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Extra-legislative Functions of Second Chambers in Federal Systems

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Abstract

Discussions regarding the functional design of second chambers in federal or quasi-federal systems seem to focus mainly on legislative functions. Thus, extra- or non-legislative functions related to the executive branch or the judiciary have been rather neglected in the literature. This paper will examine the extra-legislative functions of second chambers which include Austria, Belgium, Germany, Italy, Spain, Switzerland and the United Kingdom. By grouping the functions into different categories (relations with the Government, appointment functions and functions in the field of international affairs, powers in relation to the European Union and functions granted to maintain the legitimate constitutional order), their effectiveness in serving the purposes of bicameralism, and of regional representation, will be explored.

Key-words

bicameralism, extra-legislative functions, federal second chambers, appointments, scrutiny, international affairs, guarantor of the constitutional order, subsidiarity, European Union, regional representation



1. Introduction

Bicameralism as a model of parliamentary design has been adopted in many parliamentary democracies (Russell 2001a: 442). Among the justifications put forward for a second chamber are the separation of powers to avoid the risk of abuse entailed by concentrating power into a single body and the enhancement of democracy by drawing on a broader and more diversified base (Luther 2006: 20-21). By representing ‘different interests from those represented in the first chamber’ (Russell 2001a: 443) and by providing for more independent scrutiny of the executive (Russell 2001a: 447-448), the value of checks and balances is enhanced (Watts 2006: 14). The importance of check and balances holds true not only for legislative functions, but also for extra-legislative functions attributed to Parliaments and underlines the essential role of control in a parliamentary democracy.

In federal (and in regionalised) states, which almost all feature second chambers (Watts 2006: 2), the different interests represented by a second chamber are those of the subnational units and are therefore of a territorial nature (Palermo and Kössler 2017: 164). The main reason for this is that participation in central decision-making compensates for subnational units’ loss of sovereignty (Palermo and Kössler 2017: 164). In addition, a second chamber provides a forum for debate among the different territorial levels and directly or indirectly links the national Parliament to regional legislatures and executives (Russell 2001b: 109).

When discussing the functions of federal or non-federal second chambers the focus is mostly on legislative powers, including powers of constitutional amendment and in financial and budgetary matters. Much less attention is given to extra-legislative functions, for example scrutiny of the Government, or participation in international affairs or appointment powers.

Against this background, the paper examines non-legislative powers of second Chambers in federal or quasi-federal systems by looking at the German and the Austrian *Bundesrat*, the Swiss Council of States, the Senates of Belgium, Spain and Italy and the House of Lords as a case of its own. Firstly, extra-legislative powers will be grouped into different categories such as relations with the Government, appointment functions and functions in the field of international affairs, powers in relation to the European Union and functions granted to maintain the legitimate constitutional order. Secondly, considerations will be made on the



effectiveness of extra-legislative powers attributed to federal or quasi-federal second chambers in representing territorial interests.

2. Functions *vis-à-vis* the Government

Functions of second chambers *vis-à-vis* the Government mainly include oversight and control functions of governmental activities, but can also themselves be of an administrative nature. Instruments may vary from the vote of confidence (or no confidence), essential for the Government to remain in power, to general or more specific scrutiny powers towards governmental actions including means to voice (non-binding) suggestions for the Government.

Generally, a confidence vote, as the strongest means of parliamentary control over governmental actions, is a prerogative of parliamentary chambers elected directly by the people. Therefore, it is not typically a function of second chambers in federal or regionalised systems that are supposed to represent the interests of the territorial level (Russell 2001b: 447). This is clearly shown by the example of the Italian Senate which holds the power of the confidence vote.^I Italian Senators are directly elected, albeit on a regional basis, but this criterion refers only to the delimitation of the constituencies.^{II} The Constituent Assembly rejected the idea of a body representing vocational categories or regional interests, therefore construing the Italian Senate as a popular second chamber of reflection (Ferrara 1984: 23-25).

The means to scrutinise and monitor the activities of the Government include questions put to the Government, motions approved to give political directions to the executive or enquiries conducted and reports elaborated by committees, generally in addition to their legislative work. Through these instruments, second chambers can exert political pressure and shape the political mood by tackling specific matters of relevance to the regional level. An example is the General committee for the Autonomous Communities in the Spanish Senate: in addition to its legislative work in the area of territorial issues, the General committee carries out inquiries and conducts debates in relation to the regions (Russell 2001: 111-112). The same applies for the UK House of Lords Committees which conduct in-depth analysis of public policies, also on behalf of territorial issues (Russell 2006: 83-86), thereby not only gaining the basis for their legislative work but also making suggestions for future



governmental action. The 2017 Brexit Devolution report of the European Union Committee can be cited as example.^{III} The report clearly underlined the potentially dangerous effects of Brexit on the devolution settlements and recommended that the Government develop a coherent strategy and framework of guiding principles together with the devolved institutions,^{IV} therefore not only scrutinising the activities of the Government, but also suggesting a certain course of action to the executive. In some cases, Committees have powers similar to the judiciary exercising truly investigative powers, as is the case for the Italian Senate.^V Nevertheless, investigative powers seem more linked to a general function of oversight than to the specific function of representing territorial interests (Dickmann 2009: 181-184).

These instruments of oversight seem less important if the relationship between the Government and the second Chamber is based on mandatory and regular information rights, thus allowing for comprehensive control of the executive's activities. This is the case of the German *Bundesrat*. The Basic Law states in Article 53(3) that the *Bundesrat* has the right to be informed by the Federal Government fully and on an ongoing basis in regard to all Government business and is entitled to summon members of the Federal Government to attend its meetings.^{VI} In addition, members of the Federal Government are individually entitled to attend all meetings and are allowed to speak. However, it must be pointed out that in regard to the representation of the territorial element these information rights are of minor importance; the composition of the German *Bundesrat* by delegates of the subnational executives secures an efficient information exchange between the regional and the federal executives (Herzog 2008: 977).

Coming to the area of administrative functions exercised by second chambers, the German *Bundesrat* must again be cited. In particular, the *Bundesrat* participates in the federal administration by consenting to regulations at the federal level.^{VII} In contrast to the legislative level, there is no mediation committee^{VIII} to decide on conflicts with the federal Government. Therefore, the *Bundesrat* has an absolute veto right in this regard, which allows the *Bundesrat* substantial influence on the content of such regulations (Kloepfer 2011: 520). The same rights apply to general administrative provisions affecting the competencies of the *Länder*.^{IX} This sort of administrative power is somewhat exceptional and can be considered a distinctive element of German federalism which features an ambassadorial second Chamber. In combination with the particular institutional design of the German *Bundesrat* which implies



that the delegates vote *en bloc* according to the instructions of the Governments of their respective *Länder*^x (Palermo and Kössler 2017: 165), the administrative power of the German *Bundesrat* enhances its role as the representative of the *Länder*.

3. Appointment Functions

Second chambers may exercise, alone or together with other constitutional organs, a range of appointment rights with regard to the executive branch and to the judiciary (Palermo and Kössler 2017: 193).

Second chambers can have the right to appoint high executive offices as is the case for the Spanish Senate, which appoints six members of the Court of Auditors.^{xI} Appointment rights may extend to key figures of the constitutional order. In Italy, according to Article 83 (1 and 2) Constitution, the Head of State is elected in a joint meeting by the Senate and the Chamber of Deputies in which regional delegates participate to represent the territorial element, although only symbolically (Rescigno 1978: 3).

In the context of territorial representation, the appointment of constitutional judges is of particular interest. According to Article 84 (1) Basic law, the German *Bundesrat* elects half of the members of the German Constitutional Court by a two-thirds majority. The Austrian *Bundesrat* proposes three members and one substitute member of the Constitutional Court to the Federal President who nominates them, the other members being proposed by the National Council and the Federal Government.^{xII} The Belgian Senate, alternatingly with the Chamber of Deputies, proposes candidates for the Constitutional Court to the King who appoints them for life.^{xIII} Due to the specific features of Belgian federalism, which accommodates not only territorial interests but linguistic group interests as well, six judges must belong to the Dutch language group, six to the French language group and one of the judges must have an adequate knowledge of German.^{xIV} The Spanish Senate appoints one third of the twelve Constitutional Court judges from a list of candidates proposed by the Assemblies of the Autonomous Communities.^{xV} The right of the Autonomous Communities to propose candidates was established to enhance the territorial element of the Senate, considered to be too weak due to its mixed composition of senators elected in direct universal suffrage and a only a minority of one fifth appointed by the Assemblies of the Autonomous Communities^{xVI} (Palermo and Nicolini 2013: 195). Nevertheless, if the



proposed candidates fail to reach the majority required, the Spanish Senate can proceed to nominate other candidates without the contribution of the Autonomous communities.

4. Functions Related to International Affairs

In the area of international affairs, second chambers can be involved in the ratification and implementation of international treaties, thus participating in national treaty-making power (Palermo and Kössler 2017: 199). In Austria, pursuant to article 50(2 subsection 2) Federal Constitutional Law, the *Bundesrat* has to consent to each ‘political’ or legislation-affecting treaty concerning the powers of the *Länder*. This function is interpreted in extensive manner, covering all treaties with a potential to curtail or influence *Länder* powers (Öhlinger 2013: 2). Similarly, the German Basic Law states in Article 59(2) that treaties are incorporated by federal law into the German legal system and thus require the consent or participation of the bodies responsible for their enactment – including potentially that of the German *Bundesrat* in accordance with the respective subject-matter. Therefore, the German *Bundesrat* retains a veto right in the area of international treaties which parallels its powers in the legislative area.

In some cases, second chambers exercise their treaty making powers together with the first chamber. This is the case in Spain where, according to Article 94(1) of the Constitution, treaties related to subject-matters of some importance, such as treaties of a political nature, treaties affecting the territorial integrity of the state, or treaties implying the amendment or the repeal of laws can be only ratified by prior authorization from the *Cortes Generales*, composed of the Congress and the Senate.^{xvii} The decision is taken in a joint session by a majority vote in each of the Houses, the procedure being initiated by the Congress.^{xviii} Although at first sight the Senate appears to be on equal footing with the Congress, should the Senate not agree to ratify the treaty, a Mixed Committee between both chambers is set up in order to reach an agreement and, if no agreement is reached, the Congress overrides the Senate by overall majority (Castellà Andreu 2006: 891-892).

Another example can be found in the Swiss Constitution. According to Article 166 Swiss Constitution, the Federal Assembly, composed of the directly elected National Council and the Council of States representing the Cantons,^{xix} participates in foreign policy, supervises foreign relations and approves international treaties. Both chambers are of equal standing^{xx}



and exercise their functions in separate proceedings and by separate votes.^{xxi} Therefore, the approval of a treaty requires the agreement of both chambers.^{xxii} If they disagree, a conciliation procedure aims at reaching an agreement. When one of the two chambers still does not approve, the rejection is final,^{xxiii} thus giving the Council of States an absolute veto power (Biaggini and Sarott 2006: 753 -756).

5. Functions Related to the European Union

The functions of second chambers related to the European Union stem originally from their participation in national treaty-making power (Palermo and Kössler 2017: 199). Traditionally, special provisions safeguard the role of Parliaments in relation to the treaties constituting the basis of the European Union, acknowledging their particular nature and their effects on the constitutional order of the Member States linked to the transfer of sovereignty. From a regional point of view, the transfer of sovereignty leads to an erosion of the powers constitutionally conferred on the subnational units. Therefore participation and control in the process of European integration represents a necessity for the subnational level. As an example, Article 50 (1 subsection 2 and 4) of the Austrian Federal Constitutional Law can be given, which defines treaties modifying the treaties constituting the basis of the European Union as a particular category which require the consent of the Austrian *Bundesrat* with a qualified quorum and majority.

Until the Treaty of Maastricht of 1992, national Parliaments were absent from the European integration process except for their role in the treaty-making process. The Maastricht treaty generated a series of constitutional amendments to accommodate the new role of national Parliaments, for example in Germany, which introduced Article 23 Basic Law (Badura 2015: 491). With the entry into force of the Treaty of Lisbon in 2009, national Parliaments acquired an important role in the European Union. According to Article 10 Treaty of the European Union, they represent together with the European Parliament the two pillars of democracy in the European Union and contribute actively to its good functioning. Likewise, until the Maastricht Treaty the regional element had been absent in the architecture of the European Union. Today, according to Article 4(2) Treaty of the European Union, the European Union respects the national identities of the Member States, ‘inherent in their fundamental structures, political and constitutional, inclusive of regional



and local self-government'. Pursuant to Article 13(4) of the Treaty on European Union, the EU-organs are advised by a Committee of the Regions, representing the regional and local element.^{XXIV}

One of the more prominent prerogatives granted to national Parliaments by European Union law is the mechanism of subsidiarity scrutiny, according to article 5 (3) of the Treaty of the European Union and the Protocol on the application of the principles of subsidiarity and proportionality (Protocol No. 2 to the Lisbon Treaty). It entitles the chambers of national Parliaments to scrutinise draft EU-legislation on its compliance with the principle of subsidiarity by giving a reasoned opinion within eight weeks. If a certain threshold of negative opinions by national Parliaments is reached, the legislative procedure may even be stopped. To date, territorial second chambers have been far more active in this regard than the first chamber, for example the Austrian *Bundesrat* (Gamper 2016: 356-357). This tendency is confirmed by the latest data on reasoned opinions given in 2016 (European Commission 2017:8). Nevertheless, efficient regional involvement in subsidiarity scrutiny depends on a strong representation of regional interests in the second chamber, or, if this is not the case, on mechanisms set up at the national level to involve the regional level in the drafting of the opinion (Popelier and Vandenbruwaene 2017: 213-216).

EU-Member States have introduced explicit obligations for their Governments to inform and consult both chambers about all aspects relating to matters of European integration, and have entitled the Parliament to bind the Government to a certain position at the European level, in particular within the Council of Ministers. As far as second chambers are concerned, the example of the Austrian *Bundesrat* can be mentioned. According to Article 23e(4) of Austrian Federal Constitutional Law, the Austrian *Bundesrat* can give an opinion on a proposal of a binding legal act at the European level requiring national provisions if it would curtail the powers of the *Länder*. The opinion basically binds the Austrian Government in the Brussel's negotiation process; the federal minister representing Austria in the negotiations may depart from this opinion only for 'compelling integration and foreign policy reasons' and if the Austrian *Bundesrat* does not object within an adequate timeframe. The power confirms the idea of the *Bundesrat* as a protective body of the Austrian *Länder* – although this role is not exercised in practice (Gamper 2006: 808). The Austrian provisions are similar to the German model in relation to the powers of the German *Bundesrat*. In addition, the German *Bundesrat* has the right to nominate a representative of the *Länder*, who represents



Germany in the Council of Ministers and can vote on behalf of Germany in cases where the subject matter discussed concern primarily legislative powers of the *Länder*.^{xxv} Such powers emphasise the federal character of the state and provide the subnational units with the chance of influencing the European decision-making process in an indirect way through the second chamber (Kloepfer 2011: 526).

In other cases, an ordinary law determines specific procedural rules concerning the participation of the Parliament in European decision-making in general and therefore also in regard to the second Chamber. This is the case in Italy, where State law n. 234 of 2012 vests Parliament and thus its two chambers with information rights, and rights to oversee and direct the activities of the Government, and provides the procedural rules for enacting subsidiarity control at the national level.^{xxvi}

Although all second chambers of the federal EU-Member States are involved in the European decision-making process through the procedures set out above, it must be pointed out that the extra-legislative functions of second chambers with regard to territorial interest are overlapped by procedures of intergovernmental cooperation set up between the national and the regional executive which supplement regional participation through second chambers. This is due to the role of the Council of Ministers which, according to Art 16 (2) Treaty of the European Union, represents the Member States in the European decision-making process. For example, in Austria, a constitutional agreement between the *Länder* and the Federation, and an agreement between the *Länder* themselves, determines the *Länder's* right to bind the Federation by a uniform opinion given by the *Länder*, and to participate in the meetings of the European Council of Ministers when subject-matters within the provincial competencies are concerned. Even if these provisions are considered to be of a rather symbolic nature (Öhlinger and Konrath 2013: 33), they reflect the federal organisation of the state. In Italy, the right of the regions to participate in the decision-making process at the European level, according to Article 117 (5) of the Italian Constitution (introduced by the 2001 constitutional reform), offers the legal basis to conclude an agreement on the regional participation in the European decision process between the Government and the Presidents of the regions (Happacher 2012: 386-392).



6. Second Chambers as Guarantors of the Constitutional Order

The last category of extra-legislative functions is linked to guaranteeing the constitutional order. In addition to their role in processes of constitutional amendment, second chambers may also be provided with powers in relation to sustaining the legitimate constitutional order, including functions in constitutionally defined emergency situations like breaches of the constitutional duties by constitutional organs or by the subnational units themselves. In this regard, the additional role of second chambers, in maintaining the principle of separation of powers from a territorial point of view, is of particular importance, constituting an additional form of control over the executive vested with emergency powers.

In some cases second chambers may initiate or take part in impeachment procedures. Pursuant to Article 61 Basic Law, the German *Bundesrat*, by a majority of two thirds, can impeach the Federal President for wilful violation of the Basic Law or of any other federal law. In Italy, according to Article 90 (2) of the Constitution, the President of the Republic can be impeached before the Constitutional Court by a joint vote of the Chamber of Deputies and the Senate.

Another power of second chambers regards the referral of laws to the Constitutional Court. This power can be granted to the second chambers as a plenary or to a certain number of their members. In this way, they contribute to the maintenance of the constitutional legal order, either with the specific view to protect the constitutional status of territories, or to protect the constitution generally. Austria and Germany can be cited as examples. In Austria, Article 140 (1 subsection 2) Federal Constitutional Law gives one third of the members of the *Bundesrat* the right to file an application for reviewing a Federal law with the Constitutional Court, by claiming it to be contrary to federal constitutional law. In this case, a political minority in the *Bundesrat* is entitled to supervise federal legislation, even irrespective of territorial interests (Rohregger 2003: 84). In Germany, according to Article 93(1 subsection 5) Basic Law, the *Bundesrat* has the power to file an application to the Federal Constitutional Court for reviewing federal laws on their alignment with concurrent legislative powers, thus safeguarding the constitutional order in respect of territorial interests.

As guarantors of the constitutional legal order, some federal second chambers have the power to consent to national measures directed at subnational entities which fail to fulfil their constitutional obligations. If a German *Land* were to fail to comply with its obligations



under the Basic Law or other federal laws, according to Article 37 Basic Law the Federal Government may take the necessary steps to compel the *Land* to comply with its duties on condition that the *Bundesrat* consents. When exercising this power of the Federal Government, known as *Bundeszwang* – which until now has never been applied – measures must be necessary and proportional (Kloepfer 2011: 992-993).

Similar to Article 37 German Basic Law, Article 155 of the Spanish Constitution gives the Government the power to take all necessary measures if an Autonomous Community does not fulfil obligations imposed by the Constitution or laws, or acts in a way that seriously prejudices the general interest of Spain (Uriarte Torrealdy 2013: 172). These measures are considered to be of an exceptional nature (*Ibid.*) and can be only envisaged after the Government has lodged a complaint with the President of the Autonomous Community, and this has not been correctly attended to. According to Article 155 Spanish Constitution, the Senate has to approve these measures by an absolute majority, after having heard the Autonomous Community. The fact that the power of approval is exclusively assigned to the Spanish Senate emphasises its role as a representative and guardian of the territorial element in situations of political crisis, such as, most recently, the first application of Article 155 *vis-à-vis* Catalonia on October 27th, 2017 in reaction to a declaration of independence by the Catalan Assembly.^{xxvii}

Another example is Article 100 Austrian Federal Constitutional Law, enabling the Federal Government to request the dissolution of a *Land* Parliament by the Federal President with the consent of the *Bundesrat*, for example if the regional assembly is no longer able to form a political majority (Liehr 2001: 5).

7. Extra-legislative Functions and Effective Territorial Representation: Some Reflections

As one can easily see from this certainly not exhaustive overview of extra-legislative functions of second chambers, these powers cover a wide range of subjects. In addition, chambers matching both the ambassadorial and senatorial models are provided with such powers. Thus, to answer the question if they entail an effective representation of subnational interests, other aspects must be considered.



The first criterion that comes to mind is the nature of the functions in regard to their exclusivity. Palermo and Nicolini (2013: 192-201) classify the powers of federal second chambers into parallel, shared, joint and exclusive functions. Parallel functions are functions attributed to both chambers but exercised separately. If powers are attributed to more than one constitutional organ, they can be of shared or joint nature. If they are shared, they are exercised by distinct acts or decisions of each organ. If they are joint functions, they are again attributed to more than one organ but exercised through joint decisions regularly taken by an organ composed of the second Chamber and other constitutional organs, in most cases the First Chamber. Exclusive functions are powers attributed to second chambers only and therefore can be qualified as specialised powers.

Most control and oversight powers concerning the national executive are exercised separately by both chambers and can therefore be classified as parallel functions. By exercising these powers, federal second chambers, independently from the first chamber, contribute to the scrutiny of the executive with a view to protect the separation of powers and checks and balances.

Appointment functions are often joint or shared functions. For example, Article 157 of the Swiss Constitution requires the National Council and the Council of States to join, under the umbrella of the United Federal Assembly, for, *inter alia*, elections of the judges of the Federal Supreme Court or the members of the Federal Council. In such cases of joint action, the number of members of each chamber plays a significant role: if the second chamber is numerically disadvantaged, the first chamber will prevail, which weakens the territorial element. The appointment of Austrian Constitutional Court judges is an example of a shared function insofar as it is not only the *Bundesrat* that proposes members, but also the National Council as first chamber and the Federal Government, while the Federal President appoints them. When looking at appointment functions, the influence of second chambers appears of a very indirect nature as usually the nominees are not held accountable to the second chamber (or to any other organ detaining similar appointment powers). But nevertheless, they enhance the territorial element within the state and fulfil a guaranteeing function, in particular with regard to the appointment of constitutional judges (Doria 2006: 35).

The strongest representation of regional interests usually manifests itself when exclusive functions of territorial second chambers are concerned. In general, these functions are granted as a substitute for the powers transferred to the federal level by the constituent units



and aim to secure the 'statehood' of the subnational entities (Palermo and Nicolini 2013: 200-201). Among them are the powers of second chambers in international affairs and in European affairs, the right to challenge federal laws at the Constitutional Court and powers linked to the role of guarantor of the constitutional order.

Nevertheless, it must be pointed out that the role of second chambers as guardians of the constitutional order can also imply supervision and control over subnational units. This is the case when Article 155 of the Spanish Constitution seeks to force subnational entities into fulfilling their constitutional obligations in the general interest of Spain. In this perspective, it even allows for the extreme measure of ceding the Government the power to remove the President of an Autonomous Community and to dissolve its Regional Assembly.^{xxviii}

The application of Article 155 of the Spanish Constitution shows that, when the territorial impact of extra-legislative functions of second chambers is evaluated, the property of exclusivity of the function is not sufficient. Other elements have to be taken into account, such as the genesis of the federal or regional element and the party system. As far as the first variable is concerned, Article 155 of the Spanish Constitution, although a legal transplant of the German *Bundeszwang*, lacks the strong federal background of the corresponding German rule, characterised by the principles of federal comity and trust, federal cooperation and the *Bundesrat's* role of safeguarding the cultural identities of the *Länder* (Kotzur 2006: 261-264).

As far as the party system is concerned, the role and character of the political parties, in particular with regard to the presence or absence of regional parties and the degree of symmetry or asymmetry between them and national parties, represent important factors of any federal second Chamber (Watts 2006: 10). This was shown clearly when Article 155 of the Spanish Constitution was applied for the first time. Due to a strong asymmetry between national and regional parties linked to weak representation of the regional element, the vote was taken along national party lines and not according to territorial interests.^{xxix} Thus, party politics can have a major influence in weakening the effective representation of territorial interests, in particular if the second chamber does not stand for effective territorial representation as in the case of the Spanish Senate (Virgala Foruria 2013: 66).

Therefore, the capacity of second chambers to grant effective representation of subnational interests depends not only on their functions, but also on their institutional design in relation to elements such as composition, appointment methods and procedures



or the possibility to impose mandatory instructions on the delegates (Palermo and Kössler 2017: 169-177). Without doubt, an institutional design with mandatory instructions and accountability to territorial institutions – as it is the case for the German *Bundesrat* (Russell 2001b: 112; 115) – provides more effective representation of territorial interests.

Even where a second chamber is reorganised into territory-based institutions, however its role in representing territorial interests at the central level is not always strengthened. This is the case of the Belgian Senate after its last reform, which enhanced the territorial element on the institutional level but reduced the legislative powers of the Senate at the same time (Goossens and Cannoot 2016: 38-42). A similar situation would have emerged in case of a reformed Italian Senate if the 2016 Constitutional reform^{xxx} had successfully passed the referendum. The reform would have transformed the Italian Senate into a body representing the territories of the Italian Republic, but without the power of a confidence vote, while its legislative powers would have been abolished except for a few subject-matters, among them constitutional amendments in restricted fields of interest at the subnational level (Bertolini 2016: 6-24). In sum, the Senate would have been given a primarily consultative role with some vague oversight powers on public policies.

In the context of the European Union, functions assigned to second chambers cover controlling the activities of the national Government on the European level and the activities of the European Union itself, in particular in regard to the subsidiarity principle. However, the scrutiny of subsidiarity has an only indirect impact on the constitutional position of the subnational units inasmuch as the subsidiarity principle aims at maintaining the powers of the Member States and not directly the powers of the regions set out at constitutional level (Calliess 2016: 134).

Generally, extra-legislative functions of federal second chambers complement their legislative powers. Irrespective of whether second chambers are vested with strong or weak legislative powers, extra-legislative powers offer additional channels to represent territorial interests at the central level, thus contributing to the separation of power and democracy. This can enhance the federal element but also serve other constitutional interests. The strongest representation of subnational interests is vested in exclusive powers of second chambers with a strong federal institutional design, which generally parallel a strong position in relation to the legislative, as the German *Bundesrat* proves. However, extra-legislative functions can also be attributed to second chambers to supplement a weaker role at the



legislative level, at the same time satisfying a more general interest of maintaining the legitimate constitutional order, as the case of the Spanish Senate shows.

Nonetheless, extra-legislative and legislative functions are not the only way for subnational units to participate in the central decision-making process and to represent the interests of the territorial level. As Palermo and Kössler have pointed out (Palermo and Kössler 2017: 177-178), participation of the subnational units through intergovernmental relations and thus outside the Parliament is increasing, not only in the field of European integration. Therefore, the role of second chambers in federal or quasi-federal systems as representatives of the regions is also being challenged by these developments.

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^I Article 94 (1) Italian Constitution.

^{II} Article 57 (1) and Article 58 (1) Italian Constitution.

^{III} European Union Committee, 2017, Brexit: devolution; 4th Report of Session 2017-19 - published 19 July 2017, available at <https://www.parliament.uk/brexit-devolution-lords-inquiry>.

^{IV} See European Union Committee, 2017, Brexit: devolution. Summary of conclusions and recommendations, points 27 to 48, available at https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/9/911.htm#_idTextAnchor113.

^V Article 82 Italian Constitution.

^{VI} For details, see Badura 2015: 613-614.

^{VII} Article 80 (2) Basic Law.

^{VIII} See Article 77 Basic Law on the Mediation Committee in the legislation process.

^{IX} Articles 82 and 88 Basic Law.

^X Article 51 (3) subsection 2 Basic Law.

^{XI} Organic Act 2/1982, of May 12th, section 30.

^{XII} Article 147 (2) Austrian Federal Constitutional Law.

^{XIII} Article 142 (1) Belgian Constitution; Articles 31 and 32 Special Act of 6 January 1989 on the Belgian Constitutional Court.

^{XIV} On the specific features of Belgian federalism, see Popelier and Lemmens, 2015: 75 -84.

^{XV} Article 159 (1) Spanish Constitution, Organic Law n.6/2007.

^{XVI} Article 69 Spanish Constitution, see in detail Castellà Andreu 2006: 872 -875.

^{XVII} Article 66 (1) Spanish Constitution.

^{XVIII} Article 74 Spanish Constitution.

^{XIX} Article 148 (2) Swiss Constitution. For the composition of the directly elected National Assembly see article 149 Swiss Constitution, for the composition of the indirectly elected Council of States see Article 150 Swiss Constitution.

^{XX} Article 148 (2) Swiss Constitution.

^{XXI} Article 156 (1) and (2) Swiss Constitution.

^{XXII} Article 156 (2) Swiss Constitution.

^{XXIII} Article 156 (3) Swiss Constitution; Article 95 Federal Act on the Federal Assembly 2002.

^{XXIV} Articles 300 and 305 – 307 Treaty on the Functioning of the European Union.

^{XXV} Article 23 subsection 6 Basic Law.

^{XXVI} In particular Articles 4 to 16.

^{XXVII}

See <http://www.senado.es/web/actividadparlamentaria/iniciativas/detalleiniciativa/index.html?legis=12&id1=596&id2=000001>.

^{XXVIII}

See <http://www.senado.es/web/actividadparlamentaria/iniciativas/detalleiniciativa/index.html?legis=12&id1=596&id2=000001>.



[96&id2=000001.](#)

XXIX For the voting results of October, 27th 2017 see <http://www.senado.es/web/actividadparlamentaria/sesionesplenarias/pleno/rwdsesionespleno/detalle/index.html?id=30&legis=12>.

XXX See the text of the constitutional reform bill at <http://www.gazzettaufficiale.it/eli/id/2016/04/15/16A03075/sg>.

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