicameralism: it was an institutional feature of the Unitary Kingdom of the Netherlands, from which the Belgians had seceded (Bécane in Mastias and Grange 1987: 367; De Schepper 1990: 16-31). In the societal context, the constitution had, admittedly, abolished class distinctions, but in reality the population was composed of several strata on top of which were the aristocracy and the bourgeoisie. The National Congress rejected the British model of a hereditary aristocratic upper chamber, but as a result of the elevated levy condition the aristocracy was well represented in the newly elected Senate (Luyckx and Platel 1985, 5-6). From a political perspective, the Senate was the result of a compromise between progressive forces and more conservative ones. Belgium was not unique in this respect: the transition to liberal democracy in the nineteenth century was a key moment for bicameralism (Mastias and Grange 1987: 44-45), a lubricant for helping the old elite to accept the assumption of power by a new political class (Bécane in Mastias and Grange 1987: 151). In Belgium, another argument played a part: to gain international recognition a conservative touch was important to reassure the Great Powers (Alen 1992: 439-440; Stengers 1990: 11-12).

Initially, the functions of the Belgian Senate were threefold. It was to serve as a counterpower for the political powers of the 'progressive' Chamber of Representatives, a forum for reflection, and it secured the representation of large landowners and aristocracy (Alen 1992: 441; Goossens 1983: 795). These functions determined the Senate's composition and powers. Conditions of age and fortune secured the conservative element.¹ Symmetrical bicameralism, giving the Senate nearly the same powers as the Chamber of Representatives, made sure that its objections would not pass unnoticed.

As in other countries, the rise of democracy plunged the Senate into a crisis. The dilemma was that the upper chamber's role as protector of elite interests and institutional check on the quality of legislation presupposed specificity in composition, but deprived it of democratic legitimacy and therefore of authority (Mastias and Grangé 1987: 51-74). In Belgium, the Senate evolved from specific but not legitimate into legitimate but not specific. In a first period, the aristocratic Senate played second fiddle; in a second period the Senate was gradually reformed to give it more legitimacy (Goossens 1983: 796). The entrance of political parties and party discipline eliminated whatever specificity that remained, making the Senate redundant. In small unitary states such as Sweden, Denmark and Croatia, unicameralism was a reply to the dilemma of upper chambers (see Massicotte



2001: 155-156). In Belgium, federalism rescued the upper house from abolishment. Indeed, the dilemma is solved when territorial division enables the combination of specificity and legitimacy. This explains why, world-wide, federalism appears as one of the dominant variables correlated with bicameralism (Massicotte 2001:152).¹¹

1.2. The fourth state reform: The Senate in a federal state

The fourth state reform in 1993 offered an opportunity to deal with the Senate, which was increasingly criticised for being redundant and time-consuming. Ultimately, the Senate was not abolished but drastically reformed with its powers curtailed. Since 1970, Belgium, initially a unitary system, gradually devolved, culminating, in 1993, in the official recognition in Article 1 of the Constitution of the federal state. By that point the sub-state Communities had already been established, and for the first time their Parliaments would be composed of directly elected representatives. This made it possible to reduce the number of seats in the Senate without losing political mandates. At the same time, federalism was invoked to justify the Senate's preservation. After all, federalism and bicameralism seem a natural pair.

Nevertheless, the Senate was not reformed into a chamber of the sub-states. Instead, it was called a 'meeting point' between the federal authority and the sub-states – in Belgium: the Communities and Regions. Moreover, the Senate was to maintain its function of a place for reflection. The Chamber of Representatives was to be the assembly for the daily legislative work, and the exclusive political chamber. The Senate was deprived of the power to control the Government. The result was a hybrid chamber, complex in its composition and powers.

The Senate was composed of four types of senators. The directly elected senators and the Community senators fulfilled the function of 'meeting room': the first were to represent the federal interests, the latter, appointed by the Community Parliaments from within their members, the regional interests. The co-opted senators, appointed by the former categories, were to bring in specific expertise for the reflective function. The last category was a throwback to the past: the King's children were senators by right. Except for the last category, the Senators, as the MPs in the Chamber of Representatives, were divided in two language groups, French and Dutch. The German Community Senator, however, is not part of a language group.



In establishing parliamentary functions, three law making procedures were put in place. According to the default procedure, the Chamber of Representatives became the dominant legislative assembly. In its role as a chamber of reflection, the Senate could decide whether to discuss a bill adopted by the Chamber of Representatives, and it retained the right of initiative. It could, however, only suggest amendments; the Chamber had the final say. For specific matters, listed in Art. 77 of the Constitution, the Chamber and the Senate remained symmetrical, implying that every bill had to be adopted by both. These were mostly matters linked to the institutional design of the federal state, in line with the Senate's function as 'meeting place'. Finally, Article 74 of the Constitution listed four types of laws in which the Senate had no say at all. These were laws that were closely linked to the Chamber's political function: the civil and criminal liability of the federal Ministers, the federal budget, the granting of naturalisation and the setting of army quotas.

Criticism, however, remained, as the Senate was unable to fulfil its functions. First, it did not perform as a meeting place, because the directly elected Senators outnumbered the Community Senators, 40 to 21. Moreover, Community Senators, appointed on the basis of the results of the federal elections, did not necessarily reflect the majority in the Community Parliament. In addition, the Regions were only indirectly represented, often without a seat for the Dutch-speaking representatives of the Brussels Region. The linguistic communities, on the other hand, were well represented through their language groups, but the Senate was redundant for this purpose, as the House was already divided into language groups. Second, the lack of specificity hindered the Senate in its function as a reflection room. The Chamber of Representatives and the Senate were still made up of the same political majorities, due to the fact that they were elected on the same day and the Community Senator's seats were allocated on the basis of federal election results. Moreover, no guarantees were built in to avoid that co-option would become a second chance for failed election candidates rather than a mechanism to bring in specific expertise from people outside of the political domain. On top of that, the complexity of law making procedures created uncertainty, especially in respect of 'mixed' bills, containing matters allotted to different procedures.

Consequently, pleas for the abolishment of the Senate re-emerged. In a political agreement of 26 April 2002, it was ultimately decided not to abolish the Senate, but to



reform it into a genuine ‘chamber of the sub-states’; but it took another decade to actually reform the Senate in that way.

1.3. The sixth state reform: the Senate in a (con)federal state

The sixth state reform was implemented after a long political crisis. After the elections in 2010, it took a year and a half of negotiations before the political parties agreed on a coalition agreement including, on request of the Flemish parties, a new phase in the state’s devolution, with more competences being transferred to the sub-states. Considering the widespread criticism of the hybrid Senate as a consequence of the fourth state reform, the opportunity was seized to tackle the problem and turn the Senate into a Chamber of the sub-states, with effect after the 2014 elections.

Composition

The Senate is now composed of 60 Senators. Its composition, however, is still complex; the Senate still consists of French and Dutch language groups, and the representation of sub-states must not influence their relative strengths. This means that the representatives of the bilingual Brussels Region must be spread over two language groups. The Flemish Community and the Flemish Region have merged, with only one Parliament represented. On the francophone side, however, the French Community and the Walloon Region are different entities with different Parliaments. As a result, 29 Senators are designated from the Flemish Parliament or the Dutch language group of the Brussels Region. One of them must have residence in Brussels. Ten are designated by the Parliament of the French Community, at least nine of which are members of this Parliament. Three must be members of the French language group of the Brussels Parliament. Eight are designated by and from the Walloon Parliament. Two are designated by and from the French language group of the Brussels Parliament. One is designated by and from the Parliament of the German-speaking Community and does not belong to a language group in the Senate.

In addition, ten senators are still co-opted. Their presence is at odds with the logic of a sub-state chamber, especially since the seats are distributed on the basis of the results of federal elections. The *ratio* is purely political. The state reform included the splitting of the electoral district Brussels-Halle-Vilvoorde. This was the only electoral district that crossed



linguistic borders, with mutual benefits for the Flemish and the French-speaking political parties. The first were able to gain seats in the federal Parliament for Flemish candidates in Brussels, as the votes in the Flemish districts Halle-Vilvoorde were added to the few Flemish votes in Brussels. The latter were able to reach out to the French-speaking voters residing in the Flemish districts. For that reason, however, the Flemish parties considered the district a symbol of French imperialism and requested the splitting of the district. As a compensation, the francophone candidates in Flemish municipalities and the Flemish candidates in Brussels could be considered for co-option to the Senate. In practice, the co-option system, as discussed before, gives failed candidates a second chance, irrespective of their home district.

Finally, gender quotas were introduced (Art. 67 § 3 Constitution). Gender quotas already applied to the lists of candidates for elections, raising the proportion of women in Parliament from 10 to almost 40 % (see Popelier and Lemmens 2015: 112-113). As the category of directly elected Senators was removed, a system was put in place reserving one third of the seats for each gender. In 2014 this resulted in perfect gender parity, with a 50% representation of each sex. The question remains as to why this gender quota is deemed relevant for the Senate. The quota for the lists of candidates secures an equal starting position for men and women, by compensating for the alleged unconscious mechanisms that put women behind. Quotas for the actual seats, however, impact on the outcome rather than the starting position. The Senate is a chamber that is presumed to protect the interests of the sub-states, not women (or men) – especially since the Senate is not involved in the adoption of gender-related legislation.

Competences

While the Senate became a (more or less) genuine chamber of the sub-states, its powers, however, were drastically reduced. It is constructed as a non-permanent body (Art. 44 Const.), and as a rule does not intervene in the law-making procedure; only in two categories of laws does the Senate still have a say. In the first, in the types of laws listed in Art. 77 of the Constitution, the Senate has the same powers as the Chamber of Representatives. These laws concern the Constitution itself as well as matters that directly affect the federal state structure and the statute and functioning of the Communities and Regions, including the organisation of the Constitutional Court. In the second, in the types



of laws listed in Art. 78 of the Constitution, the Senate has the right to discuss bills approved by the Chamber of Representative and to propose amendments, but it has no right of initiative and the Chamber has the final say. These laws mainly concern institutional matters too, such as the procedure for the avoidance of conflicts of interest, and the prevention of discrimination on ideological and philosophical grounds – which, in Belgium, largely coincide with the linguistic fault lines - or the organisation of the Council of State or administrative courts.

Daily legislative work is handled by the Chamber of Representatives to the exclusion of the Senate. Even laws that fall under the rare category of shared powers are not listed under Art. 77 or 78 of the Constitution, and are therefore adopted without the Senate's involvement. Tax laws, for example, are concurrent matters, with priority for federal tax laws: sub-states have taxing powers, but they cannot tax matters that are already subjected to federal taxes, and federal laws can determine exceptions to regional taxes (Art. 170, § 2 Const.). The Senate does have a non-decisive say in laws that interfere in sub-state tax laws (Art. 78, § 2 Const.), though not in regular tax laws, although they determine the room that is left for regional taxes. Framework matters, for example regarding public procurement or consumer protection, are also outside the scope of the Senate's powers. The same goes for the few matters in which the federal legislature lays down the normative framework and the Regions have executive powers. For example, the normative framework regarding unemployment policy is a federal matter, but the Regions have the power to check whether the unemployed are available for work and if necessary to sanction them. Equally striking is that the Senate only has a limited say, through Art. 78 Constitution, in the organisation of the Council of State. Yet, the Council of State has important powers that also concern the sub-states: it can annul executive regulations and orders, and executives are under the obligation of submitting legislative bills and draft executive regulations to the Council for legal advice.

As to external relations, the Senate has been deprived of its privileged function. Whereas the 1993 reform obliged the government to ask the Senate for approval before submitting a treaty to the Chamber of Representatives, the Senate no longer has any power in these matters. Its main function in external relations is to act as an intermediary for reasoned subsidiarity opinions of sub-states, because EU Protocol No 2 on Subsidiarity



and Proportionality distributes votes of Member States on these matters between both houses in bicameral systems (see Popelier and Vandenbruwaene 2011: 216-226).

1.4. Conclusion

Two decades after Belgium was declared a federal state, the Senate has finally transformed into a House of the sub-states. This, however, has proven to be a disguise for the simultaneous dismantlement of bicameralism.

In its present form, the Senate comes to life mainly for constitutional revisions and at key moments in the transformation of the federal state structure. In between, it makes a pretence of purpose by producing well-elaborated study reports, called ‘information reports’, on federal issues that also have repercussions on the competences of the Communities or Regions (Art. 56 Constitution). Between 2014-2017, eight information reports were adopted on a variety of matters such as surrogate motherhood, gender equality, child poverty, and the implementation of EU law, resulting in recommendations for which follow-up is in no way guaranteed. In addition, in the same period, the Senate adopted one constitutional revision and two laws following the symmetrical bicameral procedure of Art. 77 Constitution, and it discussed (without proposing amendments) three out of 15 laws that came within the asymmetrical bicameral procedure of Art. 78 Constitution. Further, it adopted six amendments of the Senate’s procedural rules, and eight non-binding resolutions. Meanwhile, the Chamber of Representatives adopted 511 laws and one constitutional revision.

Evidently, the gradual federalisation of Belgium is coupled with the simultaneous gradual dismantling of the Senate. This is puzzling, as federalism and bicameralism are usually a pair. The question, then, is why we observe these opposing movements at play.

2. The functions of Upper Houses in multi-tiered systems

Multi-tiered systems come in many forms. What they have in common, is that they deal with tensions between territorial sub-entities’ claims for autonomy on the one hand, and on the other the concern for the state’s integrity as a whole. In a dynamic approach to federalism, forms of state are no longer categorised by defining sets of institutional features. For example, bicameralism is one of several determinants but not a defining



feature of federal systems; and confederal systems are not necessarily composed of sovereign states. Instead, multi-tiered systems are situated (and evolve) on a sliding scale based on parameters that measure the autonomy of the sub-states as well as the integrity of the federal state as a whole. Federal constructions aim at a balanced relation between diversity and integrity, whereas in so-called regionalised or quasi-federal states the concern for integrity gains the upper hand, and confederal systems primarily aim at securing sub-entities' autonomy (see further Popelier 2014:5-6).

Bicameralism has a clear purpose, wherever central decisions are adopted that impact upon the sub-entities: it allows sub-states to protect their interests (2.1.). Closely linked to this is the representation of sub-state's interests in external relations (2.2.). In more traditional federal states the idea of checks and balances is also part of an Upper House's *rationale* (2.3.). In multinational states, much revolves around multinational conflict management (2.4.). In essence, however, bicameralism is a device for federal systems that seek a balance between diversity and integrity, as the Upper House secures the interests of the sub-states through a collective veto right while committing them to the federal interest in daily legislative work. This is not necessarily considered the perfect solution in multi-tiered systems with a more pronounced emphasis on either integrity or diversity.

2.1. Territorial representation

Function

The most obvious function of Upper Houses is that of an institutional mechanism to voice the interests of sub-national entities. Bicameralism is a balanced solution to this end, securing both differentiation and integration. On the one hand, it allows sub-states to protect their interests at the central level, on the other hand, by involving sub-state representatives in everyday central law-making, these representatives are more likely to appreciate the central perspective. For this reason, federalism and bicameralism seem a perfect pair, to the point that Upper Houses have been labelled 'identity bracelets' for federal systems (Burgess 2006: 204).

In practice, it proves difficult to maintain a perfect balance, and some scholars doubt whether Upper Houses are ever able to secure both national integrity and sub-state autonomy (Sharman 1987: 189). Involving sub-state representatives too systematically in



central law-making bears the risk that they start to sympathise more with the central authorities rather than their sub-states (Osoghae 1998: 219-220), especially if they have to give account to central party leaders (Palermo and Kössler 2017: 142; Swenden 2010: 114-117).

Moreover, Upper Houses in federal systems are not necessarily designed to give voice to the interests of the sub-states, or to do so in an adequate way. The necessary conditions to fulfil this function adequately implicate both the composition and the powers of the Upper House. Russell adds to this that Upper Houses must be perceived as legitimate (Russell 2000: 42; 250-254).

Conditions

In the absence of an institutional link, for example if the Upper House is composed through direct elections, this House will protect the interests of electors in a region, rather than the interests of the sub-state government (Watts 2003: 78). The political system also plays a part: whether a chamber of the sub-states is strong or weak, usually correlates with the presidential or parliamentary character of the system (Swenden 2010: 106). In most parliamentary systems, where the federal executive emanates from the Parliament, party politics and executive dominance hinder the effective protection of sub-state interests through the Upper House (Bogdanor 1992: 415-416). In these systems, effective protection is much better secured at the executive level (Sharman 1987: 82) or through executive representation in the Upper Chamber, as is the case in the German *Bundesrat* (Watts 2003: 78).

As to competences, it is not necessary to give the Upper House equal powers in all matters submitted before Parliament. It is, in particular, unnecessary for an Upper House to be involved in the adoption of laws regarding matters that range within the federal state's sphere of exclusive competences (Swenden 2010: 112). On the contrary, as was mentioned before, this may even have the reverse effect, if it results in sub-state representatives sympathising chiefly with federal interests. Differentiation, then, is an obvious feature of Upper Houses designed to voice the interests of territorial sub-states. In theory, a distinction can be made between four categories of subject-matters: (1) matters directly affecting the federal organisation and the statute and functioning of the sub-states; (2) matters that influence the sub-state's space for policy-making, e.g. with regard to shared



powers – concurrent as well as framework legislation – or, in the case of executive federalism, legislation that is implemented by the sub-states; (3) matters that indirectly affect sub-state policy and (4) exclusive federal matters that do not (considerably) affect sub-state policy. The territorial representation function requires the strongest say in matters under category one and no or only weak involvement in matters under category four. In reality, the Upper Houses' packages of competences are indeed differentiated, although not necessarily according to this fourfold arrangement.

Practice

In practice, not all Upper Houses in bicameral federal states fulfil these requirements, making the correlation between federalism and bicameralism quite misleading. Reasons are manifold, including historical path dependence, democracy concerns and efficiency arguments (Palermo and Kössler 2017: 148). An example is Spain, where the Upper House is not representative of the Self-Governing Communities and only has a suspensory vote (Art 90 Spanish Constitution; Ferreres Comella 2013: 96-97; Palermo and Kössler 2017: 144). In Canada as well, Senators are not representative of the states, to the point that the Upper House has been labelled 'a case of pseudo-bicameralism' (Hueglin and Fenna 2006: 190). The Belgian case constitutes another illustration: after the 1993 reform, the sub-states were only partially represented. Since 2014, the Upper House has become a Chamber of the sub-states, but its remaining powers almost exclusively belong to category one.

The conclusion is that there is no necessary link between federalism and bicameralism (Sharman 1987: 96). In some federal systems, there is no Upper House at all. This is the case in very small federations such as Micronesia and St. Kitts and Nevis, but also in larger federal systems such as Venezuela. Interestingly, in Venezuela, a process aimed at reinforcing the federal system resulted in the abolishment of bicameralism, as the Upper House was perceived as bastion for traditional, centralised parties suspected of withholding institutional reform (Penfold-Becerra 2004:219). The Venice Commission even pleaded for the abolishment of the Upper House in Bosnia and Herzegovina, where only Bosnians, Croats and Serbs are represented, with important veto powers, to the exclusion of other groups in society (Venice Commission 2005, § 36). Instead, other mechanisms may fulfil the function of territorial representation.



One option is representation of the sub-states within a single chamber. For example, in Micronesia, Congress consists of one member elected at large from each state on the basis of state equality, and additional members are elected in each state apportioned by population (Art. 8 Micronesian Constitution). In Venezuela, each state elects three representatives, in addition to the directly elected Deputies (Art. 186 Venezuelan Constitution). Such was also the proposition of the Venice Commission regarding Bosnia and Herzegovina (Venice Commission 2005: § 36). Interestingly, with devolution in the UK, the need for territorial representation led to a differentiation of matters in the House of Commons legislative procedures (English Votes for English Laws), rather than a reform of the House of Lords (see Guastaferrò 2018).

Another possibility is direct involvement of the sub-states; the Belgian case is an example. First, the Special Majority Law (Special Law 8 August 1980 on the reform of institutions) enumerates specific matters in which the federal legislature is under obligation to consult or negotiate with the sub-states, or to conclude inter-federal cooperation agreements. Second, all legislative assemblies have the power to intervene directly in the federal (and other sub-state's) parliamentary procedures, and suspend the procedure for further negotiations if they consider that a pending bill may seriously harm their interests (Art. 32 Special Law 8 August 1980 on the reform of institutions). The drawback of the latter system is that bills are not systematically seen by regional parliaments. Also, this mechanism corresponds to a conflict model, whereas the involvement of the Senate takes place in a more harmonious model. Therefore, Upper Houses are better suited to balanced federal systems, whereas direct sub-state interference is more indicative of a confederal system.

2.2. Sub-state involvement in external matters

The entanglement of states in international or supranational networks impacts on the position of sub-states in federations, as sub-state competences are also exercised at the international and, in particular, the EU level. It is vital, then, for sub-states to be involved in international and supranational rule-making in matters that affect their competences. For parliaments, this concerns, amongst others, the approval of treaties, participation in the EU Early Warning System and the standpoint the executive is to take in the Council of Ministers.



States can take three approaches: a centralist approach, a gate-keeper approach and a dual approach (see further Popelier 2014: 10-12). In the first approach, the central government is in control, which fits best in more regionalised multi-tiered systems. In the gate-keeper approach, the central government is the main point of contact, but sub-states are involved in the determination of the state's position. They have most impact when they act not in isolation but in unison with other sub-states. This is a more balanced approach, and therefore the most likely to be found in federal systems. Lastly, in a dual approach, sub-states have wide powers to establish external relations, including the right to conclude international agreements without the Federal Government's consent; they have direct representation within the Council of Ministers, and individual sub-states can veto 'mixed' treaties negotiated by the central government. In this approach, the interests of individual sub-states are given more weight than the collective will of the sub-states.

For systems that prefer a federalist gate-keeper approach, Upper Houses, composed as Chambers of the sub-states, are an ideal match. For example, in Germany, treaty revisions that involve the delegation of powers to the EU requires a two third majority in both the *Bundestag* and the *Bundesrat* (Art. 23(1) combined with Art. 79(2) Basic Law). Art. 23 Basic Law secures the right of the *Bundesrat* to be involved in determining the Federal Government's position in EU Affairs, according to the *Länder* interests involved.

2.3. Checks and balances

Bicameral systems, in both multi-tiered and unitary systems, are often justified as instruments of checks and balances: they reduce the concentration of power in one House, and confine executive's powers because two Houses are allegedly more difficult to manipulate (Trivelli 1974: 29). In practice, the dilemma mentioned above made it difficult for Upper Houses to fulfil this task: if specific but not representative, they have no legitimacy for curbing decisions of the Lower Houses; if representative but not specific they will reach the same conclusions. The latter is especially the case in parliamentary systems, where the Executive emanates from the majority in Parliament.

This function, however, gains relevance in federal systems. As mentioned, federalism allows for the combination of specificity and representativeness. Moreover, the idea of curtailing government power is a basic principle on which federal theories are built (Burgess 2006: 35), which explains the notable correlation of bicameralism and federal



systems (Sharman 1987: 96). Nonetheless, the function presupposes strong Upper Houses, which is more likely in presidential systems rather than parliamentary systems. Germany, Australia and Switzerland are rare examples of strong Upper Houses in parliamentary systems (Stone 2003: 1; Swenden 2010: 106). In other parliamentary systems, alternative mechanisms of checks and balances, such as judicial review, can compensate for weak Upper Houses.

2.4. Multinational conflict management

Multinational states are often divided. Any state contains groups that differentiate themselves through language, religion or ethnic background. In divided societies, however, these group features are essential for shaping identity, political mobilisation and structural political conflicts (Choudhry and Hume 2011: 363). They are called ‘multinational states’ if such groups are localised within one territory and claim self-governance on the basis of national identity (Stepan 2004).

Federalism can serve as a solution to keep the state together while giving national groups space to develop diversity (Hueglin and Fenna 2006: 24). Whether federal or not, central governments are advised to involve national groups in central decision making that affects their interests. This reduces the risk that central decisions have a negative impact on these groups, causing them to react against the system and threatening the state’s integrity (Choudhry and Hume 2011: 375; Lantscher, Constantin, Kmezic and Marko 2012: 277-278; McGarry and O’Leary 2005: 282). Thus, representation of national sub-groups at the central level is vital for the survival of divided states (Osoghae 1998: 203). Representation can also take place in a unicameral system, whether federal or not, through several mechanisms, such as the exemption from an electoral threshold for parties that represent national minorities; the delineation of electoral districts; or the allocation of a number of seats to representatives of national minorities (Lantschner and Kmezic 2012: 235-236). In federal systems, Upper Houses are the most obvious forum for this function. In practice, however, Upper Houses in divided societies are often unable to fulfil their task, because of their composition or limited powers. According to Osoghae (1998: 210) this may be explained by the fear that strong multinational mechanisms reinforce identity awareness to the point that decentralist dynamics get out of hand.



2.5. Conclusion

While federalism and bicameralism are often correlated, Upper Houses are not essential for a federal system. More important is the function that is assigned to Upper Houses. In federal systems, the most common – but not necessarily exclusive – function is representation of territorial sub-entities. To fulfil this task, however, Upper Houses have to fulfil certain requirements that concern both composition and competences. Where these conditions are not fulfilled, alternative mechanisms may secure the involvement of sub-states in central decision making. Such mechanisms may favour the protection of individual sub-state interests over the protection of collective interests. In multinational states, the representation of national groups is vital for the survival of the system. Therefore, where national groups do not entirely match with territorial division, representation of national groups will have priority over representation of territorial sub-entities.

These findings will guide the discussion of the puzzle with which Section one of this paper concluded, and which is resumed in the following Section. The central position is that multinationalism explains why bicameralism is being gradually dismantled in Belgium, despite continuous decentralising dynamics.

3. The dismantling of the Belgian Senate as a symbol of multinational confederalism

3.1. Introduction

According to parliamentary documents, the main purpose of Senate reform was securing the involvement of the territorial sub-states (Parl.Doc. Senate 2011-2012, 5-1720/1: 2). This explains why – apart from the relic of co-opted senators – the Senate is composed of members of the sub-state assemblies. However, it neither explains the complexity of its rules of composition, nor its declining powers.

Confederalist aspirations, as a device for multinational conflict management, provide more insight in the peculiarities of the Belgian Senate. As mentioned above, in the search for an optimum between diversity and integrity, confederal systems prefer the maximisation of diversity. Belgium is a federal system with undeniable confederal traits, as federal decisions require the approval of the two major language groups: language parity in the federal government ensures that any government decision is approved by both



language groups and in Parliament each language group has a veto right with regard to special majority laws.

Multinationalism coincides with the delineation of sub-states, but only partially. The division of territorial Communities and Regions is complex, due to diverging views on whether the federal design should be Community-based or Region-based. The Walloons aspired for autonomy with regard to territory-based competences such as economic policy, whereas the Flemish demanded autonomy with regard to cultural and other language-related matters. The Walloon demand led to the creation of three Regions: a Flemish, a Walloon and a Brussels Region. The Flemish demand led to the creation of Communities, with a German-speaking Community that was given far-reaching autonomy considering that the unit represents less than 1% of the population, and with a French-speaking and a Flemish Community that both have competences in Brussels, because of the bilingual status of Brussels. Within Brussels, two extra Communities emerged, one (the Joint Community Commission) to deal with certain matters regarding Brussels residents and bilingual institutions; another (the French Community Commission) to take over competences transferred by the French-speaking Community to the Walloon Region, as the latter has no powers in Brussels. On the Flemish side, the Community and Region institutions have merged. The result is an overlap of institutions with different sets of competences.

At the heart, however, everything revolves around the two major language groups, the French and the Dutch. In what follows, I will demonstrate that 1) territorial representation must not interfere with power relations between the major language groups and 2) in accordance with confederalism, individual veto power was preferred over collective involvement.

3.2. Preference for language groups over territorial representation

The Senate is composed of MPs of the sub-national assemblies, yet the partitioning in two language groups has not been removed. The representation of the sub-states was not to interfere with the proportional share of each language group. Territorial representation threatened to do so, as there are more French-speaking sub-states compared to Dutch-speaking sub-states: on the Flemish side, because of the merger of the Community and Regional levels, there is only one sub-state entity, whereas on the francophone side, the



French-speaking Community and the Walloon Region are accompanied by the bilingual but mainly francophone Brussels Region. Hence, as was clarified in the parliamentary debate, the composition of the Senate was not the result of common negotiations; instead each language group was allocated a specific number of seats – apart from the co-opted senators: 29 for the Dutch language group, 20 for the French language group – and each group was to decide for itself how to fit sub-state representation within that portion (Parl. Reports Plenary Session, Senate 2013-2014, 5-125: 26 November 2013 - afternoon).

On the Flemish side, this was relatively simple, since the Flemish Parliament is representative of both the Region and the Community. The only concern was to also involve the Dutch-speaking members of the Brussels Region. For the French-speaking side, the concern to find a compromise between ‘regionalists’ and ‘communitarists’, together with the involvement of the Brussels Region, resulted in more complexity. Moreover, the division in language groups and the discussions per language group explain why, ultimately, the Brussels Region is not, as such, represented in the Senate. Instead, the language groups within the Parliament of the Brussels Region are represented. On the Flemish side, the representatives are appointed by the Flemish Parliament from within that Parliament *or* the Dutch-speaking language group of the Brussels Parliament. For the francophones, two senators are appointed by the French language group of the Brussels Parliament from its members, and three out of ten senators appointed by the French Community must (also)^{III} be a member of the French language group of the Brussels Parliament. As a result, the language groups, not the Brussels Parliament as such, are represented in the Senate. This makes sense for the French language group in the Brussels Parliament, as this constitutes a separate autonomous entity, for the few competences that have been given up by the French Community and transferred to the Walloon Region on the one hand and, for Brussels, the French language group in the Brussels Parliament on the other. By contrast, the Dutch language group of the Brussels Parliament is a separate entity with administrative powers under the hierarchy of the Flemish Community, not an autonomous sub-state.

3.3. Preference for confederal over federal arrangements

Confederalism is mainly concerned with the preservation of autonomy of the entities in the confederation, that are considered equal within the confederal entity. Therefore,



confederal authority requires the approval of the constituent entities, and each constituent entity has the individual power to interfere with or obstruct the confederal decision-making process.

In Belgium, confederal traits mainly relate to the language groups. As language groups and sub-states coincide in many regards, this is intensified by mechanisms that allow direct involvement of individual sub-states. For example, each sub-state Parliament can interfere in the federal law-making process and adjourn the procedure for negotiations (Art. 143 § 3 Constitution and Art. 32 Ordinary Law on the Reform of Institutions of 9 August 1980). This compensates for the drastically reduced powers of the Senate. ‘Mixed’ international treaties, combining federal and sub-state matters, require the approval of federal and sub-state parliaments, thereby giving each parliament a veto right. Instead of reducing this veto right, which, as the CETA adventures showed,^{IV} risks undermining federal external policy, the Senate’s power to give approval to international treaties was removed. Clearly, direct and individual involvement was preferred over a more balanced, indirect and collective involvement through the Chamber of sub-states.

Only two political parties explicitly aspire towards confederalism: the Flemish Christian-Democrat party sees it as the ideal state structure for Belgium; the separatist Flemish party N-VA considers it a transition phase towards the disappearance of the Belgian state. Although the N-VA withdrew from the negotiations for the sixth state reform, confederalist aspirations seem to have impacted deeply on the final result.

Still, one could wonder why the Upper House was not valued more in a combination with direct involvement. Indeed, the mechanism for direct involvement in the federal law-making procedure is far from effective: sub-states are not systematically informed of the bills and proposals handled by the Chamber of Representatives; and if negotiations do not lead to a compromise, the Chamber can resume the procedure. Consequently, confederalists would be expected to prefer the Chamber of sub-states over the Chamber of Representatives. However, in Belgium, the powers of the Chamber of Representatives have been strengthened to the detriment of the Senate.

The answer is that the Chamber of Representatives is not a federal chamber that represents the federal interests. It is composed of representatives of the two language communities, elected on lists adopted by regionally-based political parties, divided in two language groups, and constituting a majority to support a government that, in conformity



with the constitution, is made up of an equal number of French- and Dutch-speaking ministers.

Consequently, where language group representation is preferred over territorial representation and confederalist decision making is preferred over the federalist, the Chamber of Representatives is the preferential chamber.

4. Conclusion

The research question was phrased as follows: ‘how does the dismantling of the Belgian Senate fit in the increasingly devolutionary nature of the Belgian state structure?’.

Section 1 showed the gradual dismantling of the Senate: as it was turned into a more genuine chamber of the sub-states, it was deprived of most of its powers. Section 2 clarified the various functions of Upper Houses in multi-tiered systems, and the requirements regarding composition and competences needed to fulfil these functions. It highlighted that while bicameralism is the preferred institutional device for federal states, it is not essential. Section 3 applied this to the Belgian Senate. While, officially, the function of the Senate is territorial representation, it is imperfect as to composition and inadequate as to competences. It has no function in external relations, having lost its powers to give approval to international agreements. It is inadequate in its provision for checks and balances; the system has turned into a *de facto* unicameral one, except in important but exceptional institutional and constitutional matters. What remains is its function as management tool for multinational conflict. For this function, language group representation is preferred over sub-state representation. This explains the complex composition of the Senate, but also explains the preference for the Chamber of Representatives over the Senate.

Multinationalism-based confederalism, then, is the answer to the research question. The transformation of the Senate into a Chamber of the sub-states turned out to be an inadequate effort to disguise how the Belgian state increasingly evolves towards confederalism based on two major linguistic groups.

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ⁱⁱ Art. 56, 4° and 5° Constitution in the 1831 version. Originally, the Senators also had a mandate of 8 years instead of four.

ⁱⁱ Along with a large population, size and the presence of a stable democracy, i.e. the absence of a coup or



revolution leading to the abolishment of traditional institutions (Massicotte 2001: 152).

^{III} At least two must also be a member of the French-speaking Community Parliament, one of them does not. The French-speaking Community Parliament is not directly elected, but composed of all 75 members of the Parliament of the Walloon Region and 19 out of 72 French-speaking members of the Brussels Parliament. This is different in Flanders, where the Flemish Parliament is directly elected and the members of the Dutch-speaking language group have no institutional link with the Flemish Parliament.

^{IV} A trade agreement between the EU and Canada was temporarily obstructed because the EU required approval of all Member States, which means, in Belgium, that every sub-state has to approve. The francophone socialists, at the time in power in the Walloon Region and the Brussels Region but excluded from the federal coalition, threatened to veto the agreement.

References

- Alen André, 1992, 'Le bicaméralisme belge, de la voie unitaire à la voie fédérale', in 439-46.
- Bogdanor Vernon, 1992, 'The problem of the upper house', in Blom H.W., Blockmans Willem Pieter and De Schepper Hugo (eds), *Bicameralisme*, SdU Publisher, 's Gravenhage, 411-422.
- Burgess Michael, 2006, *Comparative federalism. Theory and Practice*, Routledge, London.
- Choudhry Sujit and Hume Nathan, 2011, 'Federalism, devolution and secession: from classical to post-conflict federalism', in Ginsburg Tom and Dixon Rosalind (eds), *Comparative Constitutional Law*, Edward Elgar, Cheltenham, 356-384.
- De Schepper Hugo, 1990, 'De Eerste Kamer in het Verenigd Koninkrijk der Nederlanden', in Postma A., De Rijk L.M., Sprey A., Vis J.J. and van der Werff Y.P.W. (eds.), *Aan deze zijde van het Binnenhof. Gedenkboek ter gelegenheid van het 175-jarig bestaan van de Eerste Kamer der Staten-Generaal*, SdU, 's Gravenhage, 16-31.
- Ferreres Comella Víctor, 2013, *The Constitution of Spain: A contextual analysis*, Hart Publishing, Oxford.
- Goossens Charles, 1983, 'Le bicaméralisme en Belgique et son évolution', in *Liber Amicorum F. Dumon*, Kluwer, Antwerp, 793-872.
- Guastafarro Barbara, 2018, "'Visible" and "Invisible" Second Chambers in Unitary States - "Territorialising" National Legislatures in Italy and the United Kingdom', in Fasone Cristina (ed), *Bicameralism under Pressure: Constitutional Reform of National Legislatures*, Edward Elgar Publishing Cheltenham (in press).
- Hueglin Thomas and Fenna Alan, 2006, *Comparative Federalism. A Systematic Inquiry*, Broadview Press, Toronto.
- Huyttens Emile, 1844, *Discussions du Congrès National de Belgique*, A. Wahlen,, Bruxelles, part I.
- Lantschner Emma, Constantin Sergiu, Kmezic Marko and Marko Joseph, 2012, 'Comparative Conclusions', in Lantschner Emma, Constantin Sergiu and Marko Joseph (eds), *Practice of Minority Protection in Central Europe*, Nomos, Baden-Baden, 261-278.
- Lantschner Emma and Kmezic Marko, 'Political Participation of Minorities in Central Europe: Is it Effective or Just Window-Dressing?', in Lantschner Emma, Constantin Sergiu and Marko Joseph (eds), *Practice of Minority Protection in Central Europe*, Nomos, Baden-Baden, 223-260.
- Luyckx Theo and Platel Marc, 1985, *Politieke geschiedenis van België*, Kluwer, Antwerp.
- Massicotte Louis, 2001, 'Legislative Unicameralism: A Global Survey and a Few Case Studies', *The Journal of Legislative Studies*, VII(1): 151-170.
- Mastias Jean and Grange Jean, 1987, *Les seconds chambres du parlement en Europe occidentale*, Economica, Paris.
- McGarry John and O'Leary Brendan, 2005, 'Federation as a Method of Ethnic Conflict Regulation', in Noel Sid (ed), *From power-sharing to democracy: post-conflict institutions in ethnically divided societies*, McGill Queen's Press, Montreal, 263-296.
- Osoghae Eghosa E., 1998, 'Purpose and functioning of the Senate', in De Villiers Bertus, Delmartino Frank and Alen André (eds), *Institutional Development in Divided Societies*, Human Rights Research Council, Pretoria, 219-220.
- Palermo Francesco and Kössler Karl, 2017, *Comparative Federalism. Institutional Arrangements and Case Law*, Hart Publishing, Oxford.



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- Penfold-Becerra, 2004, 'Federalism and Institutional Change in Venezuela', in E. Gibson (ed) *Federalism and Democracy in Latin America* (Baltimore, The John Hopkin University Press): 197-225
 - Popelier Patricia, 2014, 'Subnational multilevel constitutionalism', *Perspectives of Federalism*, VI(2): 1-23.
 - Popelier Patricia and Lemmens Koen, 2016, *The Constitution of Belgium – A Contextual Analysis*, Hart Publishing, Oxford.
 - Popelier Patricia and Vandenbruwaene Werner, 2011, 'The Subsidiarity Mechanism as a Tool for Inter-Level Dialogue in Belgium: on 'Regional Blindness' and Cooperative Flaws', *European Constitutional Law Review*, VII(2): 204-228.
 - Russell Meg, 2000, *Reforming the House of Lords: Lessons from Overseas*, Oxford University Press, Oxford.
 - Sharman Campbell, 1987, 'Second Chamber', in Bakvis Herman and Chandler William M. (eds), *Federalism and the role of the State*, University of Toronto Press, Toronto, 57-81.
 - Stengers Jean, 1990, 'Les caractères généraux de l'évolution du Sénat depuis 1831', in *La réforme du Sénat*, Bruylant, Brussels, 13-43.
 - Stepan Alfreed, 2004, 'A New Comparative Politics of Federalism', in Gibson Edward L. (ed), *Federalism and Democracy in Latin America*, The John Hopkins University Press, Baltimore, Maryland, 29-84.
 - Stone Bruce, 2003, 'Australian Bicameralism: Potential and Performance in State Upper Houses', *Papers on Parliament* No. 41.
 - Swenden, Wilfried, 2010, 'Subnational participation in national decisions: the role of second chambers', in Enderlein Henrik, Wälti Sonja and Zürn Michael (eds), *Handbook on Multi-Level Governanc*, Edwar Elgar, Cheltenham, 114-117.
 - Trivelli Laurent, 1974, *Le bicaméralisme. Institutions comparées*, Imprimerie Pont Frères, Lausanne.
 - Venice Commission: European Commission for democracy through law, 2005, *Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative*, CDL-AD (2005) 004, 11 March 2005, para. 36.
 - Watts Ronald, 2003, 'Bicameralism in Federal Systems', in Joyal Serge (ed), *Protecting Canadian Democracy: The Senate You Never Knew*, Mc Gill Queen's Press, Montreal, 67-104.



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The Secession Issue and Territorial Autonomy in Spain: Bicameralism Revisited

by

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Abstract

The Spanish Constitution defines the Senate as 'Chamber of territorial representation'. But in the Senate the provinces are represented, not the Autonomous Communities. The Senate is a Chamber of 'sober second thought', subordinated to the lower House, whose will prevails in the event of discrepancy. It lacks specific powers with regard to territorial autonomy; in spite of this, there has been an attempt to assign it relevance in this sphere by creating a *General Committee on Autonomous Communities*. By way of exception the Senate is exclusively responsible for the decision to authorize the Government to apply measures of 'federal coercion'. This constitutional provision was first activated in October 2017, in the context of the secessionist process in Catalonia, as a result of the repeated non-compliance by the authorities of the resolutions of the Constitutional Court (CC), which concluded with the Unilateral Declaration of Independence (UDI) by Parliament at the same time as the adoption of the measures of federal coercion. The Senate demonstrated that even in a case in which it has the reserved competence, as in the authorization of the adoption of measures of federal coercion, it lacks the capacity to be a federal Chamber.

Key-words

bicameralism, Senate, Spain, Catalonia, secession, federal coercion



1. The Spanish Senate as a second Chamber: general remarks

The Spanish Constitution -sec. 69(1) - states, quite categorically, that the Senate 'is the House of territorial representation'. This is, however, an affirmation that requires clarification in order to understand the nature of the Senate in Spain; in other words, what those who form it -the Senators- represent and what functions are assumed by the House as an element of legislative power^I.

The first clarification that needs to be made is that the Senators only very marginally represent the seventeen Autonomous Communities (ACs); in other words, the territories – the 'nationalities and regions'- that are holders of political autonomy according to sec. 2 of the Constitution. The Senators are directly elected by the voters; the constituency is the Province – the territorial organisation of Spain, consolidated early in the 19th century, which replaced the old territorial division of the *ancien régime*-; in each Province four Senators are elected via a plurinomial first-past-the-post electoral system with open lists^{II}, in which each voter may cast a vote for a maximum of three candidates, in order regularly to permit the minority to obtain a seat. In this way, 208 Senators are elected in the Provinces. Meanwhile, the Constitution establishes that, in addition, each AC shall designate one Senator and one more per million inhabitants. An appointment that shall correspond to the Regional Parliament, in the terms established by the respective Statute of Autonomy (SA) 'which shall, in any case, guarantee adequate proportional representation' - sec. 69(5) Const.-. In the current legislature a total of 58 Senators have been appointed by the AC, less than a quarter of the whole House.

In view of the composition of the Senate, there is an obvious conclusion: the Senate is a Chamber of territorial representation; not of the new AC created according to the Constitution, but of the old administrative- territorial – structure of the State. Given the characteristics of the ACs, this results in a significant imbalance in how they are represented in the Senate, benefitting those comprising a greater number of provinces – the largest in territorial terms-^{III}, which are, in very significant cases, those with smaller, ageing populations. This has very significant effects upon the political majority in the upper House, favouring both the representation of the two main traditional parties and a conservative majority^{IV}.



The composition of the Senate on a provincial basis rather than on that of the ACs has a historical justification, since when the Constitution was adopted (1978), the new territorial structure had not yet been determined; neither which territories would become AC nor whether all the territories would do so. The territorial structure was an issue that had remained unresolved when the short life of the Second Republic (1931-1939) came to an abrupt end: initially, only Catalonia and, subsequently, the Basque Country, appeared to be destined to become autonomous regions, but it was not long before other territories began to demand autonomy. Therefore, the structure of the State, divided in its entirety into ACs, is a result subsequent to the adoption of the Constitution, in which, generally speaking, the provisions related to territorial autonomy are limited to regulation of the process to create the ACs.

The traditional territorial structure, the only one in existence when the Constitution was adopted, was that of the Provinces. The original constitutional regulation was, therefore, understandable; unlike the fact that there has been no modification of the composition of the Senate, to turn it into a Chamber of representation of the autonomous territories, when all the territories have been ACs for thirty-five years now.

The Spanish Senate is a House of *sober second thought*. With regard to the procedure of drafting laws, the Senate has general functions; so it participates, along with the lower Chamber, in the drafting of all the laws of the State. But it is a Chamber subordinated to the *Congreso de los Diputados*. Even when legislative initiative is exercised by the Senate - *Private Bills*- debate and adoption have to take place previously in the lower House. The Senate only debates and votes on texts that have already been debated and voted upon in the *Congreso de los Diputados*. The Senate can veto the text submitted by Congress; but this requires an overall majority of the Chamber and the veto may be overturned by the lower House, either immediately by absolute majority or, two months after the Senate veto, by simple majority. Alternatively, the Senate may introduce amendments to the text submitted by the lower Chamber; but when this occurs the text is returned to Congress for final approval, deciding -by simple majority- whether or not to accept the modifications introduced by the Senate. The subordination of the Senate is also clear in the specific case of Organic Acts, which require approval by an overall majority in Congress 'in a final vote on the bill as a whole' -sec. 81 Const.-^V. Finally, the Senate is completely alienated from the process to validate Decree-Laws, the temporary Statutory Instruments invested with the



force of an Act, although they are passed by the Government. To remain in force, the Decree-Laws have to be validated by the lower House within 30 days of their promulgation, with the Senate having no role in this process (sec. 86 Const.). The Decree-Laws have become a quite common way to legislate, this alienation being of great significance in the law-making process.

The Senate, on occasions, has powers on equal terms with the Congress. This is the case of the procedure to reform the Constitution, although in the case of disagreement, the lower House can impose its opinion by a qualified majority -sec. 166 and ff. Const.-, the procedure for ratification of international Treaties, when parliamentary authorisation is required -sec. 94 Const.-, control of government activity -sec. 109-111 Const.-, or the appointment of judges to the Constitutional Court -sec. 159 Const. - or to other State organs. But these are exceptions rather than the rule.

Finally, there are decisive issues in the parliamentary system in which the decision corresponds exclusively to Congress, without any Senate intervention whatsoever. This is the case of both the election of the President of the Government (*Prime Minister*) -sec. 99 Const. - and the demand for Government accountability (vote of confidence -sec. 112- and vote of censure -sec. 113-).

In conclusion, Spain has an imbalanced bicameral parliament, with absolute dominance of the lower Chamber which, with very few exceptions, has the capacity to impose its will in the event of discrepancy between the two Houses, almost immediately, especially in the procedure of drafting laws. Moreover, the second Chamber is completely excluded from what W. Bagehot (1873: 78) regarded as the 'principal business' of a legislature in a parliamentary system: 'making and keeping an executive', although 'it is chosen, in name, to make laws'.

2. Senate and territorial autonomy: general overview

With regard to the Senate's powers in relation to its definition as 'House of territorial representation' it is significant that, apart from the exception that will be analyzed later – and which, indeed, is the main focus of this work-, the Senate is set to play no significant role, with no power that justifies that condition.



First of all, what is most surprising is the Senate's exclusion from effective participation in the determination of the content of the SA, the internal or territorial Constitution of each AC, its 'basic institutional rule', as defined in sec. 147(1) Const. Its participation is merely formal, in the process of final adoption of the SA as Organic Act, but when its contents have already been decided upon. In the Spanish system the SA is not, in the fullest sense, an exercise of the constitutional autonomy of the territory, but is rather a State's Act -as far as it is an Organic Act-, adopted via a complex process, initiated by the parliamentary representatives of the territory, who present their project to the Select Committee on Constitution in the *Congreso de los Diputados*, where the definitive text is agreed upon between a delegation of the representatives of the territory and the members of the Select Committee. The resulting text is submitted to referendum before the electorate of the territory and, if endorsed, is processed in Parliament (*Cortes Generales*) for its adoption as Organic Act (Aguado 1996). The Senate only participates in this final phase, in which the Chambers do no more than formally validate the text, now -at least, politically- unmodifiable.

The Constitution, by contrast, establishes three questions in which the Senate decides in conjunction with Congress, on an equal footing, without being subordinated, as is generally the case. On the one hand, it corresponds to the *Cortes Generales*, 'by overall majority of the members of each House' to assess the need 'to harmonize the rulemaking provisions of the Self-Governing Communities' to enact what have been called 'harmonization Acts' -sec. 150(3) Const.-. This is, in any case, a type of Act which, following the frustrated attempt by the LOAPA – Organic Act of harmonization on the process of territorial autonomy-, declared substantially unconstitutional by the Constitutional Court regarding the quest to be an 'Act of harmonization' (CC Ruling -CCR- 76/1983, of August 5) (Muñoz Machado 1983; Cruz Villalón 1983), has been practically disabled, without further mention of the possibility of its use.

On the other hand, sec. 158(2) Const. establishes that the *Cortes Generales* -i.e., both Houses – shall distribute between the ACs and the provinces –'where appropriate'- the financial resources from the fund that will have to be created 'with the aim of redressing inter-territorial economic imbalances and implementing the principle of solidarity'. But this Fund, which seemed to be contemplated in the Constitution as an equalization fund, plays a completely marginal role in the system of distribution of financial resources, while the



equalization is channelled via other funds (López-Laborda 2012; Zabalza *et al.* 2011; Vilalta 2016).

Finally, cooperation between the ACs, regarding issues different from the management and rendering of services in matters pertaining to the latter, shall require authorization by the *Cortes Generales* -sec. 145(2) Const.-. These are, therefore, what might be considered extraordinary cooperation agreements between ACs, virtually non-existent, in the context of extremely weak horizontal relations of inter-governmental cooperation (García Morales 2013: 132 ff.; 2016: 96 ff.).

In the three cases in which the Constitution attributes to the Senate an intervention in parity with Congress vis-à-vis territorial autonomy, these are questions that, at least in practice, have become almost irrelevant. Generally speaking, therefore, one must conclude that the Senate plays no special role with regard to territorial autonomy: it lacks significant specific powers relating to territorial autonomy; it is excluded from the establishment of the contents of the territory's internal Constitution – SA-; and, on the rare occasion when it is assigned participation which is not subordinated to lower House, it is with regard to issues that have been proven irrelevant.

3. The General Committee on the Autonomous Communities

The parliamentary political forces have attempted to increase the importance of the Senate vis-à-vis territorial autonomy. The most significant initiative in this respect was taken in 1994, with the reform of the Senate Standing Orders^{VI}. This included, most importantly, one question of particular interest in relation to the subject of this work. It incorporated the most significant novelty during these years: the creation in the Senate of a *General Committee on AC* -sec. 55- (Visiedo 1997; García-Escudero 1994; Ripollés 1995; Morales *et al.* 1994).

With the creation of this *General Committee* the aim was, on the one hand, to establish within the Senate a *Committee* that was particularly relevant from the formal point of view, in an attempt to differentiate it from the other *Select Committees* of the House. Furthermore, the idea was for this *Committee* to be the catalyst for all reflection and debate on territorial autonomy within Spanish legislature as a whole, for it to be the forum for decisive debates on territorial autonomy, the benchmark for reflections on the latter and the driving force



behind initiatives in this area. And it was a case, finally, in order that all this might be possible, of it not being an exclusively internal *Committee* within the Chamber, but the scenario in which the representatives of the governments of the ACs, and in particular their respective presidents, could participate in these reflections and in the promotion of the State Parliament's initiatives with regard to territorial autonomy. To facilitate all the above, Senate Standing Orders introduced a significant symbolic novelty: the possibility that interventions taking place in the sessions of the *General Committee* may be performed in any of the official languages that, along with Castilian, have official status in an AC; interventions that shall be reproduced in the *Official Report (Hansard)* 'in the language in which they were delivered and in Castilian' -sec. 56. bis (9) of the Standing Orders^{VII}-.

The objectives indicated are quite clearly expressed in sec. 56 of the new text of the Senate Standing Orders adopted in 1994. The aim is for this to be a *Committee* of a *general* nature regarding territorial autonomy. So, all the Senators appointed by the ACs and who are not members of the *General Committee* should be 'advised in advance of its sessions' which they may attend and participate in all debates -sec. 56 bis (1) of the Standing Orders^{VIII}. Also entitled to participate in the debates and sessions, apart from members of the Central Government, are the members of the Governments of the ACs, their *First Ministers* primarily -sec. 56 bis (2) of the Standing Orders-. Acknowledgement of the important role of the Governments of the ACs is also evident in the fact that any Government of the latter may request that the *General Committee* be convened -sec. 56 bis (3)-.

The functions of debate, promotion and legislative procedure of the *General Committee* are of a general, all-embracing nature, with regard to all that concerns territorial autonomy, in the attempt to make the Committee the lead player in this area, as is evidenced by the extensive and detailed sec. 56 of the Standing Orders in which its powers are specified.

Finally, it should be noted, in the same sense, that the new drafting of the Senate Standing Orders establishes that the *General Committee* shall hold once a year, on a mandatory basis prior to the end of the first period of sessions –in other words, before the end of each year- a general debate on the system of territorial autonomy (a session whose sole item on the agenda shall be that of 'evaluating the situation of the State of Autonomies' -sec. 56 bis (7)-), after which members may pass the Motions they deem to be appropriate. An annual debate in the *General Committee* which is added to the general debate



on territorial autonomy, exclusively dedicated to this question, which, similarly, must be held every year in the Plenary Session of the House -sec. 56 bis (8) of the Standing Orders-.

The creation of the *General Committee* on the Autonomous Communities raised hopes in some sectors regarding the prominence that its activity would attribute to the Senate in relation to territorial autonomy. The experience, however, has been largely frustrating. Although during the initial years, following the creation of that *General Committee*, such a debate attracted some attention, the similar debate in the Plenary Session has attracted more attention than the former. But even the latter has languished considerably. To the traditional absence of members of the Government of the AC of the Basque Country – and in particular, of its president-, has been added, in recent years, that of the Government of Catalonia, which, without a doubt, has reduced the significance of the debate. But above all it has been the absence of significant impact of the questions raised in the debates and, in general, within the *General Committee*, which has largely dashed the hopes inspired in some by this initiative (Varela 2006: 149-150)^{IX}. On the other hand, the nationalist parties – Basque and Catalan in particular, but also, in certain parliamentary circumstances, those of the Canary Islands or others- have continued to make very effective use of their votes in the lower Chamber, when the Government majority has required them, meaning that, for these parties, the real House of territorial representation has always been the *Congreso de los Diputados*.

One can conclude, therefore, that the Senate is not a House of territorial representation, from neither a structural nor a functional point of view (Punset 2006: 112).

4. Federal Coercion and the Senate's Role

In this context of subordination of the Senate to the lower House and of absence of any significant special power vis-à-vis territorial autonomy, one exception stands out, in which the Senate alone decides, without any intervention by the lower House: authorizing the Government to apply measures of 'federal coercion'.

The Spanish Constitution -sec. 155 - regulates this concept in a manner taken directly from sec. 37 of the German *Grundgesetz* (GG)^X. In this respect, it establishes, firstly, the element of fact or the necessary condition for the adoption of measures of federal coercion: 'If a Self-governing Community [AC] does not fulfill the obligations imposed



upon it by the Constitution or other laws, or acts in a way that is seriously prejudicial to the general interest of Spain' -sec. 155(1)-. Unlike the regulation established in the *Grundgesetz*, which only refers to non-fulfilment of legal obligations, the Spanish Constitution adds a second element – serious impact upon the general interest-. There has been debate as to whether this second element adds something different from the first or whether it simply repeats this. The intention to autonomize the definition of the 'general interest' and who should define it is an old debate (Requejo 2013). In my opinion, considering the serious impact upon the general interest as a reason to apply federal coercion different from the non-fulfilment of legal obligations is extremely problematic, not to say difficult to sustain. On the one hand, if we bear in mind that control of the actions of the ACs corresponds to the law courts – with the particularities that affect this control on the part of the CC, especially with regard to suspension of the territories' actions when challenged by the Government - (López-Basaguren 2017a: 303 ff.), the non-fulfilment of legal obligations that justifies recourse to federal coercion must refer to non-compliance with final court decisions. Any discrepancy between the interpretation of the constitutional and legal obligations of an AC cannot be imposed by the Government, but must be ruled upon in court^{XI}. If the issue is addressed in these terms, is it possible to conceive of serious prejudice to the general interest on the part of an AC through actions that do not consist in non-compliance with the decisions of the law courts? However, with regard to the recent application of the measures of federal coercion in Catalonia there seems to be a widely held view that the serious impact upon the general interest is a reason in itself to justify federal coercion different from the non-fulfilment of legal obligations. Although we do not know what these acts or situations would be.

Regarding the process of application of measures of federal coercion, the Spanish Constitution requires certain prior steps that do not exist in the *Grundgesetz*. While in the latter non-fulfilment of constitutional and legal obligations directly justifies taking 'the necessary steps to compel the Land to comply with its duties', the Spanish Constitution requires, previously, the lodging of 'a complaint before the President of the Self-governing Community [AC]' -which, in the opinion of E. García de Enterría (1983: 167), evoked what is provided for in sec. 84(5) GG-. Only in the event of failure 'to receive satisfaction', may the Central Government 'take all measures necessary to compel the Community to meet said obligations' or -in accordance with the addition made to the original German



constitutional text- 'to protect the above mentioned general interest'. Finally, the Spanish Constitution – in a very similar drafting to that contained in sec. 37(2) GG- establishes that, in order to apply the said measures of federal coercion 'the Government may issue instructions to all the authorities of the Self-governing Communities [AC]'

The application of measures of federal coercion by the Government requires, in both the German *Grundgesetz* and the Spanish Constitution, prior authorisation by the second Chamber; in the Spanish case, by overall majority. Herein lies the radical difference between the German *Bundesrat* and the Spanish Senate regarding the question of territorial representation. In the German case, the required authorisation by the *Bundesrat* has a clear sense of territorial 'consensus' in the adoption of the measures of coercion, given the exceptional nature of the *Bundesrat* in the world of second federal chambers, particularly in relation to its composition (Kotzur 2006).

In light of what has been said on preceding pages, the requirement of authorisation by the Senate does not represent, in Spain, the idea of the ACs reaching a consensus in the adoption of the aforementioned measures of coercion. This is clear and practical evidence of the contradiction between the constitutional definition of the Senate as 'Chamber of territorial representation' and its true nature, as a Chamber that, on the basis of representation of the provinces, distorts representation, producing majorities far-removed from reality and, generally, of a conservative leaning and, in any case, strongly favouring the existing political majority at any given moment. In other words, in the Spanish case, the introduction of the requirement of authorisation by the second Chamber does not represent, as it does in Germany, what might be termed a 'federal guarantee'.

As the CC has indicated, there is no doubt that the purpose of sec. 155 Const. is to guarantee the unity of the legal system (CCR 25/1981, of 2 July). In the virtually unanimous opinion of scholars, this is an absolutely extraordinary measure, in view of the particular requirements, the precautions established in the Constitution and the enormous political significance of recourse to federal coercion. An extraordinary nature that was apparent in the debate on the drafting of the Constitution and that has been confirmed in the practical functioning of the political system (Vírjala Foruria 2005: 58-9). This has also been reiterated by the CC^{XII}. And so it has become consolidated in the political consciousness. The fact that this constitutional provision has never been applied in the country (Germany) that served as the model for the regulation of federal coercion in the



Constitution reaffirmed this notion of exceptionality. All this led to the idea that this was a provision intended, fundamentally, not to be applied; or, rather, the use of which was not to be forced. Which was not to deny its usefulness, insofar as its main function was considered to be not so much its practical application as the preventive effect arising from its presence in the Constitution (Ballart 1987: 92).

That awareness of the exceptional nature of federal coercion, the unknown quality of its application in the prototype-country and the political connotations of its application led to unwillingness to resort to this constitutional provision. Not even on the occasion of repeated disobedience of the CC's decisions by the Catalan authorities with regard to the staging of the referendum (the so-called 'consultation') of 9-N (2014), was there any intention to apply the measures of federal coercion to impose compliance with those legal obligations that were being violated. Although there had been warnings that the development of events would make it very difficult to avoid the application of measures of this kind (López-Basaguren, 2017a: 311), until very shortly before the events surrounding the referendum on self-determination of 1-O and the UDI (2017) the application of measures of federal coercion was regarded as unlikely.

There is significant evidence that the Government sought to avoid their application until the last moment. Although it did so, in my opinion, simply in an attempt to elude its responsibility in the hope that other institutions would assume responsibility for the actions that would render unnecessary the application of federal coercion. If, on the one hand, it appears that the government's majority attempted to 'normalize' in political -and legal-discourse the measures included in sec. 155 of the Constitution, introducing it into 'ordinary' legislation^{XIII}, on the other hand, it strove to 'normalize' the 'coercive' measures beyond the procedure established in the Constitution, by way of measures with similar effects, but avoiding that procedure. Which would enable the Government to elude the political responsibility implicit in its implementation. This is what, in my view, was the objective of the reform of the Act regulating the CC – Organic Act 15/2015, of October 16-, assigning the CC the capacity, amongst other measures, to suspend from their duties authorities and civil servants who refused to comply with or implement its resolutions, or to impose periodic penalty fines - from 3,000 to 30,000 €- upon those authorities and civil servants, as well as those individuals who did not comply with them. This was, without a doubt, an attempt to render it unnecessary to recur to federal coercion, though it has



proved to be an almost complete failure, to date at least^{XIV}, as the CC has not made use of its ‘new’ powers, in particular the possibility of suspending authorities and civil servants. The final recourse –too late, in the opinion of many- to ‘federal coercion’ can only be correctly understood, in my view, if these elements are taken into account.

5. The Secession Issue in Catalonia: general overview

In order to analyze the practical application of federal coercion and, in this area, the Senate’s role, it is necessary to present a general picture of the political process of the claim for secession in Catalonia, insofar as recourse to this instrument has been the State’s response to the most recent developments. The characteristics of this work, however, require a synthetic, schematic presentation, in order not to stray from its purpose^{XV}.

The secessionist process in Catalonia began in 2012^{XVI}, with a massive public demonstration on September 11 (national holiday in Catalonia, *Diada*), which would be repeated, in different ways, on the same holiday in successive years (Tornos Mas 2015). Furthermore, there have been two key moments in this process of popular mobilisation: the ‘referendums’ on independence of November 9, 2014 (9-N) and of October 1, 2017 (1-O). This has been a short political process, of rapid development, in which the growth of support for secession has been meteoric, from traditionally very low levels until the process started in 2012. The initial approach focused on the demand for a ‘referendum’ (or ‘consultation’) on the political future of Catalonia, including independence (‘right to decide’), achieving what was apparently overwhelming support in Catalan society (Tornos Mas 2014). A demand that was soon directly transformed into a demand for secession. The advocates of the secessionist claim have acted with haste and have successively proposed very close dates (18 months has been the time frame most repeated as an objective at different and successive moments). According to the arguments of the advocates of the secessionist demand – the most complete expression of which is to be found in the reports of the Council for national transition (*Consell assessor per a la transició nacional*) (de Miguel Bárcena 2016)^{XVII}-, the claim for secession would be supported by international Law, insofar as Catalonia, as a nation, has a right to the self-determination recognised in international Covenants on rights (1966). This interpretation would be endorsed by the International Court of Justice’s (ICJ) *Advisory Opinion on Kosovo*, of July 22, 2010. Likewise,



independence would not only be a democratically unquestionable objective, but would also, if it enjoyed majority social support, be democratically unassailable. Independence, moreover, would be quickly achieved, majority social support having been established, and would be even attainable in unilateral fashion. And it would be a peaceful and legal process, requiring only that the Catalan Parliament, as custodian of the sovereignty of the people of Catalonia, pass the laws that would ‘disconnect’ Catalonia from Spain.

This is not the place to enter into a debate on an approach such as that employed by the advocates of the secessionist demand. But I think it is clear to any observer minimally removed from the partisan defence of the process that the political and legal bases of this approach reveal highly questionable aspects. The interpretation of the right to self-determination does not correspond to its contents as defined by the international organisations with competence in this sphere; and neither does the understanding of the right to self-determination by the ICJ in its *Advisory Opinion on Kosovo*. The ICJ reiterates over and over again that this right is not what is under consideration – nor whether if in the case of Kosovo this is an instance of *remedial secession*. A negative answer that is extraordinarily significant, in view of the events preceding that UDI. One is struck by the fact that the authors of the secessionist discourse have not addressed – at least not openly – the two practical problems, the two inescapable challenges to the effectiveness of such a discourse: the capacity effectively to control the territory and sufficient recognition by the international community. It comes as a surprise, above all, because these are two questions that were explicitly indicated by the Supreme Court (SC) of Canada in the *Reference* on the secession of Quebec (1998) and by the ICJ in the case of Kosovo – much used in the defence of the legitimacy of secession–.

But throughout the process the secessionist movement has faced a far more serious problem: the absence of a majority of Catalan society in support of secession, a simple majority, never mind that ‘clear majority as a qualitative evaluation’ referred to as indispensable, in any case, by the Canadian SC in the *Reference on Quebec secession* (para. 87).

In 2010 nationalism had a comfortable majority, with over 1.5 million votes (around 49% of the total) and 76 seats out of 135. The combination of non-nationalist parties accounted for 41.5% of votes – just under 1.3 million - and 59 seats. All this with a low turnout: 58.78%. The secessionist process has slowly but surely transformed this situation. In the 2012 elections – in which, for the first time, CiU’s *Manifesto* included the referendum



(‘consultation’) on the political future of Catalonia (‘right to decide’), but without advocating independence – nationalism as a whole lost two seats and a little over 1% in terms of votes, but retained a comfortable majority in Parliament. The nationalists, together, obtained 47.89 % - just over 1.7 million votes - and 74 seats, compared with 44.8 % - just over 1.6 million votes - and 61 seats for the non-nationalists, as a whole. Turnout climbed to 69 %. After the referendum of 9-N (2014), in the early elections of 2015, called as a ‘plebiscite’ in favour of independence by *Convergència* - already without *Unió* -, and ERC, under the ticket *Junts pel sí* (*Together for yes*), the pro-independence parties lost further ground. With a turnout of over 75 % - more than seven points higher than in the 2012 elections -, the parties that advocated secession obtained 47.7 % of the votes – just under 2 million -, while those opposed to independence obtained 48.05 % of the votes – around 100,000 more than the former-. However, the pro-independence groups formed an overall majority in the Parliament, with 72 seats against the 63 seats of the latter.

The forces in favour of independence, therefore, emerged from the 2015 elections having failed the ‘plebiscitary’ challenge, insofar as, contrary to what *Junts pel sí* had argued during the campaign, this coalition did not achieve majority electoral support in terms of number of votes; not even with the inclusion of the votes for CUP, which had not featured in the manifesto. Nevertheless, as the days and the weeks went by, within the pro-independence forces the notion took root that the overall majority in Parliament legitimized their desire to call –and hold- the referendum on self-determination -even if it were suspended or annulled by the CC- and declare independence -unilaterally if necessary- if the pro-independence option triumphed in the referendum. The problems regarding the legitimacy of this option, however, were obvious, even to observers who could certainly not be described as opponents of the independence movement^{xviii}.

Finally, after the referendum on self-determination of 1-O, and as a consequence of the dissolution of the Parliament of Catalonia as one of the measures under sec. 155 Const., the elections of December 2017 confirmed the trend that had been apparent since 2012. Turnout continued to increase, reaching 79.09 %, and in total the three parties advocating secession obtained 47.32 % of the votes (just over 2 million, almost exactly the same as those obtained by the pro-independence option in the 1-O referendum), while the candidacies opposed to independence obtained, altogether, 50.72% of the votes (over 2.2 million votes). The latter led the former by almost 2.5% and 150,000 votes. Yet, once



again, the former achieved an overall majority in Parliament, with 70 seats (two fewer than in the previous legislature and four fewer than in the 2012 elections) compared with 65 seats for the forces opposed to the declaration of independence (two more than in the 2015 elections and four more than in those of 2012)^{XXIX}.

Irrespective of other considerations, strictly in terms of electoral support for the pro-independence option, the electoral results obtained by the secessionist movement in 2015 did not constitute sufficient a base for the strategy followed in the two years of legislature. And certainly did not provide the minimum necessary grounds to make the leap to the unilateral declaration of independence which took place during the parliamentary sessions of October 10 and 26-27, 2017. The considerable popular support achieved by the secessionist movement, the impressive popular mobilization, quantitatively speaking, as well as the qualitative importance of the support for the movement within Catalan society^{XX} and the partisan attitude of the public media dependent upon the Government of Catalonia^{XXI}, produced a blurred image of the support for independence. A distorted perception which the electoral results have corrected. In short, the independence movement has revealed remarkable strength, unimaginable only six years ago. But insufficient strength at this time to advocate such a strategy.

Everything stated so far reveals the major weaknesses of the secessionist claim, both in its theoretical construction and in its practical foundations. But one must ask oneself, at the same time, how such rapid growth of support for secession has been possible in a community where, traditionally, it had been so weak; what it is that has made possible such a severe fracture between a broad and significant sector of Catalan society and the Spanish political system.

In my opinion there are two elements which explain this process and its characteristics. Firstly, the perception shared by a large part of Catalan society that their aspirations were being ignored by part of the Spanish political system. The landmarks in the build-up to this perception are to be found - though, possibly, in a somewhat subjective retrospective reconstruction - in the process of amendment of the SA that concluded in 2006, following its conflictive processing in the lower House -and an aggressive campaign against the SA by the PP, in response to the party's exclusion from the process of its drafting-; in the CC ruling on the reform, in 2010, which has been canonised by the secessionist movement as a humiliation and an insult to the dignity of Catalonia^{XXII}; in the rejection of the proposal to



improve the financing of Catalonia – the so-called ‘Fiscal Agreement’- submitted by the then *First Minister* Artur Mas; and finally, in the perception of the impossibility of reforming the system of territorial autonomy in Spain.

Secondly, the process – and its characteristics- have been possible because the Spanish political system -in general, but firstly the PP’s Government and the parliamentary majority supporting it – had not addressed the political debate arising from the nationalist claim and has relinquished the terrain of political debate to those who advocate secession as the only alternative^{XXIII}. The sole argument employed in opposition to that claim has been the argument of legality, the *rule of law*: both the demand for a referendum on the political future of Catalonia and, even more so, the secession, are illegal, contrary to the Constitution, so there is nothing to be negotiated; not even anything to debate. And, in this sense, the idea has spread in some sectors in Spain that addressing a reform of the Constitution to reform the system of territorial autonomy, further exploring the federal path adopted in practice by the CC (Cruz Villalón, 2009), to resolve the problems arising from a constitutional model rooted in a Constitution – the republican Constitution of 1931- which specifically attempts to articulate a system differing from federal systems, would be a way of satisfying the secessionists -though the latter reject it as non-satisfactory-, and must therefore be ruled out.

This has been, in my opinion, a politically evil process, marked by the irresponsible strategy employed by the secessionist movement and the, irresponsible too - though in a different way and to a different extent- lack of a political alternative on the part of the State (López Basaguren 2017b). There have been some particularly dark moments, on both sides of the conflict. The secessionists sank to their lowest point in the parliamentary sessions of 26-27 September, when they blatantly violated the rights of the opposition in the Catalan Parliament during passing of the ‘laws of disconnection’. And they took a risky path when, on September 21, while members of the police, under the control of court staff, were conducting a search regarding the preparations of the referendum of 1-O, a secessionist mob laid siege to the headquarters of the Catalan Department of Economy, destroying police cars and preventing members of the police and of the court staff from leaving the buildings. Regarding the State’s actions, the darkest day resulted from its attempt to impede the holding of the referendum of 1-O, with images of police repression that were broadcast all over the world, though what was said required much closer scrutiny than was generally



the case (Preston 2017a). And the reaction by the State that is most difficult to understand is the investigating judge placing the leaders of the secessionist movement in precautionary prison and accusing them of rebellion, which, in opinion of several lawyers - and my own-, has weak legal grounds, insofar as -according to the Criminal Code- rebellion, on the one hand, involves ‘violence’ and, on the other, differs from ‘sedition’ in that the latter involves not ‘violence’ but ‘tumultuous acts’ (López-Basaguren, 2017a: 314-315, and 2018).

6. The measures of Federal Coercion in Catalonia

Throughout the development of the process of the claims for the secession of Catalonia, there have been various acts of clear disobedience on the part of the authorities of the AC against the CC resolutions, in particular. The two moments when disobedience was especially evident involved the calling and holding of the referendums on the political future of Catalonia (9-N, 2014) and on self-determination (1-O, 2017).

The ‘consultation’ of the 9-N took place in spite of the suspension - by the CC, as an effect of sec. 161(2) Const. - of the Act and the Convening Order in accordance with which it was called, after these were challenged by the Government before the CC (López-Basaguren 2017a: 303 ff.)^{XXIV}. The then *First Minister* -Artur Mas- and two members of his Government -Joana Ortega and Irene Rigau- were sentenced in first instance by the High Court of Justice of Catalonia –Ruling of March 13 2017– to different penalties and disqualification from public and representative office because of the crime of disobedience: two years of disqualification and a 1,200 € fine, the former, one year and nine months’ disqualification and a 1,000 € fine in the second case, and disqualification for a year and six months and an 800 € fine for the latter. The three were cleared of wilful neglect of duty. The appeal is pending a decision in the Supreme Court. No measures of federal coercion were applied at that time, but the Catalan authorities at the time did not contemplate taking any practical decision regarding Catalonia’s secession as a result of such a ‘referendum’.

Disobedience of the CC resolutions was reiterated in the new legislature, following the 2015 elections, on the path towards the referendum of the 1-O and UDI which followed the latter. Thus, one of the key moments of the process of disobedience of the CC resolutions was the Parliament’s disobedience of the suspension and, subsequently, of the Constitutional Court Ruling (CCR259/2015, of December 2, 2015) which declared null and



void, as contrary to the Constitution, the Resolution declaring the ‘start of the process of creation of an independent Catalan State in the form of a Republic’: it stated that, in the ‘process of disconnection’ from Spain, the Catalan institutions ‘will not be subject to the decisions of the institutions of the Spanish State, and in particular of the Constitutional Court’, which they regarded as lacking ‘legitimacy’ and ‘competence’. The Resolution urged the Government to exercise only those mandates emanating from the Catalan Parliament (*Resolution 1/XI* of November 9, 2015).

The Parliament of Catalonia also ignored the suspension of the reform of the Standing Orders (sec. 135) adopted on July 26, 2017, which reformed the procedure known as ‘single reading’ that made it possible, during the same session, directly to present, debate and pass a Private Bill. The procedure imposes an extraordinary limit upon the time available for debate and the possibility of tabling amendments^{xxv}. Despite the suspension of the amendment, Parliament applied it in the procedure of adopting the Act of the referendum on self-determination (declared null and void by CCR 114/2017, of October 17) and the Act on Legal Transience and Foundational of the Republic, in the stormy session of September 6-7, 2017. The Government of Catalonia eventually organised and held the referendum of the 1-O in spite of its having been suspended, after being challenged before the CC by the Spanish Government. And, finally, the Parliament of Catalonia, in two extremely chaotic sessions, without complying with what was established in the actual -but suspended- Act of the referendum on self-determination, passed the UDI: on October 10, without any vote and with its subsequent suspension by the *First Minister*- which in no case fell within his competence, according to the Act of the referendum-; and on the 26th-27th, with vague contents in the Declaration adopted by the Parliament.

This last session of the Parliament of Catalonia was held at the same time as the processing in the Senate of the authorisation for the Government to apply the measures of federal coercion which it had proposed, after previously requesting of the *First Minister* of Catalonia -according to what is required by sec. 155 Const. - that he cease in his non-compliance with constitutional and legal obligations^{xxvi}.

At that moment the situation was completely different from that of November 2014. In October 2017 the Catalan Parliament and Government had formally declared that they would not comply with Spanish legal system (Catalonia, they said, had already been



‘disconnected’ from Spain), refusing to apply either Spanish legislation or the decisions of its Courts -among them, those of the CC-; both, Parliament and Government had declared that they would apply the Acts of ‘disconnection’ passed by the Catalan Parliament; these Acts stated that in the event of the referendum producing more votes in favour than against independence - irrespective of the turnout achieved - the Parliament would declare the secession of Catalonia; Parliament and Government played with the UDI, passing and suspending and passing it again^{xxvii}.

The measures proposed by the Government to be adopted in the Senate were multiple, but their objective was essentially the removal of the members of the Government of Catalonia and the assumption of their competences by the Spanish Government, especially in the areas of security, the treasury and communications. But these measures were intended to be transitory and instrumental. The most important measure envisaged by the Spanish Government was the dissolution of the Parliament of Catalonia and the calling of early elections, a decision that was formally adopted by the Spanish Prime Minister, exercising the powers that corresponded to him having assumed those of the *First Minister* of Catalonia^{xxviii}. Many – myself included - considered that, on the one hand, the – unexpected and surprising- dissolution of the Parliament was a measure that, in principle, posed problems of compatibility with the provision of sec. 155 Const., insofar as the latter refers to ‘non-fulfilment of obligations’, as grounds for activating ‘federal coercion’, and the reason for applying the latter is ‘to compel the Community to meet said obligations’. But, on the other hand, it was believed, very generally, that this was politically intelligent, since, simultaneously, it limited intervention in the administration of the AC to a minimum and - the Spanish Government expected and hoped– imposed a time limit upon that intervention, in a politically special period of electoral campaign. And, eventually, it left the final decision in the hands of the voters, which would establish an indisputable way out of the political crisis in Catalonia.

The debate that took place in the Senate vis-à-vis authorising the Government’s application of the proposed measures was relevant first of all in terms of procedure: the fact that it was previously reported in joint session (October 26) by the *Select Committee on Constitution* and the *General Committee on Autonomous Communities*. This confirmed the intention of attributing to the latter a central role in issues relative to territorial autonomy. But the debate demonstrated the consequences of the configuration of the Senate as



Chamber of *sober second thought*, with no special character as Chamber of representation of the autonomous territories. The debate and the decision were dominated, fundamentally, by the two main parties at State level, who negotiated the terms of the Senate's decision on the basis of criteria of Spanish politics as a whole. The Senate, as demanded by the Socialist Party, eliminated one of the measures proposed by the Government: the control of the public media dependent upon the Government of Catalonia. In spite of the partisan defence of independence characteristic of these media, the Socialists believed that the fundamental right to freedom of information might be affected, so demanded this exclusion. Although the PP – in Government at that time – held an overall majority in the Senate, it -and the Government- considered that the support of the Socialists was politically essential in order to venture onto the unexplored path of federal coercion, so it acceded to this demand. This was the only relevant question raised in the Senate. On October 27, the Plenary of the Chamber authorised the Government to apply the measures included in sec. 155 Const.^{XXIX}.

The adoption of the measures of federal coercion has given rise to a debate over their compatibility with the Constitution; and different appeals of unconstitutionality have been lodged –before the CC- against the Senate's authorisation, by both the Parliament of Catalonia and by a group of MPs belonging to *Podemos*, the left-wing party. In my opinion, there could be an incongruence between some of these measures and the wording of sec. 155 Const.. That incongruence might exist not only in the case of the dissolution of the Parliament, but also, previously, in the removal of the members of the Government, and firstly, its President. In my opinion, the aim of sec. 155 Const. is forcibly to impose fulfilment of constitutional and legal obligations not complied with by the authorities of a certain AC. All the measures that are necessary, as the Constitution states; but only those that are strictly necessary, as is required by the exceptional nature of such measures.

Therefore, the aim of measures adopted under sec. 155 Const. has to be compliance - though compulsory- with the decisions that had been defied. Not punishment of those who have defied said decisions. There are two questions, at least, that have to be asked. Is it not a punishment to remove from office the members of a Government instead of giving them instructions and, in the event of continued defiance, suspending them until they comply? Removing an authority from office is a measure that only judges can take according to a due process. And, secondly, regarding the dissolution of Parliament, the



issue is whether the strictly political declarative acts of a representative Chamber, which, not being self-executive, need ‘executive’ activity to have practical effects, can be a case of refusal to ‘fulfil the obligations imposed upon it by the Constitution or other laws’, as stated by the sec. 155 Const. This could be the case, on the one hand, of the UDI by Parliament, which is a declarative act, and, on the other, the executive acts needed for that declaration to become a reality (Lopez Basaguren 2017a: 314 ff.). In these cases, is control and -if appropriate- its nullification by the Courts -i.e., CC- not sufficient?^{xxx}

Though it is not possible in this work to undertake an in-depth analysis of these questions, it is worthwhile – given the expressiveness of its position- to refer to the opinion of the Catalan *Council on Guaranties of Autonomy* -the advisory council of the institutions of Catalonia- when it informed Parliament on the viability of the appeal lodged before the CC against the application of sec. 155 Const. (Consell de Garanties Estatutàries 2017). On the issues debated, the *Consell* considers that, in spite of the fact that the measures of federal coercion have not been in the form of an Act, the Senate Decision to authorise them is open to challenge before the CC via the appeal of unconstitutionality – an appeal in accordance with which primary and secondary legislation is subject to control by this Court. Regarding this issue, it is necessary to take into account that the Organic Act on CC states -sec. 31- that the appeal of unconstitutionality can be lodged not only against ‘Acts and regulations having the force of an Act [secondary legislation]’ -as stated in sec. 161.1,a Const.- but also against ‘decisions’ having the same force. The ‘decision’ taken by the upper House in support of the measures of federal coercion could be, without a doubt, this kind of ‘decision’ having the force of an Act.

With regard to the measures adopted, the *Consell* considers the dissolution of Parliament to be compatible with the Constitution, though it considers that in the prior notification the Central Government should have warned the Government of Catalonia that this dissolution might be one of the measures adopted in the event of non-compliance. The *Consell* considers that this measure is covered by sec. 155 Const. insofar as Parliament ‘is responsible for passing Acts of referendum on self-determination and on Legal Transience and Foundational of the Republic with the corresponding effects and subsequent acts of undermining of the constitutional order and prevailing statutory law’ (p. 55). And, at the same time, it thinks that it is the most proportionate and shortest-lasting measure, allowing for rapid re-establishment of institutional normality. On the other hand,



the *Consell* considers that the removal of the members of the Government of Catalonia is not covered by sec. 155 Const., because it is contrary to the principles of gradualism and proportionality, insofar as the objective of the measures of federal coercion could have been achieved via other less drastic and definitive measures, e.g., suspension from office (p. 69).

The issue, in any case, is pending resolution by the CC. Meanwhile, the situation in Catalonia has been singular, in that the political process following the December elections was paralysed, with a Parliament in which the pro-independence parties continue to have a majority – albeit, apparently, with varying strategic goals-. After the December elections, the Parliament opened the new (XII) Legislature on January, 2018. But it was not able to appoint the *First Minister* -Joaquim Torra- until May, 14, after various attempts to propose different candidates who had fled from Spain -Carles Puigdemont- or who were in prison - Jordi Turull-. Following the first investiture vote on March 22 -for the candidate Jordi Turull, not yet in prison-, which failed, it would be necessary to repeat elections if the Parliament were unable to elect a *First Minister* before May 22. After the appointment of the new *First Minister* some time was still required in order for the Government members to be nominated (June, 1) since the *First Minister* attempted to appoint as Ministers some people in prison and the Spanish Government, still competent under the measures of federal coercion, refused to accept these nominations. Hopes that the dissolution of Parliament and the calling of elections in December would guarantee a rapid return to political normality have largely faded.

7. Final Remarks: the need to reform a useless Senate

The Spanish Senate, despite its constitutional description as ‘House of territorial representation’, fulfils a function as a Chamber of *sober second thought*, completely subordinate to the lower House, in which its function with regard to territorial autonomy is in practical terms thoroughly diluted. The absence of a ‘territorial’ role occurs, even, when the Senate is exclusively responsible for a function linked to territorial autonomy, as is the case of authorisation of measures of ‘federal coercion’ referred in sec. 155 Const.

Firstly, the composition of the Senate is decisive in this incapacity to play an active role in the channelling of interests related with territorial autonomy. It is not only the fact that



the vast majority of senators are elected upon a provincial basis and this radically distorts the territorial origins of the members vis-à-vis the relative demographic weight of the different ACs and also distorts the political orientation of this Chamber. It is also the fact that, as a consequence of the electoral system and the absolute power of the leadership of the parties in the designation of - or support for- candidates, the members of the Chamber respond, absolutely, to a dynamic of party rather than territorial interests. Moreover, finally, nobody, neither parties nor ACs, has ever felt the need to channel their territorial interests via the upper House. It is in the lower House that the interests of the ACs are channelled. This is evident in the cases where the AC is governed by one of the two major parties that have alternated in Government; as it is in the cases of the nationalist parties - the Basque and Catalan cases are the most significant - or by regionalist parties, regardless of whether or not they control the Government of the AC, although their viability is conditioned by political context and parliamentary arithmetic.

It is extremely difficult for a Chamber constituted thus and accustomed to functioning in a manner subordinate to the political dominance of the lower House, with the members of the Senate having an absolutely secondary role, to be able to act according to territorial interests when it has to exercise a function within the sphere of territorial autonomy, even if it enjoys exclusive competence. The experience of the *General Committee on AC* is very significant in this respect.

On the other hand, the attempt to reinforce in the upper House activity, debate and proposals in questions of territorial autonomy soon petered out, after the initial impact arising from the novelty of the initiative. The functioning of the party system has not changed and the parties have not assigned the *General Committee on AC* the leading role regarding territorial autonomy. The same conclusion can be drawn from the extraordinary procedure to authorise the measures of coercion proposed by the Government, under sec. 155 Const. regarding the Catalan authorities' defiance of their legal obligations. The debate and its contents were in no way different from what would have been witnessed in the lower House.

There is an almost unanimously held opinion among scholars, which dates from the very birth of the Constitution (Aja Fernández 1979), that the Senate is a completely useless Chamber and that the reform of the Constitution in this regard is absolutely essential. But there is no unanimity regarding the type of Senate that Spain needs. A considerable



majority of authors attempt to materialise the constitutional declaration of the Senate as Chamber of territorial representation, but not all the proposals coincide. Most authors favour the introduction of a Senate following the model of the German *Bundesrat* (Aja Fernández 2005), which is certainly very popular amongst Spanish scholars, though opposing stances do exist (Portero Molina 1995: 98 ff.; Solozábal Echavarría 1995: 74 ff.). There are also those who advocate, purely and simply, its disappearance, considering it to be ‘a remnant of history that contributes little to the federal structure’ (Sáenz Royo 2014: 64). I have the impression that, in any case, reform of the Senate in the sense of it becoming a Chamber of representation of the AC, whatever the formula, faces considerable resistance in the political world, particularly sensitive to the possible impact of the proposed reform upon the number of Senators the corresponding party might reasonably aspire to and how this would compare with the existing situation: the Senate offers a large number of representative posts, employed on many occasions as destinations for distinguished members who have abandoned front-line party activity.

Reform of the Senate was contemplated within the limited -and excessively formalist, in my opinion- proposal for constitutional reform made by *prime minister* Rodriguez Zapatero in the investiture debate of 2004. A proposal that gave rise to an acclaimed Report by the Council of State, then presided over by Prof. Rubio Llorente (Álvarez Junco & Rubio Llorente 2006), highlighting the major problems posed by any intended constitutional reform of the Senate.

In any case, what the present system has shown is that without significantly altering the Senators’ provenance and without transforming the Senate’s powers within the parliamentary system, any attempt to assign it a leading role in relation to territorial autonomy appears to be almost inevitably doomed to failure.

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¹ There is obviously a considerable amount of academic literature in Spanish on the subject of the Senate. In English, the most complete work is that of Castellà 2013.

² Spain is divided into 50 provinces. However, for the purposes of the election of Senators, under sec. 69 (3) of the Constitution, the island provinces appoint ‘three Senators for each of the major islands —Gran Canaria, Mallorca and Tenerife— and one for each of the following islands or groups of islands: Ibiza-Formentera, Menorca, Fuerteventura, Gomera, Hierro, Lanzarote and La Palma.’ In addition, ‘the cities of Ceuta and Melilla



shall elect two Senators each.’

^{III} In any case, of the 17 ACs in Spain, seven were formed on the basis of a single Province: Asturias, Cantabria, Navarra, La Rioja, Madrid, Murcia and the unique case of the Balearic Islands.

^{IV} This is what explains the political majorities that usually exist in the Senate. The current legislature is a good example. While the lower Chamber has witnessed a significant diversification of representation, with the traditional two-party system significantly weakened, complemented by the existence of significant territorially localised -nationalist- minorities, in the Senate the conservative PP -the party in Government until the vote of no confidence of June, 1- retains a comfortable overall majority -148 seats-, followed, at some distance, by the Socialist Party -62 seats-, with a very minority representation of the other parties: 20 seats Podemos, 12 *Esquerra Republicana de Catalunya*, 6 the PNV – Basque nationalists-, 6 the PdCAT - former *Convergència*, Catalan nationalists- and 12 other small parties.

^V The Organic Act is a type of reinforced Act, reserved for the regulation of the development of fundamental rights, the electoral system, the SA and, in general, the regulation of the constitutional institutions of the State (sec. 81 Const.).

^{VI} The Senate Standing Orders establish the possibility of the formation within the Parliamentary Groups of ‘Territorial groups’ (sec. 32), with a certain capacity for autonomous intervention in the Chamber (García Fernández 1984), but the sum of their activity has been practically irrelevant (Punset Blanco 2006: 112)

^{VII} This drafting was introduced into the reform of the Standing Orders adopted on June 29, 2005: see. *Boletín Oficial de las Cortes Generales, Senado*, serie III A, n. 31, of June 30, 2005. Until then, the various official languages of the AC could only be used in the Senate in the annual debate on the AC - to which I shall refer below- and in the symbolic case of the President of the Chamber’s speech in the opening address on the first day of the legislature.

^{VIII} Sec. 56 bis (5) of the Standing Orders establishes, in the same vein, that Senators appointed by a certain AC who are not members of the *General Committee* shall be able to participate in any Committee established to examine issues that specifically affect a particular AC.

^{IX} One of the most relevant initiatives of the *General Committee* was the adoption, in the first debate on territorial autonomy (September 28, 1994), of the PP’s proposal to create the *Conference of Presidents*, to bring together the *Prime Minister* and the *First Ministers* of the ACs. But the Conference was not created until 2004, when it first met. To date, it has met on six occasions (2004, 2005, 2007, 2009, 2012, and 2017).

^X In any case, it was argued at the time (García de Enterría 1983: 163 ff.) that sec. 155 was not a simple transfer of ‘federal coercion’ (*Bundeszwang*) from sec. 37 GG, but an amalgam of that provision and of the ‘federal oversight’ (*Bundesaufsicht*) of sec. 84 GG. Upon this basis, the prestigious jurist was attempting to ‘de-dramatize’ the interpretation of the constitutional provision, defending its ‘ordinary’ nature as an instrument of relationship between the State and the AC, at least in the execution of State legislation by the autonomous territories. In this sense, he differentiated between what he called the ‘declarative stage’ (federal oversight) and the ‘enforcement phase’ (federal coercion). The ‘declarative stage’ was what was activated in 1989 against the AC of the Canary Islands, when its Government refused to apply the elimination of its territory’s import tariffs, provoking a conflict with the EU and with the Spanish Government. Negotiations between both Governments led to an agreement that all parties regarded as satisfactory.

^{XI} A different matter is the adoption of purely ‘political’ measures like the declaration of ‘extraordinary’, situations such as ‘states of emergency and siege (martial law)’, regulated in sec. 55(1) and 116 of the Constitution.

^{XII} In this sense, the CC has said more than once that sec. 155 establishes an ‘extraordinary tool’: CCR 6/1982 of 22 February (‘an extraordinary control’); CCR 49/1988 of 22 March (‘an extraordinary means of obligation, not appropriate for the resolution of common matters’); CCR 215/2014 of 18 December (‘a last reaction against a flagrant breach of obligations imposed by the Constitution’).

^{XIII} The term ‘ordinary’ legislation is used in counter-position to ‘constitutional’. This is the case of the Act on Budgetary Stability - Organic Act 2/2012, of April 27-, under which non-compliance by the AC with the consequences arising from non-compliance with objectives of budgetary stability and of the economic-financial plan will allow the Government to apply the measures provided for in sec. 155 Const. in order to force compulsory compliance (sec. 26). This is an unnecessary provision, since it does no more than reproduce what is established in sec. 155 Const. But it made it possible to introduce federal coercion into ‘ordinary’ legal language.

^{XIV} With regard to the secessionist process in Catalonia, the CC has not applied these new instruments attributed to it by the law. It seems relevant that no Catalan authority was suspended despite the clear defiance of the CC’s decisions regarding the referendum of 1-O; and that only in relation to that referendum did it impose periodic penalty fines upon the members of the Electoral Commission (*Sindicatura electoral*), whose task was to supervise the referendum process and to announce the results. The CC’s decision resulted in the immediate withdrawal of



the Commission members, so there was neither supervision of the process nor official announcement of the results.

^{xv} A more detailed analysis can be found in the following works: Castellà Andreu 2014 and 2016; Ferreres Comella 2014 and 2016; Fossas Espadaler 2014; López-Basaguren 2016a, 2016b and 2017; Tornos Mas 2014 and 2015; Tudela Aranda 2016; in a critical vein. In defence of the process and of the claim for secession, see Barceló *et al.* 2015; Ridao 2014; Vintró Castells 2012; as well as the texts gathered in Kraus *et al.* 2017.

^{xvi} Although there are conflicting interpretations with regard to its impact upon the beginning of the process, at least indirectly, in its origin is the frustrating conclusion to the process of reform of the SA of Catalonia (2006), the final milestone being the CC ruling (CCR 31/2010, of June 28) declaring contrary to the Constitution -and, consequently, null and void- twelve clauses in different articles of the SA, establishing, in addition, how different clauses in another twenty-seven articles had to be understood to be consistent with the Constitution. The bibliography upon the reform of the SA of Catalonia and on the corresponding CCR is extensive in Spanish and Catalan. In English, see López-Basaguren 2013: 400 ff.

^{xvii} The reports of the *Consell assessor per a la transició nacional* are accessible at https://www.ara.cat/politica/informe-consell-assessor-transicio-nacional_0_1120088191.html; the official website of the *Generalitat* of Catalonia only has the last eight reports of the *Consell* (http://premsa.gencat.cat/pres_fsvp/AppJava/notapremsavw/274452/ca/catn-conclou-independencia-suposaria-guany-fiscal-d11-600m-deuros-i-garanteix-viabilitat-pensions.do).

^{xviii} In this sense, immediately after the elections of September 2015, M. Keating (2015) stated, in relation to the first of the pro-independence options (unilaterally declare independence): ‘Prominent members of the civil society pro-independence movements have long advocated this. Yet, without a majority of the popular vote, this looks democratically dubious. It is also formidably difficult as a practical matter, as it would require international recognition and the loyalty of citizens to the new state.’

^{xix} In this process there has been another highly significant event: the profound internal transformation of each of the political sectors configured in relation to the question of independence, with the strengthening in each of them of the political forces occupying a more radical position in favour of or against independence. But this is neither the time nor the place to analyse this question.

^{xx} Until very recently, the most significant figures in Catalan society who appeared and spoke in public in relation to the political process did so in support of the demand for independence.

^{xxi} See the considerations of the experienced former editor of *The Guardian* P. Preston (2017b).

^{xxii} Indeed, ‘The dignity of Catalonia’ was the title of the joint editorial of the Catalan press as a whole published on November 26, 2009, on the CC ruling on the reform of the SA, that was still being drafted, over three years after the appeal was lodged-.

^{xxiii} One of the favourite – and most effective- arguments employed by the secessionists is that it is easier to achieve the independence of Catalonia than it is to reform the – constitutional – system of territorial autonomy. The answer to that conviction comes, however, via the very history of Catalonia, in relation to the proclamation of the Catalan Republic on October 6, 1934, during the Spanish Second Republic, from one of the sharpest observers of those events, A. Calvet, *Gaziel* (2013, 135) at that time editor of the newspaper *La Vanguardia*: ‘The separatist believes that it is impossible to get along with the rest of the Spaniards, and to resolve this situation, proposes something even more difficult, which is violently to part with them. He feels incapable of making the necessary effort in order to exert influence in Spain, and dreams instead of the mighty objective of breaking free once and for all from its formidable influence. To escape one difficulty he creates a greater one. But if he lacks the strength to resolve the smaller problem, how is he going to deal with the bigger one?’

^{xxiv} Both were, finally, declared null and void, as contrary to the Constitution: CCR 31 and 32/2015, of February 21.

^{xxv} The procedure, moreover, prevented opposition groups from requesting a report from the *Consell de Garanties Estatutàries*. This organ recalled that the right to request the Opinion upon the presentation of a Bill is a fundamental right of the members of Parliament: see CONSELL DE GARANTIES ESTATUTÀRIES: *Acord del Ple del Consell de Garanties Estatutàries, of September 6, 2017* and *Acord del Ple del Consell de Garanties Estatutàries, of September 7, 2017*. The CC resolved the appeal via Ruling 139/2017, of November 29, in which it considers that the reform of article 135 of the Regulation is constitutional insofar as it is interpreted solely in the sense that it allows for the presentation of partial or total amendments to the Bill by the parliamentary groups.

^{xxvi} See the Government Decision proposing the measures of ‘federal coercion’ in *Boletín Oficial del Estado* n. 260-I, of October 27, 2017.

^{xxvii} The former Catalan Minister of Education, Clara Ponsatí, has recently declared: ‘We were playing poker and



we were bluffing': see *Ara.cat* (electronic newspaper), 09.06.2018

^{XXVIII} See the Decree of the President of the Spanish Government calling for elections in Catalonia to be held on December 21, 2017 –Royal Decree 946/2017, of October 27- in *Boletín Oficial del Estado*, n. 261-I, of October 28.

^{XXIX} The debate in the joint session of the *Select Committee on Constitution* and of the *General Committee on Territorial Autonomy*, in *Diario de Sesiones. Senado. XII Legislatura*, Comisión Conjunta de las Comisiones General de las Comunidades Autónomas y Constitucional, n. 183, 26.10.2017. The debate in the Plenary, in *Diario de Sesiones. Senado. XII Legislatura*, Pleno, n. 45, 26.10.2017.

^{XXX} The CC, however, adopted a different stance by declaring the unconstitutionality of *Resolució 5/X* of 23 January 2013 (*Butlletí Oficial del Parlament de Catalunya*, X Legislature, n 13, 24.01.2013) in CCR 42/2014, of March, 25 (Fossas Espadaler 2014; Ferreres Comella 2016).

References

- Aguado Renedo César, 1996, *El estatuto de autonomía y su posición en el ordenamiento jurídico español*, CEPC, Madrid.
- Aja Fernández Eliseo, 1979, 'Por un Senado de las nacionalidades y regiones', in Trujillo Gumersindo (ed), *Federalismo y regionalismo*, CEPC, Madrid, 447-466
- Aja Fernández Eliseo; Albertí Rovira Enoch; Ruiz Ruiz Juan J., 2005, *La reforma constitucional del Senado*, CEPC, Madrid.
- Álvarez Junco José and Rubio Llorente Francisco, 2006, *El informe del Consejo de Estado sobre la reforma constitucional: texto del informe y debates académicos*, CEPC/Consejo de Estado, Madrid.
- Bagehot Walter, 1873, *The English Constitution*, 2nd edition, Little, Brown & Company, Boston.
- Ballart Hernández Xavier, 1987, *Coerció estatal i autonomies. Estudi de l'article 155 de la Constitució de 1978*, Escola d'Administració Pública de Catalunya, Barcelona.
- Barceló Serramalera Mercè & Corretja Mercè, 2015, 'El derecho a decidir en Cataluña; cronología de la construcción de un nuevo derecho democrático', *federalismi.it. Rivista di Diritto pubblico italiano, comparato, europeo*, no. 4/2015 (accesible at <http://federalismi.it/ApplyOpenFilePDF.cfm?artid=28881&dpath=document&dfile=24022015125800.pdf&content=El+derecho+a+decidir+en+Catalu%C3%B1a:+cronolog%C3%ADa+de+la+construcci%C3%B3n+de+un+nuevo+derecho+democr%C3%A1tico+-+stato+-+dottrina+-+>).
- Calvet Agustí (*Gaziel*), 2013, *Tot s'ha perdut*, RBA/La Magrana, Barcelona.
- Castellà Andreu Josep M., 2006, 'The Spanish Senate after 28 years of Constitutional Experience. Proposals for Reform', in Luther, Jörg *et al.* (eds), *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milano, 859-909.
- Castellà Andreu Josep M., 2014, 'Secesión y referéndum sobre el "derecho a decidir" en Cataluña. Una aproximación desde el Derecho Constitucional', in Oliver Araujo Joan (ed), *El futuro territorial del Estado español. ¿Centralización, autonomía, federalismo, confederación o secesión?*, Tirant lo Blanch, Valencia, 451-490.
- Castellà Andreu Josep M., 2016, 'Tribunal Constitucional y proceso soberanista catalán: respuestas jurídico-constitucionales a un conflicto político-constitucional', *Teoría y Realidad Constitucional*, no. 37: 561-592.
- Consell de Garanties Estatutàries de Catalunya, 2017, *Dictamen 14/2017, de 5 de desembre, sobre la Resolució de 27 d'octubre de 2017, de la presidència del Senat, per la qual es publica l'Acord del Ple del Senat, pel qual s'aproven les mesures requerides pel Govern, a l'empara de l'article 155 de la Constitució*.
- Cruz Villalón Pedro 1983, '¿Reserva de Constitución? (Comentario al fundamento jurídico cuarto de la Sentencia del Tribunal Constitucional 76/1983, de 5 de agosto, sobre la LOAPA)', *Revista Española de Derecho Constitucional*, no. 9: 185-208.
- Cruz Villalón Pedro 2009, 'La dificultad del Tribunal Constitucional como garante de la autonomía territorial', *Revista catalana de Dret Públic*, 39, 21-36
- De Miguel Bárcena Josu, 2016, 'Manual para construir un Estado (Los informes del Consejo Asesor para la transición nacional de Cataluña)', *Teoría y Realidad Constitucional*, no. 37: 499-527.
- Ferreres Comella Víctor, 2014, 'The Spanish Constitutional Court Confronts Catalonia's "Right to Decide" (Comment on the Judgment 42/2014)', *European Constitutional Law Review*, X(3): 571-590.



- Ferreres Comella Víctor, 2016, 'Cataluña y el derecho a decidir', *Teoría y Realidad Constitucional*, no. 37: 461-475.
- Fossas Espadaler Enric, 2014, 'Interpretar la política. Comentario a la STC 42/2014, de 25 de marzo, sobre la Declaración de soberanía y el derecho a decidir del pueblo de Cataluña', *Revista Española de Derecho Constitucional*, no. 101: 273-300.
- García Fernández Javier, 1984, 'Los Grupos Territoriales del Senado', *Revista de Derecho Político*, no. 21: 141-160.
- García Morales María Jesús, 2013, 'Intergovernmental Relations in Spain and the Constitutional Court Ruling on the Statute of Autonomy of Catalonia: What's Next?', in López-Basaguren Alberto *et al.*, *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain*, Springer, Heidelberg, 83-109.
- García Morales María Jesús, 2016, 'El Gobierno central y los Gobiernos autonómicos en España... ¿Trabajan juntos?', *Istituzioni del federalismo*, XXXVII(1): 117-161.
- García-Escudero Márquez Piedad, 1994, 'La Comisión General de las Comunidades Autónomas (Reforma del Reglamento del Senado)', *Revista de Administración Pública*, 133, 485-500
- García de Enterría Eduardo, 1983, *La ejecución autonómica de la legislación del Estado*, Civitas, Madrid.
- Generalitat de Catalunya. Centre d'Estudis d'Opinió, 2018, *Enquesta sobre context polític a Catalunya. 2018*, REO n. 874, 23/02/2018 (accessible at <http://ceo.gencat.cat/ca/barometre/detall/index.html?pid=6508>).
- Keating Michael, 2015, 'What next for Catalonia?', *Centre on Constitutional Change*, Blog, published on October 1, (accessible at <https://www.centreonconstitutionalchange.ac.uk/blog/what-next-catalonia>).
- Kotzur Markus, 2006, 'Federalism and Bicameralism -The German "Bundesrat" (Federal Council) as an Atypical Model', in Luther, Jörg *et al.* (eds), *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milano, 257-290.
- Kraus Peter A. & Vergés Grifa J. (eds), 2017, *The Catalan Process. Sovereignty, Self-Determination and Democracy in the 21st. Century*, IEA, Barcelona.
- López-Basaguren Alberto, 2013, 'Current Issues around Territorial Autonomy in Spain', in López-Basaguren Alberto *et al.* (eds), *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain*, Springer, Heidelberg, 395-419.
- López-Basaguren Alberto, 2016a, 'Scottish referendum and Catalan "consultation": two experiences in the mirror', in Otaola Paloma *et al.* (eds), *Autonomies et indépendences: le nationalisme au XXI^e. siècle*, Éditions Connaissances et Savoirs, Paris, 119-152.
- López-Basaguren Alberto, 2016b, 'Demanda de secesión en Cataluña y sistema democrático. El *procés* a la luz de la experiencia comparada', *Teoría y Realidad Constitucional*, no. 37: 163-185.
- López-Basaguren Alberto, 2017a, 'Regional Defiance and the enforcement of federal Law in Spain. The claims for sovereignty in the Basque Country and Catalonia', in Jakab András *et al.* (eds), *The Enforcement of EU Law and Values. Ensuring Member State's Compliance*, OUP, Oxford, 300-315.
- López-Basaguren, Alberto, 2017b, 'Esperando a Godot', *El País* newspaper, October 11.
- López-Basaguren Alberto, 2018, 'Escrutinio judicial europeo', *El Correo* newspaper, April 7.
- López-Laborda Julio, 2012, 'The assignment of revenue to Spain's Autonomous Regions', *SEFO. Spanish Economic and Financial Outlook*, I(4): 73-77.
- Morales Arroyo José M. & Gutierrez Rodriguez Francisco J., 1994, 'Un intento de territorialización del Senado: la Comisión General de las Comunidades Autónomas', *Administración de Andalucía. Revista Andaluza de Administración Pública*, no. 20: 305-336.
- Muñoz Machado Santiago, 1983, 'La interpretación de la Constitución, la armonización autonómica y otras cuestiones (La Sentencia del Tribunal Constitucional de 5 de agosto de 1983: asunto LOAPA)', *Revista Española de Derecho Constitucional*, no. 9: 117-145.
- Portero Molina José A., 1995, 'Contribución al debate sobre la reforma del Senado', *Revista de Estudios Políticos*, no. 87: 81-105.
- Preston Peter, 2017a, 'Violence in Catalonia needed closer scrutiny in age of fake news', *The Guardian* newspaper, October 8.
- Preston Peter, 2017b, 'Catalonia's dreams of secession were incubated in a media cocoon', *The Guardian* newspaper, October 15.



- Punset Blanco Ramón, 2006, 'De un Senado a otro. Reflexiones y propuestas para una reforma constitucional', *Teoría y Realidad Constitucional*, no. 17: 107-142.
- Requejo Rodríguez Paloma, 2013, 'La resurrección del interés general en el Estado autonómico', *Revista de Derecho Político*, no. 87: 149-178.
- Ridaó Martín Joan, 2014, *El Dret a decidir. La consulta sobre el futur polític de Catalunya*, IEA, Barcelona.
- Ripollés Serrano M. Rosa, 1995, 'La participación del Gobierno y de los Consejos de Gobierno de las Comunidades Autónomas en la Comisión General de las Comunidades Autónomas del Senado', in *Corts. Anuario de Derecho Parlamentario*, no. 1: 11-30.
- Sáenz Royo Eva, 2014, *Desmontando mitos sobre el Estado autonómico*, Marcial Pons, Madrid.
- Solozábal Echavarría Juan J, 1995, 'Presupuestos y límites de la reforma constitucional del Senado', *Autonomías. Revista catalana de Dret Públic*, no. 20: 61-77.
- Tornos Más Joaquín, 2014, 'El problema catalán: una solución razonable', *El Cronista del Estado Social y Democrático de Derecho*, no. 42: 44-53.
- Tornos Mas Joaquín, 2015, *De Escocia a Cataluña. Referéndum y reforma constitucional*, Iustel, Madrid.
- Tudela Aranda José, 2016, 'El derecho a decidir y el principio democrático', *Teoría y Realidad Constitucional*, no. 37: 477-497.
- Varela Suanzes-Carpegna Joaquín, 2006, 'La reforma del Senado', *Teoría y Realidad Constitucional*, no. 17: 143-168.
- Vilalta Maite, 2016, 'Pasado, presente y futuro de la nivelación en el modelo de financiación de las Comunidades Autónomas', *Mediterráneo Económico*, no. 30: 87-116.
- Vintró Castells Joan, 2012, 'Legality and the referendum on independence in Catalonia', *Blog del Institut de Dret Públic*, posted on 23 October (<http://idpbarcelona.blogspot.com.es/2012/10/legalidad-y-consulta-soberanista-en.html>).
- Vírjala Foruria Eduardo, 2005, 'La coacción estatal del artículo 155 de la Constitución', *Revista Española de Derecho Constitucional*, no. 55: 58-116.
- Visiedo Mazón Francisco J., 1997, *La reforma del Senado. Territorialización del Senado*, Comisión General de las Comunidades Autónomas, Senado, Madrid.
- Zabalza Antoni & López-Laborda Julio, 2011, 'The new Spanish system of Intergovernmental Transfers', *Int. Tax Public Finance*, XVIII(6): 750-786.



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**Attempts to change the British House of Lords into a
second chamber of the nations and regions:
explaining a history of failed reforms**

by

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Abstract

The House of Lords is the world's longest-established and probably best-known second chamber. Wholly unelected, with most members appointed for life, it appears a vestige of the 'elite' form of bicameralism once common throughout Europe. Hence calls for major reform are commonplace. However successful changes have been piecemeal and rare. Meanwhile the UK is not federal, but is nonetheless a 'union state', comprising the territories of England, Scotland, Wales and Northern Ireland, each with its own distinct governing arrangements. These were most recently boosted by the 1997 Labour government's devolution programme. Hence for decades, and particularly the last 20 years, devolution and Lords reform have both been on the UK's political agenda. Throughout this time attempts to create a 'second chamber of the nations and regions' have repeatedly failed. This paper reviews the proposals made, and the obstacles they faced – drawing lessons for Britain, and territorial bicameralism more widely.

Key-words

House of Lords, bicameralism, devolution, England, Scotland, Wales, Northern Ireland



1. Introduction

The UK might at first glance appear an unlikely candidate for inclusion in a discussion on federalism and bicameralism, having never been a federal state. Its second chamber, the House of Lords, is one of the best-known in the world, but as an unelected body incorporates no form of territorial representation.¹

Nonetheless, both the territorial nature of the UK state and the appropriate form of UK bicameralism have long been under discussion, and focus on both matters has intensified over the past 20 years. The Labour government elected in 1997 arrived in office with an ambitious agenda of constitutional reform. This included two clear areas of ‘unfinished business’ from past periods of government by the left: devolution and House of Lords reform. For a brief period, at least, these topics were seen as connected – and some in the UK still believe that they should be, through creation of some form of ‘second chamber of the nations and regions’. While the House of Lords could be seen as a vestige of the old ‘elite’ model of bicameralism, this kind of reform would bring the UK into line with many other bicameral countries around the world (Coakley 2014, Patterson and Mughan 1999, Russell 2000, Tsebelis and Money 1997). However no progress towards a more territorial second chamber has ever yet been achieved.

This paper reviews proposals for a UK territorial second chamber in context, asking why calls to adopt such a model have been so unsuccessful. It begins by briefly reviewing the territorial history of the UK, and the history of debates on Lords reform. It then turns to the various proposals that have been made for forms of territorial representation in the UK second chamber, particularly since the 1990s. In doing so it recognises that territorial representation may potentially be reflected in both the composition and the functions of a second chamber (Russell 2001). While UK debates have given some limited attention to the former, they have barely touched upon the latter. The paper ends with a summary of the obstacles to creating a UK territorial second chamber. Some of these are relatively unique to the UK case, but others are familiar from other countries’ long-running debates on territorial politics and second chamber reform.



2. The UK as a territorial state

The United Kingdom brings together four historically distinct territorial areas (or ‘nations’): England, Wales, Scotland and Northern Ireland. These combined through a series of historic unions: between England and Wales in 1536, with Scotland in 1707, and Ireland in 1801 (Bogdanor 1999a). While England and Wales essentially merged their governance and legal structures, a degree of distinctiveness continued to exist in the other areas. Significant tensions over the Irish union in the 19th century led to prolonged debates about ‘home rule’ (for Ireland, but also potentially the other areas), and ultimately Irish independence in 1921. This left the six counties of Northern Ireland under UK rule, with their own devolved parliament at Stormont, which was later suspended in 1972 during the so-called ‘troubles’ between the Catholic/nationalist community and Protestant/Unionist community. This sectarian divide continues to define the politics of Northern Ireland, and is reflected in its party system – which differs entirely from that of the mainland UK. In addition Scotland and Wales both have nationalist parties – the Scottish Nationalist Party (SNP, formed in 1934), and Plaid Cymru (formed in 1925).

Hence despite being formally unitary, the UK is arguably best described as a ‘union’ state, with distinct territorial dynamics (Mitchell 2009). Its territorial history has continued to deeply influence UK politics, most obviously in terms of pressures for devolution, and consequent changes.

Following the ‘home rule’ debates, devolution next appeared most firmly on the political agenda in the 1970s. A Royal Commission on the Constitution (commonly referred to as the ‘Kilbrandon Commission’) was established by Harold Wilson’s Labour government in 1969. The Commission’s principal focus was territorial politics, and although its members were not united the majority report suggested new elected assemblies for Scotland and Wales (Royal Commission on the Constitution 1973). This proposal was supported by the Labour government elected in October 1974, which legislated to establish such assemblies, subject to referendums in Scotland and Wales – neither of which approved the plans. Soon after, a Conservative government was elected which rejected devolution.

The Conservatives were in government for 18 years, but fast progress followed the re-election of Labour in 1997. Legislation was passed to facilitate referendums on



establishment of a Scottish Parliament and Welsh Assembly, both of which approved the proposals that year. The next year a referendum in Northern Ireland on the ‘Good Friday Agreement’ agreed the re-establishment of a Northern Ireland Assembly at Stormont. Also in 1998, Londoners voted for creation of a Greater London Assembly and Mayor. Beyond this, Labour proposed elected assemblies in the English regions, but these plans were abandoned, following heavy rejection at the first referendum (in North East England) in 2004. Nonetheless, Regional Development Agencies and Government Offices of the Regions were created in eight areas, covering the whole of England (outside London), overseen by indirectly elected bodies including local councillors. These boundaries, collectively representing the ‘nations and regions’, were used for election of UK MEPs from 1999. However, English regional structures were largely dismantled following the election of a Conservative-led coalition government in 2010 (Sandford 2013).

Territorial devolved arrangements in the UK have always been characterised by asymmetry, and their introduction been driven by political pragmatism rather than grand design. They exist, of course, in the absence of a codified constitution – where such rules might otherwise be set out and entrenched. Prior to 1997 Scotland and Northern Ireland retained separate rules and structures, and each, alongside Wales, had its own dedicated Secretary of State responsible for policy at Cabinet level. Parallel parliamentary structures existed in the House of Commons, including ‘select committees’ for Scotland, Wales and Northern Ireland, to oversee the three territorial government departments, and ‘grand committees’ made up of MPs representing each area. The 1997-98 settlement then devolved distinct powers to each nation, broadly similar to those previously resting with the Secretary of State. Powers were most extensive in Scotland, including full legislative competency in areas such as education, health, environment and local government, and weakest in Wales – which initially had very limited legislative power. In all three areas devolved policy competencies have subsequently grown, boosted in Scotland in particular by pledges from the UK party leaders when campaigning in the failed independence referendum, held in 2014 following calls by the Scottish SNP government.

The biggest current controversy concerning devolved powers results from ‘Brexit’ – the UK’s process of withdrawal from the European Union. This has caused significant arguments about the level of government to which powers currently held by the EU (e.g. over fisheries and agriculture) should be repatriated. Arrangements for intergovernmental



relations within the UK are generally seen to be weak (Swenden and McEwen 2014), and have recently been described by the Welsh Government (2017) as ‘inadequate’. These arrangements were built in the early years of devolution, when Labour was in power at UK level and in Scotland and Wales, allowing relatively informal intraparty communications.

Another unresolved issue for UK devolution is the ‘English question’ (Hazell 2006). Devolved government within England remains patchy, with a Greater London Assembly and Mayor, alongside other ‘metro mayors’ in seven other areas. But these bodies have varied and relatively weak powers, and cover only part of the English population (Sandford 2016). Since the 1990s some campaigners have rejected the regional approach altogether, and called instead for establishment of an English Parliament (Russell and Sheldon 2018). As things stand, Westminster already serves in many important policy areas largely as a parliament for England. There has hence been significant controversy concerning the voting rights of MPs from the devolved areas – the so-called ‘West Lothian question’ (Bogdanor 2010). In 2015 this was partly resolved by introduction of a system of ‘English votes for English laws’ (Gover and Kenny 2016).

3. The long and winding road of Lords reform

The long-running nature of constitutional debates about the UK’s territorial arrangements has been more than rivalled by the concurrent debates about second chamber reform. The House of Lords has ancient roots, traceable through at least 1000 years of history to the bodies of noblemen drawn together to advise past monarchs (Russell 2013). The development of bicameralism was gradual, but clearly established by the 14th century. The Lords fits historically with the model of an ‘elite’ chamber, similar to those which once existed in other European states such as France, Italy, Sweden, Hungary and Spain (Marriott 1910). It influenced establishment of other such bodies, such as the Japanese House of Peers and the Canadian Senate.

While most of these other chambers have since been swept away, the Lords has remained – albeit being reformed incrementally, through measures that have collectively added up to a significant transformation. Reform pressures can be traced back centuries, but gained strength in the late 19th century, as the franchise for the House of Commons widened. The first substantial change came through the 1911 Parliament Act, which



removed the House of Lords' absolute veto over legislation, reducing this to a power of delay in most cases.ⁱⁱ The same Act also defined a category of 'money bills' over which the chamber's power was even more constrained. The 1949 Parliament Act reduced the power of delay broadly from two years to one, which is where it remains. Hence the House of Commons can in theory pass a bill without the Lords' consent; but in practice this has occurred only very rarely, and the two chambers tend instead to reach agreement through negotiation.

Changes to the composition of the House of Lords have occurred more slowly. Prior to 1958 the chamber comprised largely of hereditary peers (who passed their titles down the – almost invariably male – family line), alongside 26 Church of England bishops.ⁱⁱⁱ In 1958 a Conservative government passed the Life Peerages Act, which allowed new members to be created for life, rather than requiring a new hereditary peerage to be bestowed. From this point on, the usual way into the House of Lords was through appointment as a life peer – appointments being made by the monarch, acting on the Prime Minister's advice.

The Life Peerages Act did not remove the existing hereditary peers, and pressures for reform continued. In 1968 Harold Wilson's government introduced a bill for wholesale reform of the Lords, to further reduce its powers and alter its balance of membership. However this was withdrawn following resistance by the House of Commons. Subsequently no further government proposals were advanced for three decades.

The 1997 Labour government arrived in office on a manifesto pledge to remove the remaining hereditary peers as 'an initial, self-contained reform', which would be 'the first stage in a process of reform to make the House of Lords more democratic and representative' (Labour Party 1997). This 'first stage' was largely achieved through the House of Lords Act 1999, which expelled over 650 such members – roughly halving the size of the chamber. However, following a compromise with the Conservatives, 92 hereditary peers were allowed to remain. Reform nonetheless transformed the membership of the chamber, and particularly its party political balance – since many departing hereditary peers were Conservatives, and very few were Labour. Today the House of Lords includes roughly equal numbers of Conservative and Labour peers, with the balance of power held by the Liberal Democrats and a large group of independent 'Crossbenchers'.



Labour remained in office for 13 years, but the promised ‘second stage’ of Lords reform never occurred. Under Labour there were various initiatives (described in more detail in the next section), including a Royal Commission on the Reform of the House of Lords (the ‘Wakeham Commission’), which reported in 2000, and four subsequent government White Papers containing various proposals.^{IV} Beyond the government, further initiatives came from parliamentary committees and other cross-party groups. With one minor exception, no proposal resulted in legislation being introduced.

After Labour left office, a further White Paper and a draft House of Lords Reform Bill were published by the 2010 Conservative-Liberal Democrat government, but ultimately failed. Ambitious in its scope, this initiative was spearheaded by the Liberal Democrat Deputy Prime Minister Nick Clegg. A government Bill was introduced into the House of Commons in 2012, but was withdrawn when it became clear that it lacked adequate Conservative support. Subsequently, debate on the options for Lords reform has continued, but the only reforms achieved have been small. The House of Lords Reform Act 2014 resulted from a private member’s bill (promoted by former Liberal Party leader Lord Steel of Aikwood), and simply created a right for life peers to permanently retire from the House of Lords.^V Most recently one of the biggest concerns has been the chamber’s growing size, due to large numbers of prime ministerial appointments (the number of which remains unregulated). In March 2018 membership of the chamber was just under 800. Consequently proposals for a reduction in size were recently made by a committee convened by the Lord Speaker (Lord Speaker’s Committee on the Size of the House 2017).

4. Options for territorial bicameralism

Given the importance of territorial relations to the UK’s constitutional history, it would be natural for a settlement between the nations and regions to have been reflected in reform to the second chamber. Despite also not being strictly federal, such arrangements have for example been captured in 20th-century reform of bicameralism in Italy (Lodici 1999) and Spain (Juberias 1999).

The modes in which a second chamber can be ‘territorial’ reflect the broad functions of legislatures: representation, decision-making, linkage and legitimation (Loewenberg 2011, Russell 2001). Hence territorial politics may be reflected in either the composition or



functions of a second chamber. The extent to which this succeeds in creating a chamber that provides a voice for territorial units, and successfully binds the nation together, depends on certain key features of institutional design.

Compositionally, strongly territorial designs often give territorial units equal representation irrespective of population size (as in the US and Australia, for example), or give disproportionate weight to smaller units (as in Austria, Switzerland and Germany), short of equality. Strongly territorial designs also often involve representation through ‘indirect’ election, by members of sub-national legislatures (as in Austria, India and South Africa), or even through appointment by sub-national governments (as in Germany). Alternatively, territorial representatives may simply be elected by the people directly, using the boundaries of subnational units (as in the US and Australia), or be appointed centrally to represent such units (as in Canada).

In terms of policy-making, some territorial second chambers have enhanced powers over legislation affecting the subnational units (e.g. Germany, South Africa). Potential also exists for such bodies to stage territorially-focused debates, organise territorially-focused committees, or give special consideration to bills proposed by subnational units. Procedural arrangements promoting meaningful territorial representation also include provision for block voting by representatives of such units (again for example Germany, South Africa), and for formal accountability mechanisms back to the assemblies of those areas (Russell 2001).

The extent to which second chambers actually serve a territorial function may hence depend on their composition, powers and procedures. In many states where the second chamber serves notionally as a territorial forum binding the nation together, such as Australia, Canada and Spain, its ability to do so meaningfully is disputed – with implications for legitimation. In Canada the Senate’s reputation as a territorial chamber is damaged by the fact that appointments are made by the federal prime minister with no provincial input. In Australia, critics complain that senators, despite being elected as state representatives, vote rigidly along party lines. However, territorial influence can be subtle: in the latter case the fact that senators are elected by proportional representation ensures that geographically diverse voices are heard in behind-the-scenes meetings in the party room.



5. A brief history of territorial proposal for House of Lords reform

The above discussion helps to provide a framework against which to judge past proposals for a UK territorial second chamber. This section analyses such schemes across four time periods: before the Labour government's election in 1997, surrounding the Royal Commission on the Reform of the House of Lords 1998-2001, during the decade 2002-2012, and since. The extent to which these included features associated with strong territorial second chambers is summarised in Table 1. We see that while there have been numerous proposals in the UK for a reformed second chamber compositionally representing the nations and regions, these have largely been at the weak end of the spectrum. Discussion of territorial powers and functions has meanwhile been extremely underdeveloped. Throughout these debates there has been some limited learning from models in other bicameral states.

5.1. Pre-1997 proposals

An exhaustive historical account of proposals for a UK territorial second chamber would be challenging, given the plethora of schemes mooted over centuries for Lords reform. But two particularly high profile packages of proposals are worth mentioning in the pre-1997 period.

In 1917, following the passage of the 1911 Parliament Act, a cross-party Commission was established chaired by the Liberal constitutionalist Viscount Bryce, to consider the next steps in House of Lords reform. Its report provided a definitive analysis of the role of the second chamber, and made recommendations for compositional reform (Bryce 1918). The Commission's most favoured solution was for 75% of members of the second chamber to be elected by members of the House of Commons, organised in regional blocs (while the remainder would be drawn from existing peers). However, this electoral arrangement appeared merely to be driven by convenience, rather than any expectation of regional representation. The report included no suggestion that the Lords or its members should perform any explicit territorial function.

The Kilbrandon Commission of the 1970s, in contrast, was primarily focused on resolving the UK's territorial tensions, not on Lords reform. Its majority report, while recommending elected assemblies for Scotland and Wales, made no proposal for links to



the second chamber. Indeed it explicitly rejected such an idea, suggesting that ‘if a regional structure for Parliament were thought advantageous... it would be inadvisable to link it with the House of Lords’; as representation in the House of Commons was already based on geographical areas, the report suggested that it would be ‘irrational to introduce a novel geographical factor into the House of Lords’ (Royal Commission on the Constitution 1973: 322). Nonetheless, a ‘memorandum of dissent’ was issued by two members of the Commission, which included some strongly differing ideas. This argued for elected regional assemblies in England, in addition to the new bodies in Scotland and Wales, and suggested that 150 new members should be added to the Lords, drawn from the members of these bodies. As well as proposing indirect election, a broad principle of equality was envisaged, with some limited weighting: each of five English regions would have 20 representatives, alongside 25 each for Scotland and Wales (which would significantly advantage those two areas in population terms). In support of their case the authors drew attention to the German example. Among the arguments made for such representation was the idea that members of the new elected bodies should be given ‘a national and public platform on which to make their voices heard’ which could help ‘to provide a countervailing force’ to the ‘centripetal pull’ of central government (Crowther-Hunt and Peacock 1973: 118).

In retrospect, 45 years on, these remain the most radical territorial proposals yet to have been made by any official body on Lords reform. For critics of the Kilbrandon Commission’s work, the majority report demonstrated ‘tunnel vision’, by ‘straining so hard (yet unsuccessfully) to focus on a single devolutionary proposal that they dared not look around to see the constitutional problems they were passing by’; yet in proposing an all-UK arrangement for devolution the authors of the minority report suffered from an ‘obsession ...with comprehensiveness and uniformity’ (Daintith 1974: 555). Neither set of proposals resulted in immediate change, but it was the majority report that went on to have more lasting impact.

**Table 1: Key Lords reform proposals including a territorial element**

Proposal and year	Territorial boundaries	Weighted representation	Indirect elections	Territorial functions	Broad proposal
Minority report to the Royal Commission on the Constitution 1973	For minority	Proposed strong weighting	Proposed election by members of new devolved assemblies	Provide a national platform for the new assemblies, and counter centralisation	The Commission's focus was devolution, not Lords reform. The majority report supported elected bodies for Scotland and Wales only, and explicitly rejected a territorial second chamber. But two dissenting members proposed such a chamber, alongside elected English regional assemblies.
Royal Commission on Reform of the House of Lords 2000	For minority	Mentioned but dismissed	Discussed but ultimately dismissed	Discussed at length, but most options dismissed. Proposed only a Devolution Committee	Largely appointed chamber of 550 members serving 12-15 year terms, with a minority (three options, 12-35%) elected using regional boundaries. As in most subsequent proposals, elections would be by proportional representation, and 20% of seats be reserved for independent (non-party) appointees.
Government White Paper 2001	For minority	Not discussed	Dismissed	Not discussed	Largely appointed chamber of 600 members with 20% elected using regional boundaries for 4-15 years
Public Administration Select Committee 2002	For majority	Not discussed	Some interest, but didn't recommend	Not discussed	Chamber of up to 350 members, of which 60% elected using regional boundaries for 8-10 years
Cross-party report <i>Breaking the Deadlock</i> 2005	For majority	Not discussed	Briefly discussed but dismissed	Not discussed	Chamber of up to 385 members, of which 70% elected using regional boundaries for 12-15 years
Government White Paper 2007	For 50%	Not discussed	Briefly mentioned but dismissed	Not discussed	Chamber of 540 members, 50% elected using regional boundaries for 15 year terms
Government White Paper 2008	For majority	Not discussed	Dismissed	Not discussed	Chamber of 250-450 members, 80-100% elected using regional boundaries for 12-15 years
House of Lords Reform Bill and White Paper 2011	For majority	Not discussed	Not discussed	Not discussed	Chamber of 300 members, 80-100% elected using regional boundaries for 12-15 years.



David Steel speech 2013	For all	Proposed slight weighting	proposed	Barely discussed	Senate of roughly 500 members, chosen by regional electoral college comprising MPs, MEPs and MSPs/AMs
Labour manifesto 2015	Unclear	Not discussed	Not discussed	Not discussed	Proposed 'an elected Senate of the Nations and Regions', but no detail. Gordon Brown made a similar proposal in 2014.
David Owen 2016	For all	Proposed strong weighting	Proposed	Proposed	UK Federal Council of 68 to complement (not replace) the Lords, strongly based on German Bundesrat, with 3-6 members per region

5.2. Proposals 1998-2001: the Royal Commission and immediate responses

The question of territorial representation in the second chamber did not subsequently reach the mainstream until the 1997 Labour government simultaneously sought to pursue devolution and House of Lords reform. In an initial White Paper published alongside the announcement of the new Royal Commission on the Reform of the House of Lords, the government set out future priorities and options for the promised 'second stage' of reform. This specified that the Royal Commission's terms of reference would require it to 'take particular account of the present nature of the constitutional settlement, including the newly devolved institutions' (Cabinet Office 1999: 10). The White Paper noted that territorial arrangements were common in second chambers overseas, and commented (ibid: 36) that:

By the time a fully reformed second chamber can be put in place, there will be devolved institutions in Scotland, Wales and Northern Ireland. London will have its directly elected Authority. English regionalism will be increasingly recognised through Regional Development Agencies and regional chambers. Some regions may be working towards regional assemblies of their own. The relationship of the second chamber to those bodies will need to be a significant part of the Royal Commission's deliberations; it could have a marked impact on both the second chamber's functions and how its members are selected.

One option mentioned was that of indirect election by the devolved bodies, where the White Paper simply noted that 'If the Commission were attracted to this basic principle it would no doubt wish to take evidence, including from the devolved institutions



themselves, as to how this... might operate' (ibid: 48). The purpose of the paper, however, was primarily to illustrate a wide range of ideas, and pass consideration of them over to the Royal Commission, rather than making specific recommendations.

The Royal Commission itself dedicated a full chapter of its final report to 'Giving a voice to the nations and regions'. This opened by suggesting that 'Deciding what relationship the reformed second chamber should have with the devolved institutions has been one of the most interesting and important aspects of our work' (Royal Commission on the Reform of the House of Lords 2000: 58). Nonetheless, the Commission's proposals in this area were modest, when compared with the Kilbrandon Commission minority report. An explicitly stated reason was that devolution was at very early stages. The Commission was established in 1998, and published its report in spring 2000, while the new legislatures in Scotland and Wales were elected for the first time in May 1999, and the new Northern Ireland Assembly just 11 months earlier. New structures in the English regions were promised, but this process had barely begun. Hence the Commission noted that (ibid: 108):

indirect election would really only be relevant in respect of those regions which already have devolved institutions, i.e. Scotland, Wales, Northern Ireland and perhaps London. It could therefore only make a partial contribution to the composition of the second chamber and would be unfair to most of England.

This caused the Commission to conclude that, while representatives of the nations and regions were desirable, they should be directly elected by the citizens of those areas.

The Commission noted that representation of subnational units in federal second chambers is organised 'frequently on an equal or at least graduated basis, while the lower chamber is constituted on a population basis', commenting that the UK 'however, is not a federal state' (ibid: 59). It went on to suggest that 'the great disparity between the sizes of the different nations and regions of the United Kingdom means that an equal distribution of seats would be inappropriate' (ibid: 105) – population figures are illustrated from an analysis at the time in Table 2. A consideration here, though not explicitly stated by the Commission, was almost certainly that Northern Ireland would be greatly 'overrepresented'. This could bring particular problems given that area's distinct politics and political party system.



Table 2: Distribution of a possible 240 seats in a territorial second chamber, based on population share or principle of equality

	Population (000s)	Option 1: Population based	Option 2: Equality
South West	4,841	20	20
Eastern	5,293	22	20
South East	7,895	32	20
West Midlands	5,317	22	20
East Midlands	4,141	17	20
Yorkshire and Humberside	5,035	20	20
North East	2,600	11	20
North West	6,891	28	20
London	7,074	29	20
Wales	2,921	12	20
Scotland	5,128	21	20
Northern Ireland	1,663	6	20
TOTAL	58,801	240	240

Source: Russell (2000: 311).

The Commission ultimately proposed that elected members should be distributed between nations and regions proportionately to population, and chosen via a proportional electoral system (on the same boundaries as those used for the election of UK MEPs). But concerns about the impact on the chamber's democratic legitimacy and relationship with the House of Commons led the Commission to propose that these members should comprise only a minority of the chamber (12 – 35%).^{VI} Most other second chamber members would continue to be appointed at a UK level, albeit via an updated process. As well as dismissing indirect election, the Commission opposed members of the second chamber holding a 'dual mandate' as members of a devolved legislature.

These decisions on composition already limited the possibilities for territorial functions to be performed by the reformed second chamber. The Commission noted that 'Many respondents to our consultation paper agreed that regional representation as a feature of the reformed second chamber could act as a kind of "constitutional glue"' (Royal Commission on the Reform of the House of Lords 2000: 58). It suggested that these members might 'contribute to cohesion', 'help resolve concerns about the protection of Scottish interests in the second chamber', and 'build on the emerging political identity of the nations and regions of the United Kingdom' (ibid: 60). However, beyond simply being elected from these areas, it had little to say about linkages to the devolved institutions;



instead it merely proposed that ‘It is for the members of the various Parliaments and Assemblies to decide what links they should establish’ (ibid: 63). It made clear that the second chamber ‘should not become a forum for inter-governmental liaison’ (ibid: 62) and its role ‘should not be to provide a vehicle by which the devolved institutions themselves could be represented in Parliament’ (ibid: 63). The Commission’s only firm suggestion for territorial functions was that the new chamber should consider establishing a Devolution Committee, which would consider relations between the devolved institutions and the centre, and relations between the institutions themselves. Notably, while other proposals from the Royal Commission for establishment of new committees – including one focussed on human rights, and another broadly on the constitution – have subsequently been adopted by the House of Lords, this proposal has not.

In retrospect the Royal Commission’s proposals look timid, and could be seen as a missed opportunity to propose a strongly territorial second chamber at a key moment for the newly-devolved UK. But the timing, rather than being propitious, proved disadvantageous. The two processes were developing simultaneously, but independently, and Commissioners were cautious about dictating plans from the centre that might not reach approval in the devolved areas. Meanwhile, they were offered little guidance by representatives of those areas. The Commission invited evidence, and received 1,734 submissions. But none were forthcoming from the new bodies in Scotland, Northern Ireland and Wales. Some interest was expressed in indirect election by political parties from these areas – the Alliance Party of Northern Ireland (1999: 3) suggested that there was a ‘Strong case for some members to be indirectly elected by members of the devolved national Assemblies and Parliament and the future bodies for the regions of England’, while Plaid Cymru (1999: 2) suggested that choice of elected members ‘may be by a mixture of direct and indirect election (by the national and regional Assemblies and Parliaments for example)’. But the SNP preferred abolition of the second chamber, arguing that for it to be ‘a forum where regional and national voices may be heard’ would be ‘far from simple’ (Scottish National Party 1999: 6); meanwhile the (nationwide) Liberal Democrats (1999: 28) suggested that it would not be ‘appropriate to use an electoral college drawn from the nations and regions’ and that ‘There is no satisfactory substitute for allowing the people of the United Kingdom to elect directly their representatives’.^{vii} Greater interest in territorial options was seen in the submissions by some representatives



of English regional forums. Indirect election were suggested by the North West Regional Chambers and the Eastern Region Local Government Conference, while various such groups expressed aspirations that the second chamber would enhance cohesiveness, and act as a space for negotiation between different areas. But these bodies themselves, and their ideas, were both underdeveloped.

Some detailed and thoughtful submissions were received by the Royal Commission from academics. Professor Vernon Bogdanor, author of key texts on devolution (e.g. Bogdanor 1997, Bogdanor 1999a, 2009), noted that some hoped a territorial chamber ‘could perhaps play its part in holding the United Kingdom together in the face of the centrifugal pressures threatening to tear it apart’ (Bogdanor 1999b: 3). But he suggested that direct election to such a chamber would lead to party dominance, while indirect election would face major practical difficulties given the lack of elected bodies in England. Bogdanor also pointed out that the nature of the devolution settlement – which gave the new bodies largely separate policy responsibilities to those of UK central government – made it inappropriate for their members to have a role in scrutinising UK-level legislation. Another well-known expert, Professor Iain McLean (1999: 3), noted that either a directly or indirectly elected model was theoretically possible, but that ‘the problem of England haunts both models’. He also reflected on the distribution of seats, noting that ‘the principle of territory gives equal votes to each territory regardless of population’ (ibid: 4), but equality by nation would be unacceptable to England (which accounts for 85% of population), while equality by region might also provoke controversy.

It is hence understandable that the Royal Commission was cautious. Nonetheless, some specialists expressed disappointment post-publication in the lack of imaginative thinking on territorial options in its report. Russell and Hazell (2000: 7) noted that ‘The Commission’s proposals in this area mostly relate to the composition of the chamber, rather than its powers and functions... [which] sits uncomfortably with their general approach whereby composition flows from functions, rather than vice versa’. Likewise Russell and Cornes (2001: 91) suggested that ‘the Commission ... did little to identify what territorial role or functions the upper house might play in a devolved UK’. Procedural options to encourage meaningful representation might for example have included formalised territorial representation on second chamber committees, or encouraging members representing the nations and regions to make regular reports to their respective



assemblies – perhaps through question times or committees, at least starting with the existing devolved areas. Nonetheless, these were fairly niche concerns. The main criticism expressed (both in the media and parliament) of the Royal Commission’s proposals related to the low proportion of seats proposed for elected members.

Subsequent to the Royal Commission’s report, the government issued a new White Paper, in which it accepted some elements of the Commission’s analysis, but made modified proposals. However these were even less ambitious than the original, both in terms of territorial representation and elected members. With respect to indirect election, the White Paper (Lord Chancellor's Department 2001: 19) noted that:

The French and German second chambers are composed on this basis, as a means of fortifying the voice and influence of sub-national government - the Länder Governments in the German case - in the national Parliament. Devolution to Scotland, Wales, Northern Ireland together with the creation of the Greater London Assembly, and the Government’s intention to publish a White Paper taking forward its Manifesto commitment for directly elected regional government in England, gives some force to the argument for such an approach in the UK. However, the great majority of England is not at present covered by assemblies above the level of local government and the Royal Commission reported that they had found little desire for direct representation in House of Lords to be drawn from the UK’s devolved institutions. The Royal Commission concluded that a directly elected minority component of the Lords, chosen on a regional basis, would be a better way of guaranteeing effective representation of the nations and regions, beyond that provided through the nominated membership. The Government agrees.

Regarding roles, the White Paper baldly stated that ‘There is no case for giving specific new functions to the House of Lords’ (ibid: 11). There was no discussion of any special weighting for regional seats, and the government simply proposed, as had the Royal Commission, that seats should be allocated proportionately by population. Elections should use regional boundaries and there should be 120 elected members in a chamber of 600 (20%), with the remainder centrally appointed.

The government’s proposals, like those of the Royal Commission, were not received well among parliamentarians and the public. The main point of contention was the low proportion of elected members, with little focus on the weakness of the territorial proposals. Had the devolved bodies expressed concerns, these might have been taken seriously. But the new bodies were busily focused on developing their own procedures and



policy responsibilities, and there was no other clear political dynamic through which territorial claims might gain momentum. Among the UK-wide parties the Liberal Democrats were the most strongly committed to devolution, but favoured direct election. The Conservatives were ambivalent about both devolution and Lords reform, while the Labour Prime Minister, Tony Blair, had little personal interest in constitutional affairs, and was concerned about any measure that would give added legitimacy and strength to the Lords (for discussion see Cook 2003). In Wales, Plaid Cymru was ambivalent about the Lords itself, while in Scotland the SNP had a long-held commitment to unicameralism. In its own evidence to the Royal Commission the latter admitted that as a separatist party there was ‘no secret that the Scottish National Party does not want to strengthen the Union’, meaning it had no interest in building institutions that would help to bind the UK together (Scottish National Party 1999: 6). The Labour manifesto for the general election of 2001 said nothing about links between Lords reform and devolution, stating only that ‘We have given our support to the report and conclusions of the Wakeham Commission, and will seek to implement them in the most effective way possible’ (Labour Party 2001). The Liberal Democrats (2001) stated that they would ‘replace the House of Lords with a smaller directly elected Senate with representatives from the nations and regions of the UK’ (Liberal Democrats (2001). Neither the SNP nor Plaid Cymru made any reference in their manifestos to Lords reform.

5.3. Proposals 2002-2012: the battle over direct election

In the next period proposals for House of Lords reform continued to pay some lip service to questions of territoriality, but were largely focused on resolving the increasingly intractable dispute between those who favoured elected versus appointed members.^{VIII}

In 2002, the House of Commons Public Administration Select Committee launched an inquiry into next steps for Lords reform. As the government’s White Paper proposals had been widely rejected – including by Labour backbenchers – it sought explicitly to find a ‘centre of gravity’ around which opponents could unite. This intervention had fairly explicit support from the Leader of the House of Commons, Robin Cook, who – despite being a member of the government – was troubled by its proposals (Cook 2003). A central feature of the committee’s work was a questionnaire circulated to all MPs, which suggested that a majority of members of the House of Commons supported a second chamber that was



wholly or largely elected. The headline recommendation of its report was that the elected proportion in a reformed second chamber should be increased to 60%.

The Public Administration Select Committee went further than most bodies in expressing interest in indirect election, partly prompted by Cook. In his oral evidence to the committee (Public Administration Select Committee 2002: 26) the Leader of the House, who represented a Scottish seat, suggested:

As someone who comes from a part of the UK where there is a vigorous and well supported devolved body I can see the attractions of the indirect election route. It also ... comes closer to the model that exists through most of Europe. Spain, France, Germany, the Netherlands all have second chambers which are predominantly reflections of indirect election by regional and local bodies.

But the committee commented that ‘we need to hear from the devolved institutions that they want to be represented in this way. No evidence has been received from the devolved bodies’ (ibid). Like others before it, it concluded that indirect election would be ‘difficult to pursue further, because it is not a feasible proposition until there are elected assemblies in England which could form electoral colleges alongside the devolved assemblies in Scotland, Wales and Northern Ireland’, but commented that this was ‘something to revisit in the future, when the devolution settlement is more complete’ (ibid). The committee gave no attention to territorial functions, being largely preoccupied with the argument over the second chamber’s composition, and did not consider any other option beyond population-based distribution of seats. Like the Royal Commission and the government, it proposed that elected members be chosen by proportional representation, using the boundaries of the nations and regions.

Following this committee report, the Leader of the House successfully negotiated establishment of a joint committee of both chambers to consider the issue of Lords reform, and to devise a range of options to be put to both in unwhipped votes. The committee issued a report in which it noted that ‘a reformed House should contain an appropriate number of members from all parts of the country’, but with reference to indirect election commented that ‘it is difficult to see at the moment structures which are parallel to those to be found in fully federal countries like the USA and Germany upon which to base this representation’ (Joint Committee on House of Lords Reform 2002: 11).



Hence, like previous bodies, it simply suggested direct election using regional boundaries. It gave no consideration to territorial functions, but did note joint evidence received from the Presiding Officers of the Scottish Parliament, Welsh Assembly and Northern Ireland Assembly, who were all at that time members of the House of Lords, which suggested that such office holders should in future automatically hold seats on an *ex officio* basis – to provide at least some link to the devolved bodies. Even this minimal proposal has not been acted upon, and no Scottish or Welsh Presiding Officer has since been appointed to the House of Lords.^{IX}

The centre of the joint committee's report was a set of options for composition combining appointed and directly elected members, where the elected members might comprise 0%, 20%, 40%, 50%, 60%, 80% or 100%. In the votes that followed, the House of Commons rejected all seven options (and also rejected the option of unicameralism) while the House of Lords voted in support of an all-appointed chamber (McLean, Spirling and Russell 2003).

The pattern of failure was now becoming established, and the government clearly had no discernable instruction from parliament to act. However a further White Paper was issued after the votes, suggesting that – rather than introduce elections – the appointments process for the House of Lords should be put onto a more rational basis. By this point the debate over meaningful territorial representation or functions was largely closed, though the paper did note with respect to appointments that 'We wish to see a mix of independent members that are representative of the nations and regions of the UK' (Department for Constitutional Affairs 2003: 53, 44). As the House of Commons had only recently rejected the notion of a wholly appointed second chamber, the proposals in this paper got no further.

Two years later there was an attempt by a senior cross-party group of parliamentarians – including Robin Cook, who had since left the government, and Tony Wright, the chair of the Public Administration Select Committee – to revive the Lords reform debate. Their jointly-produced report, which included a draft bill, proposed a 70% elected second chamber. This group expressed some interest in the possibility of indirect election of representatives for the nations and regions, but noted that 'it [had] not been proposed by any major group so far considering Lords reform', and that 'there [had] been little interest amongst the devolved assemblies themselves, or from local government, in this form of



representation'. In addition, 'particularly following the recent failure of the referendum in the North East ... [there was] no obvious basis for electing English members' (Tyler et al. 2005: 26-27). The paper hence proposed, like its predecessors, direct election using regional boundaries, with the distribution of seats based on population.

This demonstrates how, even among senior political actors interested in principle in creating a territorial second chamber, opportunities to achieve this seemed limited and the primary concern was with increasing the proposed proportion of elected members. This was the argument that dominated public debate, with proponents of a high elected proportion demanding a more electorally legitimate second chamber, and opponents fearing the effects on the chamber's relative power in relation to the House of Commons. Very little energy was focussed on strengthening the possible role of the second chamber regarding devolution, and there was no political campaign for such a change, in the absence of interest from the (by now increasingly established) devolved bodies.

Over the subsequent years, proposals regarding devolution and House of Lords reform continued in parallel, but rarely overlapped. The government became increasingly open to the arguments in favour of a majority-elected second chamber. A third post-Wakeham White Paper proposed a 50% elected chamber, and noted that indirect election of some kind (not necessarily territorial, but perhaps instead for example based on vocational groups) could avoid conflicts over legitimacy, but that there would be 'inevitable arguments about who would comprise the electoral colleges', and that the Royal Commission had dismissed this option (Cabinet Office 2007: 33). The paper made no recommendations whatsoever about powers and functions – only composition. It was followed by a further set of free votes in the House of Commons, in which a majority of MPs this time supported either an 80% or 100% elected chamber. A government White Paper in response set out broad principles for an 80% directly elected variant, making no mention of other territorial options. This paper noted that 'Proposals for indirect electoral systems for the second chamber have been put forward on a number of occasions but have never gathered a great deal of support' (Ministry of Justice 2008: 23).

The Labour government, which remained fundamentally divided on the question of elections to the Lords, did not attempt to legislate for this solution. Its only legislative proposals for Lords reform were some far more incremental proposals in the Constitutional Reform and Governance Bill 2009-10, which would have removed the



remaining hereditary peers and allowed life peers to retire. However, even these minor measures were dropped when the bill ran out of time before the 2010 general election.

Labour lost this election, which resulted in the Conservatives again being the largest party – but short of a House of Commons majority. The Conservatives hence formed a coalition government with the Liberal Democrats. The latter party, as already indicated above, had long sought radical Lords reform. However, its primary interest was in an elected second chamber, rather than one necessarily performing any kind of meaningful territorial role.

The minister responsible for Lords reform was the Liberal Democrat Leader, and Deputy Prime Minister, Nick Clegg. A year after the general election he produced a draft government bill for consultation, alongside a White Paper. This followed very naturally from the recently preceding proposals by, first, supporting a chamber that was 80-100% directly elected using regional boundaries and, second, giving virtually no attention to the functions of the chamber, only to its composition. In terms of functions the paper suggested in summary that ‘The reformed House of Lords would have the same functions as the current House’ (Cabinet Office 2011: 7). Even the use of regional boundaries was discussed only in the context of the electoral system, and justified by stating that ‘The Government considers it practical where possible to start from the basis of existing boundaries in use for elections in the UK’ (ibid: 16). Far from any suggestion that there should be non-population weighting, the document included a section entitled ‘Equally weighted votes’, which emphasised that there must be ‘broad equality in the potential weight of a vote across the country’ (ibid). This was a sensitive topic, as the Conservatives were keen to legislate to equalise the electorates of House of Commons constituencies, in the belief that the present system favoured Labour. Ultimately, the Conservatives and Labour jointly wrecked Nick Clegg’s plans for Lords reform, and in retribution his party blocked the Conservatives’ proposed boundary changes for the House of Commons.

The first step in parliamentary consideration of the Clegg proposals was establishment of a Joint Committee to review the draft bill. The proposals were highly divisive, and a wide range of opinions were represented on this committee – creating significant incentives to propose alternative schemes. But the Joint Committee report included no discussion of links to devolution. Among the evidence received was a submission from the Welsh Assembly, which did not argue for indirect election or any kind of territorial functions for



the second chamber – merely pressing for Wales to have a fair number of seats. Neither the Scottish Parliament nor the Northern Ireland Assembly submitted evidence. Nonetheless the committee did comment that, if the present proposals failed (as they shortly would), it ‘would like the Government to give further consideration to a nationally indirectly elected House as an alternative’ (Joint Committee on the Draft House of Lords Reform Bill 2012: 33). Its definition of indirect election was broad, including both territorial and vocational alternatives. Again, indirect election was mooted not in order to perform any specific territorial linkage function, but to avoid the competing legitimacy that the House of Commons might face if the second chamber were directly elected.

5.4. Post-2012 Proposals: a limited return to territorial models

Following the failure of the Clegg reforms there has been some revival of interest in territorial solutions. This may be partly due to the full range of options involving direct election having been closely considered and rejected. However it is more obviously linked to the mounting tensions over devolution, as the Scottish Parliament and Welsh Assembly have gained greater powers, and separatist voices have been more clearly heard. In particular several proposals emerged around the time of the Scottish independence referendum. These were driven by Unionist concerns, that at a time when the UK risked falling apart, a territorial second chamber might help to bind it together.

In late 2013, in the immediate run-up to the referendum, David (Lord) Steel – the former Liberal Leader (1976-88) and former Presiding Officer of the Scottish Parliament (1999- 2003), made a speech proposing a more joined-up approach to constitutional decision-making, through the establishment of ‘a UK constitutional convention’ (Steel 2013). He claimed that this could ‘bring some cohesion and principle to the developing governance of the United Kingdom. For the truth is that all of our recent institutions including the Scottish and European Parliaments have just grown up higgledy-piggledy’. This kind of convention might ‘organize a more genuinely federal-type style of government throughout the United Kingdom’. Central to such arrangements would be a reformed second chamber, where he harked back to the Bryce Commission proposals of 1918 – noting that a regional electoral college for selection of second chamber members could now extend beyond simply MPs, to include MEPs and members of the devolved legislatures. Lord Steel’s preferred model was for the second chamber to have 460



members, with slight overrepresentation for the three devolved areas (so that Scotland, for example, would hold 40 seats), of which 100 would be reserved for non-party representatives. This speech, however, made little impact and led to no subsequent action.

The next year Gordon Brown, the former Labour Prime Minister (2007-10), published a book reflecting on the place of his native Scotland in the UK. This made quite vague proposals for ‘a senate of the regions and nations, elected by the people, responsible for bringing regions and nations together, and finding a way of ensuring that where one measure offends one part of the country this is taken into account in making final decisions’ (Brown 2014: 328-29). Brown had campaigned passionately for Scotland to remain part of the UK, and clearly hoped that such a second chamber would serve the Unionist cause. The proposals were not far developed, but were closely echoed by those from his successor as Labour Leader, Ed Miliband (who had previously worked as a researcher for Brown). In November 2014, immediately after the referendum, Miliband made a speech calling for the second chamber to be ‘truly a senate of the regions and nations of our whole country’. According to one account (Labour List 2014):

The Labour leader wants the new chamber to be based on representation of the regions and the four nations of the United Kingdom to ensure that there’s great diversity in terms of where members of the upper chamber come from. This will take place on a regional basis, to avoid conflicting with the primacy of the Commons, and will see the Senate taking on a specific, defined and separate role from the Commons.

However, this role was nowhere spelt out, and the only firm pledge was to put the idea to a constitutional convention. The commitment to ‘replacing the House of Lords with an elected Senate of the Nations and Regions’ then went on to appear in Labour’s manifesto for the 2015 general election, alongside a promise to ‘set up a people-led Constitutional Convention’ focused on the remaining tensions over devolution (Labour Party 2015: 84). However Labour lost this election, after which Miliband immediately resigned as party leader. His successor, Jeremy Corbyn, has as yet shown little interest in Lords reform.

One further intervention has since been made by another senior political figure – David (Lord) Owen, a former Labour cabinet minister who was leader (1983-87) of the short-lived breakaway party the SDP. He went further than all of the previous proposals, to



suggest a ‘UK Federal Council’ modelled on the German Bundesrat (Owen 2016). This would have given strongly weighted representation (of between 3-6 seats) to the existing devolved areas, plus the eight ‘city regions’ in England possessing newly elected mayors. However this body was not intended to replace the House of Lords, but exist alongside it. The proposals were relatively underdeveloped and have received little political attention. Meanwhile proposals for the Lords itself have moved on from any kind of ‘grand plan’ to more modest measures intended to constrain the chamber’s size (Lord Speaker's Committee on the Size of the House 2017).

6. Key obstacles to creating a UK territorial second chamber

The preceding section shows that House of Lords reform has been much discussed in the UK over the last century, and particularly the past 20 years. Numerous proposals have been made to reform the second chamber – while at the same time devolution has been established, and gradually developed, across the nations of the UK. At times connections have been made between these two sets of developments, with frequent calls for representation for the nations and regions in the second chamber. But such proposals have repeatedly stalled, and the idea of a strongly territorial second chamber has never captured the public imagination. The obvious question, reflecting on this history, is why such repeated failures have occurred. Several factors emerge from the account above.

An obvious one, affecting calls for Lords reform of any kind, is the worldwide phenomenon that achieving second chamber reform is almost always very difficult (Russell and Sandford 2002). This flows in part from the ‘essentially contested’ (Mughan and Patterson 1999: 338) nature of second chambers, which exist to challenge first chambers, and at the same time must have a different logic of representation in order to be effective. Both of these aspects cause controversy. Specific obstacles to reform include the various vested interests who may wish to maintain the status quo, conflicts between those who seek to strengthen the second chamber and those who prefer to weaken it, low public salience, plus general constitutional rigidity. Although the UK has an unwritten and famously ‘flexible’ constitution, others of these factors have contributed to Lords reforms being only occasional and incremental, rather than decisive and large-scale (Ballinger 2012).



Meanwhile, since the 1999 reform, the existing House of Lords is seen as a relatively effective body (Russell 2013).

A second factor more specific to the UK flows from its constitutional flexibility. Unlike many other states, the UK has never had a constitutional ‘moment’ – for example after war, dictatorship or revolution – which has forced it to construct a new constitution from scratch. Instead constitutional developments have been piecemeal and ad hoc. Consequently debates on territorial politics and bicameralism have proceeded in parallel rather than being resolved in a single package. Other countries that have constructed coherent packages of territorial reform have done so in very different circumstances. This ad hoc UK pattern also applies to devolution itself – the new institutions in Scotland, Wales, Northern Ireland and London were legislated for separately rather than in a unified statute, with each institution having different powers. Meanwhile, most of England has no similar body. Such patchy and piecemeal arrangements make a typically ‘federal’ second chamber difficult to envisage. Notably, one of the most ambitious proposals came from the Kilbrandon Commission minority report in 1973, whose authors sought unsuccessfully to pursue an all-round system of devolution.

In addition, other aspects of the devolution settlement make typical federal-type arrangements difficult. UK devolution, initially in Scotland and Northern Ireland and now increasingly also in Wales, has been based on a clean separation of policy responsibilities between the UK and the devolved level. There is no clear category of ‘shared’ or ‘concurrent’ competencies such as exists in most decentralised states. Consequently there is no strong rationale for representatives of the devolved bodies to sit at Westminster and little shared policy to discuss. This can help to account for the consistently underdeveloped nature of proposals for territorial *functions* in a UK second chamber, as opposed to territorial *representation*.

This links to a fourth point: that little interest has ever been shown by the devolved bodies themselves in developing links via the UK second chamber. Partly a product of the lack of shared powers, this also reflects key features of the UK party system. In the early years of devolution Labour controlled the UK government, and the administrations in Scotland, Wales and London, allowing negotiations to operate through intra-party mechanisms. Subsequently the primary challenge to Labour (particularly in Scotland) has come from nationalist/separatist parties, which have no desire strengthen the bonds at the



UK centre. Unionist parties, meanwhile, do not wish to construct a stronger national platform for such voices. Similar tensions are seen in Spain and Canada, where separatist parties resist dealing with the shortcomings of the second chamber as a truly territorial body (Russell 2001).

Finally, Russell and Sandford (2002) note that second chamber reform can fail due to becoming entangled in other constitutional and political arguments – most obviously, over the nature of federalism or decentralisation. In the UK this entanglement has barely existed or been an obstacle. Instead the dynamic has almost operated in reverse – debates about territorial representation in the second chamber have been eclipsed by fundamental disagreements over the role of elections to such a body, and questions of democratic legitimacy. This polarised debate – between proponents and opponents of direct election – has squeezed out discussion of other models (such as indirect election or ex officio membership) which could have linked the second chamber to the devolved institutions.

7. Conclusions

The British case hence holds some lessons for the design of territorial second chambers in general, but also has its own unique features. The piecemeal nature of devolution in the UK, and in particular the lack of uniform devolved institutions in England, alongside the extensive powers devolved to other areas, have presented real challenges for the design of a meaningful ‘second chamber of the nations and regions’. Even those who have seen the merits in principle of such a body have struggled to set out a convincing blueprint.

Some moments in the debate over the last century might in retrospect be seen as missed opportunities. The Bryce report of 100 years ago did not – despite the high resonance of ‘home rule’ debates at the time – propose any very convincing form of territorial representation, and ultimately anyway failed to result in change. The Kilbrandon Commission of the 1970s took a pragmatic and demand-led approach to devolution, focusing on Scotland and Wales, which ultimately set the path for the uneven devolution of the 1990s. Had its minority report been implemented, an all-round system of devolution might have been cemented through a strongly territorial second chamber. However the approach of the majority report was less idealistic and ambitious, and far more in line with the British way. Another 25 years on, the Royal Commission on the Reform of the House



of Lords was less bold than it could have been, but was faced with a difficult environment, where devolution was incomplete and there was no bottom-up demand for strong territorial representation in the second chamber from the devolved areas themselves.

A final question is whether implementation of any of these schemes might have helped to stabilise UK territorial politics. Although derided for caution at the time, even the Royal Commission's small proportion of directly elected second chamber members might have had some impact. Like the elected members of the Australian Senate, they would have injected greater territorial diversity into the Westminster party groups – perhaps most obviously strengthening the Scottish and Welsh Conservatives. Post-2015, Scottish representation in the House of Commons under the 'first past the post' system has resulted in overwhelming dominance by the SNP. Even a modest sprinkling of second chamber members from other parties could perhaps have made Scottish politics feel less detached from the rest of UK politics than it currently appears – particularly in the context of 'Brexit'. The recent revived interest in territorial solutions seeks to heal these divides, but could prove to be too little too late.

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^I Members of the House of Lords are appointed on a national basis and have no form of 'constituency', although their titles do indicate a notional geographical affiliation (e.g. 'Lord Jones of Birmingham'). The exception in terms of members with any more formal territorial link are the bishops, each of whom represents a diocese. But even they collectively all represent the Church of England as a whole, and indeed see themselves as representing people of faith more generally.

^{II} The restrictions on the House of Lords' power over ordinary legislation apply only to bills beginning their passage in the House of Commons. Around one third of bills (usually less controversial measures) begin their passage in the House of Lords, where the veto continues to exist.

^{III} There were also a very small number of 'life peers' appointed under the Appellate Jurisdictions Act 1876 for their judicial expertise, in order to contribute to the House of Lords' function as the UK's highest court (which ended in 2005, when a Supreme Court was established).

^{IV} For a broader and more general analysis of reform proposals over this period, beyond the territorial aspect, see Russell (2013).

^V The Liberal Party was a precursor to the current Liberal Democrats, which in turn resulted from a merger between it and the Social Democratic Party in 1988. Lord Steel is also a former Presiding Officer of the Scottish Parliament, and appears as a proponent of a territorial second chamber later in the paper.

^{VI} The Commission put forward three slightly differing models, each comprising a different proportion of elected members. Its preferred option was for 87 regional members in a chamber of 550 (15.8%).

^{VII} The Liberal Democrats, and their predecessor parties, had a long-standing commitment to regional representation in a directly elected second chamber. For example the Liberal Party manifesto of 1979 pledged that 'The House of Lords should be replaced by a new, democratically chosen, second chamber which includes representatives of the nations and regions of the United Kingdom, and UK members of the European Parliament'. The 1987 Liberal-Social Democratic Party Alliance manifesto stated that 'The Alliance will work towards a reform of the second chamber linked with our devolution proposals so that it will include members elected from the nations and regions of Britain and will phase out the right of hereditary peers to vote in the Lords' (quoted in Steel 2013).

^{VIII} For more detailed discussion see Russell (2013).



^{ix} Only William Hay, Presiding Officer of the Northern Ireland Assembly 2007-14 has subsequently been appointed.

References

- Alliance Party of Northern Ireland (1999), *Submission to the Royal Commission on the Reform of the House of Lords*, (Belfast: Alliance Party of Northern Ireland).
- Ballinger Chris, 2012, *The House of Lords 1911-2011: A Century of Non-Reform*, Hart, Oxford.
- Bogdanor Vernon, 1997, *Power to the People: A Guide to Constitutional Reform*, Victor Gollancz, London.
- Bogdanor Vernon, 1999a, *Devolution in the United Kingdom*, Oxford University Press, Oxford.
- Bogdanor Vernon, 1999b, *Evidence to the Royal Commission on the Reform of the House of Lords*, University of Oxford, Oxford.
- Bogdanor Vernon, 2009, *The New British Constitution*, Hart, Oxford.
- Bogdanor Vernon, 2010, 'The West Lothian Question', *Parliamentary Affairs*, LXIII(1): 156-72.
- Brown Gordon, 2014, *My Scotland, Our Britain: A Future Worth Sharing*, Simon & Schuster, London.
- Bryce James, 1918, *Report of the Conference on Reform of the Second Chamber - Letter from Viscount Bryce to the Prime Minister (Cd 9038)*, HMSO, London.
- Cabinet Office, 1999, *Modernising Parliament: Reforming the House of Lords*, The Stationery Office, London.
- Cabinet Office, 2007, *The House of Lords: Reform*, The Stationery Office, London.
- Cabinet Office, 2011, *House of Lords Reform Draft Bill*, The Stationery Office, London.
- Coakley John, 2014, 'The Strange Revival of Bicameralism', *Journal of Legislative Studies*, XX(4): 542-72.
- Cook, R. (2003), *The Point of Departure* (London: Simon and Schuster).
- Crowther-Hunt, N. and Peacock, A. T. (1973), *The Report of the Royal Commission on the Constitution 1969-1973 (Volume II): Memorandum of Dissent* (London: The Stationery Office).
- Daintith, T. (1974), 'Kilbrandon: The Ship That Launched a Thousand Faces?', *The Modern Law Review*, 37(5), 544-55.
- Department for Constitutional Affairs (2003), *Constitutional Reform: Next Steps for the House of Lords*, (London: The Stationery Office).
- Gover Daniel and Kenny Michael, 2016, *Finding the Good in EVEL: An Evaluation of "English Votes for English Laws" in the House of Commons*, Centre on Constitutional Change, Edinburgh.
- Hazell Robert (ed), 2006, *The English Question*, Manchester University Press, Manchester.
- Joint Committee on House of Lords Reform, 2002, *House of Lords Reform (First Report of Session 2002-03)*, House of Commons and House of Lords, London.
- Joint Committee on the Draft House of Lords Reform Bill, 2012, *Draft House of Lords Reform Bill (Report of Session 2010-12, Volume I)*, House of Commons and House of Lords, London.
- Juberias Carlos Flores, 1999, 'A House in Search of a Role: The Senado of Spain', in Patterson Samuel C. & Mughan Anthony (eds), *Senates: Bicameralism in the Contemporary World*, Ohio State University Press, Columbus, 260-300.
- Labour List, 2014, 'Miliband Announces Plans to Scrap the Lords – and Introduce an Elected Senate of Nations and Regions', [<https://labourlist.org/2014/10/miliband-announces-plans-to-scrap-the-lords-and-introduce-an-elected-senate-of-nations-and-regions/>, accessed 6 April 2018].
- Labour Party, 1997, *New Labour: Because Britain Deserves Better*, Labour Party, London.
- Labour Party, 2001, *Ambitions for Britain: Labour's Manifesto 2001*, Labour Party, London.
- Labour Party, 2015, *The Labour Party Manifesto 2015*, Labour Party, London.
- Liberal Democrats, 1999, *Modernising Parliament, Reforming the House of Lords: The Liberal Democrat Evidence to the Royal Commission*, Liberal Democrats, London.
- Liberal Democrats, 2001, *Manifesto: General Election 2001*, Liberal Democrats, London.



- Lodici Claudio, 1999, 'Parliamentary Autonomy: The Italian Senato', in Patterson Samuel C. & Mughan Anthony (eds), *Senates: Bicameralism in the Contemporary World*, Ohio State University Press, Columbus, 225-259.
- Loewenberg Gerhard 2011, *On Legislatures: The Puzzle of Representation*, Paradigm, Boulder.
- Lord Chancellor's Department, 2001, *The House of Lords - Completing the Reform*, The Stationery Office, London.
- Lord Speaker's Committee on the Size of the House, 2017, *Report of the Lord Speaker's Committee on the Size of the House*, House of Lords, London.
- Marriott J.A.R., 1910, *Second Chambers: An Inductive Study in Political Science*, Clarendon, Oxford.
- McLean Iain, 1999, *Modernising Parliament, Reforming the House of Lords: Evidence to the Royal Commission*, University of Oxford, Oxford.
- McLean Iain, Spirling Arthur and Russell Meg, 2003, 'None of the Above: The UK House of Commons Votes on Reforming the House of Lords', *The Political Quarterly*, LXXIV(3): 298-310.
- Ministry of Justice, 2008, *An Elected Second Chamber: Further Reform of the House of Lords*, The Stationery Office, London.
- Mitchell James, 2009, *Devolution in the UK*, Manchester University Press, Manchester.
- Mughan Anthony and Patterson Samuel C., 1999, 'Senates: A Comparative Perspective' in Patterson Samuel C. & Mughan Anthony (eds), *Senates: Bicameralism in the Contemporary World*, Ohio State University Press, Columbus, 1-31.
- Owen David, 2016, 'A Federal UK Council', [<http://www.lorddavidowen.co.uk/wp-content/uploads/2016/11/A-federal-UK-Council-2.pdf>, accessed 6 April 2018].
- Patterson Samuel C. and Mughan Anthony, 1999, 'Senates and the Theory of Bicameralism', in Patterson Samuel C. & Mughan Anthony (eds), *Senates: Bicameralism in the Contemporary World*, Ohio State University Press, Columbus, 333-349.
- Plaid Cymru, 1999, *Reform of the House of Lords: An Initial Response to the Royal Commission's Consultation Paper*, Plaid Cymru, Cardiff.
- Public Administration Select Committee, 2002, *The Second Chamber: Continuing the Reform (Fifth Report of Session 2001-02)*, House of Commons, London.
- Royal Commission on the Constitution, 1973, *The Report of the Royal Commission on the Constitution 1969-1973 (Volume I)*, The Stationery Office, London.
- Royal Commission on the Reform of the House of Lords, 2000, *A House for the Future*, The Stationery Office, London.
- Russell Meg, 2000, *Reforming the House of Lords: Lessons from Overseas*, Oxford University Press, Oxford.
- Russell Meg, 2001, 'The Territorial Role of Second Chambers', *Journal of Legislative Studies*, VII(1), 105-18.
- Russell Meg, 2013, *The Contemporary House of Lords: Westminster Bicameralism Revived*, Oxford University Press, Oxford.
- Russell Meg and Cornes Richard, 2001, 'The Royal Commission on Reform of the House of Lords: A House for the Future?', *Modern Law Review*, LXIV(1): 82-99.
- Russell Meg and Hazell Robert, 2000, *Commentary on the Wakeham Report on Reform of the House of Lords*, Constitution Unit, London.
- Russell Meg and Sandford Mark, 2002, 'Why Are Second Chambers So Difficult to Reform?', *Journal of Legislative Studies*, VIII(3): 79-89.
- Russell Meg and Sheldon Jack, 2018, *Options for an English Parliament*, Constitution Unit, London.
- Sandford Mark, 2013, *The Abolition of Regional Government (SN/PC/05842)*, House of Commons Library, London.
- Sandford Mark, 2016, *Devolution to Local Government in England (Briefing Paper 07029)*, House of Commons Library, London.
- Scottish National Party, 1999, *Submission to the Royal Commission on the Reform of the House of Lords*, Scottish National Party, Edinburgh.
- Steel David, 2013, 'Scotland and the Lords after 2014', [<https://www.libdemvoice.org/david-steel-scotland-and-the-lords-after-2014-full-speech-37010.html>, accessed 6 April 2018].



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- Swenden Wilfried and McEwen Nicola, 2014, 'UK Devolution in the Shadow of Hierarchy? Intergovernmental Relations and Party Politics', *Comparative European Politics*, XII(4/5): 488-509.
 - Tsebelis George and Money Jeannette, 1997, *Bicameralism*, Cambridge University Press, Cambridge.
 - Tyler Paul, Clarke Kenneth, Cook Robin, Wright Tony and Young George, 2005, *Reforming the House of Lords: Breaking the Deadlock*, Constitution Unit, London.
 - Welsh Government, 2017, *Brexit and Devolution: Securing Wales' Future*, Welsh Government, Cardiff.



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The Lesson from the Modern American Federalism: A Challenge to Effective Public Policy Performance

by

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Abstract

Contemporary U.S. federalism particularly since the late 1960s has evolved over the course of pluralism alternating exercisable governmental powers between the federal and state governments. The complexity of the power relationship has been observed in a variety of policies during the past quarter-century as has the discussion of whether or not contemporary U.S. federalism has developed in a way that increase effective public policy performance. Focusing mainly on the period of the past 50 years of U.S. federalism history, this article suggests that federalism dynamics have not exercised either constant liberal or conservative influence on public policy performance. Instead, this article suggests that the clear functional responsibility between the federal government and state and local governments have characterized contemporary U.S. federalism—more federal responsibility for redistribution and more state and local responsibility for development, which in turn increased public policy performance. This feature has been quite substantial since 1970s. As a result, this article suggests that despite the increased complexity of the U.S. federal system, it has evolved in such an appropriate way that would increase the efficiency of federal system by dividing a clear intergovernmental responsibility on major policy platforms.

Key-words

U.S. federalism, public policy performance, functional responsibility, policy-making process



1. Introduction

During the 20th century, there have been constant variations in U.S. federalism. The period of *cooperative federalism* (1913-1964) was subject to overlapping responsibilities between the federal and subnational governments, whereas the period of *centralized federalism* (1964-1980) showed a clear expansion of the federal government. The era of *new federalism* (1980-2001) was an attempt to transfer the power of the federal government to state and local governments, and the period of *representational federalism* (2001-present) does not contain any constitutional division of powers between federal and state governments. Contemporary U.S. federalism, particularly since the late 1960s, has evolved through pluralism, alternating exercisable governmental powers between the federal and state governments. The earlier phase of U.S. federalism has drawn a relatively clear form of cooperative federalism, which aims essentially to expand the supremacy of the federal government. Similarly, the period of contemporary U.S. federalism since the late 1960s has been characterized by the increasing coercive power of the federal government over state and local governments, but it has exhibited a more complex mixture of dual and cooperative elements than had been shown during earlier periods in the history of federalism (Kincaid 2008: 10-11; Zimmerman 2008: 2).

Although founding fathers were passionate enough to suggest an idealistic form of U.S. federalism based on stronger central power, the power relationship between the federal and state governments has become more complicated due to subsequent constitutional provisions based on the Supreme Court justices' view federalism. Looking at the important decisions of the Supreme Court between 1900 and 1980, the Supreme Court has been supportive of more federal power over states' sovereignty. Through the early 1900s, the Supreme Court had been divided between the limitation of the federal government's authority, as shown in the cases of *Hammer v. Dagenhart*^I in 1918 and *United States v. Wheeler*^{II} in 1920, and its expansion, as shown in the case of *Swift and Company v. United States*^{III} in 1905, *Missouri v. Holland*^V in 1920, and *J. W. Hampton, Jr. & Co. v. United States*^V in 1928. The Great Depression, however, influenced the Supreme Court to allow even more power to the federal government by extensively interpreting the Commerce Clause. In the *National Labor Relations Board v. Jones and Laughlin Steel*^{VI} case in 1937, for example, the Supreme



Court ruled that the National Labor Relations Act of 1935 is constitutional, and thus the federal government can use its authority under the Commerce Clause to regulate interstate commerce. Other examples that showed the willingness of the Supreme Court to hold the supremacy of the federal government include the cases of *Steward Machine Company v. Davis*^{VII} in 1937, *Wickard v. Filburn*^{VIII} in 1942, *Cooper v. Aaron*^{IX} in 1958, and *Oregon v. Mitchell*^X in 1970.

Over the past quarter-century, however, the ideology of the Supreme Court has been back and forth between decisions in favor of increasing federal power and decisions in favor of defending state sovereignty. Supreme Court cases such as *Garcia v. San Antonio Metropolitan Transit Authority*^{XI} in 1985, *South Dakota v. Dole*^{XII} in 1987, *U.S. Term Limits, Inc. v. Thornton*^{XIII} in 1995, *Gonzales v. Raich*^{XIV} in 2005, and *Arizona v. United States*^{XV} in 2012 has forced state governments to cooperate with the federal government. On the contrary, the rulings of *New York v. United States*^{XVI} in 1992, *United States v. Lopez*^{XVII} in 1995, *Printz v. United States*^{XVIII} in 1997, *Clinton v. City of New York*^{XIX} in 1998, and *United States v. Morrison*^{XX} in 2000 have defended states' rights over the federal dominance. As a result, the late 20th and the early 21st centuries of U.S. federalism show that the lines between federal and state power have become blurred.

The complexity of the power relationship has been observed in a variety of policies during the past quarter-century as has the discussion of whether or not contemporary U.S. federalism has developed in a way that increase effective public policy performance. Indeed, this question has not yet been clearly answered, as U.S. federalism does not draw a clear line between what is great and aggregate and what is local and particular (Pagano 2007: 9; Walker 2000: 15). This unclear boundary of roles between the federal and state governments has caused slower policy-making processes and obscured the boundary of policy responsibility. This essentially increases political and administrative costs, and thereby producing untidiness, fragmentation, and inefficiencies in public policy performance (Nathan 2008: 13-25). In conservative periods, there has been a strong belief that states take substantial regulatory powers over the nation. Thus, states have exerted more independent political power and economic interest, which is not entirely curbed by federal power and the Constitution (Grodzins 2007: 57-58). However, in liberal periods, the federal government has taken many additional responsibilities because they believe that people can be bettered by the exercise of national governmental power. Leaving this



inherent and atypical complexity in the U.S. federal system, one substantial question arises: how effectively has the U.S. federal system evolved to increase public policy performance?

Based on the founding fathers' idea on U.S. federalism, the ideal shape of federalism might be result from coordinating the actions of subnational actors in policy subsystems. This in turn would increase effective public policy outcomes. Although the U.S. federal system could be successful when it has established a democratic institution by manifesting the separation of powers between the federal and subnational governments, it is challenging taking into consideration structural complexities that result from the division of powers and responsibilities among many different units of government. In terms of power relationships, U.S. federalism remains mostly a nation-centered one, but there has been a far more fluid division of power due to the institutional constraints, growing state operational responsibilities, and sometimes, critical social or economic changes since the Second World War. However, narrowing down our focus on U.S. federalism to public policy performance, the contemporary history of U.S. federalism clearly provides some important lesson about how effectively public policies have been managed in a federal system, regardless of the changing trends of U.S. federalism, whether in traditional *liberal* or *conservative* political cleavage.

Focusing mainly on the period of the past 50 years of U.S. federalism history, this article suggests that federalism dynamics have not exercised either constant liberal or conservative influence on public policy performance. Instead, the clear functional responsibility between the federal government and state and local governments have characterized contemporary U.S. federalism—more federal responsibility for redistribution and more state and local responsibility for development, which in turn increased public policy performance. This feature has been quite substantial since 1970s. As a result, this article suggests that despite the increased complexity of the U.S. federal system, it has evolved in such an appropriate way that would increase the efficiency of federal system by dividing a clear intergovernmental responsibility on major policy platforms.

2. The Definition of the U.S. Federalism

Under a unitary system of government, a central government possesses ultimate sovereign power over all other entities within the state. While the small city-states such as



Singapore and Monaco facilitate centralized policy-decision based on a single-tiered governing system, the vast majority of countries such as China, France, Italy, Japan, Korea, Sweden, and the United Kingdom have multi-tiered governments based on a unitary government system (Rodden 2004: 497; Shah 2007: 4). On the contrary, the federal system entails a distinctive territorial division of powers (national and subnational governments), the juristic device of giving legal protection to the authority of subnational governments of a polity, and certain attitudes embedded in the constitutional and political cultures (Beer 1973: 50-51). The different levels of government exercise separate and autonomous authority, electing their own officials, and taxing their own citizens. While this definition of federalism can be generally applied to most countries that adopt the federal system, U.S. federalism has distinct features in comparison with systems in other countries.

Countries with a federal system vary considerably in terms of the power relationship between the national and subnational governments. While the Constitutions of some establish a considerable power with the national government over subnational units of governments (e.g., Australia, Germany, India, and Mexico), some others delegate a substantial power, especially taxation power, to subnational governments (e.g., Brazil, Canada, and Switzerland) (Shah 2007: 4-6). In the form of cooperative federalism, some countries like Belgium and Brazil exercise a federal system in which all units of governments have autonomous and equal responsibilities (Shah 2007: 6). However, in the U.S., the federal government exercises somewhat moderate power over state and local governments, and the federal system has retained an effective balance that serves both the liberty of states and the stability of the nation. However, the U.S. federalism is close to a fluid concept, which does not clearly define the boundary of responsibility between the federal and state/local governments. Historically, the courts and Congress have defined the relationship between federal and state governments. Thus, the level of authority of the federal government has been changing. For this reason, the scholarship in U.S. federalism has focused more on issues of by which unit of government a policy decision should be made, rather than the substance of the policies themselves. This indicates that the challenge to effective public policy performance in the U.S. federal system would result in the effective policy coordination and accountability to manage policies between federal and state governments.



3. Federalism Dynamics: Getting More Liberal or Conservative?

In earlier periods, there was a strong belief that the states should reserve substantial powers, and each state ought to pursue a different mix of commercial, financial, and other economic policies. Traditionally public opinion has expressed distrust of the federal government and placed great value in the strength and reliability of state and local governments (Conlan 2017: 177). There was also the opinion that '[t]he constitutional restraints on the expansion of national authority are less important and less direct today than they were in 1879 or in 1936' (Grodzins 2007: 59). As a result, states attempted to increase more independent political power as well as economic interests, which were not entirely curbed by federal power or the Constitution during the early 1900s. However, in recent years, political conflict over federalism has tended to follow traditional 'liberal' political cleavage, which means that liberals enhance the power of the national government because they believe that people can be bettered by the exercise of national governmental power. The Constitution also defines the superior power of the federal government, and there have been some decisive moments behind the incremental growth of the federal power since World War II. For instance, the regulatory power of the federal government during the decade following World War II was much greater than the previous era because 'the agencies that had been expanded during the war to cope with unique war-related problems, were able to hold on to part of their new resources and authority by relying on pressure from special interests and inertia in the political process' (Rockoff 1999: 261).

First, some critical events transformed decentralizing tendencies to centralizing tendencies. The serious financial crisis immediately following World War II forced the federal government to take more responsibility for economic recovery. The Great Depression lasted throughout the 1970s dramatically changed the role of the federal government to take more substantial policy responsibilities. More recently, centralizing statutes have been adopted in the aftermath of wars and natural disasters. These centralizing tendencies were highlighted in response to the terrorist attacks of September 11, 2001 and the U.S. occupation of Iraq. These events prompted the immediate passage of the USA Patriot Act of 2001 (Conlan and Dinan 2007: 280). Furthermore, the occurrence of Hurricane Katrina came with passage of the Defense Authorization Act of 2007, which



allows the president to federalize the National Guard without the permission of a governor (Dinan 2008: 383).

Second, constitutional constraints have affected the expansion of federal power. For example, the *Garcia v. San Antonio Metropolitan Transportation Authority* case in 1985 dealt with the Fair Labor Standard Act (FLSA), which ‘establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments’ (United States Department of Labor 2016: 1). In *Garcia*, the U.S. Supreme Court expanded the congressional power to directly exert its legislation in matters traditionally reserved to the states (Wright 1988: 40-42). The case arose after Congress directly ordered state and local governments to pay minimum wages to their employees. The decision was made by the Court’s belief that state interests will be protected by the political safeguards of federalism. In another sense, despite the constitutional restraints on the increase of the federal authority, the *Garcia* case indicates that the Supreme Court has flip-flopped on some major issues and does not draw a clear line of responsibility between the federal and state governments. Looking at four major previous decisions regarding FLSA including the *Garcia* case, first in *Maryland v. Wirtz*,^{xxi} the Court held that FLSA can be applied to states, and then in *National League of Cities v. Usery*,^{xxii} it held that it cannot be applied to states, but in *Garcia v. San Antonio Metropolitan Transportation Authority*,^{xxiii} the Court reverted back to the decision that it can be applied to the states, and again, in *Alden v. Maine*,^{xxiv} the Court ruled that it cannot be applied to the states (Friedman 2000: 249-250).

Third, public and interest groups have influenced the expansion of federal power. For example, the National Minimum Drinking Age Act of 1984 required all states to limit the legal age for alcohol to 21 years old. This Act was the result of a strong citizens’ lobby, including groups such as Mothers Against Drunk Driving. Thus, public opinion supports the federal government more than state governments when their interests can be better protected or enacted by the central authority.

Finally, the fiscal power defined by the Constitution allows for the expansion of federal power. Especially, the centralizing tendencies resulted from Congress restricting ‘the states from taxing much—such as the retirement income of nonresidents,^{xxv} internet access,^{xxvi} or interstate business with limited nexus^{xxvii}’ (Gamage and Shanske 2016: 547). The Tax Reform Act (1986) increased federal power over taxation although they possess their own



taxation authority protected by the Constitution (Pagano 1988: 37-38). While it can be seen that the sharp increase in the number of preemption statutes has substantially limited the discretionary authority of states over tax policies, it is noteworthy that the federal government has gradually increased spending on redistributive areas as well as increased its taxing authority. Indeed, '[a] series of tax acts starting with the 1986 Tax Reform Act—and running parallel to the erosion of the traditional welfare system—has increased assistance to the working poor through expansions of the Earned Income Tax Credit' (Eissa and Hoynes 2011: 689).

However, the evidence of centralizing tendencies of U.S. federalism does not necessarily mean that the federalism dynamic has exercised a constant liberal trend to increase federal power over states. This is because policy implementation and output in the policy process are not constant to one dominant power either by the federal or state governments. That is, as many scholars have observed in the pattern of policy changes in institutions, the power between the federal and state governments to influence policy outputs has changed over time (e.g., Baumgartner and Jones 1993: 25-38 ; Kingdon 1984: 1-17; Lindblom 1959: 79-80; Sabatier and Weible, 2007: 189-190). I suggest three phenomena of the federalism dynamics in public policies: first, the linkage between the federal and state governments is an interdependent relationship; second, the balance of power between two different units of government is unstable; and third, states and local governments have pushed for more discretionary power in policy making.

First of all, many public policy outputs show evidence that the federal and state governments interact with each other to make better policy. The interdependent relationship began with *cooperative federalism* that implies the existence of two planes of government. In this perspective, the federal government offers scores of assistance programs to states and localities in exchange for their agreement to implement a program. Department of Housing and Urban Development in the early 1970s and the mid-1980s is an example of successful bargaining between federal and local governments. The Great Depression of the 1930s forced the federal government to recover the national economy especially by taking more responsibility for poverty and unemployment, and states were also supportive of and cooperative with the federal policy to do it but by increasing their investment on economic development programs. Most recently, the state governments have been increasingly cooperative to the immigration and homeland security policy, and



this was particularly true in 2005, with the passage of the REAL ID Act requiring state driver's licenses to be brought into compliance with national standards (Dinan 2006: 334). These cases indicate that there has been no dominant power of either federal or state governments to drive public policy performance, but the power has been balanced between the federal and state governments to increase the efficiency of federalism.

Second, public policy output is not fixed by either federal or state governments. That is, a policy output is temporal according to the changing perspective between the federal and state governments. A good example is education policy. Traditionally, authority over public education is given to the discrepancy of states or local governments. The Elementary and Secondary Education Act of 1965 was narrowly targeted on inputs and contained few federal mandates. However, the federal government has increased control over education, because the quality of public schools has been low. Responding to the federal government's increasing responsibility to ensure quality public education, President George W. Bush signed into law the No Child Left Behind (NCLB) Act, which dramatically expanded the federal role in elementary and secondary education policy.^{xxviii} However, NCLB's performance has been the subject of extensive criticism due to a lack of consensus on policy details between different units of government (Krane and Koenig 2005: 2; MaGuinn 2005: 60). This example shows that there is temporal variation of federalism, which may cause intergovernmental conflict.

Third, subnational governments have exercised their own power over public policy making. An era of *new federalism* was a critical time that Richard Nixon shifted power away from Washington and expanded the power of state and local governments. One of Nixon's most ambitious initiatives was to establish a program of revenue sharing from the federal level to state and local governments. Likewise, Ronald Reagan pledged to reduce the size of the national government, in part, for the purpose of reducing the increased government deficit. One of his practices to this end was administrative simplification. While Nixon preferred a system that provided more extensive federal aid to states, Reagan's variant of *New Federalism* was a transfer of national responsibility to the states as well as significant cuts in federal grants (Bohte and Meier 2000: 40). In the early 1980s, federal aids were reduced, some programs like General Revenue Sharing and anti-recession fiscal assistance grants were eliminated (Stephens and Wikstrom 2007: 132-137).



As an example of policy output, states have dramatically increased their power over even international commerce. Some economically interdependent states have attempted to take the economic incentives from the global market into their own market (Fry 1998: 67-76; Kline 1999: 112-113). States often act to address problems when the federal government has failed to do so. Partial preemption statutes have been enacted in an innovative manner to increase the discretionary authority of states. Examples of such laws include the Marine Sanctuaries Act Amendments of 1984 and the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.

4. Lessons from Modern U.S. Federalism

Overall, the federalism dynamic did not exert a steady and inexorable liberal influence during the past several decades. The reality of U.S. federalism is that all levels of government have independent power over public policy performance. Although the federal government is firmly established by exercising its power in the U.S. government, state and local governments have also enhanced their power. The Tenth Amendment has significantly expanded the state power by designating ‘in whose favor (the states) powers not delegated to the United States are reserved, contingent, however, on each state government’s ability to meet the affirmative demands of its own constitution’ (Van Alstyne 1987: 770). Although state governments influence local governments, they have considerably influenced ‘street-level’ policy performances (Lipsky 2010: 48-53). Local governments have exerted independent power over even international affairs. Some good examples are the economic sanction impositions of the city of San Francisco against Myanmar. More recently, New York City’s comptroller banned certain Swiss banks from bidding on billions of dollars in bond offerings. In contrast, in fiscal policy, state and local governments remain dependent on the fiscal support of federal government. It is indisputable that the fiscal role of the federal government may limit the subnational governments’ discretionary power to implement public policies. For example, the Economic Growth and Tax Relief Reconciliation Act of 2001 was introduced by President Bush to cut the federal income-tax, and it caused revenue decline for those states that base their income-tax amounts on taxpayers’ federal income-tax payments.



The fact that neither centralizing nor decentralizing tendencies on public policy performance has been constant suggests that the interaction between federal and state governments has not been so well coordinated. However, this does not necessarily mean that the U.S. federalism has evolved in the considerable structural complexity and thus has produced ineffective public policy performance. As seen in the cases of major policies, policy making and output have consistently changed along with the power shifts between national and subnational government, but the policy responsibility has been clearly divided between the federal and state governments. This raises an important but unanswered question: what lessons do we learn from the changing U.S. federalism during the particular past 50 years?

From colonial times through much of the early nineteenth century, state and local political institutions played a large role in shaping their economies. By the time of the revolution, the American colonies were accustomed to practice English mercantilism, which stressed centralized forms of authority in order to promote commerce and industry. Although the new nation was willing to sustain a government intervention in nurturing economic development, the early U.S. colonial governments attempted to mitigate a shortage of capital resources by providing such incentives as stimulating legal frameworks and direct aids to private enterprise (Brace 1993: 1-3). States became active in promoting economic development through the first third of the nineteenth century. For example, the state of New York achieved enormous economic success by constructing the Erie Canal. This brought about a large economic growth in the state by reducing the cost of transportation from the farm to the market transportation costs. The success of this canal encouraged other states, including Ohio, Indiana, Illinois, Virginia, and South Carolina, to build an extensive infrastructure in order to facilitate the growth of their economies. In the middle of the nineteenth century, however, states experienced a fiscal crisis due to ‘the result of substantial government expenditure without fiscal coordination’ (Brace 1993: 20).

During the late nineteenth century, the states’ ability to control their economy was strongly limited by federal intervention. After the Civil War, federal revenue increased as a result of industrialization and a higher protective tariff allowed the federal government to pay off the Civil War debt. The aftermath of the Civil War increased federal governmental spending. This era has been described as ‘the era of national subsidy’ (Schlesinger 1999: 234). Furthermore, a decade after the *Granger* cases—a series of cases in 1877 which



concluded that states have the power to regulate businesses that served a public interest—the Supreme Court took a conservative turn and started to limit states' role in economic development. In the *Wabash* Case in 1886, the Court declared that an Illinois statute violated the exclusive power of Congress over interstate commerce. In *Chicago, Milwaukee and Saint Paul Railroad Co. v. Minnesota* in 1890, the Supreme Court held that the railroad rate regulation by a state legislative commission is unconstitutional (Brace 1993: 21). By the 1890s, the Supreme Court had greatly curtailed the regulatory power of states, and thus, increased the role of federal over the U.S. economy.

By the beginning of the twentieth century, the federal government exerted even more power in the economic realm. Theodore Roosevelt expanded the regulatory role of the federal government when facing both an economic depression and a banking panic in 1907. Woodrow Wilson also maintained the strong role of the federal government in order to preserve fair competition. The Great Depression through the 1930s affected the federal government to adopt more substantial responsibilities at the expense of the states. As noted by Webber and Wildavsky (1986: 411), 'the New Deal was acceptance by the U.S. public of the doctrine that the federal government has ultimate responsibility for the economy.' Furthermore, after World War II, the economic role of the federal government dramatically increased. Paradoxically, however, the increased poverty rate after the Great Depression motivated Washington to achieve their economic goal in a way that transferred the increased economic gains to the underrepresented regions or citizens lacking in economic resources. Indeed, states have been delinquent to increase the redistributive efforts in an ever more integrated economy (Peterson 1995a: 92-93).

The Great Recession between the late 2000s and early 2010s caused many state governments to compel Congress to pass an economic stimulus measure in excess of three quarters of a trillion dollars. The Obama administration established 'legislation to reform the entire federal economic regulatory structure, including provisions to consolidate federal regulatory responsibilities, enhance the power of the Federal Reserve, and create a new systemic risk overseer for the marketplace as a whole' (Kantor 2010: 3). However, as shown in the details of the enactment of the American Recovery and Reinvestment Act, the stimulus package allocated more than 60% of total funds to welfare programs and tax cuts. This means that a significant portion was not spent directly in stimulating the growth of physical infrastructure or providing financial incentives to the existing industries and



businesses. Rather, federal money was spent on increasing economic growth indirectly by helping temporarily economically underrepresented populations to re-enter the labor market. Instead, state governments have been more willing to take initiatives in stimulating economic development because their decisions were driven by market forces and political pressures (Brace and Mucciaroni 1990: 152-154; Eisinger 1989: 9).

Based on an objective perspective, many scholars assert that 'policy problems occur because intergovernmental hierarchy, in terms of communication or organization, breaks down, because member of the Congress play politics with intergovernmental programs, or because local governments are not committed to federal policies' (Ellison 1998: 36). As such, the solution to coordinate different levels of government can be achieved by exercising effective governance and by structuring a pivotal institution. Good governance can enhance the balance and coordination among levels of government. 'Governance generally refers to the means for achieving direction, control, and coordination of wholly or partially autonomous individuals or organizations on behalf of interests to which they jointly contribute' (Lynn et al. 2000: 235). Good governance requires agreement about common goals, clear communication, and a division of labor to make use of scarce resources (Roberts 2008: 3-14). However, it is difficult to define how to achieve it. One argument is whether centralization or decentralization can enhance coordination and accountability among levels of government. Although none of scholars confirm which type of government structure is better, there is the inclination to believe that a clear functional and operational dispersion helps to coordinate different units of government in policy subsystems (Peterson 1995a: 50). This leads to policy responsibility of all units of government and to more effective public policy performance.

Throughout the history of American federalism, we can observe that the policy examples of changing power between the federal and state government can be explained by three larger policy roles of governments, national security/safety, redistributive and developmental policies. While there have been few challenges that states take more authority on defense and security policies over the federal government throughout the U.S. history, the contemporary history of U.S. federalism has shown that two different units of governments have exercised cooperative and divided responsibilities largely in two different forms of public policies: redistributive and economic development policies. Functional theory provides a potentially powerful explanation of how the federal and state



governments have been cooperative based on policy implications. According to functional theory, each level of government establishes the function that it can run more effective and efficient. Traditionally, the federal government has focused more on redistributive policy reallocating economic resources from the rich to the poor—the elderly, the disabled, the unemployed, the sick, the poor, etc.—while state governments have been more interested in pursuing economic growth policy including developmental programs—physical infrastructure such as roads, mass transit systems, public parks, etc.—and social infrastructure such as personal property protection, education, etc (Peterson 1995b: 8). In this sense, there is no dominance of either the federal or state governments in driving policy making process. In other words, although the past several decades have shown that the federal government has increased its coercive power over states, its increase was just the growth of federal power to take more responsibility on social welfare programs in that states have been reluctant to participate.

As a result, the U.S. federalism can be viewed as a substantial contribution to the growth of both the federal and state governments by exercising comparative advantages that each level of government can best perform. In particular, the practice of democratic values and improvement in the efficiency of U.S. federalism has increased the extent of the role of all units of governments on public policy. This is basically a byproduct of advantages inherent to U.S. federalism. The federal system clearly has the advantages of enabling state and local governments to develop and to implement programs that they want to develop more. ‘Uniformity of policy and administration can be achieved in national affairs to the extent needed while states retain control over their respective internal affairs’ (Zimmerman 2008: 5). The U.S. federal system as democratic institution of pluralism has increased cycles of activism alternating between federal and state governments, depending on the goal of achieving effective governance and maximizing democratic values (Nathan 2008: 13-25). The overall effect of these variations over time has increased the roles and responsibilities of both the federal and state governments in major public policies as a whole. Looking at the past 50 years, indeed, the U.S. federalism draws a clear line between what is general and aggregate and what is local and particular. As probably Peterson (1995: 191-195) wanted to see, the U.S. federal system at least for the past 50 years has been evolving in a way that respects the comparative advantages of each level of government. Both federal and state governments have strengthened the cooperative intergovernmental



relationship that produces efficiency policies and performance. This essentially decreases political and administrative cost.

5. Conclusion

Looking back to the past 50 years, the U.S. federal system was characterized by ‘the increasing concentration of political powers in national government flowing from congressional preemption statutes removing completely or partially regulatory powers from subnational governments and generally broad U.S. Supreme Court interpretations of the scope of the delegated powers of Congress’ (Zimmerman 2008: 2). The U.S. federal system, however, has not clearly exercised any one direction of traditional liberal or conservative political cleavages on policy-making processes. Such complexity is more obvious in recent decades. *National Federation of Independent Business v. Sebelius*^{xxix} in 2012 upheld congressional powers to enact provisions of the Patient Protection and Affordable Care Act. Regarding a landmark civil rights case, however, *United States v. Windsor*^{xxx} in 2013 and *Obergefell v. Hodges*^{xxxi} in 2015 cases suggest that the federal recognition of marriage to apply only to opposite-sex couples is invalid, but that the marriage is not yet clearly defined by the Supreme Court. Based on the Court decisions, in *United States v. Windsor* case, any same-sex couples who were married in states that permitted same-sex marriage legally are treated the same under federal law as married opposite-sex couples, and in *Obergefell v. Hodges* case, all fifty states must recognize the same-sex marriage on the same conditions as the opposite-sex marriage (Harr et al. 2018: 104). As a result, while the former cases meant the respect of the federal government to states’ autonomous interpretation on marriage as the Court recognized states that permitted the marriages of same-sex couples, the latter case indicates the increase of the federal authority as the Court decision enforced states that are against the legitimacy of same-sex marriage. However, this trend does not mean that the U.S. federal system has been evolving in ineffective ways to design and administer public policies. Rather, the U.S. federalism has become ‘a dynamic and flexible one characterized by fluidity in the distribution of formal political powers between Congress and states over time’ (Zimmerman 2008: 55). I agree with Walker’s argument: after World War II, ‘the direction of U.S. federalism does not tend to any one direction, as many have contended, but is of an ambiguous nature, given the many



conflicting trends within various arenas of intergovernmental action. In the regulatory, judicial, program, and fiscal areas, no one tendency is consistently dominant' (Walker 2000: 2).

However, such a conventional debate whether the U.S. federalism dynamic is getting more liberal or conservative does not provide any useful information to evaluate the efficiency of U.S. federalism on public policy performance. From Montesquieu to Madison to Riker, there have been issues of whether U.S. federalism should be centralized or decentralized, and whether it should be more cooperative or competitive. Popular attitudes on domestic policy issues still vary according to a local-by-local and a state-by-state basis. The U.S. federal system shows, however, that a mix between more federally- and state-driven policy initiatives has produced both directly and indirectly beneficial policies to increase policy outcomes. As the functional theory of U.S. federalism suggests, American states have proven to be more resourceful than the federal government on economic development ventures. However, such growing globalization issues as national security, environmental protection, and the growing volume of trade expand the role of the federal government, which would benefit regional governments. Paradoxically, the decentralizing features of contemporary U.S. federalism caused by the financial crisis necessitates that the federal government leans more toward a state-centered creed by delegating to the states, a substantial amount of power to manage economic development policies, while the federal government takes more responsibility for taking care of the poor by increasing its spending on social welfare areas. As a corollary, the complexity of issues makes it much simpler to expect that in the future U.S. federalism will be evolving to increase its efficiency by separating the functional responsibilities on such policies that each unit of government can best perform.

Perhaps, a better evaluation for the contemporary as well as future U.S. federalism dynamic might be made, as many federalism scholars have done, by examining 'how government should look according to some normative benchmark, be it efficiency, democracy, or representation' (Erik 2006: 166). In another way, the character of the future federalism dynamic would be evaluated by examining the extent of operational federalism such as 'the funding, running, and accounting of public programs, whether inter-governmentally or by separate levels' (Walker 2000: 321). It still needs, however, to clarify not only how well U.S. federalism based on many varieties balances or harmonizes



distribution of policy responsibility among different levels of governments, but how effectively it reflects changing public demands in the democratic creed. Justice Louis Brandeis describes federalism as ‘the laboratories of democracy’ (Pagano 2007: 6). The federal system, grounded in democratic values, can improve political and policy performance on all levels of government. Although scholars and politicians contest whether federalism is still a core value in American political culture, no one may disagree that the American federalism should be rooted in a healthy and balanced intergovernmental association by increasing the cooperative production of public policy.

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^I 247 U.S. 251 (1918). The Court ruled that ‘the Keating-Owen Child Labor Act was outside the Commerce Power and the regulation of production was a power reserved to the states via the Tenth Amendment.’ <https://www.oyez.org/cases/1900-1940/247us251>

^{II} 254 U.S. 281 (1920). ‘In all the states, from the beginning down to the establishment of the Articles of Confederation, the citizens possessed the right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom. A consequent authority resided in the states to forbid and punish violations of this right. P. 254 U. S. 293.’ <https://supreme.justia.com/cases/federal/us/254/281/>

^{III} 196 US 375 (1905). In this case, the Court held that ‘congressional power under the Commerce Clause justified regulations of the meat trust.’ <https://www.oyez.org/cases/1900-1940/196us375>

^{IV} 252 U.S. 416 (1920). The Court held that ‘the national interest in protecting the wildlife could be protected only by national action.’ <https://www.oyez.org/cases/1900-1940/252us416>

^V 276 U.S. 394 (1928). The Court held that ‘Congress, within ‘defined limits,’ could vest discretion in Executive officers to make public regulations and direct the details of statutory execution. The Court argued that the same principle that allowed Congress to fix rates in interstate commerce also enabled it to remit to a rate-making body under the control of the Executive branch.’ <https://www.oyez.org/cases/1900-1940/276us394>

^{VI} 301 U.S. 1 (1937).

^{VII} 301 U.S. 548 (1937). The Court held that ‘the tax under the Social Security Act was a constitutional exercise of congressional power.’ <https://www.oyez.org/cases/1900-1940/301us548>

^{VIII} 317 U.S. 111 (1942). The Court ruled that ‘Congress may use its Commerce Power to regulate or prohibit activities provided the economic effects of such activities are substantial.’ <https://www.oyez.org/cases/1940-1955/317us111>

^{IX} 358 U.S. 1 (1958). The Court held that ‘the Arkansas officials were bound by federal court orders that rested on the Supreme Court’s decision in *Brown v. Board of Education*.’ https://www.oyez.org/cases/1957/1_misc

^X 400 U.S. 112 (1970). The Court held that ‘Congress had the power to enact the amendments that changed the voting age for federal elections, abolish literary tests at the polling station, and abolish state residency requirements for presidential and vice presidential election.’ <https://www.oyez.org/cases/1970/43-orig>

^{XI} 469 U.S. 528 (1985). The Court held that ‘the guiding principles of federalism established in *National League of Cities v. Usery* were unworkable and that SAMTA was subject to Congressional legislation under the Commerce Clause. The Court argued that the structure of the federal system itself, rather than any ‘discrete limitations’ on federal authority, protected state sovereignty.’ <https://www.oyez.org/cases/1983/82-1913>

^{XII} 483 U.S. 203 (1987). The Court held that ‘Congress, acting indirectly to encourage uniformity in states’ drinking ages, was within constitutional bounds. The Court found that the legislation was in pursuit of ‘the general welfare,’ and that the means chosen to do so were reasonable.’



<https://www.oyez.org/cases/1986/86-260>

^{xiii} 514 U.S. 779 (1995). ‘The Constitution prohibits States from adopting Congressional qualifications in addition to those enumerated in the Constitution.’ <https://www.oyez.org/cases/1994/93-1456>

^{xiv} 545 U.S. 1 (2005). The Court held that ‘the commerce clause gave Congress authority to prohibit the local cultivation and use of marijuana, despite state law to the contrary.’ <https://www.oyez.org/cases/2004/03-1454>

^{xv} 567 U.S. 387 (2012). The Court held that ‘the federal immigration laws preclude Arizona's efforts at cooperative law enforcement and preempt the four provisions of S.B. 1070 on their face.’ <https://www.oyez.org/cases/2011/11-182>

^{xvi} 505 U.S. 144 (1992). It was a decision of the Supreme Court, ‘reasoning that Congress had the authority under the Commerce Clause to use financial rewards and access to disposal sites as incentives for state waste management. The third provision, the ‘take-title’ qualification, stipulated that states must take legal ownership and liability for low-level waste or by the regulatory act.’ <https://www.oyez.org/cases/1991/91-543>

^{xvii} 514 U.S. 549 (1995). The Court held that ‘the 1990 Gun-Free School Zones Act is, forbidding individuals from knowingly carrying a gun in a school zone, unconstitutional because it exceeds the power of Congress to legislate under the Commerce Clause.’ <https://www.oyez.org/cases/1994/93-1260>

^{xviii} 521 U.S. 898 (1997). ‘Using the Necessary and Proper Clause of Article I as justification, the Court held that Congress can temporarily require state CLEOs to regulate handgun purchases by performing those duties called for by the Brady Bill's handgun applicant background-checks.’ <https://www.oyez.org/cases/1996/95-1478>

^{xix} 524 U.S. 417 (1998). The Court ruled that ‘the President's ability to selectively cancel individual portions of bills, under the Line Item Veto Act, violate the Presentment Clause of Article I.’ <https://www.oyez.org/cases/1997/97-1374>

^{xx} 529 U.S. 598 (2000). The Court held that ‘Congress lacked the authority to enact a statute under the Commerce Clause or the Fourteenth Amendment since the statute did not regulate an activity that substantially affected interstate commerce nor did it redress harm caused by the state.’ <https://www.oyez.org/cases/1999/99-5>

^{xxi} 392 U.S. 183 (1968). The Court held that ‘the inclusion of commercial enterprises is constitutional because otherwise commercial enterprises that utilize substandard wages and excessive hours would have an advantage over other companies.’ <https://www.oyez.org/cases/1967/742>

^{xxii} 426 U.S. 833 (1976). The Court held that ‘Congress may not regulate the labor market of state employees. The Tenth Amendment prohibits Congress from enacting legislation which operates to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions.’ <https://www.oyez.org/cases/1974/74-878>

^{xxiii} 469 U.S. 528 (1985). The Court held that that the guiding principles of federalism established in National League of *Cities v. Uesry* were unworkable and that the San Antonio Metropolitan Transit Authority was subject to Congressional legislation under the Commerce Clause. <https://www.oyez.org/cases/1983/82-1913>

^{xxiv} 527 U.S. 706 (1999). In response to ‘a group of probation officers that sued their employer, the State of Maine, in 1992 alleging that the state had violated the overtime provisions of the 1938 Fair Labor Standards Act,’ the Court held that ‘Congress may not use its Article I powers to abrogate the states' sovereign immunity.’ <https://www.oyez.org/cases/1998/98-436>

^{xxv} 4 U.S.C. section 114.

^{xxvi} Internet Tax Freedom Act, 47 U.S.C. section 151 note.

^{xxvii} P.L. 86-272

^{xxviii} NCLB was replaced to the Every Student Succeeds Act on December 2015, which basically returns the substantial power to manage education policy to state governments.

^{xxix} 567 U.S. 519 (2012). The Court held that the Patient Protection and Affordable Care Act, commonly called Obamacare, was ‘an unconstitutional assertion of Congress’ power to regulate commerce among the several states, but was nonetheless sustainable under Congress’ power to tax’ (Reynolds and Denning 2012: 807)

^{xxx} 570 U.S. ___ (2013).

^{xxxi} 576 U.S. ___ (2015).



References

- Baumgartner Frank R. and Jones Bryan D., 1993, *Agendas and Instability in American Politics*, University of Chicago Press, Chicago.
- Beer Samuel H., 1973, 'The modernization of American Federalism,' *Publius*, III(2): 49-95.
- Bohte John and Meier Kenneth J., 2000, 'The Marble Cake: Introducing Federalism to the Government Growth Equation,' *Publius*, XXX(3): 35-46.
- Brace Paul, 1993, *State Government and Economic Performance*, The Johns Hopkins University Press, Baltimore, MD.
- Brace Paul and Mucciaroni Gary, 1990, 'The American States and the Shifting Locus of Positive Economic Intervention,' *Policy Studies Review*, X(1): 151-173.
- Clovis Samuel Jr, 2006, 'Federalism, Homeland Security and National Preparedness: A Study in the Development of Public Policy,' *Homeland Security Affairs*, II(3): 1-24.
- Conlan Timothy J., 2017, 'The Changing Politics of American Federalism,' *State and Local Government Review*, XLIX(3): 170-183.
- Conlan Timothy J. and Dinan John, 2007, 'Federalism, the Bush administration and the transformation of American conservatism,' *Publius*, XXXVII: 279-303.
- Dinan John, 2006, 'The State of American Federalism, 2005: Federalism Resurfaces in the Political Debate,' *Publius*, XXXVI(3): 327-374.
- Dinan John, 2008, 'The state of American Federalism 2007-2008: Resurgent state influence in the national policy process and continued state policy innovation,' *Publius*, XXXVIII(3): 381-415.
- Eisinger Peter, 1989, *The Rise of the Entrepreneurial State*, University of Wisconsin Press, Madison.
- Eissa Nada and Hoynes Hilary, 2011, 'Redistribution and Tax Expenditures: The Earned Income Tax Credit,' *National Tax Journal*, LXIV(2): 689-730.
- Ellison Brian A., 1998, 'Intergovernmental Relations and the Advocacy Coalition Framework: The Operation of Federalism in Denver Water Politics,' *Publius*, XXVIII(4): 35-54.
- Frey Bruno S., 2006, 'How to deal with Terrorism,' *The Economists' Voice*, III(7): 1-4.
- Friedman Leon, 2000, 'Supreme Court Federalism Decisions,' *Touro Law Review*, XVI(2): 243-264.
- Fry Earl H., 1998, *The Expanding Role of State and Local Governments in U.S. Foreign Affairs*, Council on Foreign Relations Press, New York.
- Gamage David and Shanske Darien, 2016, 'The Federal Government's Power to Restrict State Taxation,' *State Tax Notes*, August. 15: 547-553.
- Grodzins Morton, 2007, 'The Federal System,' in O'Toole Laurence J. (ed), *American Intergovernmental Relations: Foundations, Perspectives, and Issues*, CQ Press, Washington, D.C., 54-63.
- Harr J. Scott, Hess Karen M., Orthmann Christine H., and Kingsbury Jonathon, 2018, *Constitutional Law and the Criminal Justice System* (7th ed.), Cengage Learning, Boston.
- Kantor Paul, 2010, 'City futures: Politics, Economic Crisis, and the American Model of Urban Development,' *Urban Research & Practice*, III(1): 1-11.
- Kettl Donald F., 2003, 'Contingent Coordination: Practical and Theoretical Puzzles for Homeland Security,' *The American Review of Public Administration*, XXXIII(3): 253-277.
- Kincaid John, 2008, 'Contemporary U.S. Federalism: Coercive Change with Cooperative Continuity', *REAF*, VI: 10-36.
- Kingdon John W., 1984, *Agendas, Alternatives, and Public Policy*, Little/Brown, Boston.
- Kline John M., 'Continuing controversies over state and local foreign policy sanctions in the United States,' *Publius*, XXIX(2): 111-134.
- Krane Dale and Koenig Heidi, 2005, 'State of American Federalism, 2004: Is Federalism still a core value?', *Publius*, XXXV(1): 1-40.
- Lindblom Charles E., 1959, 'The science of muddling through', *Public Administration Review*, XIX(2): 79-88.
- Lipsky Michael, 2010, *Street Level Bureaucracy: Dilemmas of the Individual in Public Service*, The Russel Sage Foundation, New York.



- Lynn Laurence E., Jr., Heinrich Carolyn J. and Hill Carolyn J., 2000, 'Studying Governance and Public Management: Challenges and Prospects', *Journal of Public Administration Research and Theory*, X(2): 233-262.
- MaGuinn Patrick, 2005, 'The National Schoolmarm: No Child Left Behind and the New Educational Federalism', *Publius*, XXXV(1): 41-68.
- Nathan Richard P., 2008, 'Updating Theories of American Federalism', in Conlan Timothy J. and Posner Paul L. (eds), *Intergovernmental Management for the Twenty-First Century*, Brookings Institution Press, Washington, D.C.
- Pagano Michael A., 2007, 'In the eye of the beholder: The Dynamics of Federalism in National and Supranational Party Systems', in Pagano Michael A. and Leonardi Robert. (eds), *The Dynamics of Federalism in National and Supranational Political Systems*, Palgrave MacMillan, New York, 1-18.
- Peterson Paul, 1995, *The Price of Federalism*, Brookings Institution, Washington, D.C.
- Reynolds Glenn H. and Denning Brannon P., 2012, 'National Federation of Independent Business v. Sebelius: Five Takes', *Hastings Constitutional Law Quarterly*, XL(4): 807-832.
- Roberts Nancy C. (ed), 2008, *The Age of Direct Citizen Participation*, Routledge, New York.
- Rockoff Hugh, 1999, 'World War II and the Growth of the U.S. Federal Government', *Japan and the World Economy*, XI: 245-262.
- Rodden Jonathan, 2004, 'Comparative Federalism and Decentralization: On Meaning and Measurement', *Comparative Politics*, XXXVI(4): 481-500.
- Sabatier Paul and Weible Christopher, 2007, 'The Advocacy Coalition Framework: Innovations and Clarifications', in Sabatier Paul (ed), *Theories of the Policy Process*, Westview Press, Boulder, CO, 189-220.
- Schlesinger Arthur M., 1999, *The Cycles of American History*, Houghton Mifflin, New York.
- Shah Anwar, 2007, 'Introduction: Principles of Fiscal Federalism', in Shah Anwar (ed), *The Practice of Fiscal Federalism: Comparative Perspectives*, McGill-Queen's University Press, Montreal, 3-42.
- Stephens G. Ross and Wikstrom Nelson, 2009, *American Intergovernmental Relations: A Fragmented Federal Polity*, Oxford University Press, New York.
- United States Department of Labor, 2016, *Handy Reference Guide to the Fair Labor Standard Act*, available at <https://www.dol.gov/whd/regs/compliance/wh1282.pdf>.
- Van Alstyne William, 1987, 'Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea', *Duke Law Journal*, Vol. 1987(5): 769-799.
- Walker David B., 2000, *The Rebirth of Federalism*, Chatham House Publishers, Chatham, NJ.
- Wibbels Erik, 2006, 'Madison in Baghdad? Decentralization and Federalism in Comparative Politics', *Annual Review of Political Science*, IX: 165-188.
- Wright Deil. 1988. *Understanding Intergovernmental Relations*, Brooks/Cole, Monterey, CA.
- Zimmerman Joseph F., 2008, *Contemporary American Federalism*, State University of New York Press, Albany, NY.

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