

## Reform of the Second Chamber or Its Perpetuation? The Austrian Dilemma and Its Implications for the Italian Senate

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*Molte seconde Camere sono al giorno d'oggi incapaci, in misura diversa, di portare a termine la funzione ad esse assegnata di rappresentare gli interessi subnazionali. Il presente articolo si propone di verificare fino a che punto il Consiglio federale dell'Austria riesca a svolgere questo ruolo, sia a livello dell'applicazione formale delle regole costituzionali sia nella prassi politica ed istituzionale. L'altro obiettivo è quello di capire se l'esperienza austriaca possa essere utile per valutare la parabola del Senato italiano. A tale scopo, il presente contributo illustra in primo luogo l'assetto istituzionale della seconda Camera austriaca, soprattutto per quel che riguarda il ruolo degli enti intermedi nella nomina dei membri del Senato e la composizione di quest'ultimo. In secondo luogo, il contributo indaga i rapporti del Consiglio federale con gli organi legislativi ed esecutivi degli enti intermedi austriaci, i Länder. Si concentra poi sulle funzioni della seconda Camera correlate ai Länder, in particolare sulla partecipazione al processo legislativo. Questa analisi è funzionale a una valutazione complessiva dell'effettiva capacità del Consiglio federale di svolgere una funzione di rappresentanza degli interessi subnazionali, offrendo spunti di riflessione per la riforma costituzionale in corso in Italia.*

### **1. Introduction**

In comparing second chambers there seems to be little doubt that “with only a few exceptions, we search in vain for logical principles, general tidiness and comfortable regularities”<sup>1</sup>. In a similar vein, another observer has noted that “[t]he bicameral systems of the world have, in

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(1) M. BURGESS, *Comparative Federalism: Theory and Practice*, London and New York, Routledge, 2006, p. 206.

fact, little in common except the number two”<sup>2</sup>. Indeed, the house of Parliament that is directly elected by the people as a whole is typically denominated as the first chamber, while an additional chamber with another mode of appointment is usually the second one.<sup>3</sup> Apart from numbers, a comparative perspective certainly makes clear that, empirically, second chambers are as a rule more prevalent in federal systems and more powerful in countries with a presidential system of government<sup>4</sup>. On the other hand, of course, one of the more powerful second chambers is precisely that of Japan, featuring both a unitary and parliamentary system.

A closer inspection of the origins of bicameralism in federal systems reveals the reason behind the above-mentioned lack of logical principles and regularities. The very existence of a second chamber and its design are typically the outcome of power struggles rather than the result of deliberate theory-based planning. In other words, they form part of what William H. Riker called the federal “constitutional bargain”<sup>5</sup> between future national and subnational governments. For an analysis of second chambers, in particular of Austria’s Federal Council (*Bundesrat*), it seems vital to be aware of this pragmatism instilled at their founding. In hindsight, for instance, it is evident that the US Senate, serving later as a model for bicameralism in many other countries, was the result of the pragmatism underlying the so-called “Connecticut Compromise”. It simply was supposed to please the smaller states so that it seems today “rather muddleheaded to romanticize a necessary bargain into a grand

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(2) D. PINARD, *The Canadian Senate: An Upper House Criticized Yet Condemned to Survive Unchanged*, in: J. LUTHER, P. PASSAGLIA, R. TARCHI (eds.), *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*, Milan, Giuffrè, 2006, p. 460.

(3) There are certain exceptions to this rule like the Netherlands and Sweden before 1970, where the chamber appointed through elected in general popular elections is actually the second one (see S. PATTERSON, A. MUGHAN, *Senates and the Theory of Bicameralism*, in S. PATTERSON and A. MUGHAN (eds.), *Senates: Bicameralism in the Contemporary World*, Columbus: Ohio State University Press, 1999, p. 2.

(4) S. PATTERSON, A. MUGHAN, *Fundamentals of Institutional Design: The Functions and Powers of Parliamentary Second Chambers*, in *The Journal of Legislative Studies*, 7(1), 2001, p. 46.

(5) W.H. RIKER, *Federalism: Origin, Operation, Significance*, Boston, Little, Brown & Company, 1964, p. 1.

principle of democratic politics".<sup>6</sup> But this is precisely what occurred when the participation of subnational entities in the national legislative through a second chamber came to be declared an essential characteristic of federalism. As the United States and in the wake of it many other federal systems have adopted bicameralism, numerous eminent theorists have indeed regarded such an institution with the ambition to represent subnational interests as an indispensable hallmark of federal design<sup>7</sup>. Others have challenged this view<sup>8</sup>. Today, many second chambers in federal countries quite obviously fail to fulfil this representative function which they are, in (federal) theory, supposed to perform.<sup>9</sup> This paper seeks to explore whether Austria's Federal Council fulfils this function, both in terms of constitutional rules and their operation in practice, and what lessons, if any, may be learned from this experience for the Italian Senate. To this end, the contribution first outlines the second chamber's institutional design regarding subnational influence on the appointment of its members and its composition (section 2). Following this, the paper then explores the links of the Federal Council with both the legislatures and governments of Austria's subnational entities, the *Länder* (section 3). It then focuses on the *Länder*-related functions of the second chamber; above all, its participation in the national leg-

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(6) R.A. DAHL, *A Preface to Democratic Theory*, Chicago, University of Chicago Press, 1956, p. 112. The Federalist Papers even explicitly concede this bargain nature: "The equality of representation in the Senate is another point, which, being evidently the result of compromise between the opposite pretensions of the large and the small States, does not call for much discussion. (...) But it is superfluous to try, by the standard of theory, a part of the Constitution which is allowed on all hands to be the result, not of theory, but 'of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable.' (...) A government founded on principles more consonant to the wishes of the larger States is not likely to be obtained from the smaller States. The only option, then, for the former, lies between the proposed government and a government still more objectionable. Under this alternative, the advice of prudence must be to embrace the lesser evil." (Federalist No. 62).

(7) See, for instance, S.R. DAVIS, *The Federal Principle: A Journey through Time in Quest of a Meaning*, Berkeley, University of California Press, 1978, p. 142; P. KING, *Federalism and Federation*, London, Croom Helm, 1982, p. 44.

(8) An early critic was Walter Bagehot, who wrote about the necessity of bicameralism for federalism that "this doctrine has no self-evidence, and it is assumed, but not proved" (W. BAGEHOT, *The English Constitution*, Boston, Little Brown and Co., 1877), p. 162.

(9) See G. DORIA, *The Paradox of Federal Bicameralism*, in *European Diversity and Autonomy Papers*, 5, 2006, 1-41.

islative process (section 4). All this prepares the ground for a comprehensive evaluation of whether the Federal Council fulfils the aforementioned function to represent subnational interests of current reform proposals and possible implications for Italy.

In view of the above, it has to be clarified at the outset that Austria's second chamber is like many others the product of a pragmatic compromise. Similar to Jean-Jacques Rousseau and the protagonists of the French Revolution,<sup>10</sup> Hans Kelsen, the main architect of the Austrian Constitutional Act of 1920 (*Bundes-Verfassungsgesetz*, hereinafter B-VG), strongly believed that bicameralism would run contrary to the democratic idea which requires majority decisions of one single legislative body<sup>11</sup>. Even more importantly, on the political level the Social Democrats also had a clear penchant towards unicameralism or, at least, towards a very weak second chamber. They were opposed, in that regard, by the Christian Social Party, which had their political strongholds in the *Länder* outside Vienna and advocated a powerful institutional representation of subnational interests at the federal level.

Even if the Constitution, essentially negotiated between these two parties, nowhere mentions this representative role explicitly, it is self-evident from the Federal Council's organisation, which is, albeit weakly, linked to the *Länder*,<sup>12</sup> and its various functions related to the protection of the subnational autonomy against interference from the national level.<sup>13</sup> Moreover, the Constitutional Court held as early as in 1952 that the participation of the *Länder* in national legislation through the Federal Council is an essential part of Austrian federalism<sup>14</sup>. This means that national legislation must as a rule pass both chambers and that an abolition of the second chamber would require confirmation in a referendum. This is so because federalism, as entrenched above all in Article

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(10) See, for example, Article 6 of the 1795 French Constitution: *«La loi est la volonté générale, exprimée par la majorité ou des citoyens ou de leurs représentants»*.

(11) See H. Kelsen, *Allgemeine Staatslehre*, Berlin, Springer, 1925, p. 352.

(12) See below sections 2 and 3.

(13) See below section 4.

(14) VfSlg 2455/1952.

2 B-VG, is one of the primary constitutional principles.<sup>15</sup> Any abandonment of one of these principles or one of its key elements would qualify as a total revision and would thus need by virtue of Article 44(3) the approval in such a popular vote. According to the above-mentioned case law of the Constitutional Court, the involvement of the *Länder* in federal legislative process through the Federal Council, possibly instead of it through other equivalent channels<sup>16</sup>, is such a key element<sup>17</sup>.

## 2. *Appointment and composition*

As to the appointment of the Federal Council's members, the Austrian Constitution provided with the Article 35 B-VG clear and detailed indications. It does not follow, therefore, the example of neighbouring Switzerland, which leaves this organizational issue to the subnational level (Article 150(3) of the Swiss Constitution) and thus allows for inter-cantonal variation. In contrast to second chambers featuring mixed membership, with some representatives being indirectly elected by the people, others directly elected and still others nominated<sup>18</sup>, the members of the Federal Council are all appointed in the same manner. They are elected by the subnational legislature (*Landtag*) of "their" *Land* for the duration of their respective legislative periods and according to the principle of proportional representation. Thereby, at least one seat must be allocated to the second-placed party (Article 35(1) B-VG), even when it forms of a coalition government with the first-placed party. For the passive voting it is only mandatory to be eligible for this *Land* parliament, but not to be a member of it (Article 35(2) B-VG).

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(15) The other ones are the principles of democracy, republicanism, the rule of law, the separation of powers and fundamental rights.

(16) See below section 5.

(17) One could argue that the principle of federalism is not impaired, if the Federal Council were abolished, but replaced by other forms of *Länder* participation in federal legislation (see H. SCHÄFFER, *Alternative Modelle zur Wahrnehmung von Länderinteressen an der Bundesgesetzgebung*, in P. BUSSJÄGER and J. WEISS (eds.), *Die Zukunft der Mitwirkung der Länder an der Bundesgesetzgebung*, Vienna, Braumüller 2004, p. 54. For such alternative forms and their viability see below section 5.

(18) For an overview see R. BORTHWICK, *Methods of Composition of Second Chambers*, in *The Journal Of Legislative Studies*, 7(1), 2001, pp. 19-26.

These rules of appointment have several implications for relations with the subnational level. First, it is obvious that the requirement to only be eligible does allow for a double mandate, but does not promote it. In fact, double memberships are absolutely rare cases and members of the Federal Council, who were subsequently elected to a *Land* legislature, have typically resigned as members of the second chamber. Secondly, the composition of the Federal Council inevitably reflects the seat distribution between political parties in the respective *Land* parliament. In response to a challenge regarding the Land of Lower Austria, the Constitutional Court clarified in 2013 the election process according to the above-mentioned principle of proportionality (Article 35(1) B-VG). The constitutional requirement to observe this principle and to reserve at least one seat in the second chamber for the party second largest number of seats in the *Land* Parliament has entailed, in practice, that each party is entitled to nominate a certain number of candidates to be then formally elected, in other words rubberstamped, by the *Land* legislature as a whole. As to the nomination under the proportionality principle, the Constitutional Court held in the aforementioned ruling of 2013 that the ranking of parties in the Land Parliament according to the number of seats is decisive and not the number of votes. The latter are thus only relevant when two parties have the same number of seats<sup>19</sup>. Importantly, the party with the right to nominate in practice acts independently and without any prior debate in the plenary session of the *Land* parliament. A third major implication of appointment rules is that the composition of the Federal Council changes individually after each election of a new *Land* parliament.<sup>20</sup> In this regard, the second chamber differs significantly from the National Council (*Nationalrat*), the first chamber of parliament, which has a legislative period spanning from one Austria-wide popular election to another (Articles 26-27 B-VG). Even if this mode of appointment has been criticized for having done (too) little to safeguard the effective representation of subnational interests, this must not hide the fact that the current Austrian constitutional

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(19) VfSlg 19.782/2013.

(20) Such elections take place according to the *Land* Constitutions every five or six years.

framework would already allow for an improvement in this regard. It would not pose a legal obstacle, for instance, to the election of members of the respective *Land* parliament, typically more influential, to the Federal Council. This was actually demanded first in 1995 by some members of the second chamber itself and then by leading figures of the main opposition parties in the mid-2000s<sup>21</sup>. But in contrast to other federal systems like Belgium such a form of double mandate was never realized. First, there were at that time certain legal obstacles because two *Land* Constitutions prohibited double mandates<sup>22</sup>. Much more importantly, however, the proposal failed to find the support of the political majority and thus fell victim, more generally, to the inertia resulting from lacking incentives to reform the second chamber<sup>23</sup>.

The above-mentioned rules about the appointment say nothing, of course, about how many members the Federal Council is composed of. From a comparative point of view, there are again a great number of models, which may tend towards arithmetic representation or geometric representation<sup>24</sup>. According to the first option, which was part of the above-mentioned “Connecticut Compromise” in the United States<sup>25</sup> and then adopted by other countries, all subnational entities shall have, in a symmetrical manner, the same number of votes. Of course, this inevita-

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(21) H. SCHÄFFER, *Reformperspektiven für den Bundesrat*, in *Journal für Rechtspolitik*, 15, 2007, p. 14.

(22) These were the Constitutions of Burgenland and Carinthia (see W. LABUDA, *Die Zusammensetzung des Bundesrates: Vorbilder für eine Länderkammer*, in H. SCHAMBECK (ed.), *Bundesstaat und Bundesrat in Österreich*, Vienna, Verlag Österreich, 1997, p. 350).

(23) See below section 5.

(24) See A. GAMPER, A “Global Theory of Federalism”: The Nature and Challenges of a Federal State, in *German Law Journal*, 6, 2005, p. 1315.

(25) Despite being the result of bargaining and compromise (see also the quote in footnote 6), arithmetic representation was later justified by the Federalist Papers additionally with certain arguments about its presumed advantages: “In this spirit it may be remarked that the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty. ... Another advantage accruing from this ingredient in the constitution of the Senate is the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the States. It must be acknowledged that this complicated check on legislation may in some instances be injurious as well as beneficial.” (Federalist No. 62).

bly leads from the perspective of the “one person, one vote” principle to a more or less strong bias in favour of smaller subnational entities. A senator from California, for instance, represents roughly 65 times more citizens than one from Wyoming<sup>26</sup>. This bias has been considered in many cases, such as the creation of relatively small States in the North-east of India, as unacceptable to larger subnational units. As a result, most federal systems have introduced, starting with the German Empire in 1871, the population size of subnational entities, the “democratic factor”, as an intervening variable. In other words, subnational representation is shifted from “one unit, one vote”, to different extents, towards “one person, one vote”, albeit without ever fully realizing the second principle. Austria is an example of such an asymmetrical geometric representation, as the number of members of a *Land* in the Federal Council differs according to its population. The Austrian Constitution stipulates that the *Land* with the largest number of citizens shall elect 12 members and that the smaller entities proportionately less members (Article 34(1-2) B-VG). Thereby, the *ratio* between number of nationals in each Land as compared to that with the highest number is determined by the Austrian President every ten years following a national census (Article 34(3) B-VG). At present, the total of 61 members of the Federal Council is elected as follows: Burgenland (3), Carinthia (4), Lower Austria (12), Upper Austria (10), Salzburg (4), Styria (9), Tyrol (5), Vorarlberg (3) and Vienna (11).

### 3. *Links with the Länder*

As to links between the Federal Council and the legislature of the respective *Land*, there is not much more to refer to than the above-mentioned process of appointment. What is lacking completely are any ties in terms of instructions and/or accountability. In concrete terms, the members of the Federal Council are like those of the National Council explicitly “bound in the exercise of their function by no mandate.” (Article 56(1) B-VG) Even if they completely fail to represent the interests of the *Land* whose parliament once elected them, there is no possibil-

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(26) For various examples see R.L. WATTS, *Federal Second Chambers Compared*, in *federalismi.it*, 2006, pp. 4-8.



ity of a recall. Furthermore, they do not have to report back to the sub-national legislature. Similar to the above-mentioned situation regarding the appointment, the Austrian Constitution would actually provide certain opportunities to establish links. Again, however, it depends on the political will whether they are seized or not. To be sure, recent years have witnessed cautious attempts of at least some subnational entities, like Styria or Tyrol, to better connect members of the Federal Council with the respective *Land* parliament by granting them the right to participate in an advisory capacity in session of “their” subnational legislature. Otherwise, the only difference to a normal citizen attending a public session of the *Land* parliament is that a member of the second chamber has a guaranteed seat and that his/her presence is noted in the minutes. Likewise, there would be no constitutional obstacles to a system of institutionalized reporting, which so far was not implemented, however, in any part of the country<sup>27</sup>.

With regard to relations between the Federal Council and the executive of the respective *Land*, Austria differs fundamentally from neighbouring Germany. To be sure, the German model of *Länder* delegations with imperative mandate has been controversially discussed in Austria as well. Some have indeed endorsed in more vague terms the ideas of a second chamber composed of the true political elite of the *Länder*<sup>28</sup>. Possible candidates would include, above all, government members themselves or the *Länder* administrations’ chief officers (*Landesamtsdirektoren*). Yet, many opponents fear that the adoption of the German model or a similar one would lead to de-parliamentarization which sees the executive branch being strengthened at the expense of the legislative branch. In part, however, these concerns seem to miss the mark. First, it should be admitted that such an increasing predominance of the executive already is the current constitutional reality, with the Con-

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(27) See H. SCHÄFFER, *Alternative Modelle zur Wahrnehmung von Länderinteressen an der Bundesgesetzgebung*, in P. BUSSJÄGER and J. WEISS (eds.), *Die Zukunft der Mitwirkung der Länder an der Bundesgesetzgebung*, Vienna, Braumüller, 2004, p. 44.

(28) See R. WALTER, *Der Bundesrat zwischen Bewährung und Neugestaltung*, in H. SCHÄFFER and H. STOLZLECHNER, *Reformbestrebungen im österreichischen Bundesstaatssystem*, Vienna, Braumüller, 1993, pp. 41-50.

ference of the *Länder* Governors (*Landeshauptleutekonferenz*) acting as the primary representation of subnational interests.<sup>29</sup> Secondly, the criticism of de-parliamentarization appears to insinuate a lack of democratic legitimacy. But this fails to recognize that the current members of the Federal Council enjoy exactly to the same extent only indirect popular legitimation as the *Länder* executives do. Both are elected by the respective subnational legislature. According to Article 101 B-VG, the parliament of a *Land* elects the government, that is, the Governor and additional members (*Landesräte*). Similar to the Federal Council, members of the subnational executive do not have to be members of the *Land* Parliament, but only eligible to it. Given the prevalent opposition to the German model and other more ambitious reform proposals, one should explore more realistic options. In this respect, the current constitutional framework would provide ample scope to intensify relations with the *Länder* executives. For example, the above-mentioned appointment rules offer the possibility for members of a *Land* government to be at the same time a member of the Federal Council. Such a double mandate may only be prohibited by incompatibility rules in the respective *Land* constitution. As a matter of fact, there was an initiative of Josef Krainer, the Governor of Styria, to convince with his membership in the second chamber (1965-1968) other governors to follow his example and thus give the institution more weight<sup>30</sup>. These attempts, however, have remained futile. Another option for stronger ties is to involve members of the Federal Council in the drafting of opinions of the *Länder* governments concerning federal legislation<sup>31</sup>. This has occurred, albeit to different extents. Conversely, there have been attempts of the Federal Council to inform the subnational entities about their activities, for example, by making them aware, well in advance, of the agenda

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(29) See below section 5.

(30) G. GLANTSCHNIG, *Der Bundesrat und das Verhältnis zu den Landesparlamenten und Landesregierungen*, in P. BUSSJÄGER and J. WEISS (eds.), *Die Zukunft der Mitwirkung der Länder an der Bundesgesetzgebung*, Vienna, Braumüller 2004, p. 20.

(31) See H. SCHAMBECK, *Von der Bedeutung des Bundesstaates und Bundesrates in Österreich*, in H. SCHAMBECK (ed.), *Bundesstaat und Bundesrat in Österreich*, Vienna, Verlag Österreich, 1997, p. 581.

of its sessions. But the most notable, and constitutionally entrenched, instrument of linking the second chamber with the *Länder* executives is the extension of the governors' right to speak in the Federal Council. Since a reform in 1996 "they have at their request always the right to be heard on business relating to their Land" (Article 36(4) B-VG)<sup>32</sup>. This business exceeds the scope of merely the subnational competences and includes all matters which have an impact on the *Land*. In reality, of course, this formal right has been hardly used because the powerful *Land* governors feel no need to address the members of a relatively weak institution. And if they wished to speak in the Federal Council even before 1996, it had not very difficult for them to find an appropriate item on the agenda.

#### 4. *Functions*

##### 4.1. *Participation in the Federal Legislative Process*

As mentioned above, the involvement of Austria's second chamber in the adoption of federal legislation is like in the case of other countries its main function. Nevertheless, participation of the *Länder* in law-making at the national level does not always occur through the Federal Council. Sometimes the *Länder* themselves are involved. The Austrian Constitution indeed prescribes for several cases<sup>33</sup> a direct approval of the subnational entities, which is usually granted or withheld by their governments in accordance with their own constitutions. Much broader in its scope are intergovernmental agreements according to Article 15a B-VG. Since the introduction of this provision in 1974, these accords may be concluded horizontally between the *Länder* or vertically between them and the federal government. Many of these agreements are about the adoption of federal legislation so that they may be considered as a part of subnational participation in this process. Importantly, however, they are according to the case law of the Constitutional Court

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(32) This is specified by § 38(3) of the Standing Orders of the Federal Council, GOBR BGBl 1996/50.

(33) See Articles 14b, 102(1 and 4) and 129a(2) B-VG.

not self-executing<sup>34</sup> and thus have to take, afterwards, the normal path of law-making through the National Council and the Federal Council. If in this long procedure the *Länder* wish to have an impact on the content, they typically attempt to achieve it immediately through the government concluding the accord rather than, at a later stage, through the Federal Council. Another opportunity for direct involvement of the subnational entities in the federal legislative process is provided by the so-called consultation mechanism, which is based on a constitutional law<sup>35</sup> from 1998 and a three-level agreement concluded the following year on the basis of the aforementioned Article 15a B-VG<sup>36</sup>. If the national or subnational government plans to pass a law or by-law entailing financial obligations for another government level, the matter may be relegated upon the request of one of the parties to a tripartite consultation committee. In default of a consensus within this body, the party considering the law and by-law is also responsible for its financing. Even though this mechanism is per definition focused on consultation, it is nonetheless a potentially powerful instrument. In light of the fact that negotiations in the tripartite consultation committee have been hardly ever initiated, the significance lies mainly in the preventive function of pressuring the legislator concerned towards a revision of the draft law or by-law. This has actually really occurred in several cases<sup>37</sup>. The consultation mechanism, of course, is a form of functional participation by the *Länder* directly, which must be distinguished from their institutional participation through the Federal Council.

While these possibilities of direct functional participation may tempt the reader to assume a significant role of the *Länder*, their effects have been countered, and largely offset, by a consensual political culture. On the

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(34) VfSlg 9581/1982; 9886/1983.

(35) BGBl I 1998/61.

(36) The agreement involves three levels of government because it was concluded by the national government, the *Länder* and the Austrian Association of Cities and Towns and the Austrian Association of Municipalities representing the interests of local governments.

(37) See P. BUSSJÄGER, *Die Instrumente der Mitwirkung der Länder an der Bundesgesetzgebung in Theorie und Verfassungswirklichkeit*, in P. BUSSJÄGER and J. WEISS (eds.), *Die Zukunft der Mitwirkung der Länder an der Bundesgesetzgebung*, Vienna, Braumüller 2004, pp. 9-10.

other hand, the federal government has often got its way in important matters by wielding political power or in the past, when broad coalition governments could still do so<sup>38</sup>, by “overruling” the *Länder* through the use of constitutional provisions<sup>39</sup>. As to the specific case of the intergovernmental agreements according to Article 15a B-VG, these have met criticism mainly for requiring too cumbersome procedures. An interesting proposal is therefore the possibility for these accords to be self-executing, that is, to create directly applicable law<sup>40</sup>. Paradoxically, but somewhat typical of Austria’s weak bicameralism, such a reform would strengthen the participation of the *Länder* and, at the same time, weaken the Federal Council as their presumed representation at federal level. As far as institutional participation through the second chamber is concerned, the Federal Council has, from a comparative perspective, quite limited powers. It hardly comes as a surprise then that Austria has been classified in an analysis, which subdivided the continuum between perfect and imperfect bicameralism into five categories, merely in the fourth category that implies functions restricted to delaying legislation and to assuming an advisory role.<sup>41</sup> The following explanations regarding the constitutional framework and established practice will demonstrate that it even seems doubtful whether it is able to exercise these two functions to any meaningful degree. From a systematic point of view, the Federal Council’s participation in national legislation essentially covers three stages, namely the initiation of such legislation, its adoption and, if the chamber deems it unconstitutional, the challenge of laws

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(38) Constitutional amendments merely require the explicit identification as such plus a positive vote in the National Council, in the presence of at least half the members and a two thirds majority of the votes cast (Article 44(1) B-VG). Over much of the post-war history, governing coalitions easily had such a comfortable two-thirds majority.

(39) See P. BUSSJÄGER, *Die Instrumente der Mitwirkung der Länder an der Bundesgesetzgebung in Theorie und Verfassungswirklichkeit*, in P. BUSSJÄGER and J. WEISS (eds.), *Die Zukunft der Mitwirkung der Länder an der Bundesgesetzgebung*, Vienna, Braumüller 2004, pp. 10-11.

(40) H. SCHÄFFER, *Reformperspektiven für den Bundesrat*, in *Journal für Rechtspolitik*, 15, 2007, p. 20.

(41) See S. PATTERSON and A. MUGHAN, *Fundamentals of Institutional Design: The Functions and Powers of Parliamentary Second Chambers*, in *The Journal of Legislative Studies*, 7(1), 2001, p. 42. The five categories are in descending order regarding powers the following: “Co-equal with Lower House”, “Co-equal with Restrictions”, “Limited Exclusive Powers, Veto”, “Delay and Advisory” and “Subordinate to Lower House”.

before the Constitutional Court. As to starting the process of law-making, Article 41(1) B-VG foresees that the Federal Council or even only one third of its members may submit legislative proposals to the National Council. In parliamentary practice, however, the second chamber makes hardly use of this right, as the bulk of draft laws is introduced by the federal government. After the completion of the legislative process, one third of the members of the Federal Council may request the Constitutional Court to review a piece of federal legislation (Article 140 B-VG). Compared to these two provisions, subnational participation regarding the adoption of bills is of course much more crucial.

With only few exceptions, ordinary draft laws indeed have to pass both chamber of parliament, usually from the National Council to the Federal Council<sup>42</sup>. Among the bills, which are expressly not subject to a vote of the Federal Council, are the Standing Orders of the National Council and draft legislation regarding federal assets and, most notably, the federal budget (Article 42(5) B-VG). Even if the second chamber's vote is thus mandatory in almost all cases, its *quorums* and consequences vary considerably. Unless otherwise provided in the B-VG or in the Standing Orders, the Federal Council's decision-making requires the presence of at least one third of the members and an absolute majority of the votes cast (Article 37(1) B-VG). If an objection is raised, the National Council may usually overrule it with a majority decision in the presence of at least half of its members (Article 42(1-4) B-VG).

Yet, there are some exceptions to this main system of a merely suspensive veto. In certain cases, the Federal Council enjoys an absolute veto because its objection may not be overruled by the National Council<sup>43</sup>. This holds true, for example, for any amendments of Articles 34 and 35 B-VG, which pertain to the appointment and composition of the Federal Council and require, because of the particular interest in these issues, beyond the above-mentioned normal *quorums* a majority of the members from at least four *Länder* (Article 35(4) B-VG). Another signifi-

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(42) The federal legislative procedure is regulated in Articles 41-49 B-VG.

(43) For an overview of these exceptions see P. BUSSJÄGER, *Die Zustimmungsrechte des Bundesrates*, Vienna, Braumüller, 2001.

icant special case concerns constitutional amendments curtailing legislative or executive powers of the *Länder*. Again, explicit approval must be granted with special *quorums*, namely a two-thirds majority of the votes cast with half of the Federal Council's members being present (Article 44(2) B-VG). This provision was only introduced in 1984 upon explicit demand by the *Länder* in 1976. While the Federal Council's absolute veto in these two cases relates to constitutional amendments, there are few other provisions that concern other sources of law. The approval of the second chamber is needed, for instance, in case of federal framework laws requiring the *Länder* to implement them within an exceptionally short or exceptionally long period (Article 15(6) B-VG) and for international treaties regarding competences of the *Länder* (Article 50(2) B-VG). Yet, these special provisions are of rather little practical relevance.

Upon closer scrutiny, even the two absolute vetoes concerning constitutional law turn out, like the normal suspensive veto, to have very limited political impact. This is not to contest possible preventive effects that it might have<sup>44</sup>, however difficult they are to verify. But the immediate effects are without doubt rather minimal. Similarly, the second chamber since 1945 has, on average, only used its suspensive veto in roughly three cases per year, with the vast majority of them being then overruled. Over the decades, the practice of objection has been subject to immense fluctuations, depending, as we shall see below, on whether there were divergent majorities in the two chambers or not. In the last years, for example, the instrument of the suspensive veto has fallen again into complete disuse<sup>45</sup>. Moreover, it has then been overruled in the vast majority of these cases. But even in the quite rare instances in which the Federal Council actually raised objections, the latter were mostly unrelated to interests of the *Länder*. An overview of the reasons indicated by objections over decades, indeed, demonstrates that they frequently do not

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(44) See P. BUSSJÄGER, *Die Instrumente der Mitwirkung der Länder an der Bundesgesetzgebung in Theorie und Verfassungswirklichkeit*, in P. BUSSJÄGER and J. WEISS (eds.), *Die Zukunft der Mitwirkung der Länder an der Bundesgesetzgebung*, Vienna, Braumüller, 2004, p. 9.

(45) See INSTITUT FÜR FÖDERALISMUS, *17. Bericht über die Lage des Föderalismus in Österreich (1992)*, Vienna, Braumüller, 1996, p. 31.

refer at all to such interests<sup>46</sup>. Instead, they are often based on general grounds such as concerns regarding excessive financial burdens for taxpayers, constitutionality or economic sense. In other instances, disputes within the Federal Council about whether to put a suspensive veto or not appear to have damaged its reputation and weakened it further. This was the case of a 2003 budget-related bill (*Budgetbegleitgesetz*), regarding to which there was in the second chamber neither sufficient support nor a sufficient number of representatives to lodge an objection. After a scholarly debate on whether a bill would become a law in these circumstances<sup>47</sup>, the Constitutional Court answered this question in the affirmative<sup>48</sup>. As to the absolute veto on constitutional amendments restricting subnational competences, one might expect that it is effectively used in consultation with the *Länder*. In practice, however, the Federal Council has been reluctant to use this right. Quite the contrary, it has between the entry into force of Article 44(2) B-VG in 1985 and the end of 2014 given its consent in an exceptionally high number of cases. In numerical terms, the second chamber has in this period approved amendments curtailing *Länder* powers, including both entire constitutional laws and single provisions with constitutional rank in ordinary laws, in as many as 257 cases<sup>49</sup>. Moreover, there are several glaring examples from the practice of the second chamber that epitomize its reluctance to make use of the absolute veto. It failed to lodge it, for instance, against a 1996 draft law concerning politicians' salaries, even though the bill was fiercely opposed by several *Länder*. Even more importantly, the Federal Council rubberstamped all constitutional amendments necessary for Austria's accession to the EU, even though the reform of the federal sys-

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(46) See F. ERMACORA, G. BAUMGARTNER and G. STREJCEK, *Österreichische Verfassungslehre*, Vienna, Verlag Österreich, 1998, p. 285.

(47) See C. GRABENWARTER, *Bundesrat: Wenn Anträge keine Mehrheit finden*, in *Journal für Rechtspolitik*, 2003, pp. 155-160; T. ÖHLINGER, *Die Selbstblockade des Bundesrates*, in *Journal für Rechtspolitik*, 2004, pp. 11-12; C. GRABENWARTER, *Anträge ohne Mehrheit: keine Selbstblockade des Bundesrates*, in *Journal für Rechtspolitik*, 2004, pp. 13-14.

(48) VfSlg 17.173/2004.

(49) See INSTITUT FÜR FÖDERALISMUS, *17. Bericht über die Lage des Föderalismus in Österreich (1992)*, Vienna, Braumüller, 1996, p. 31.



tem, promised in this context by the federal Government in a political agreement<sup>50</sup>, was never carried out.

Small wonder, in this light, that the Federal Council's role in the federal legislative process has been the subject of numerous reform proposals. Particularly interesting seem suggestions that aim to improve not only the suspensive and absolute veto procedures separately, but also reconsider their relation to each other. In 2005, for instance, the Austrian President Heinz Fischer endorsed amendments, according to which the Federal Council should focus rather on the most crucial topics, but have concerning these, at the same time, more weight<sup>51</sup>. In concrete terms, he proposed that the today utterly ritualized suspensive veto procedure should be set in motion only upon demand of a third of the representatives. At the same time, the absolute veto of the second chamber should be extended to the crucial Fiscal Equalization Law (*Finanzausgleichsgesetz*)<sup>52</sup> and to all constitutional amendments. It should therefore cease to be limited, as currently, to those amendments concerning the Federal Council itself or those limiting competences of the *Länder*. Also innovative seem considerations to not limit the ritualized and largely ineffective suspensive veto procedure but to improve it. For example, one might introduce a qualified majority for decisions of the National Council to overrule an objection or a flexible majority that is bound to the level of support for the objection. A suspensive veto supported by 70% of the Federal Council would then require the first chamber to rally the same percentage of its members behind a decision to overrule<sup>53</sup>.

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(50) On the so-called "Perchtoldstorfer Paktum" see below section 5.

(51) See the analysis in H. SCHÄFFER, *Reformperspektiven für den Bundesrat*, in *Journal für Rechtspolitik*, 15, 2007, pp. 18-19.

(52) This ordinary law, which at present cannot be vetoed by the Federal Council, regulates, for a period of four years, the allocation of taxation powers between the national level, the *Länder* and the municipalities. In doing so, it is only bound by certain principles and abstract types of taxation competences (exclusive, shared, etc.), as established in the Fiscal Constitutional Law of 1948 (*Finanz-Verfassungsgesetz*, F-VG). One of these principles is the duty of the federal legislator to consider the fiscal performance capacities of each *Land* (§ 4 F-VG).

(53) H. SCHÄFFER, *Alternative Modelle zur Wahrnehmung von Länderinteressen an der Bundesgesetzgebung*, in P. BUSSJÄGER and J. WEISS (eds.), *Die Zukunft der Mitwirkung der Länder an der Bundesgesetzgebung*, Vienna, Braumüller, 2004, pp. 58-59.

Other problematic features of the Federal Council's legislative participation are more technical, but equally contribute to the weakness of this institution. According to the prevailing view of scholars and established parliamentary practice, the Federal Council may only put its veto on a draft law as a whole and not on specific parts of it. In times of an increasing trend towards omnibus bills, this rule has become a more and more serious problem<sup>54</sup>. Not only are the members of the second chamber often under immense time pressure in reviewing a very comprehensive and complex bill. They also face the risk, through the linking of often disparate issues in one and the same bill, in case of an objection, to be blamed for the failure of the entire legislative project, even if they actually oppose only parts of it. Another issue is time limit for the suspensive veto, which the Federal Council must put within eight weeks upon receipt of the bill (Article 42(3) B-VG). It is evident that such a short period makes it often very difficult, in view of omnibus bills, to make well-founded objections and even more to consult also the *Länder* and, possibly, local governments in this process. While there do not appear to be serious efforts to tackle this problem, several observers have recently pointed to an earlier participation of the Federal Council in the legislative procedure as a both important and realistic reform option<sup>55</sup>. More concretely, this could include, for instance, its involvement in consultations regarding a bill within the committees of the National Council or that a bill would be tabled simultaneously in both chambers.

#### 4.2. *Secondary functions*

There may be little doubt that the participation in the process of federal law-making is both the historically primary and today most central function of Austria's second chamber<sup>56</sup>. This is illustrated not least by the structure of the B-VG, as the provisions addressing the Federal Coun-

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(54) *Ivi*, pp. 59-60.

(55) See G. HOLZINGER, *Der österreichische Bundesstaat und seine Reform*, in M. AKYÜREK, G. BAUMGARTNER, D. JAHNEL, G. LIENBACHER and H. STOLZLECHNER (eds.), *Staat und Recht in europäischer Perspektive*, Vienna and Munich, Manz and C.H. Beck, 2006, p. 289.

(56) See above section 1.

cil, mostly its organization<sup>57</sup>, are the Articles 34-37 and thus form part of Chapter Two “Federal Legislation”. Nonetheless, it is important to underline that the competences of the second chamber reach beyond that. The potentially most significant one among these secondary functions is its role in the EU decision-making process, which it was accorded through constitutional amendments in 1992 and 1994<sup>58</sup>. According to the new Article 23e(1) B-VG “[t]he competent Federal Minister shall without delay inform the National Council and the Federal Council about all projects within the framework of the European Union and afford them opportunity to vent their opinion.” If EU legislation under discussion would require the enactment in Austria of federal constitutional law that limits the competences of the *Länder*, this needs to be approved by the Federal Council according to Article 44(2)<sup>59</sup>. In this case, the competent federal minister “may deviate from such comment in negotiations or voting in the European Union only for compelling international and foreign political reasons.” (Article 23e(4) B-VG). Even if these two provisions might suggest a powerful role of the second chamber, constitutional reality again provides a different picture. In practice, Article 23e(4) B-VG has never been applied, although the *Länder* often complain about the loss of powers triggered by European integration. Moreover, if Austria’s subnational entities seek to influence EU decision-making, then the Federal Council is not their primary channel. Formally, there exists for the purpose of coordinating positions and drafting joint opinions the Integration Conference of the *Länder* (*Integrationskonferenz der Länder*) with the President of the Federal Council being allowed to attend its session, but not to actively participate in them<sup>60</sup>. Mainly due to its cumbersome procedures, how-

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(57) The provisions concerning the functions are in an unsystematic way scattered all over the constitution.

(58) For an overview and a comparison with Germany see J. WOELK, *A Place at the Window: Regional Ministers in the Council*, in R. TONIATTI, F. PALERMO, M. DANI (eds.), *An Ever More Complex Union: The Regional Variable as a Missing Link in the EU Constitution?*, Baden-Baden, Nomos, 2004, pp. 117-141.

(59) See above section 4.1.

(60) H. SCHÄFFER, *Alternative Modelle zur Wahrnehmung von Länderinteressen an der Bundesgesetzgebung*, in P. BUSSJÄGER and J. WEISS (eds.), *Die Zukunft der Mitwirkung der Länder an der Bundesgesetzgebung*, cit., p. 54.

ever, this forum is hardly used in practice so that opinions of the *Länder* regarding European integration are typically formulated by the powerful Conference of *Land* Governors.

Apart from federal legislation and EU decision-making, the Federal Council is assigned additional functions, most of which have little practical relevance and rather pertain to exceptional situations. Together with the first chamber, it constitutes the Federal Assembly (*Bundesversammlung*), which, among other things, has the power to declare war and certain functions concerning the President of Austria (Articles 38-40 B-VG). Moreover, the second chamber is also responsible for the legal, political, and financial control of the national government and involved in certain appointment procedures. While the Federal Council is paradoxically not allowed to appoint its own President<sup>61</sup>, it nominates the members of certain institutions whose activities pertain to both the national and subnational levels of government. It is entitled to suggest, for instance, to the Austrian President the appointment of three out of twelve judges of the Austrian Constitutional Court (Article 147 B-VG). By contrast, Article 148g(2) and Article 122(4) B-VG, respectively, reserve to the National Council the nomination of the three-person ombudsman board (*Volksanwaltschaft*) and of the President of the Public Audit Office (*Rechnungshofspräsident*). The exclusion of the Federal Council regarding these institutions has been criticized, like the non-involvement since 1929 concerning appointments to the Administrative Court, as being inconsistent with federalism<sup>62</sup>. After all, each of the aforementioned institutions has competences which relate as much to the *Länder* as to the national level.

#### ***4.3. Relations with First Chamber and the Impact of Party Politics***

With regard to the above-mentioned responsibilities, both the Federal Council participation in the legislative process and its secondary functions, it is essential to take into account the relations with the Nation-

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(61) Article 36(2) B-VG prescribes that the position of the president rotates between the groups from each *Land* on a biannual basis.

(62) See, for example, the proposals made by the Austrian President Heinz Fischer in 2005, analyzed in H. SCHÄFFER, *Reformperspektiven für den Bundesrat*, in *Journal für Rechtspolitik*, 15, 2007, pp. 18-19.

al Council and the party political dynamics that shape these relations. From a constitutional point of view, the links between the two chambers are few. They exist primarily through the permanent joint committee regarding *Länder* tax bills rejected by the federal Government (§ 9 of the Fiscal Constitutional Law of 1948) and the above-mentioned Federal Assembly. As mentioned above, main functions of this joint convention, which brings together the members of both houses of Parliament, relate to exceptional situations rather than everyday politics. Most importantly, the Federal Assembly is not involved in any way in the vote of no confidence. This remains an exclusive prerogative of the National Council (Article 74 B-VG). An interesting reform proposal towards stronger ties is the establishment of a Standing Committee of the Federal Council, similar to the Main Committee of the National Council (Article 55 B-VG). This board would then be supposed to interact with the first chamber in a more continuous and effective way, above all in the process of drafting legislation.

While points of contact between the chambers are thus only few from a constitutional perspective, relations are obviously close, even too close, in terms of party politics. This is partly due to a certain convergence of the composition that is linked to the respective electoral systems. The above-mentioned method of appointing the members of the Federal Council<sup>63</sup> entails a proportional reflection of the overall strength of parties in all *Länder* taken together. The rules for elections to the National Council result in a chamber that reflects, similarly in a proportional manner, the strength of parties throughout the country (Article 26 B-VG). In concrete terms, there are electoral districts at three levels (39 regional, nine *Länder* and one federal district) with seats being allocated according to the D'Hondt method<sup>64</sup>. The convergence and closeness between both chambers of the Austrian Parliament is, for example, epitomized by the fact that seating arrangements in the Federal Coun-

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(63) See above section 2.

(64) For an analysis of the National Council's system of proportional representation in comparative perspective see K. KÖSSLER, *Die Gerechtigkeit der Verhältniswahl zwischen Anspruch, Wirklichkeit und verfassungsgerichtlicher Beurteilung*, in A. GAMPER (ed.), *Entwicklungen des Wahlrechts am europäischen Fallbeispiel* (Vienna and New York: Springer, 2010), pp. 257-280.

cil do not follow the division of the members into *Länder* delegations, but their party affiliation. Moreover, each party's representatives in both chambers have since the times of the First Republic (1919-1934) formed one single parliamentary group. If there only was the political will to do so, this could, of course, be changed easily by a simple amendment of the Standing Orders. Most importantly, party affiliation is also decisive for voting behaviour in the Federal Council, even if representatives of a *Land* like Vorarlberg are traditionally more focused on subnational interests than those of others. A particularly glaring example of party politics was the practice to expressly foresee in coalition agreements that representatives of the governing parties in the Federal Council may not deviate in their voting from those of the National Council<sup>65</sup>. Paradoxically, the above-mentioned freedom from instructions of the *Länder* is thus perverted because the free mandate became restricted through coalition agreements. This has entailed, for instance, that from the mid-1990s onwards the Federal Council did not put a single suspensive veto for roughly a decade. That situation only changed when in autumn 2005 two opposition parties, the Social Democrats and the Green Party, achieved after several *Länder* elections a narrow majority in the Federal Council. Until a grand coalition with majorities in both chambers took over in early 2007, objections were for this short period of little more than a year raised quite frequently. Again, however, these suspensive vetoes were as tools of the opposition mostly motivated by party political grounds rather than by the representation of subnational interests. More generally, it seems likely that the near future will witness an increase of party political vetoes because the decline of the two main parties, the Social Democrats and the conservative Austrian People's Party, has made the party system overall more fragmented and volatile at both the national and subnational levels. The thus growing probability of divergent majorities in the two houses of Parliament contrasts starkly with most of the post-war period, when there used to be grand coalitions formed by the two above-mentioned main parties. These times were characterized by greater harmony between the chambers, due in

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(65) See G. HUMMER, *Der Bundesrat und die Gesetzgebung*, in H. SCHAMBECK (ed.), *Bundesstaat und Bundesrat in Österreich*, Vienna, Verlag Österreich, 1997, pp. 374-375.

particular to a conservative predominance in the *Länder* and, as a consequence, in the Federal Council with the Austrian People's Party being at the same time part of most coalition governments.

### 5. *A comprehensive evaluation: problems and (attempted) reforms*

The preceding sections have demonstrated that the record of the Federal Council regarding the representation of subnational interests is not very impressive, to say the least. This gap between an aspiration of federal theory and federal practice is something shared with many other second chambers, to a much lesser degree even with the US Senate. Even though James Madison famously claimed in his *ex post* justification of the 1787 constitutional compromise that the Senate “will derive its powers from the States as political and coequal societies”<sup>66</sup>, the chamber did not actually develop into an institution representing states interests<sup>67</sup> and was probably never supposed to do so<sup>68</sup>. Madison's depiction of the Senate as stronghold of State interests seems inconsistent with several constitutional rules that disfavour such a role. Cases in point are the removal of the pre-existing imperative mandate and recall, which overall weakened the links between the States and their alleged representatives at the federal level. In the Austrian case, constitutional rules have similarly failed to institutionally and procedurally connect the subnational entities with the second chamber. This failure was not unintentional, but a deliberate political decision in 1920, which has not been corrected ever since.

But this is, of course, only part of the truth about the Federal Council's malfunctioning as a representation of subnational interests. A formalistic perspective focused exclusively on the constitutional framework would be unable to reveal the other part of it. This is so because such a point of view would exclude the crucial (party) political dimension. The

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(66) Federalist n. 10.

(67) See S. PATTERSON, A. MUGHAN, *Senates and the Theory of Bicameralism*, in S. PATTERSON, A. MUGHAN (eds.), *Senates: Bicameralism in the Contemporary World*, Columbus: Ohio State University Press, 1999, p. 11.

(68) See G. DORIA, *The Paradox of Federal Bicameralism*, in *European Diversity and Autonomy Papers*, 5, 2006, pp. 19–26.

weak role of the second chamber, and the only partly legal reasons for that, were even “officially” and quite explicitly recognized by the Austrian Convention on constitutional reform (Österreich-Konvent), which was in place from 2003 until 2005. Its report emphasized the consensus of the convention that a reform of the Federal Council would be particularly urgent because the institution “is currently unable to effectively fulfil its primary task of protecting the interests of the Länder in the federal legislative process, even if this is not only due to the rules of the federal constitution” (*translated by the author*)<sup>69</sup>. The (party) political dimension, which demonstrates the limits of legal design, is mainly reflected in two phenomena. First, the party affiliation is, as mentioned above, of central importance not only formally, for seating arrangements and parliamentary groups. It also determines to a large degree the voting behaviour in the second chamber and thus contributes to its malfunctioning in terms of representing subnational interests. It seems therefore fair to say that the Federal Council is essentially a party-dominated institution (“*Parteienbundesrat*”) within a party-dominated federation (“*Parteienbundesstaat*”).<sup>70</sup> Secondly, the weakness of the second chamber is epitomized by its increasing marginalization through a number of informal channels of intergovernmental relations, none of which is established by law. These include interventions during the general evaluation procedure regarding federal legislation, which also involves professional associations and NGOs. Moreover, there is the Liaison Office of the *Länder* (*Verbindungsstelle der Bundesländer*), set up for the exchange of information and the communicating joint *Länder* opinions to the federal government. Most important, however, are without doubt the numerous conferences established at both the administrative and

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(69) The original text is as follows: “Im Ausschuss bestand Einvernehmen darüber, dass in diesem Bereich ein besonders dringender Änderungsbedarf besteht, weil der Bundesrat derzeit seine primäre Aufgabe, die Interessen der Länder in der Bundesgesetzgebung zu wahren, nicht ausreichend effektiv wahrnehmen kann, was freilich nicht allein an den einschlägigen bundesverfassungsgesetzlichen Regelungen liegt”. Report of the Austrian Convention of 31 January 2005, Part III: Results of the Discussions, at 61. [http://www.konvent.gov.at/K/DE/PVORL-K/PVORL-K\\_00037/imfname\\_035682.pdf](http://www.konvent.gov.at/K/DE/PVORL-K/PVORL-K_00037/imfname_035682.pdf)

(70) H. SCHAMBECK, *Von der Bedeutung des Bundesstaates und Bundesrates*, in H. SCHAMBECK (ed.), *Bundesstaat und Bundesrat in Österreich*, Vienna, Verlag Österreich, 1997, p. 577.



political levels. These meet quite frequently, are largely detached from the Federal Council and form effective parallel structures in terms of representing subnational interests<sup>71</sup>.

The by far most important among these conferences is the above-mentioned Conference of the *Länder* Governors (*Landeshauptleutekonferenz*).<sup>72</sup> This format has its roots in informal gatherings as early as in 1918 and was eventually established as a regular semi-annual conference in 1970. After that, it did not take long for some observers to suggest that the functions of the Federal Council should be transferred to this conference in order to strengthen the allegedly more effective executive federalism<sup>73</sup>. Even if such proposals were never seriously considered, the Conference of *Land* Governors has become powerful. As its decisions require a unanimous vote, they have particular weight, but sometimes also tend towards a lowest common denominator<sup>74</sup>. From a constitutionalist perspective, it is important to note that this conference is, notwithstanding its influence in practice and unlike the Federal Council, not a legally formalized government body<sup>75</sup>. As such the Conference of the *Länder* Governors epitomizes a more general trend towards more pluralist decision-making in multilevel systems, with informal actors sometimes having more weight than formal ones with similar functions<sup>76</sup>. For some time, it was an ex-

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(71) See K. WEBER, *Macht im Schatten? (Landeshauptmänner-, Landesamtsdirektoren- und andere Landesreferentenkonferenzen)*, in *Österreichische Zeitschrift für Politikwissenschaft*, 21/4, 1992, pp. 405-418; P. BUSSJÄGER, *Föderalismus durch Macht im Schatten? Österreich und die Landeshauptmännerkonferenz*, in *EUROPÄISCHES ZENTRUM FÜR FÖDERALISMUSFORSCHUNG* (ed.), *Jahrbuch des Föderalismus 2003*, Baden-Baden, Nomos, 2003, pp. 79-99.

(72) Others are the Conference of the Presidents of the *Länder* Parliaments (*Landtagspräsidentenkonferenz*), the Conference of the *Länder* administrations' Chief Officers (*Landesamtsdirektorenkonferenz*) and the Conference of *Länder* Government Members (*Landesreferentenkonferenz*).

(73) See P. FESSLER, *Management des Staates*, in *Österreichische Zeitschrift für Politikwissenschaft*, 4, 1975, p. 463.

(74) See F. KARLHOFFER, G. PALLAVER, *Strength through Weakness: State Executive Power and Federal Reform in Austria*, in *Swiss Political Science Review*, 19/1, 2013, pp.41-59.

(75) There is no explicit legal recognition as an institution, but single provisions in some ordinary laws presuppose the existence of the conference (for examples see A. ROSNER, *Koordinationsinstrumente der österreichischen Länder*; Vienna, Braumüller, 2000, p. 15).

(76) See F. PALERMO, K. KÖSSLER, M. NICOLINI, *Comparative Federalism. Constitutional Arrange-*

explicit aim of the *Länder* to achieve the entrenchment of this conference in the Austrian constitution. This demand, however, was never satisfied out of fear of reinforcing a trend towards executive federalism<sup>77</sup>. In fact, entrenchment would have merely amounted to also legally recognizing the long established fact of the executive branch's predomination. More critical seems to be another question, namely that of who actually has the right to legitimately define, represent and promote the interests of the *Länder*. Competitors for this role are, naturally, the Federal Council, the *Länder* governors and the *Länder* parliaments, in particular their speakers<sup>78</sup>. A clear answer to this question and rules for a smooth interaction between these institutions seem to be, more generally, a precondition for any effective representation of subnational interests.

The obvious fact that the Federal Council has made in this regard only a marginal contribution, leaves, in principle, three options: to clarify that it should have another *raison d'être*, to simply abolish the second chamber or to, finally, carry out a comprehensive reform. As a matter of fact, the representation of those interests, which would be otherwise neglected under the "one person, one vote" formula and are usually the territorially defined interests of subnational entities<sup>79</sup>, is not the only function of second chambers. A second main function is their role as guarantor of institutional stability.<sup>80</sup> This includes, for example, their frequent participation in the processes of constitutional amendment, the appointment of (constitutional) judges and high-ranking officials and of the challenge of legislation before the Constitutional Court. This role as a stabilizing institution also comprises their function of calmly reviewing legislative drafts of

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*ments and Case Law*, Oxford, Hart Publishing, 2016 (forthcoming).

(77) See H. SCHÄFFER, *Reformperspektiven für den Bundesrat*, in *Journal für Rechtspolitik*, 15, 2007, p. 13.

(78) See G. HOLZINGER, *Der österreichische Bundesstaat und seine Reform*, in M. AKYÜREK, G. BAUMGARTNER, D. JAHNEL, G. LIENBACHER and H. STOLZLECHNER (eds.), *Staat und Recht in europäischer Perspektive*, Vienna and Munich, Manz and C.H. Beck, 2006, p. 289.

(79) Examples for non-territorially defined interests are the Irish Senate with several members elected by the universities and certain second chambers in African countries with representatives from indigenous communities.

(80) See S. PATTERSON, A. MUGHAN, *Fundamentals of Institutional Design: The Functions and Powers of Parliamentary Second Chambers*, in *The Journal of Legislative Studies*, 7(1), 2001, p. 52.

the first chamber, which was supposed to serve historically according to the theory of mixed government as a precaution against excesses of democracy<sup>81</sup>. This rationale of giving bills a second thought is best illustrated by an anecdote of George Washington explaining to Thomas Jefferson, who had been absent from the Constitutional Convention, the function of the Senate: “Washington asked, ‘Why do you pour your coffee into your saucer?’ Jefferson replied, ‘To cool it.’ ‘Even so,’ Washington responded, ‘we pour legislation into the senatorial saucer to cool it’”<sup>82</sup>. As to the Austria case, some observers have indeed pointed out that, precisely in view of the Federal Council’s weak performance regarding the representation of *Länder* interests, that its function as a chamber of reflection may in the future gain in importance<sup>83</sup>. According to this reasoning, the *de facto* ‘freedom’ from representing the subnational entities would enable the second chamber to (re)focus on this other potential role. Yet, the above-mentioned short period of eight weeks to raise objections and, even more importantly, the second chamber’s typical subservience to the governing coalition cast doubt on whether it may make in that regard a meaningful contribution.

If the Federal Council is hardly able to fulfil any of the aforementioned functions commonly expected from a second chamber, its whole existence might be questioned, at least in its current form. This leads us to the second and third option, that is, the complete abolition of the institution or its comprehensive reform. In this respect, it is again imperative to apply a both constitutional and political perspective. From the latter angle, it seems evident that the parties, which dominate the governing coalition and thus also the first chamber, benefit from the *status quo* of a weak Federal Council because it provides them with ample opportu-

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(81) This theory, as advocated by Montesquieu and the British Whigs, blended aristocratic and democratic elements and greatly influenced the making of the US Senate (see G. WOOD, *The Creation of the American Republic: 1776–1787*, Charlotte, University of North Carolina Press, 1998, pp. 553–57).

(82) S. PATTERSON, A. MUGHAN, *Senates and the Theory of Bicameralism*, in S. PATTERSON, A. MUGHAN (eds.), *Senates: Bicameralism in the Contemporary World*, Columbus: Ohio State University Press, 1999, p. 15.

(83) See G. SCHEFBECK, *Zur Entstehung des Bundesrates*, in H. SCHAMBECK (ed.), *Bundesstaat und Bundesrat in Österreich*, Vienna, Verlag Österreich, 1997, p. 303.

nities to influence its composition and functioning. They can therefore be neither interested in its abolition nor in its comprehensive reform. Incentives for change are similarly scarce from the perspective of the *Länder*, more precisely the *Länder* Governors, because they have established a more effective parallel system of intergovernmental conferences involving them directly. In short, the fate of the second chamber is an issue, regarding to which politicians, the primary actors of representative democracy, clearly have self-serving interests. As a consequence, it may be indeed advisable to “outsource” it like similar issues to a broader decision-making process involving participatory democracy<sup>84</sup>.

From the constitutional point of view, it has to be underlined that, as mentioned above<sup>85</sup>, the abolition of the Federal Council without any surrogate mechanism of involving the *Länder* in the federal legislative process would affect the constitutional principle of federalism and thus require a referendum under Article 44(3) B-VG. The same arguably holds true for surrogate mechanisms that would make subnational participation even more ineffective than it is now<sup>86</sup>. Beyond this mandate, which follows from settled case law since 1952<sup>87</sup>, there is a second, albeit lesser, constitutional obstacle for the abolition of the Federal Council. The attentive reader will remember the above-mentioned Article 35(4) B-VG<sup>88</sup> that requires for any amendments of Articles 34 and 35 B-VG, as an additional *quorum*, a majority of members from at least four *Länder*. Needless to say that a complete removal of the sec-

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(84) This argument was advanced by John Ferejohn, for instance, in justification of British Columbia Citizens' Assembly on electoral reform. Other typical issues, where politicians have self-serving interests and cannot therefore trusted to decide dispassionately are rules regarding electoral boundaries, campaign financing or the limitation of legislative terms (see J. FERREJOHN, *Conclusion: The Citizens' Assembly Model*, in M.E. WARREN, H. PEARSE (eds.), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly*, New York, Cambridge University Press, 2008, p. 196.

(85) See above section 1.

(86) See H.P. RILL, *Die österreichische Bundesstaatlichkeit und die Gesamtänderungsschwelle der Art 44 Abs 3 B-VG*, in M. AKYÜREK, G. BAUMGARTNER, D. JAHNEL, G. LIENBACHER, H. STOLZLECHNER (eds.), *Staat und Recht in europäischer Perspektive*, Vienna and Munich, Manz and C.H. Beck, 2006, p. 733.

(87) VfSlg 2455/1952.

(88) See above section 4.1.

ond chamber would affect these two provisions regulating its nomination and composition.

It is obvious as well that some new institutions, proposed by politicians to replace the Federal Council, like a “Council of Voluntary Organisations” or directly elected “Regional Parliaments”<sup>89</sup>, do not qualify as equivalent surrogate mechanisms for involving the *Länder* in federal legislation. The same applies to the idea of replacing the currently nine Land Parliaments and the Federal Council with one single General *Land* Parliament (*General-Landtag*) whose 40 members should represent all *Länder*<sup>90</sup>. This institution was supposed to be responsible for enacting (more) “harmonized” subnational legislation and for exercising, through the single *Länder* delegations, the parliamentary rights of electing and controlling the respective subnational government. The current legislative competences would remain as they are now, but would be exercised jointly. The alleged advantages of this model were a less costly institutional design and the better prevention of excesses of differentiated regulation, in Canada aptly termed “checkerboard federalism”<sup>91</sup>. Such excesses have been criticized in Austria particularly regarding different age limits in the field of youth protection and, until recently, different standards regarding the protection of animals. Irrespective of whether these advantages are true, it seems clear that this model does not ensure the participation of the *Länder* in the federal legislative process. Its introduction would thus likewise affect the principle of federalism and require a referendum. Besides, the need for more harmonized Land legislation does not seem to be generally required, but rather limited to specific fields. Among them would be, most notably, the subnational implementation of EU law that af-

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(89) For an overview of these and other proposals see H. SCHÄFFER, *Reformperspektiven für den Bundesrat*, in *Journal für Rechtspolitik*, 15, 2007, p. 16.

(90) See M.F. POLASCHEK, *Föderalismus als Wert: Eine Studie zu Reformmöglichkeiten des österreichischen Bundesstaates*, Graz: Aktion Vision Modell Steiermark, 1999.

(91) See H. BAKVIS, *Checkerboard federalism? Labour Market Development Policy in Canada*, in G. SKOGSTAD, H. BAKVIS (eds.), *Canadian Federalism: Performance, Effectiveness and Legitimacy*, Toronto, Oxford University Press, 2002, p. 159.

fects *Länder* competences, for which the national Government is legally responsible<sup>92</sup>.

In view of the aforementioned political and constitutional constraints, there have been since 1920 few really serious reform efforts and even fewer successful reforms. It is quite telling that, even though certain proposals have been discussed for decades, the Federal Council has not undergone any noteworthy reform until 1984. At that time, *Länder* Governors were granted the right to be heard on business relating to their *Land* (Article 36(4) B-VG) and the Federal Council was granted an absolute veto regarding constitutional amendments restricting subnational competences (Article 44(2) B-VG). A few years later, Austria's preparation for EU membership presented a window of opportunity, as the debate about the reform of the second chamber again flared up. In 1992, the federal government and the Conference of the *Länder* Governors achieved a political agreement ("*Perchtoldsdorfer Paktum*") which explicitly aimed at "a fundamental reform of the Bundesrat through strengthening its powers as a representative body of the Länder"<sup>93</sup>. In the end, however, this reform was not realized. Instead, the Federal Council was merely assigned certain rights regarding EU decision-making<sup>94</sup>. Most recently, the incapacity of finding a political consensus for reform was strikingly illustrated by the dynamics of the above-mentioned Austrian Convention on constitutional reform (2003-2005) and its aftermath. An agreement proved to be impossible not only within the convention itself, but subsequently also in a select committee of the National Council, and in deliberations of proposals made by an even smaller group of politicians and experts in 2008. In conclusion, all of the above puts in question whether Italy or other countries may learn much from the Austrian experience. Generally, there is in that regard much skepticism: "What clearly cannot be recommended, would be a second chamber of Austrian style. If one really wants to create a new federal system, one should avoid the congenital

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(92) See H. SCHÄFFER, *Reformperspektiven für den Bundesrat*, in *Journal für Rechtspolitik*, 15, 2007, p. 22.

(93) See the text printed in INSTITUT FÜR FÖDERALISMUS, *17. Bericht über die Lage des Föderalismus in Österreich (1992)*, Vienna, Braumüller, 1996, 199-204.

(94) See above section 4.2.

defects of the Austrian Bundesrat<sup>95</sup>. From this observation, one might draw the opposite conclusion that, when one does *not* aim to create a federal system, the Federal Council could be a role model, precisely because it performs so poorly in representing subnational interests. Yet, an obvious impediment to valid conclusions for the Italian case are the very different points of departure and problems, which reforms or reform attempts in the two countries start from. As to the main function of participating in federal legislation, the Italian Senate and the Austrian Federal Council are clearly at opposite ends of the spectrum<sup>96</sup>. The former has been criticized in the past for demonstrating the negative effects of perfect bicameralism, which is beyond Italy rather typical of presidential systems<sup>97</sup>. in terms of provoking deadlocks of the national legislative process. Austria's Federal Council, on the other hand, has been excoriated for exactly the opposite, that is, for being too weak vis-à-vis the first chamber. While reform in Austria has occurred for decades under the slogan "upgrading or abolition" ("*Aufwertung oder Abschaffung*"), the current trend in Italy is, starting from the high level of perfect bicameralism, much about a sort of "downgrading".

Nonetheless, there appear to be at least some lessons to be learned from the Austrian experience. First, the case well illustrates the limits of legal design in the face of a counteracting political culture and party-political constellation. Although in Austria the influence of party politics seems to be particularly prevalent, it is of course a general phenomenon that much of a second chamber's actual preparedness to really use its powers and thus its effectiveness depends on the extent of partisan conflict between the two chambers. This has not gone unnoticed in other reform debates

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(95) H. SCHÄFFER, *The Austrian Bundesrat: Constitutional Law – Political Reality – Reform Ideas*, in U. Karpen (ed.), *Role and Function of the Second Chamber*, Baden-Baden, Nomos, 1999, p. 34.

(96) In the above-mentioned classification of legislative participation, which places Austria only in the fourth out of five categories, Italy is put in the first category (see S. PATTERSON, A. MUGHAN, *Fundamentals of Institutional Design: The Functions and Powers of Parliamentary Second Chambers*, in *The Journal of Legislative Studies*, 7(1), 2001, p. 42).

(97) See M. RUSSELL, *Elected Second Chambers and Their Powers: An International Survey*, in *Political Quarterly*, 83(1), 2012, p. 123.

such as that concerning the House of Lords of the United Kingdom<sup>98</sup>. Secondly, the limits of legal design surface through the parallelism and competition between a second chamber and intergovernmental mechanisms. Such parallel mechanisms and second chambers, which complement and/or rival each other regarding the representation of subnational interests, may be to a certain extent integrated or they may exist separately on an equal footing with a second chamber or, as in the Austria case, even prevailing over it. Anyway, the relationship between them is crucial. In Austria, for instance, the weakness of the Federal Council prompts intergovernmental forums, above all the Conference of the *Länder* Governors, to not take it very seriously and to not really pursue its reform. Consequently, the second chamber's weakness is perpetuated. Thirdly, the Federal Council demonstrates the inherent link between reform efforts concerning organization and those regarding their functions, in particular, of course, their participation in passing federal constitutional and ordinary law affecting the subnational entities. A prominent observer has emphasized, and arguably rightly so, that any effective reform would require to take into account both dimensions<sup>99</sup>. Also the Austrian Convention expressly recognized this inextricable link between organization and functions<sup>100</sup> and, as a consequence, transferred the issue of reforming the Federal Council in the course of deliberations from Committee 3 "State Institutions" to Committee 5 "Distribution of Competences". Yet this convention proved to be just another episode in the long history of failed comprehensive reform. To Austria's second chamber therefore very much applies what has been said about the Canadian Senate. It is "[a]n upper house criticized, yet condemned to survive unchanged"<sup>101</sup>.

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(98) See M. RUSSELL, *Elected Second Chambers and Their Powers: An International Survey*, in *Political Quarterly*, 83(1), 2012, p. 128.

(99) See H. SCHÄFFER, *Alternative Modelle zur Wahrnehmung von Länderinteressen an der Bundesgesetzgebung*, in P. BUSSJÄGER, J. WEISS (eds.), *Die Zukunft der Mitwirkung der Länder an der Bundesgesetzgebung*, Vienna, Braumüller 2004, p. 52.

(100) Report of the Austrian Convention of 31 January 2005, Part III: Results of the Discussions, [http://www.konvent.gv.at/K/DE/PVORL-K/PVORL-K\\_00037/imfname\\_035682.pdf](http://www.konvent.gv.at/K/DE/PVORL-K/PVORL-K_00037/imfname_035682.pdf), p. 63.

(101) D. PINARD, *The Canadian Senate: An Upper House Criticized Yet Condemned to Survive Unchanged*, in: J. LUTHER, P. PASSAGLIA, R. TARCHI (eds.), *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism*, Milan, Giuffrè, 2006, p. 459.