

## Foreword: Bicameralism in an age of populism

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I was delighted to be invited to address the intellectually rich and enjoyable conference, held at LUISS University in Rome in May 2016, which sparked many of the chapters in this volume. I am likewise very happy to contribute here with some opening written words.

To put the book in context, it is the latest in a line of works produced in relatively recent years that have addressed bicameralism from a comparative perspective, drawing amongst them from a wide range of case studies.<sup>1</sup> While the cases included on each occasion may have differed, some consistent messages have emerged from such collections. First, second chambers are remarkably diverse. Second, bicameral systems nonetheless face some common challenges. This particular volume revisits some classic cases, and combines them with interesting insights from others which to many readers will be lesser known. In doing so, it successfully reinforces these same core messages.

As the editors articulate clearly in their introduction, comparative political study has many benefits. One of the most important can be to demonstrate that the features of one's own system are not unique. At times, this can include providing reassurance that one's own system is not uniquely flawed. While this kind of comparative perspective may highlight the challenges of getting political institutions right, it can potentially also help boost faith in such institutions. Coming from a country like the UK, where it is no exaggeration to say that second chamber reform has been on the political agenda for centuries, the knowledge that we are not alone in our sense of unease with our second chamber is somewhat comforting.<sup>2</sup> At least to an extent, comparative study suggests, British reformers are just engaged in the inevitable questioning that goes along with having a bicameral system.

Despite the widespread nature of such questioning around the world, there is little sign that bicameralism is currently in retreat. In fact, as I will argue in this piece, this frequently controversial institutional structure could even be seen as peculiarly well suited to our present populist times.

### The essentially controversial nature of bicameralism

The controversial nature of bicameralism has long been documented. No volume on the subject is complete without quoting French revolutionary thinker Emmanuel Sieyès' view that "If a second chamber dissents from the first it is mischievous, if it agrees, it is superfluous".

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<sup>1</sup> Jorg Luther, Paolo Passaglia, and Rolando Tarchi, eds., *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*. Milano: Giuffrè, 2006; Samuel Patterson and Anthony Mughan, *Senates: Bicameralism in the Contemporary World*. Parliaments and Legislatures Series. Columbus: Ohio State University Press, 1999; Meg Russell, *Reforming the House of Lords: Lessons from Overseas*. Oxford: Oxford University Press, 2000.

<sup>2</sup> For discussion of the long history of reform debates in the UK, see Meg Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived*. Oxford: Oxford University Press, 2013.

More recent scholars who have sought systematically to classify bicameral systems have generally done so on two dimensions: the second chamber's composition, and its powers.<sup>3</sup> To apply these to bicameralism's contested nature, a second chamber may be criticised for being on the one hand too similar in composition to the first chamber, or on the other for being too different – most obviously when it lacks a direct democratic mandate, but also sometimes when it has such a mandate but this is based on a different system of election to the first chamber. On the other dimension, a second chamber with weak powers can likewise be dismissed as peripheral, and a waste of resources, while one with strong powers may be criticised as overly disruptive. Indeed, while each pair of criticisms may seem mutually contradictory, they are sometimes even deployed concurrently. For example, the contributors to the LUISS conference who described Turkey's second chamber before its abolition in 1980 suggested that it was 'labelled as a futile, but at the same time an obstructive institution'.<sup>4</sup>

The almost routine criticism levelled at second chambers can be seen partly as a logical corollary of their role – which is fundamentally to question and challenge the decisions of elected first chambers. Assuming the mode of composition of the first chamber is that thought most legitimate in a democratic polity, any second chamber composed in a different manner may become a natural focus of political criticism. This is often vented in particular by supporters of the first chamber majority – among them, government ministers. So second chambers can have powerful enemies, who have readily available public platforms. The political environment in which these bodies must exist can hence be challenging.

For all of these reasons, Mughan and Patterson dubbed second chambers "essentially contested institutions" – a label which deliberately mimicked Gallie's notion of "essentially contested concepts".<sup>5</sup> I have heard such a parallel rejected, on the basis that Gallie's term was used to denote those concepts – such as democracy – whose basic meaning is disputed. This is a rather different matter to arguing about whether the concept (or body) in question deserves to exist; we might all agree that democracy is desirable, while nonetheless having differing beliefs about what its essence is. But Patterson and Mughan's label nonetheless seems fitting. Some years ago Philip Norton asked the seemingly simple question "how many bicameral legislatures are there?", concluding that there were various borderline cases.<sup>6</sup> Among these he counted Iran's Guardian Council and Botswana's House of Chiefs – which might or might not be considered second chambers. Contributors to the current volume likewise discuss, for example, Peru's potential "quasi bicameralism" and Bulgaria's second chamber "lookalikes".<sup>7</sup> Meanwhile we learn that Slovenia's interesting system was presented at its creation as a compromise between unicameralism and bicameralism – which could somehow meet the objectives of supporters of both. As Dušan Štrus tells us, it was only after 15 years of

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<sup>3</sup> E.g. Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. New Haven: Yale University Press, 1999; Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*. London: Macmillan, 1994.

<sup>4</sup> Bertil Emrah Oder and Valentina Rita Scotti, Turkish bicameralism (1961-1980): Some remarks on its establishment and on its abolition.

<sup>5</sup> Anthony Mughan and Samuel Patterson. "Senates: A Comparative Perspective." In *Senates: Bicameralism in the Contemporary World*, edited by Samuel Patterson and Anthony Mughan. Columbus: Ohio State University Press, 1999: 338; Walter Bryce Gallie, "Essentially Contested Concepts." *Proceedings of the Aristotelian Society* 56 (1956): 167-98.

<sup>6</sup> Philip Norton, "How Many Bicameral Legislatures Are There?". *Journal of Legislative Studies* 10, no. 4 (2004/12/21 2004): 1-9.

<sup>7</sup> Diego Serra, *Defending Bicameralism and Equalizing Powers: the Case of Peru*; Mihail Vatsov and Polina Vakleva, *The Shadow of Bicameralism in a Unicameral State: Dispersed Functional Bicameralism in Bulgaria?*

existence of the country's National Council that Slovenia's Constitutional Court issued a judgement that the country was in fact bicameral.<sup>8</sup>

## Second chambers and legitimacy

While bicameralism is often presented as having two key dimensions, my own work has emphasised the need to consider a third dimension, which is clearly related to composition and powers but has an independent existence: that of perceived legitimacy.<sup>9</sup> The de facto power or influence of a second chamber depends not just on being either compositionally distinct from the first chamber, or formally powerful (or maximally both) – it also depends on the formal powers of the chamber being usable in practice. This idea echoes Michael Mezey's focus, in his widely-cited classification of the de facto power of legislatures, on the importance of public and elite support.<sup>10</sup> As the earlier discussion already indicates, there are various reasons why the legitimacy of second chambers may be subject to dispute. Mezey identified that legislatures lacking support could be 'marginal' (if their formal powers were weak) or 'vulnerable' (if their powers were more substantial). Both of these adjectives seem well fitted to certain second chambers.

Because of the importance of perceived legitimacy, the power of a second chamber in practice may be very different to what it appears on paper – being either lesser or greater. And perceived legitimacy may not flow (as Arend Lijphart appeared to suggest) simply from whether that chamber is elected or not.<sup>11</sup>

The classic case informing this analysis is the UK's House of Lords. The Lords has long been viewed in the comparative literature as a weak second chamber. Being the extreme example of what the editors refer to in their introduction as the "temporally extended democracy" typical of second chambers, members of the Lords serve for life, many being appointed at a late stage in their careers – often including previous careers in political service. Life peerages date back to 1958, before which membership of the chamber was almost exclusively hereditary. This led to severe legitimacy problems, not least because the hereditary peers were greatly biased towards the Conservative Party, with very few drawn from the political left. This made it difficult in practice for the chamber to challenge elected governments, of either the left or the right – despite its substantial formal powers of delay (which, at roughly one year on most bills, exceeded even those of many elected second chambers). Thus the Lords' lowly place in the comparative rankings was a product purely of legitimacy concerns. As British politics specialists noted, the chamber's policy interventions tended to be timid, at best.<sup>12</sup>

Today the House of Lords feels rather different. Despite remaining subject to widespread criticism, and pressures for reform, the chamber plays a relatively active role in policy debates – as described by Peter Leyland in his chapter in this volume with respect to the 'Brexit' debates.<sup>13</sup> The reason for this transformation was not a move to an elected system – the Lords famously remains an unelected chamber. It stemmed instead from the removal in 1999 of most remaining hereditary peers, which

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<sup>8</sup> Dušan Štrus, *Constitutional Reform or Abolition of the National Council of the Republic of Slovenia?*

<sup>9</sup> Meg Russell. "Rethinking Bicameral Strength: A Three-Dimensional Approach." *Journal of Legislative Studies* 19, no. 3 (2013).

<sup>10</sup> Michael L. Mezey, *Comparative Legislatures* Durham: Duke University Press, 1979.

<sup>11</sup> Lijphart at note 3.

<sup>12</sup> Donald Shell, *The House of Lords*. 2nd ed. Hemel Hempstead: Harvester Wheatsheaf, 1992.

<sup>13</sup> Peter Leyland, *The House of Lords faces up to Brexit*.

rebalanced the chamber politically.<sup>14</sup> This rebalancing gave House of Lords members a greater confidence to challenge the government. It also somewhat changed the nature of the chamber's external support. Long criticised by the left, the Lords gained new allies in the media when it challenged the more 'illiberal' policies of Tony Blair's Labour government. It lost some of its traditional support in the right-wing press when it later stood up to David Cameron's Conservative government over cuts to benefits for the lower paid, but at the same time gained friends in the charity sector. This demonstrates that, as Patricia Monge also indicates in this volume with respect to France, classic criticisms of conservative bicameral institutions from the left, and the defence of these institutions from the right, are pragmatic at least as much as they are principled.<sup>15</sup> Most recently the Lords has faced the difficult dilemma of questioning, not only the decisions of an elected chamber, but the (distinctly underelaborated) decision taken by the British public in a referendum to leave the EU. For an unelected body to carefully critique and dissect a populist policy such as this is in some respects unsurprising; but its interventions must be navigated with enormous care.

Thus while the Lords may lack classic 'democratic legitimacy', it achieves a degree of public support through what scholars commonly refer to as 'output legitimacy' – i.e. the nature of its policy decisions.<sup>16</sup> It can also gain respect as a result of 'throughput legitimacy' – being well known for the careful and reasoned nature of its decision-making process, which is less partisan and combative than that in the first chamber. In addition, despite lacking any democratic underpinning, the Lords can still enjoy some 'input legitimacy', due to its membership being politically balanced, and including many respected independent members and subject experts.

The UK case hence demonstrates – historically – that a second chamber's usable power may fall short of its formal power. More recent developments also show that various political factors can contribute to that situation changing. The chamber can gain effective power by gaining legitimacy, even without a democratic mandate.

The fascinating bicameral dynamics in Japan, excluded from this and many other similar volumes, also demonstrate the delicate political nature of second chamber power. Alongside the Italian Senate, the Japanese House of Councillors is one of the most formally powerful second chambers to exist in a parliamentary system. Entirely directly elected, its decisions can only be overridden by a two thirds majority in the lower house. Depending on the partisan makeup of the two chambers, that potentially gives it a de facto veto. Historically, the hegemony of the Liberal Democratic Party meant that bicameral tensions were limited; but when this broke down in the 1990s the House of Councillors came sometimes to be non-government controlled, while the numbers required to achieve a lower house veto override were absent. Greater activism by the second chamber, including the blocking of government bills and key public appointments, has helped feed government instability – with for almost two decades the Japanese Prime Minister changing nearly every year.<sup>17</sup> A particularly interesting development was the chamber's increased tendency to pass

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<sup>14</sup> Russell at note 2; Meg Russell. "A Stronger Second Chamber? Assessing the Impact of House of Lords Reform in 1999, and the Lessons for Bicameralism." *Political Studies* 58, no. 5 (2010): 866-85.

<sup>15</sup> Priscilla Monge, *The Sénat Français of the Fifth Republic: The Permanent Paradox*.

<sup>16</sup> Vivien A. Schmidt, "Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput." *Political Studies* 61, no. 1 (2013): 2-22.

<sup>17</sup> Harukata Takenaka, "The Frequent Turnover of Japanese Prime Ministers: Still a Long Way to a Westminster Model." In *Looking for Leadership: The Dilemma of Political Leadership in Japan*, edited by Ryo Sahashi and James Gannon. Tokyo: Japan Center for International Exchange, 2015.

‘censure motions’ directed at ministers, including the Prime Minister. This goes beyond its formal powers, since government confidence formally depends (like in virtually all bicameral parliamentary states) on the lower house alone. Nonetheless, pressure from such motions has helped force the resignation of some senior figures.

The Japanese case thus illustrates again that the formal powers of the second chamber can be a poor guide to its real, usable power. Often the politics matters more than the rules. And as the politics shifts, the second chamber – as a forum for political debate, and a potential agenda setter – can move to a more or a less central position.

### **The challenges of reform**

In many countries, including the UK, it’s difficult to engage in conversation about the second chamber without the topic shifting towards questions of reform. This is natural, given second chambers’ controversial nature, and the various ways in which their legitimacy is challenged. What may be more counterintuitive, given the extent of criticism, is just how infrequently actual change takes place. Admittedly, some advanced democracies have abolished their second chambers – the most frequently noted including Sweden, Denmark and New Zealand.<sup>18</sup> In some countries where democracy is less well-established repeated changes have occurred – for example Senegal’s Senate was abolished in 2001, recreated in 2007 and abolished again in 2012. But these are the exceptions. The wider pattern, particularly in the established democracies, has been one of institutional inertia.

Many contributors to this volume give significant attention to reform debates, but also to the difficulties of reform. Several draw on the set of obstacles articulated by myself and Mark Sandford in 2002.<sup>19</sup> These are by no means universal, but together help to explain a good degree of the inaction. One obvious factor is constitutional rigidity: second chambers are generally specified in the country’s constitution, which may be difficult to amend. Japan has one of the most rigid constitutions in the world, demanding a two thirds majority in both chambers, and approval in a national referendum, to achieve any amendment – a bar which has never yet been met, on any topic. But the UK’s constitution lies at the other extreme, being famously flexible, with amendments dependent only on changes to ordinary statute law. Nonetheless, calls for large-scale House of Lords reform have always failed, and the only reforms achieved have been small and incremental – albeit with major cumulative effects. British inertia must therefore be explained by other factors. Among these are the vested interests of members of the Lords themselves, and of prime ministers, who find the patronage that the chamber affords them useful. But more importantly, the UK illustrates a widespread pattern, whereby governments and lower house members fear reforms that might strengthen the second chamber; meanwhile, the public may resist reforms that would weaken it.

More fundamentally, and connected to the previous discussion, a key obstacle to second chamber reform is the need not only to reject the status quo, but also to identify and agree an alternative model. While abolition may be a clear option it is radical, and raises serious concerns about removal of ‘checks and balances’. Reform to adopt a more acceptable or ‘modern’ second chamber is therefore often preferred. But finding such a model – whereby the second chamber doesn’t simply

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<sup>18</sup> Lawrence Longley and David Olson, eds. *Two into One: The Politics and Processes of National Legislative Cameral Change*. Boulder: Westview Press, 1991; Massicotte, Louis. "Legislative Unicameralism: A Global Survey and a Few Case Studies." *Journal of Legislative Studies* 7, no. 1 (2001/03/01 2001): 151-70.

<sup>19</sup> Meg Russell, and Mark Sandford. "Why Are Second Chambers So Difficult to Reform?". *Journal of Legislative Studies* 8, no. 3 (2002): 79-89.

mirror the first, but instead complements it without threatening its authority, can be challenging indeed.

### **Bicameralism: peculiarly suited to our times?**

Maria Romaniello recounts in her chapter in this volume the historical trend away from the ‘elite’ model of bicameralism (obvious echoes of which exist in the House of Lords), towards one built on territorial representation.<sup>20</sup> This clearly reflected a modernising tendency, with the new territorial chambers providing a bedrock in many federal states like Australia and the US. But the trend is far from complete, and a great diversity of models of second chamber composition remains. Meanwhile, some recent attempts at bicameral reform have failed quite spectacularly.

One of these stories is very nicely told in David Kenny’s chapter in this volume, on Ireland.<sup>21</sup> The Irish Senate has long been seen as weak, too dominated by the parties and too subservient to the government. The proposal to abolish it in a referendum in 2013 could therefore be seen as a populist move by the government – presented as an opportunity to cut the number of politicians and save public funds. Nonetheless, despite initial polling that suggested support for abolition, the public rejected the proposal, following a ‘No’ campaign that presented the reform as a government ‘power grab’. In other words, an antipolitical argument for abolition was beaten by a different antipolitical argument, that the Senate was one of the few things helping to keep government politicians in check.

A very similar pattern was seen in Prime Minister Matteo Renzi’s disastrous attempt to reform the Italian Senate, from a powerful directly elected chamber to an indirectly one representing the regions, with most of its veto powers removed. Despite long-running controversy about the wastefulness and duplication of the Senate, and hence the need for change, this move was roundly defeated in a referendum in 2016 – leading to Renzi’s resignation. The causes were multiple and complex, but as Carlo Fusaro has argued, populism played an important part.<sup>22</sup> Referendums in themselves can be seen as populist devices, used by leaders to bypass political elites and seek public endorsement for change. But as such, they can also be used to hit back at those selfsame leaders. In an anti-political age, moves by senior politicians to remove or weaken institutions that serve as a constraint on their own actions (however imperfect those institutions might be thought to be), can easily backfire. When brought to public attention, second chambers, as bodies which serve to constrain elected politicians, may appear surprisingly suited to the current anti-political mood.

In her interesting chapter, Priscilla Monge describes the French Senate as probably “the most criticised institution in the French fifth Republic”, but nonetheless an “incredibly effective political check”. The Senate may be seen as old-fashioned, but is also appreciated by the public as more independent and distant from the political parties. The same applies to the UK House of Lords, whose mode of composition polls show to be unpopular, while nonetheless demonstrating that the public believe the chamber is performing a valuable job – indeed, perhaps a better one than the

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<sup>20</sup> Maria Romaniello, *Bicameralism. Multiple Theoretical Roots in Diverging Practices*.

<sup>21</sup> David Kenny, *The Failed Referendum to Abolish the Ireland’s Senate: Defending Bicameralism in a Small and Relatively Homogenous Country*.

<sup>22</sup> Carlo Fusaro, *Constitutional Change and Upper Houses: the Italian Case*, Constitution Unit blog, 10 August 2018, available at <https://constitution-unit.com/2018/08/10/constitutional-change-and-upper-houses-the-italian-case/> [accessed 19 November 2018].

House of Commons.<sup>23</sup> In the most paradoxical poll of recent times, 72% of respondents agreed that “at least half of the members of the House of Lords should be elected so that the upper chamber of parliament has democratic legitimacy”; but 75% of this same group agreed that “the House of Lords should remain a mainly appointed house because this gives it a degree of independence from electoral politics and allows people with a broad range of experience and expertise to be involved in the lawmaking process”.<sup>24</sup> Such a result may suggest that the public are confused; but perhaps it also indicates that they recognise the conundrums at the heart of bicameralism – valuing both partisan elected politics and the tempering of it that a second chamber can bring.

One recent bicameral reform success story has sought to profit from the current antipolitical mood, albeit seemingly in a constructive manner. The Canadian Senate, which like the House of Lords is a wholly unelected body, has long been subject to demands for reform. But these have consistently faced some of the kinds of obstacles identified above – including constitutional rigidity, and the difficulty of finding an acceptable alternative (particularly due to the highly contested nature of Canadian territorial politics). Conservative Prime Minister Stephen Harper sought to delegitimise the Senate by refusing to exercise his power of appointment to replace retiring members. His opponent, Liberal Justin Trudeau, declared an ambition that the Senate should be a nonpartisan body, and in opposition expelled the Liberal senators from the party caucus. Since taking over the premiership in 2015 he has fully used his powers of appointment, but selected only non-partisan candidates – from names nominated by a newly-established Independent Advisory Board for Senate Appointments. By late 2018, 54 of Canada’s 105 senators were sitting as independents, and a further six were non-affiliated. Today the Senate proudly boasts that its members are “men and women of accomplishment and experience... business people and scientists, judges and teachers, athletes, community leaders and senior civil servants” who are “free to speak their minds and act on their consciences”.<sup>25</sup> This is an interesting, and daring, experiment by a Prime Minister – and its full effects remain to be seen.<sup>26</sup>

Yet more radical experiments are being discussed elsewhere. For example in Belgium some propose that the second chamber should be replaced with a body comprised of randomly selected citizens.<sup>27</sup> Like the independents in the Canadian Senate, their core function would be to act as a check on the partisan politicians in the first chamber, offering a distinct form of representation.

John Coakley wrote in 2014, primarily with reference to new democracies, of the ‘strange revival of bicameralism’.<sup>28</sup> But perhaps a bicameral revival in an age of antipolitics would not be strange at all? Second chambers fundamentally exist to challenge first chambers; and currently those chambers seem to be at a low point of popularity. Particularly in parliamentary systems, second chambers are often naturally more independent from the executive and political parties than the first chamber,

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<sup>23</sup> Russell at note 2.

<sup>24</sup> Populus poll for *The Times*, conducted 31 March – 2 April 2006, 752 respondents.

<sup>25</sup> <https://sencanada.ca/en/senators/> [accessed 16 November 2018].

<sup>26</sup> The developments in Canada were partially modelled on aspects of the UK system. In the UK a House of Lords Appointments Commission was established in 2000, among whose responsibilities was proposing independent members to serve in the chamber. But these ‘Crossbenchers’ while forming a large group, are well short of a majority. See Meg Russell, and Maria Sciarra, “Independent Parliamentarians En Masse: The Changing Nature and Role of the ‘Crossbenchers’ in the House of Lords.” *Parliamentary Affairs* 62, no. 1 (2009): 32-52.

<sup>27</sup> Pierre-Étienne Vandamme, Vincent Jacquet, Christoph Niessen, John Pitseys, and Min Reuchamps, “Intercameral Relations in a Bicameral Elected and Sortition Legislature.” *Politics & Society* 46, no. 3 (2018): 381-400.

<sup>28</sup> John Coakley, “The Strange Revival of Bicameralism.” *Journal of Legislative Studies* 20, no. 4 (2014/10/02 2014): 542-72.

upon whose confidence the executive relies. Their members may be more diverse, with longer experience and a greater 'hinterland' outside politics. Ironically, such chambers may benefit from the lack of harsh day-to-day media scrutiny that applies to first chambers, while those which are not directly elected may work hard to maintain public support. Their members may resort less often to political posturing, be less combative, and rely on more persuasive tools. Their lack of veto power may result in more evidence-based arguments, forcing difficult issues into the open, and requiring government responses on the public record. Today, in short, it may have become far easier to act as institutionalised critics of elected politicians, given that the public themselves subject such politicians to increasing criticism.

In this environment even seemingly "outdated" chambers such as the House of Lords can begin to seem oddly modish. Meanwhile the kind of ideas being promoted in Canada and Belgium return to the fundamentals of second chamber design – offering a potential new logic for bicameralism in a populist age. While the dominant form of representation in first chambers is party politics, contemporary sensitivities yearn for some alternatives. Bicameralism perhaps offers an opportunity to explore such routes, but in a complementary and constructive manner that avoids the threat of sweeping the whole system away.