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Representing Regions, Challenging Bicameralism: An Introduction

by

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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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