

# Second Chambers In Federal States

## Abstract

*Second chambers have a long history and were re-designed for the purposes of federalism with the invention of the US Senate. Today, almost all federal parliaments have a bicameral structure in order to allow the constituent units to exercise shared rule. The composition and selection of federal second chambers varies very much, though: the constituent units are either represented equally or by different numbers of delegates, who are, in most cases, either appointed or elected directly or indirectly. The core function of federal second chambers relates to legislation, even though not all of them are responsible for a full range of legislative matters or other legislative functions than just (suspensive or absolute) veto powers; in some cases, they also exercise non-legislative functions. Many federal second chambers are criticized for their political inefficiency and non-representation of constituent interests. It is doubtful, however, whether they could be replaced by an alternative mechanism.*

## Introduction

Second chambers have a long tradition that is rooted in the ancient world (Luther, 2006). It was the Roman *senatus* that, long before the birth of bicameral parliaments, inspired the name of many of today's second chambers. The prototypes of second chambers, however, did not represent a *demos* but only small elitist groups. This was also true for the first second chamber in the genuine sense of the word – namely, one of two component bodies of a parliament: the House of Lords that still exists today as the upper house of the British Parliament. However, a new type of a second chamber was designed in the late 18<sup>th</sup> century which combined two major institutional innovations: it was the genial invention of the US Senate that, on the one hand, democratized the prevailing model of a second chamber and, on the other hand, adapted it for the purposes of federalism. The main idea behind the Senate, as discussed in Federalist Papers Nos. 62-66, was to establish a representative forum of the constituent States each of which should have two delegates. The symmetric composition of the Senate, which had been controversial, secured the approval of the smaller States for the new federal system. The Senate should be at least as strong as the House of Representatives and thus contribute to the separation of powers and safeguard checks and balances.

Today, fewer than half of the national parliaments (and, in some countries, even regional parliaments) have a bicameral structure (Fessha, 2018; Luther, Passaglia and Tarchi, 2006; Baldwin and Shell, 2001; Albert, Baraggia and Fasone, 2019). In most of these, the second chamber has a federal or regional design reflected in its composition, selection and/or powers. Almost all federal parliaments, in turn, feature a second chamber in which the constituent units are represented, except the Comoros, Micronesia, St Kitts and Nevis, the United Arab Emirates and Venezuela.

## Definition and the Concept of Shared Rule

'Second chamber' or 'upper house' are generic terms regularly used in order to describe the component unit of a bicameral parliament which is not directly elected by all citizens. While the term 'upper house' still has an elitist connotation, the term 'second chamber' rather relates to the chronological position of that chamber in the legislative process. 'Second' does not necessarily mean, however, that the general position of that chamber is inferior to that of the first chamber.

According to the German Federal Constitutional Court, the *Bundesrat* is no genuine 'second chamber' because it is rather conceived as a representative body of the constituent states than the component part of a federal institution (BVerfGE 37, 363 (380)). This distinction is more or less theoretical, though. What is meant is an institutionalized body that represents the constituent units (not any other entities, even if they relate to territory, such as local governments) in the federal legislative process and perhaps also in the exercise of other functions – that allows them to exercise shared rule in these fields (apart from other forms of shared rule relating to other state powers as exercised by other bodies). No federal system can do without shared rule (Palermo and Kössler, 2017, p.164), and even in those lacking a second chamber we usually find that either the unicameral parliament is composed of mixed groups of members in a quasi-bicameral way or the constituent units themselves participate directly in the federal legislative process (Schmidt, 2016, margin number 5). There are also several federal states where, in addition to a second chamber, direct participation of the constituent units is constitutionally granted in some legislative matters (see, eg, Art V US Constitution with regard to federal constitutional amendments).

## Composition and Selection

There is a wide range of different models regarding the composition and selection of delegates. While older, aggregative federal systems tend towards symmetric representation despite different territorial size or population, younger federal systems, especially those with a generally asymmetric design, favour an asymmetric representation of the constituent units;

whether these asymmetries are proportionally weighted or not, differs, though (for a comparison, Schmidt, 2016, margin numbers 27-59; Fessha, 2018, margin numbers 19-20; Watts, 2008, pp. 152-153). Still, as decision-making is usually majoritarian, constituent units will hardly be able to veto decisions single-handedly even in symmetric systems.

Also the selection of members follows different methods (Watts, 2008, pp. 147-152; Palermo and Kössler, 2017, pp. 169-175): while in some federal states the members are directly elected by the constituent people (eg, Argentina, Brazil, Mexico, Nigeria, Switzerland, US), they are elected by the constituent parliaments (eg, Austria, Bosnia and Herzegovina) or appointed by the constituent governments (eg, Russia) or even federal government functionaries (eg, Canada); or members of the constituent governments themselves have a seat in the second chamber (eg, Germany), or a mixed system applies (eg, India, Malaysia, Russia, South Africa).

Whether members politically represent the wishes of their constituent units depends, though. Often, they just stick to the politics of their parties, regardless even of centralistic contents. It also makes a difference whether a party exists only at constituent or also at national level and whether members have a free mandate or whether they are bound to a block vote in accordance with their delegations. Also the mode of selection may influence the representation of constituent interests, though not necessarily (Schmidt, 2016, margin number 61).

## Powers

As regards powers, the main responsibility of second chambers is participation in federal legislation (Gamper, 2018a, pp. E-125-129). This is most important when it comes to federal constitutional legislation, since this may concern the very status of the constituent states themselves (Palermo and Kössler, 2017, p. 178). Their legislative powers are often just equated with veto rights, but they are actually much more varied: legislative powers may comprise the right to enact the second chamber's standing orders, the right to initiate legislation, the right to veto bills passed by the first chamber, the right to modify bills passed by the first chamber, the right to demand a referendum on a bill passed by the first chamber, the right to appeal to (constitutional) courts for the pre-enactment scrutiny of a bill and the right to challenge enacted laws before (constitutional) courts (Gamper, 2018a, pp. E-120-121). Not all of these rights are granted to every second chamber, even though veto rights usually are; however, veto rights themselves differ as to whether they have suspensive or absolute effect or whether they entail a mediation process. In many cases, second chambers are not responsible for a full range of legislative matters in terms of content, but only those that specifically relate to federalism and the constituent units (Fessha, 2018, pp. 24-30).

Apart from their legislative powers, federal second chambers often also exercise a number of other, non-legislative functions (Fessha, 2018, pp. 31-47; Palermo and Kössler, 2017, pp. 193-200; Happacher, 2018). Among these, we find various rights of scrutiny over the executive, participating rights in international or EU matters, the right of authoritative constitutional interpretation or appointment rights, especially with regard to heads of states or judges. Some of these rights are particularly related to issues of federalism, while others are just classical parliamentary rights.

Differently from, eg, the US Senate or the Swiss *Ständerat*, the majority of federal second chambers have a weaker position than the respective first chamber. The ensuing system of imperfect bicameralism is one of the reasons why federal second chambers are regarded as rather useless in many countries. Paradoxically, however, powerful second chambers are also criticised for producing gridlocks and preventing legislative innovation.

## Dysfunctions and Alternatives

The dysfunctions of federal second chambers have several reasons: firstly, the selection and composition of second chambers do not necessarily guarantee that the interests of the constituent units are sufficiently considered. Even if, in one

way or another, members are chosen in accordance with the principle of territorial representation, political partisanship will often prevail over constituent interests. Secondly, depending on the degree of asymmetric federalism, the interests of the constituent units may diverge. Asymmetries in composition can further conflicts between the constituent units, even though ordinary majoritarian voting can be mitigated by 'double majorities'. Thirdly, most federal second chambers have fewer and/or less effective powers than the first chambers. Innovative functions such as the legislative initiative or the power to amend bills as well as mediation mechanisms between both chambers are often absent.

Whether alternative mechanisms (Palermo and Kössler, 2017, pp. 177-178; Palermo, 2018) could operate more efficiently than second chambers is questionable. However, the question also is whether such mechanisms are just conceived as additional options (without replacing the second chamber) or as true alternatives to a second chamber (Gamper, 2018b, p. Ed-VIII).

But also the requirement of double majorities in the first chamber or the direct participation of the constituent units, eg, might encounter the same political problems as a regular second chamber, namely asymmetric interests, lacking powers and party allegiance, apart from cumbersome processes. Where intergovernmental conferences of constituent governors or similar functionaries exercise informal political influence outside the constitutionalized second chamber (Palermo and Kössler, 2017, pp. 177-178), this may be efficient in practice but still perhaps not desirable in a state governed by the rule of law; rather, one could re-design membership in the second chamber by appointing such strong functionaries as regular members. Also the institutional role of second chambers in terms of checks and balances (Watts, 2008, p. 155; Gamper, 2018b, p. Ed-VIII) is hardly transferable to any kind of alternative mechanism.

Since no federal system completely resembles the other, it is difficult to conceptualize a perfect model of a second chamber or even of an alternative mechanism: this is especially so, because federalism is a system of communicating vessels in which the second chamber has no isolated position but has to be seen in the overall context of self-rule and shared rule. It is frequently to be observed that in one and the same federal system dysfunctional shared rule is accompanied by dysfunctional self-rule, too. Moreover, some dysfunctions – eg, as they emerge from political partisanship or the executive-dependency of legislation – are not specifically inherent in *federal* second chambers, but in second chambers and, moreover, many parliaments in general (Gamper, 2018b, pp. Ed-VII-VIII). What federal second chambers may claim, however, in contrast to many other second chambers, is democratic legitimacy because their members directly or indirectly represent the constituent peoples, however weighted their representation might be (Watts, 2008, pp. 154-155; Gamper, 2018a, p. E-129).

## Conclusion

Criticism of (federal) second chambers has become traditional (see, with examples, Gamper, 2018c; Albert, Baraggia and Fasone, 2019, pp. 1-5). Nevertheless, it does not seem probable that second chambers will be largely abandoned in federal states, especially as this would need a (perhaps even qualified) constitutional amendment and, regularly, the approval of the second chamber itself. While it is true, moreover, that alternative mechanisms exist and perhaps operate more efficiently than second chambers in some federal states, it is doubtful whether their use can be generalized and, even if so, whether they could indeed avoid similar problems as second chambers. While a number of (non-federal) second chambers have been abolished, the continued existence of almost all federal second chambers in recent federal systems seems to speak in their favour: not because of their outstanding performance, but because the risk to disrupt federalism itself by removing one of its institutional pillars, while post-bicameral alternatives have not been tested, may be simply too great.

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