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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

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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

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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]

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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

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> 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).

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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

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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

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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).

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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

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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]

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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

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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

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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).

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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

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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

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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

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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

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'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 Mirkine-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 Mirkine-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

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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 as 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

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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 Mirkine-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) *cohabitation* 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

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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 chance 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'.

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