



SECOND CHAMBERS IN FEDERAL SYSTEMS



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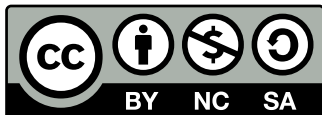
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INTRODUCTION

Federalism is a constitutional mechanism for dividing responsibilities between different levels of government in a country. It grants constituent units (i.e. substate territorial entities that may be called states, regions, provinces, Länder or cantons) a certain degree of autonomy (or self-rule) in regulating some policy areas. A key component of federalism is shared rule: constituent units are represented and participate in decision making at the federal level. In most federations, this takes place through a bicameral legislature (i.e. a legislature composed of two legislative chambers) at the federal level, in which the first chamber represents the people of the country and the second chamber represents the constituent units in some way.¹ While almost all federations have bicameral federal legislatures, there is significant variation in the composition and mandate of the second chamber, and consequently in its role in the overall federal system. The degree of influence that constituent units exercise over federal law-making greatly depends on the design of the upper house.

While this Report compares approaches to the design of federal upper houses, it is important to note that in some federations, the representation and participation of constituent units in federal-level institutions (shared rule) is also realized through other constitutional arrangements in the executive, the judiciary, fourth-branch institutions, and/or other federal institutions such as the armed forces and the civil service. Federal constitutions may also stipulate

¹ Some federal countries also have bicameral legislatures at the constituent unit level. In Argentina, Australia, India and the United States, some constituent units have established bicameral substate legislatures.

This Report highlights key considerations and provides an overview of comparative options when designing a federal upper house.

intergovernmental mechanisms or institutions to ensure coordination between different levels of government, which can serve as an avenue for constituent units to participate in federal decision making.

When negotiating the design of a future federal system, stakeholders in a given country will need to consider various constitutional design alternatives and agree on the structure and responsibilities of the upper house insofar as it is meant to achieve shared rule. This Report highlights key considerations and provides an overview of these alternatives based on comparative analysis.

The Report begins by outlining the main reasons for—and the challenges associated with—establishing a second chamber in federal systems. Chapter 2 highlights key considerations when negotiating constitutional provisions regulating second chambers during a federalization process. Chapter 3 focuses on the composition of second chambers. Chapter 4 provides a comparative overview of the responsibilities of second chambers. Chapter 5 explores the different mechanisms that federal constitutions include to resolve disagreements between the two chambers of federal legislatures. The final chapter consists of a table comparing second chambers in different federations.

This Report uses the terms ‘lower house’ and ‘first chamber’ interchangeably to refer to the house of the federal legislature that is directly elected and aims to represent the people. The terms ‘upper house’ and ‘second chamber’ refer to the house of the federal legislature that aims to represent the constituent units in some way; these are not always directly elected.

Chapter 1

WHY SECOND CHAMBERS IN FEDERAL SYSTEMS?

The primary reason for establishing second chambers in federations is to enable the representation and participation of constituent units in decision making at the federal level. This gives constituent units input into decisions on common concerns that will affect the entire country.

In addition to operationalizing shared rule, second chambers in federations may also serve other functions, like those in unitary states. A second chamber—especially if it has different electoral rules and tenures than the first chamber—can make the legislature more inclusive, serve as an additional forum for debating and scrutinizing laws and policies, and provide additional checks and balances on the majority in the lower house and on the executive.

However, establishing a second chamber also poses several challenges. The existence of two legislative chambers with different compositions raises the risk of delays and gridlock in decision making. It might be more difficult for the governing majority to pass legislation and implement reforms, and may therefore favour the status quo. In addition, it may be more difficult for the public to assign responsibility for policy failures. Where the two chambers have similar electoral rules and cycles, the existence of a second chamber might lead to unnecessary duplication and limited policy gains. A second chamber also incurs additional financial costs (Bulmer 2014).

The primary reason for establishing second chambers in federations is to enable the representation and participation of constituent units in decision making at the federal level.

Chapter 2

NEGOTIATIONS OVER THE SECOND CHAMBER DURING FEDERALIZATION

Negotiations over a second chamber should be linked to discussions on other aspects of the future federal arrangement.

When moving towards a federal structure, negotiations over a second chamber should be linked to discussions on other aspects of the future federal arrangement, especially the level of autonomy of constituent units (self-rule). Strong participation of constituent units in decision making at the federal level complements, and can serve as an alternative to, the scope of autonomous powers of the constituent units (International IDEA 2020). The two issues are interrelated and should not be discussed in isolation. In particular, it is important for those engaged in constitutional negotiations to consider how trade-offs can be made between the scope of the constituent units' legislative responsibilities and their participation in the law-making process at the federal level. If there is disagreement over the allocation of legislative responsibilities, stakeholders engaged in the constitutional negotiations could, for example, consider putting some disputed policy areas under the exclusive competency of the federal government in exchange for guarantees that the constituent units can participate meaningfully in the federal law-making process through the upper house (Bisarya and Noël 2021).

Constitution-makers should discuss the composition of the second chamber in conjunction with its powers and responsibilities.

Those involved in constitutional negotiations should also discuss the composition of the second chamber in conjunction with its powers and responsibilities. Indeed, the way delegates to the upper house are chosen significantly influences its representativeness, the extent to which it is connected to institutions of the constituent units, and its democratic legitimacy. As a result, the mode of selection is often linked to the scope of powers of the upper house. Upper houses that are directly elected tend to have stronger constitutional powers, whereas indirectly elected upper houses are likely to have less power vis-à-vis the directly elected first house.

Chapter 3

COMPOSITION OF SECOND CHAMBERS IN FEDERAL SYSTEMS

Negotiations over the composition of second chambers entails decisions on several elements, mainly: (a) the entities represented in the second chamber, (b) its size, (c) the allocation of seats therein, (d) the mode of selecting its members, (e) the representation of women therein, and (f) its term of office. This chapter discusses each in turn.

3.1. ENTITIES REPRESENTED IN SECOND CHAMBERS

While almost all federations have a bicameral legislature, the entities represented in the upper house vary. Most federal upper houses are composed of representatives of the constituent units, but some also have other types of entities represented therein.

Several comparative practices can be identified when deciding what entities are represented in the upper house:

- *Constituent units.* The most common basis for representation that seeks to guarantee shared rule in a federal system is constituent units. In the vast majority of federal countries, the upper house is composed of representatives from each constituent unit, as is the case in Australia, Germany, Nepal and the USA.
- *Constituent units and special status territorial entities.* In some federal countries, the upper house is composed of representatives from each constituent unit and from entities with special autonomy/territorial status. These are generally territorial units that have been granted special autonomy arrangements, different

Most federal upper houses are composed of representatives of the constituent units, but some also have other types of entities represented therein.

from other constituent units in the nation. India's upper house is composed of representatives from all 28 states, as well as representatives from union territories that have a state legislature, that is, areas that have less autonomy than states but are not fully under the direct control of the federal level of government. In Argentina, the Senate is composed of representatives from each of the 23 provinces, as well as representatives from the capital city of Buenos Aires that benefits from special autonomy arrangements. In Myanmar, under the 2008 Constitution, the Amyotha Hluttaw was composed of representatives from the 14 states and regions, and the self-administered zones and division. In addition, 25 per cent of the seats were reserved for the military (2008 Constitution of Myanmar, article 141).

- *Constituent units and other substate levels of government.* South Africa's upper house is composed of representatives from each of the nine provinces and from local governments. Local governments are represented through the South African Local Government Association, which is entitled to 10 representatives in the upper chamber who may participate in legislative debates but cannot vote. This arrangement gives local governments an opportunity to inform federal lawmakers of their needs and challenges. In Spain, a quasi-federal country, the Senate is composed of representatives from different substate levels of government (i.e. the 17 autonomous communities and 50 provinces) and from two special status territorial entities (i.e. the exclaves of Ceuta and Melilla).
- *Constituent units and the entire population.* Mexico's Senate has 96 representatives from its 32 states, and 32 representatives of the entire population who are elected by a single national constituency. Although representatives of the constituent units still make up 75 per cent of upper house members, this arrangement may diminish constituent units' influence on federal decision making.
- *Constituent units and the federal executive.* In Malaysia, the upper house is composed of 26 representatives from its constituent units, as well as 44 members appointed by the indirectly elected constitutional monarch on the advice (i.e. binding instructions) of the federal prime minister. This arrangement is an imperfect way to operationalize shared rule as the majority of senators are appointed by federal executive authorities and do not aim to

represent the constituent units. Constituent units have a more limited influence on federal law-making as they do not constitute the majority of members in the upper house.

- *Constituent units and specific communities.* Bosnia and Herzegovina's House of Peoples is comprised of a total of 15 representatives from the two constituent units (i.e. Republika Srpska and the Federation of Bosnia and Herzegovina). The Constitution stipulates strict equal representation for the country's three main ethnic groups. Accordingly, 5 of the 10 representatives from the Federation of Bosnia and Herzegovina are Croats and 5 are Bosniaks. The five representatives from Republika Srpska are Serbs. This arrangement guarantees representation to all three main ethnic groups and the two constituent units in the upper house. However, such an arrangement has two main disadvantages: (a) decision making in the upper house might be based on ethnic lines (rather than on the interests of the constituent units), and (b) it is exclusive in that other minority groups are not represented in the upper house. In Belgium, the Senate is composed of 60 members who represent the constituent units and the main linguistic groups: 29 senators are indirectly elected from the Flemish Parliament or from among the members of the Dutch linguistic group of the parliament of the Brussels-Capital region, 10 from the parliament of the French community, 8 from the parliament of the Walloon region, 2 from the French linguistic group of the parliament of the Brussels-Capital region, and 1 from the parliament of the German-speaking community; 6 are appointed by senators from the Flemish linguistic group and 4 by senators from the French linguistic group (Constitution of Belgium, article 67).
- *Ethnic groups.* Exceptionally, in Ethiopia, the House of Federation is composed of representatives of 'nations, nationalities and peoples'. Each group is represented by at least one member in the upper house, and receives one additional seat for each one million inhabitants in the population. Through this arrangement, the upper house primarily represents ethnic groups rather than constituent, territorial units. Yet identifying a country's ethnic groups can be difficult and controversial, and may lead to the exclusion of unrecognized groups. Due to its ethnic composition, Ethiopia's second chamber has unusual responsibilities. It is not involved in the ordinary legislative process. Instead, it is mainly responsible

for interpreting the constitution, resolving constitutional and intergovernmental disputes, and determining the division of revenues derived from joint tax sources and the subsidies that the federal government may provide to the states.

Federal upper chambers generally have fewer members than lower houses.

3.2. SIZE OF SECOND CHAMBERS

Federal upper chambers generally have fewer members than lower houses. Their smaller size reduces the cost of running the parliament, particularly since each constituent unit also has its own parliament. Although there are no hard rules when deciding on the size of second chambers, stakeholders should consider the scope of responsibilities of the upper house and ensure that there are sufficient members to staff the committees and that each member has an adequate workload. In federations where disagreements between the two chambers are resolved through a vote in a joint sitting, the ratio of the size of the two chambers affects the weight the constituent units (and other entities) represented in the upper chamber will have on the final decision.

Table 1. Size of second vs. first chambers in federations

	Total population (in millions)	Size of the first chamber	Size of the second chamber	Ratio of first/ second chamber
Australia	25.7	151	76	1.9/1
Bosnia and Herzegovina	3.2	42	15	2.8/1
Brazil	213.9	513	81	6.3/1
India	1,393.4	545	245	2.2/1
Nepal	29.6	275	59	4.6/1
Nigeria	211.4	360	109	3.3/1
United States	331.8	435	100	4.3/1

Source: Author's own research using population data from the World Bank, Population, total, [n.d.], <<https://data.worldbank.org/indicator/SP.POP.TOTL>>, accessed 1 December 2022; and constitutional data from the Constitute Project, <<https://www.constituteproject.org>>, accessed 1 December 2022.

3.3. THE ALLOCATION OF SEATS IN SECOND CHAMBERS

An important issue in the composition of second chambers is the number of representatives from each constituent unit (and/or other entities). Two main methods can be used to allocate seats in the upper house among constituent units—equal representation or weighted representation. Each method has different implications on the representativeness of the upper house and the functioning of the overall federal system. Decisions on allocating seats in the upper house involve a trade-off between the equality of individual votes, based on universal franchise and enshrined in international human rights law (Universal Declaration of Human Rights, article 21; International Covenant on Civil and Political Rights (ICCPR), article 25), and the equality of constituent units making up the federation.

In about half of the federations in the world, all constituent units have the same number of representatives in the upper house, irrespective of the size and population of each unit. Under such an arrangement, all constituent units have the same weight in decision making, which protects the interests of smaller units from being dominated by more populous ones. Depending on the law-making procedure and the type of veto power exercised by the upper house, it may enable a majority of representatives from smaller units (accounting for a minority of the population) in the upper house to veto or delay bills supported by the majority. Equal representation is used in Argentina (3 representatives from each constituent unit), Australia (12), Mexico (3), Nepal (8), Nigeria (3), Pakistan (23), South Africa (10), Switzerland (2) and the USA (2). It was also used in Myanmar's 2008 Constitution.

Other federations use weighted representation, which allocates seats based on the population of each constituent unit. The allocation of seats is not strictly proportional to the population size: constituent units with larger populations do get more seats, but less populous units are overrepresented relative to their population. Under such an arrangement, the most populated units have more weight in decision making than less populated units, but less populous units are still overrepresented. There are various ways and degrees of weighting. In India, the state of Uttar Pradesh (the most populated state with 204 million inhabitants) has 31 seats in the upper house, whereas Sikkim

Decisions on allocating seats in the upper house involve a trade-off between the equality of individual votes and the equality of constituent units making up the federation.

(the least populated state with 620,000 inhabitants) has only 1. In Austria, the most populated state has 12 seats in the upper house, and the number of seats allocated to the other states depends on their ratio relative to the most populated state; each state is entitled to at least 3 representatives in the upper house. In Germany, each Land is entitled to at least three seats in the second house. Länder with more than two million inhabitants have four seats; those with more than six million have five, and those with more than seven million have six. It is important to note that delegates are bound to vote as instructed by their respective Land (through bloc voting).

The selection mode of the second chamber influences its scope of powers.

3.4. MODE OF (S)ELECTION OF MEMBERS OF SECOND CHAMBERS

In all democratic federations, members of the lower house are directly elected. The mode of (s)electing members of upper houses varies, and often involves trade-offs between representing the people or institutions of each constituent unit. The selection mode significantly affects the representativeness of the upper house, the extent to which it is connected to institutions of the constituent units, and its democratic legitimacy. It also influences the scope of powers of the upper house: where members are directly elected from large constituencies, it tends to have stronger constitutional powers. Where members are indirectly elected, they are likely to be less powerful politically; thus the constitution often attributes less power to the upper house.

There are five broad ways in which members of the upper house can be selected: (1) direct election, (2) indirect election by constituent unit legislatures, (3) selection by constituent unit executives, (4) appointment by federal-level authorities, and (5) mixed selection processes. In a few federal countries, the mode of (s)election is left to constituent units (6).

3.4.1. Direct election

Under this arrangement, inhabitants of the constituent units directly elect their representatives to the upper house. Direct elections enhance the democratic legitimacy of second houses and are common in federations with strong upper houses (e.g. Argentina,

Australia, Brazil, Nigeria, USA). Members of the upper house are directly accountable to the electorate of the constituent unit that elected them. However, direct elections do not provide a formal connection between members of the upper house and constituent unit legislatures, and are likely to empower political parties over constituent units in federal decision making. Direct elections also have financial costs, which may be demanding in federations with limited resources.

Federal countries use a variety of electoral systems.

- *First-past-the-post (FPTP) in single-member constituencies.* In Nigeria, each state is divided into three single-member senatorial constituencies. In each constituency, the candidate who receives the most votes is elected to the upper house. Thus, members of the same political party may win all the seats from a particular state. Under such arrangements, members of the upper house represent (and are accountable to) the electorates in the senatorial constituency that elected them (not the electorate of the entire state).
- *FPTP in single-member constituencies through a staggered process.* In Brazil, each state is entitled to three representatives in the upper house. The composition of the Senate is partially renewed every four years, when either one-third or two-thirds of the seats are up for election. Each state constitutes one constituency. When one-third is to be renewed, each state elects one candidate. When two-thirds of the seats are to be renewed, each voter in a given state votes for two candidates, and each state elects two candidates. Under this system, members of the upper house represent (and are accountable to) the people of the constituent unit that elected them.
- *Party bloc vote in multi-member constituencies with guaranteed opposition representation.* In Argentina and Mexico, each constituent unit is entitled to three representatives in the upper house. Each constituent unit constitutes one senatorial constituency. In each unit, the party list that receives the most votes wins two seats, and the list that receives the second-highest number of votes wins one seat (Constitution of Argentina, article 54; Constitution of Mexico, article 56). In Mexico, 32

Direct elections enhance the democratic legitimacy of second houses and are common in federations with strong upper houses.

additional senators are elected through a party-list proportional representation system in a single national constituency.

- *Proportional representation system in multi-member constituencies.* In Australia, each state is entitled to 12 representatives in the upper house. Each state constitutes one senatorial constituency from which 12 members are elected through a party-list proportional representation system. This system ensures that candidates from different political parties with diverse views are elected from each state.

Upper houses with indirectly elected members tend to have less powers vis-à-vis the directly elected lower house.

3.4.2. Indirect election by constituent unit legislatures

Under this arrangement, the people in each constituent unit directly elect members of the legislature of their constituent unit. Members of the constituent unit legislature then select members to the federal upper house. Indirect elections by constituent unit legislatures create a better connection between the federal parliament and the constituent unit legislatures (since members of the upper house are selected by, and are therefore accountable to, the constituent unit legislatures). Indirect elections are easier and cheaper to hold than direct elections, as they require fewer financial, human and logistical resources. However, members of the upper house are not directly accountable to the electorate of the constituent units, and may thus have less democratic legitimacy. Upper houses with indirectly elected members tend to have less powers vis-à-vis the directly elected lower house.

In most federations that use this system, constituent unit legislatures elect upper house members via a proportional representation system (e.g. Austria, India, Pakistan). Such arrangements allow different parties represented in a given constituent unit legislature to be represented in the federal upper house. In India, the upper house has a maximum of 250 members; 12 are appointed by the president and the rest are elected by state/union territory legislatures (Constitution of India, article 80). The indirectly elected members do not need to be drawn from the state legislatures or to live in the state. As a result, political parties tend to select politicians who have not contested (or have lost) elections for the lower house. In this context, members of the upper house may be more inclined to defend their party interests than their state interests.

In Austria, members of the upper house are indirectly elected by the constituent unit legislatures through a proportional representation system. The Constitution also stipulates that at least one seat must be given to the party with the second-largest number of seats in the constituent unit legislatures (Constitution of Austria, article 35).

3.4.3. Selection by constituent unit executives

Selection by constituent unit executives ensures the most effective connection between the federal legislature and constituent unit governments. However, the appointment of members of upper houses by constituent unit executives enhances the policy powers of the executive, while marginalizing the influence of constituent unit legislatures on federal policymaking, especially in federations where most policy issues are determined at the federal level and the constituent units are responsible for implementing these policies.

In Germany, members of the upper house are delegates of each constituent unit executive branch. Delegates are appointed by each constituent unit executive government from among ministers and high level civil servants of the constituent unit executives (Constitution of Germany, article 51). Delegates do not have a free mandate; they must vote as a bloc according to the instructions of their constituent unit government. The upper house thus functions as an intergovernmental council where constituent unit executives debate and negotiate among themselves and with the federal lower house over federal legislation that will ultimately be implemented by the constituent unit executives.

3.4.4. Appointment by federal authorities

Only Canada uses such an arrangement. It is an imperfect way to implement shared rule, as upper house members are appointed by federal-level executives (rather than selected by the constituent units), and therefore may not properly represent the constituent units.

In Canada, the governor-general (a largely ceremonial head of state) appoints members of the upper house on the advice (i.e. binding instructions) of the prime minister, the head of the federal-level executive (Constitution of Canada, article 24). Because of the lack of democratic legitimacy and its executive appointment, the Canadian Senate very rarely rejects proposed laws. Effective representation of

Selection by constituent unit executives ensures the most effective connection between the federal legislature and constituent unit governments.

the provinces is achieved through the extra-constitutional Council of the Federation (an association of the governors of Canada's provinces and territories) and the First Ministers' Conference (a meeting of the provincial and territorial governors with the federal prime minister).

In some federal countries, members of the upper house are selected through a combination of modes.

3.4.5. Mixed selection processes

In some federal countries, members of the upper house are selected through a combination of modes. In South Africa, provincial legislatures indirectly elect 60 per cent of the members of each provincial delegation to the upper house; provincial executives appoint the remaining 40 per cent (Constitution of South Africa, articles 60, 61). Each province sends 10 delegates to the upper house—6 permanent delegates and 4 special delegates. The latter include the provincial premier and three other members of the provincial legislature designated by the provincial premier on an ad hoc basis depending on the topic. The former are appointed by provincial legislatures and serve full time. The Constitution stipulates that all parties with seats in the provincial legislature are entitled to representation in the delegation, proportional to their size. This requirement ensures that the delegation broadly represents the political diversity in each province. Nevertheless, as the delegates must vote in blocs when considering bills that affect provinces, the provincial majority often has the final say, although other representatives can formally communicate their perspectives.

In a small number of federal countries, the constituent units determine the mode of (s)electing members of the upper house.

3.4.6. Selection process left to constituent units

In a small number of federal countries, the constituent units determine the mode of (s)electing members of the upper house. However, if some constituent units select their members to the upper house through direct elections and others choose to use indirect elections, this will create a discrepancy in the level of democratic legitimacy of various members of the upper house. Directly elected members will enjoy more democratic legitimacy than those elected indirectly. In this context, a good practice consists of providing basic guidelines in the federal constitution and leaving the constituent units to decide on the details.

Switzerland's Constitution simply stipulates that the constituent units determine the rules for electing their representatives to the upper

house (Constitution of Switzerland, article 150.3). In practice, all constituent units have chosen direct elections through majority ballot except the Canton of Jura, which opted for direct elections through a proportional representation system.

The US Constitution provides that senators should be directly elected (Constitution of the USA, amendment XVII); states determine the details. In most states senators are directly elected through the FPTP system. The exceptions are Alaska and Maine, where they are directly elected through ranked-choice voting, and Georgia, where they are directly elected through a two-round system.

3.5. REPRESENTATION OF WOMEN AND MARGINALIZED GROUPS

International human rights instruments acknowledge the importance of women's participation in the conduct of public affairs and oblige states to ensure that women are represented in state institutions, including in central-level legislatures (Universal Declaration of Human Rights, articles 2, 21; ICCPR, articles 2, 22; Convention on the Elimination of All Forms of Discrimination Against Women, article 7; Beijing Platform for Action; UN 2030 Agenda for Sustainable Development Goal 5).

Federations have adopted various mechanisms to increase women's representation in legislatures, including in federal second chambers.

- *Reserved seats.* Under this mechanism, a certain number of seats in the legislature can only be held by women. The main benefit of this mechanism is its immediate effect on women's representation: if 30 per cent of the seats are reserved for women, this ensures there will be at least 30 per cent women in the given assembly. Belgium's Constitution requires the Senate to be composed of no more than two-thirds of senators of the same gender (article 67.3). The Senate, which consists of 60 indirectly elected members, always has at least 20 women.
- *Quotas by law.* Legislated quotas, provided through constitutions and/or laws, require political parties competing in elections to nominate a minimum percentage of women candidates. Contrary

Federations have adopted various mechanisms to increase women's representation in legislatures, including in federal second chambers.

to the mechanism of reserved seats, quotas do not ensure a minimum proportion of women in the legislature, but a minimum percentage of women candidates in elections. Quota systems can be used in both majoritarian and proportional representation systems. When used in closed-list proportional representation systems, the effectiveness of the quota system greatly depends on the ranking order and placement of women candidates on candidate lists. Some countries therefore require strictly alternating between women and men candidates on party lists, while others require a ranking order such as one woman in every three candidates (International IDEA, Inter-Parliamentary Union and Stockholm University n.d.). When used in a majoritarian election system, a quota system's effectiveness depends on parties' willingness to nominate women candidates to compete in *winnable* constituencies and not only in constituencies where the party has few chances to receive the highest number of votes. Argentina's election laws require parties to have at least one woman for every two men in their candidate lists for elections to the federal lower and upper chambers (International IDEA 2013).

- *Voluntary quotas adopted by parties.* In countries that lack specific legal mechanisms to promote the representation of women in legislatures, parties can choose to adopt internal quotas for women candidates, as they have in Australia, Austria and Switzerland.

In a few federations, such mechanisms have also been used to increase the representation of historically marginalized groups.

In a few federations, such mechanisms have also been used to increase the representation of historically marginalized groups. In Nepal, for example, each province is entitled to eight representatives in the federal upper house; three are reserved for women, one for Dalits, and one for a person with a disability or a member of a minority group (Constitution of Nepal, article 86.2). In each province, an electoral college comprised of all members of the provincial legislature and different local government authorities in that province elect their representatives to the upper house.

3.6. TERM AND (S)ELECTION CYCLES OF SECOND CHAMBERS

Second chambers tend to have longer terms of office than first chambers. In India, Nepal and Pakistan, members of the second chamber serve for six years, compared to five years for the first chamber. In Australia, senators are elected for a six-year term, while the first chamber has a three-year term. Only a few federations, mostly in Africa, have overlapping terms. In Bosnia and Herzegovina as well as Nigeria, the first and second chambers both serve a four-year term; in Ethiopia, Kenya and South Africa both houses serve a five-year term. Under Myanmar's 2008 Constitution both chambers also served a five-year term.

Terms may be staggered to allow the second chamber to provide continuity between changes in government. In Brazil, for instance, the Senate is directly elected by the people in each state for an eight-year term, and is partially renewed every four years, when one-third and two-thirds of the seats are alternately contested. In India, members of the second chamber are elected by the state legislatures for a six-year term, and one-third of the seats are renewed every two years.

Where both chambers are directly elected, the choice of equal terms and concurrent elections reduces the cost of recurrent elections. However, concurrent or sequential elections that result from equal tenure may produce redundant houses with a similar partisan composition. Different and/or staggered terms may induce different partisan compositions, since elections to the second chamber may be used as a protest vote against the governing majority or coalition.

While the executive may dissolve first chambers before the end of their term under specific circumstances in parliamentary federations (e.g. Germany, India, Nepal), federal second chambers are generally not subject to dissolution. Prohibiting federal executives from dissolving the second chamber helps protect shared rule in federations. The only exception is Australia, where the executive can dissolve both chambers if there are prolonged disagreements between them over a bill, although this has rarely been done (see Section 5.3).

Prohibiting federal executives from dissolving the second chamber helps protect shared rule in federations.

Chapter 4

RESPONSIBILITIES OF SECOND CHAMBERS

Nearly all second chambers in federal countries are mandatorily involved in the law-making process (Section 4.2). Second chambers' degree of influence over the law-making process greatly depends on the type of veto power they are granted (Section 4.1). They may also exercise additional functions, in line with their role in representing the interests of constituent units in the conduct of public affairs at the federal level, such as appointment and oversight powers (Section 4.3).

4.1. TYPE OF VETO POWER GRANTED TO SECOND CHAMBERS

The scope of powers of the upper house is often linked to the mode of selection. Where members are directly elected from large constituencies, the upper house tends to have stronger constitutional powers. Where members are indirectly elected, they are likely to be less powerful politically; thus the constitution often gives less power to the upper house vis-à-vis the directly elected lower house.

Therefore, some federal constitutions grant the upper house an absolute veto power over all (e.g. Australia, Nigeria, Switzerland, USA) or some proposed laws (e.g. Germany). This means that enacting legislation requires a bill to be considered and approved in both houses. If the two houses fail to pass a bill in identical form, it lapses. While an absolute veto power strengthens the influence of constituent units in federal decision making, it could also generate gridlock in policymaking, and may therefore favour the status quo.

Other federal constitutions grant the upper house a suspensive veto power over all or some proposed laws (e.g. Austria, India, Nepal, South Africa). This allows the upper house to amend or reject a bill, but the lower house can override the objection of the upper house in some way. When granted a suspensive veto power, the second chamber cannot block the enactment of a bill, but it has the opportunity to provide its opinion and proposals, which can be influential although not legally binding.

In many federal countries, the type of veto power granted to the upper house also varies depending on the type and subject matter of the bill under consideration. Upper houses are often granted a stronger form of veto power over bills that affect the federal scheme or the constituent units in some way (see Section 4.2 and Chapter 5).

In many federal countries, the type of veto power granted to the upper house also varies depending on the type and subject matter of the bill under consideration.

4.2. LAW-MAKING POWERS

The primary role of most second chambers in federal countries is to participate in the law-making process alongside the first chamber. Federal constitutions provide for different types of bills before the federal legislature, such as constitutional amendment bills, money bills, and ordinary bills. Different procedures often apply for making and adopting these different categories of bills.

4.2.1. Constitutional amendment bills

Constitutional amendment bills remove or modify provisions of the constitution or introduce new ones. Given the supremacy of the constitution, such bills typically require a higher majority threshold for approval than ordinary statutes.

The vast majority of federal constitutions lay out a constitutional amendment procedure that requires a level of consensus at the federal level and among the constituent units, in some way, to enact changes to the federal dispensations (i.e. the constitutional provisions regulating the federal system). Such arrangements ensure that the voices of constituent units are included when considering any changes to the federal arrangements, through their representatives in the federal upper house, through state-level legislatures or through¹⁵ the state electorates directly.

This involvement usually involves at a minimum the consent of the upper house, as the voice of the constituent units at the federal level. In Germany, for example, a constitutional amendment bill requires the approval of two-thirds of the members of the lower house and two-thirds of the votes in the upper house (Basic Law of Germany, article 79.2). In other cases, the approval of the second chamber may only be required for matters affecting constituent units. For instance, in South Africa, the approval of the second chamber is required only for constitutional amendments affecting the provinces, bill of rights, and values (Constitution of South Africa, article 74.3.b).

Federal constitutions may go further by requiring the approval of the peoples of the constituent units or the approval of state legislatures.

Federal constitutions may go further by requiring the approval of the peoples of the constituent units (as in Australia) or the approval of state legislatures. India's Constitution, for example, can be amended by a two-thirds majority of votes cast in both houses of the federal legislature, but amendments concerning the distribution of powers between the federal government and the states, the states' representation in the federal legislature, and the judiciary, as well as certain other provisions, must also be approved by a majority of the state legislatures (Constitution of India, article 368). In Ethiopia, a two-thirds majority vote of both houses of the federal legislature in joint sitting and a majority vote of two-thirds of the state legislatures are required to amend the Constitution. Amendments to constitutional provisions that relate to rights and freedoms and to the right to secession must be approved by a majority vote in all state legislatures, and a two-thirds majority vote in both chambers of the federal legislature (Constitution of Ethiopia, article 105) (Bulmer 2015; Böckenförde 2014).

4.2.2. Money bills

Money bills determine the level of revenue and expenditure of the federal level. Given the importance of financial legislation for the day-to-day functioning of the state and the delivery of public services, many constitutions stipulate a special legislative procedure for money bills to prevent conflicts between the two houses and protracted deadlock over matters of finance. Often, money bills can only be introduced in the lower house (e.g. Australia, India, Pakistan, South Africa). In some federations, the upper house can suggest amendments or omissions to money bills, but these may be accepted

or rejected by the lower house (e.g. Australia, India, Pakistan, South Africa).

4.2.3. Ordinary bills

Ordinary bills regulate policy areas that fall under the legislative competencies of the federal level of government as prescribed by the federal constitution. Some federal constitutions further distinguish between two types of ordinary bills: (a) those that affect the constituent units and (b) those that do not affect the constituent units. In federations that make such a distinction, upper houses are usually granted a stronger form of influence (or veto power) over bills that affect the constituent units in some way.

The Constitution of Germany differentiates between two categories of bills: 'consent' bills that require the consent of both chambers, and 'objection' bills, where the first house can overturn objections from the second house.

- The Constitution treats consent bills as exceptions, but in practice they make up more than half of all statutes adopted by the federal parliament. Consent bills are scattered throughout the Constitution. They mainly include statutes that prescribe the administrative procedures to be followed when the constituent units implement a federal law (article 84) and statutes that have financial implications for the constituent units or change the distribution of financial resources between the federations and the constituent units (articles 104.a, 105.3). To be adopted, consent bills require a simple majority of each chamber (article 77.2.a).
- In the case of an objection bill, the upper house can lodge a formal objection to a proposed bill. The lower house can override the objection of the upper house through an absolute majority (if the objection was lodged by a simple majority vote) or a two-thirds majority vote (if the objection was lodged by a two-thirds majority) (articles 77.4, 78).

South Africa's Constitution distinguishes between 'ordinary bills affecting provinces' and 'ordinary bills not affecting provinces'.

- *Bills affecting provinces* regulate policy areas that fall under the concurrent competencies of the federal level and provinces

Some federal constitutions distinguish between two types of ordinary bills: those that affect the constituent units and those that do not affect the constituent units.

(listed in Schedule 4 of the Constitution), and other laws explicitly mentioned as such in the Constitution (e.g. bills regulating the public service commission, public administration, etc.). Bills affecting provinces can be introduced in either the lower or upper house and must be considered by both houses. When voting on this type of bill, votes in the upper house are by provincial delegation. Each provincial delegation has one vote, and must cast it based on the instructions of the provincial legislature. Therefore, these bills must be discussed by each provincial legislature so that each legislature can give voting instructions to its delegation in the upper house. If the upper house refuses to pass such a bill, or proposes amendments that the lower house disagrees with, the disputed bill must be sent to a mediation committee composed of equal numbers of delegates from each house to find a compromise. If an agreement cannot be reached, a two-thirds majority in the lower house can override the objections of the upper house (article 76).

- *Bills not affecting provinces* can only be introduced in the lower house. The upper house has a limited influence on these type of bills as their rejection or amendments can be overturned by a simple majority of the lower house. The voting in the upper house on this type of bill is not by delegation. Instead, each upper house delegate has one vote and may vote individually along party lines (article 74).

As the modalities of the involvement of the upper house are likely to differ depending on how the bill is tagged, the tagging mechanism should ideally require the agreement of some delegates from both houses.

4.2.4. Tagging mechanism

When a bill is introduced in parliament, it must be classified into one of the categories of bills stipulated in the constitution. This process is often called 'tagging'; it determines the procedure the bill must follow to become law. As the modalities of the involvement of the upper house are likely to differ depending on how the bill is tagged, the tagging mechanism should ideally require the agreement of some delegates from both houses.

In South Africa, the joint rules of parliament, rather than the Constitution, regulate the tagging procedure. Bills are tagged by the Joint Tagging Mechanism (JTM), a committee that consists of the speakers and deputy speakers of the lower house and the chairperson and deputy chairperson of the upper house. The JTM decides the classification of bills by consensus. If consensus is not

achieved, the JTM must request a legal opinion from a constitutional expert. If consensus is still not achieved after considering a legal opinion, the matter is reported to both houses. If both houses cannot agree, either house can apply to the Constitutional Court to resolve the matter (Joint Rules of Parliament of South Africa, articles 151–58).

4.3. OTHER POWERS OF SECOND CHAMBERS

In addition to their legislative role, federal upper houses may also have (1) appointment powers, as well as oversight functions such as (2) impeachment of the head of state and other government officials, (3) the approval of treaties negotiated by the executive, (4) the approval of states of emergency or exception, and (5) the approval of federal interventions in constituent units.

4.3.1. Appointment powers

Federal constitutions often grant some appointment powers to second chambers, especially in relation to court(s) responsible for adjudicating constitutional and intergovernmental disputes. Besides constitutional guarantees of judicial independence, involving constituent units—through the second chamber or other ways—in the appointment of judges adjudicating the constitution can foster trust in the court exercising judicial review. For instance, in Germany, the upper house of the federal legislature (composed of delegates from the constituent units' executives) appoints half of the judges on the federal Constitutional Court by a two-thirds majority vote. In Austria, the second chamber has a more limited influence on the composition of the Constitutional Court. The president of the country appoints 3 of the 14 members and 1 of the 6 deputy members of the Constitutional Court on the proposal of the second chamber. In some federations, such as Argentina, Brazil, Nigeria and the USA, the second house must confirm the appointments of the highest federal judges and other appointments (e.g. ambassadors, senior officers of the armed forces). In Mexico, the second chamber appoints members of the Supreme Court through a two-thirds majority vote from a list proposed by the country's president.

Involving constituent units—through the second chamber or other ways—in the appointment of judges adjudicating the constitution can foster trust in the court exercising judicial review.

In some federations, second chambers are also involved in appointments to other institutions, the decisions of which affect the constituent units and the functioning of the federal system. Nigeria's Constitution, for example, requires the Senate to confirm the nomination by the president of the country to the Election Commission and the Federal Character Commission. In Kenya, the second chamber appoints five of the nine members of the Commission on Revenue Allocation.

In federations with a presidential system, second chambers often play a role in the impeachment procedure against the president and other government officials.

4.3.2. Impeachment and government removal

In federations with a presidential system, second chambers often play a role in the impeachment procedure against the president and other government officials (e.g. Argentina, Brazil, Nigeria, USA). The power to initiate impeachments tends to belong to the first chamber, but the final decision often requires a trial and a supermajority vote in the second chamber. In Brazil, a motion of impeachment against the president first requires a two-thirds majority vote of all members of the first chamber, and then a similar majority in the second chamber after a trial. Argentina and the USA have a similar procedure, although it requires a two-thirds majority vote of members present in each chamber (Abebe 2022).

In federations with a parliamentary system, second chambers are usually not involved in the removal of governments (except in Bosnia and Herzegovina). The vast majority of parliamentary constitutions deny the second house the authority to pass a vote of no confidence, reserving the power to make or break governments exclusively for the first house, in recognition of its primacy as the representative body of the whole people. In Germany and India, for example, the cabinet is responsible to the first and not to the second house.

4.3.3. Approval of treaties

Some federations require the second chamber to ratify international treaties negotiated by the executive. As some treaties have implications for the mandate of the federal level of government and the constituent units, involving the second chamber ensures that the central government does not use such agreements to undermine the autonomy of constituent units. Nevertheless, as in all aspects of the legislative process, it could lead to delays and even deadlocks.

In Mexico and the USA, only the second house needs to approve treaties. In Argentina, Brazil, Nigeria, South Africa and Switzerland, the federal constitution requires both houses to approve treaties. In Nepal, only certain types of treaties—mainly those related to peace, security, boundaries and natural resources—need to be approved by both chambers. In Austria, international treaties that affect constituent units' competences must be approved by a two-thirds majority vote in each house (article 50). Similarly, in Germany, treaties that imply a transfer of sovereign rights or involve amending the constitution, deal with political relations of the federation, or are related to matters of federal legislation must be approved by both chambers.

4.3.4. Approval of states of emergency/exception

Most constitutions include emergency provisions that allow central authorities—in times of public emergencies arising from war, armed uprisings, natural disaster, pandemic or other types of crisis—to take temporary actions necessary to safeguard national security, maintain law and order, protect lives, and keep essential public services working. These emergency provisions may permit the government to limit or suspend certain constitutional rights, to set aside some institutional checks and balances, and to infringe upon the division of powers between the central government and substate entities, so as to centralize and concentrate decision-making power in the central executive (Bulmer 2018). Nevertheless, to prevent the federal executive from resorting to states of emergency/exception to temporarily undercut the autonomy of constituent units for political or partisan purposes, federal constitutions often require the second chamber to approve states of exception.

In some federations, legislative approval must be granted before the state of emergency/exception can come into effect (pre-declaration approval). In other cases, the state of exception can come into effect immediately after an executive decision, but will lapse after a period of time if it is not confirmed by the legislature (post-declaration approval) (Bulmer 2018). In Argentina, the president must obtain Senate authorization before declaring a state of emergency in a constituent unit (article 61). In Brazil, the president must obtain the authorization of both chambers of parliament before declaring a state of siege (pre-approval, articles 49, 137), and must obtain the

To prevent the federal executive from resorting to states of emergency to temporarily undercut the autonomy of constituent units for political or partisan purposes, federal constitutions often require the second chamber to approve states of exception.

approval of both chambers within 10 days following the declaration of a state of defence (post-declaration approval, articles 49, 137). The Constitution of Brazil further requires a cross-chamber committee (i.e. a committee composed of members of both chambers of the federal parliament) to be set up to provide oversight during a state of siege or a state of defence (article 140). In Nigeria, the declaration of a state of emergency by the president must be approved within 2 (if parliament is in session) or 10 (if parliament is not in session) days by a two-thirds majority of all members of each house of the federal parliament (article 305).

In exceptional circumstances, federal intervention in a constituent unit may be necessary to ensure security, implement federal norms, and ensure that constituent unit governments deliver basic minimum services to their residents.

4.3.5. Approval of federal intervention in constituent units

Although the principle of self-rule implies autonomy in relation to matters under their mandate, in exceptional circumstances, federal intervention in a constituent unit may be necessary to ensure security, implement federal norms, and ensure that constituent unit governments deliver basic minimum services to their residents. Nevertheless, to prevent the federal executive from using federal intervention procedures to temporarily undercut the autonomy of constituent units for political or partisan purposes, federal constitutions often define specific grounds and require the second chamber to approve federal intervention.

In Ethiopia, only the second chamber can order a federal intervention in a constituent unit (article 62.9). In Brazil, the president of the country can decree a federal intervention in a constituent unit on specific grounds (and sometimes upon the request of a specific authority) but must submit the decree of intervention for consideration to the federal legislature within 24 hours (article 36.1) and obtain its approval (post-declaration approval, article 49). In South Africa, the second chamber can stop a federal intervention in a constituent unit through a simple majority vote within 180 days after the start of the intervention. In addition, the federal intervention automatically lapses if the second chamber has not approved it by the end of the 180-day period (article 100). Kenya's Constitution requires parliament to pass a law to regulate the procedure for federal intervention; this law must empower the Senate to end the federal intervention (article 190).

Chapter 5

DISPUTE RESOLUTION MECHANISMS

In almost all federal countries, both houses are involved in the law-making process. Therefore, disagreements over a bill between the lower and upper houses are likely to occur, especially where they are (s)ected differently and thus may have different majorities. To prevent prolonged deadlocks, most federal constitutions establish specific procedures for dealing with and/or resolving disputes between the two chambers. Federal constitutions may provide a combination of mechanisms, including shuttle procedures, joint mediation committees, dissolution and joint sittings, as well as different forms of override.

Where upper houses have an absolute veto power over (all or some) bills, federal constitutions may provide mechanism(s) to deal with the disagreement (i.e. shuttle procedure, mediation committee, dissolution). Where upper houses have a suspensive veto power over (all or some) bills, constitutions may foresee way(s) to deal with the disputes, but also include mechanisms to resolve it (i.e. joint sessions, first house override).

5.1. SHUTTLE PROCEDURE

In federations where the two chambers have equal powers over all or some types of bills, a shuttle procedure is used: proposed laws and amendments bounce back and forth between the chambers until disagreements are resolved and both approve an identical text. If the two chambers fail to pass an identical draft, the bill is not adopted. Shuttle procedures do not guarantee that deadlock will be overcome;

To prevent prolonged deadlocks, most federal constitutions establish specific procedures for dealing with and/or resolving disputes between the two chambers.

Shuttle procedures do not guarantee that deadlock will be overcome; they simply provide a way to negotiate disagreements.

they simply provide a way to negotiate disagreements. Unless combined with other mechanisms, reliance on shuttle procedures can lead to long delays in legislation, especially if the two houses do not have a similar political composition.

Some federal constitutions stipulate limitations with regards to the shuttle procedure.

To minimize the risk of prolonged delays and limit the number of shuttle rounds, some federal constitutions stipulate limitations with regards to the shuttle procedure. In Mexico, if one of the chambers rejects a bill twice as a whole, the bill is removed from the parliamentary agenda and cannot be reintroduced in the same parliamentary session (Constitution of Mexico, article 72.d). If the two chambers disagree over certain provisions of a bill, the Constitution of Mexico permits the enactment of only the provisions that have been approved by both chambers (article 72.e).

The shuttle procedure is used in Brazil, Mexico, Nigeria, Switzerland and the USA (i.e. federal countries where the two chambers have equal or nearly equal powers). Even in these countries, ad hoc mediation committees (i.e. comprising a few members of each chamber, sometimes also called conference committees) can be convened to try to find a compromise on the disputed bill. If a compromise is reached between delegates of the two chambers, both chambers then vote on the bill emerging from the conference committee. In the absence of agreement, the bill does not get through. In Brazil, Mexico, Switzerland and the USA, the federal constitution only provides for the shuttle procedure. The conference committees are provided for in legislation or parliamentary rules of procedures.

In Switzerland, every bill must be approved by a majority of both chambers (Constitution of Switzerland, article 156.2). If after three rounds of shuttle and three votes in each chamber a bill or some of its provisions fail to gain a majority in both chambers, a conciliation conference is convened (Law on Parliament, articles 78.5, 91, 92, 93, 94.A and 98.3). This conference consists of 26 delegates (13 from each chamber) who try to find a compromise on the disputed bill. The revised bill emerging from the conciliation conference is then submitted to the two chambers; if it fails to pass in one of the two chambers, it is not adopted.

5.2. JOINT MEDIATION COMMITTEE

A few federal countries have formalized the mediation committee system in their constitution (e.g. Germany, Kenya, South Africa). A mediation committee typically consists of a few members of each chamber, who may, in case of a disagreement between the chambers over a bill, be convened to find a compromise on the disputed bill. Both chambers then vote on the bill emerging from the conference committee.

In South Africa and Kenya, a mediation committee is established if there is disagreement over bills that affect the interests of states to attempt to develop a version that both houses will pass. While the Kenyan Constitution simply requires equal representation from both houses (article 113.1), the South African Constitution requires the mediation committee to be composed of nine members of the first house, proportionately representing the parties in the house, and one member from each of the nine provinces' delegations in the second house (article 78.1). If the mediation committee cannot find a middle ground proposal that both houses will approve within a prescribed time (30 days in both South Africa and Kenya), the draft bill lapses. In South Africa, if agreement between the two houses cannot be reached on a bill affecting the interests of provinces after a mediation committee is convened, the first house can override the objections of the second house and pass the disputed bill with a two-thirds majority vote (article 76.e).

The Constitution of Germany does not define the composition of the mediation committee, but provides that the composition and proceedings shall be regulated by rules of procedure approved by the first and second chambers (Basic Law of Germany, article 77.2). The mediation committee comprises 32 members: 16 from the first house, proportionately representing the parties in the house, and 1 delegate from each of the 16 federal member states. The second house may demand that a mediation committee is convened in relation to any bill, whether or not the interests of the states are affected, or if the consent of the second house is required. The first house can only convene a mediation committee in relation to bills that require the consent of the second house. If the mediation committee brokers a compromise on a disputed bill that requires the

A mediation committee typically consists of a few members of each chamber, who may, in case of a disagreement between the chambers over a bill, be convened to find a compromise on the disputed bill.

consent of the second house, the bill shall be adopted in its entirety by both houses. If the mediation committee reaches a compromise on a disputed bill that does not require the consent of the second house, the bill shall be approved by the first house and submitted to the second house. If the second house objects to the compromise bill, the first house can overturn the objections and adopt the bill with an absolute majority vote (if the objection was lodged by a majority of the second house) or two-thirds majority vote (if the objection was lodged by a two-thirds majority of the second house).

Mediation committee meetings are commonly closed to the public and confidential, and the houses often vote for or against the agreed text without amendment.

To facilitate negotiation and agreement, mediation committee meetings are commonly closed to the public and confidential, and the houses often vote for or against the agreed text without amendment. While this process allows disagreements to be resolved, it may give a small number of members disproportionate influence over the substance of the bill without effective scrutiny. In the USA, for example, special interest groups have intensely lobbied such committees, enabling policy decisions to be taken by small groups with little democratic scrutiny (since although each house may reject the agreement, doing so would involve high political cost).

5.3. DISSOLUTION

Australia's Senate is directly elected and has equal power with the House of Representatives (i.e. absolute veto) in relation to all proposed laws except money bills. The Constitution provides a unique type of dispute resolution mechanism: the governor-general can order the dissolution of both chambers in response to a veto imposed by the second chamber (Constitution of Australia, article 57). This procedure may be triggered if the Senate has rejected a bill twice within prescribed intervals of three months. In such a case, the government can advise the governor-general (a largely ceremonial head of state) to dissolve both chambers and call for early elections. If the deadlock over the same bill persists after the elections, it is resolved through an absolute majority vote in joint session where members of both chambers sit together.

This dispute resolution mechanism acknowledges the legitimacy that both chambers draw from direct elections, and the prescribed

time interval is intended to provide time for discussion and reflection in each chamber. This deadlock resolution mechanism is very rarely used. It is time consuming and costly, and can be politically risky for the government and its majority in the lower house. When the Senate rejects a bill, the government is more likely to negotiate with leaders of the opposition parties to broker a compromise than to trigger the double dissolution of parliament. In fact, the double dissolution procedure has been used for tactical political purposes by governments willing to anticipate elections (Le Roy and Saunders 2006).

The dissolution of both houses is an inter-chamber dispute resolution mechanism that is unique to Australia. In the vast majority of federal countries, second chambers are protected from dissolution.

5.4. JOINT SESSIONS

The shuttle and mediation committee procedures both enable, but do not finally resolve, disagreements. Some federations have therefore established mechanisms to ensure that necessary laws have the chance to be passed. Joint sessions are one such mechanism. Joint sessions can be used to resolve disputes over bills where the upper house only has a suspensive veto power. The members of both chambers sit together and resolve the deadlock by voting as a combined body on the disputed bill. India, Nepal and Pakistan use this mechanism, as did Myanmar under the 2008 Constitution.

In India, if a bill has been passed by one house and is rejected or not passed by the other house within six months, the president of the country, acting on the binding advice of the government, may call a joint session of both houses, presided over by the speaker of the first house, to decide on the bill by a simple majority (Constitution of India, article 108). This has happened only three times in over 70 years.

The Constitution of Nigeria also provides for joint sessions as a deadlock-breaking mechanism for appropriation or budgetary bills and those related to taxes, duties or fees. Where such bills are passed by one house but not passed in the other within two months of the commencement of a financial year, the president of the second

Joint sessions can be used to resolve disputes over bills where the upper house only has a suspensive veto power.

house should, within 14 days, convene a meeting of the joint finance committee of the two houses to examine the bill to resolve disputes between the two houses. Where the joint committee fails to resolve such differences, the bill is presented to a joint session of both houses; if the bill is passed in the joint session, it is presented to the president for assent (Constitution of Nigeria, article 59).

As upper houses usually have fewer members than lower houses, joint sessions typically give a preponderant influence to the majority in the lower house and can undermine the upper house's collective influence on law-making. In Nepal, for example, the lower house has 275 members and the upper house has 59 members (ratio 4.6/1). Therefore, in theory, the lower house can easily impose its views on the upper house when resolving a deadlock on disputed bills through a joint session. In practice, the outcome of the vote in a joint session is more likely to depend on the balance of parties in the two houses, as members of parliament may vote according to party lines rather than house affiliation.

5.5. FIRST HOUSE OVERRIDE

In some federal countries where second chambers have a suspensive veto power over all or some proposed laws, disputes between the two chambers may be resolved simply via the lower house's override powers. In such cases, the constitution empowers the lower house to override the disagreement of the upper house through a simple majority or qualified majority vote.

First house override procedure enables the lower house to make the final decisions on a disputed bill.

First house override procedure enables the lower house to make the final decisions on a disputed bill. However, the delay caused by the suspensive veto of the upper house might provide time to debate the issue among the general public and may put pressure on the lower house to consider some of the inputs from the upper house. Similarly, in systems that make it more difficult for the lower house to make the ultimate decision (e.g. if a qualified majority vote is required to overturn the objection of the upper house), the suspensive veto of the upper house may act as an incentive for the lower house to accept reasonable amendments introduced by the upper house and therefore encourage moderation and compromise.

5.5.1. First house override through a simple majority vote

In Austria, for example, ordinary bills passed by the lower house and objected to by the upper house may be adopted by a simple majority of the lower house in the presence of a quorum of half its members (Constitution of Austria, article 42).

In South Africa, an ordinary majority of the first house can override the objections of the second house in relation to bills that do not affect the interests of provinces (Constitution of South Africa, article 75). Such rules prevent deadlocks, but upper houses may have a more limited influence on federal law-making. Upper houses subject to such arrangements act more like a review and advisory body that can provide inputs and recommendations on bills to the lower house rather a law-making body.

5.5.2. First house override through a qualified majority vote

Some federal constitutions require a qualified majority vote in the first house to override objections from the second house. In South Africa, if the two houses do not reach agreement on a bill affecting the interests of provinces after convening the mediation committee, the first house can override the objections of the second and pass the disputed bill with a two-thirds majority vote (Constitution of South Africa, article 76.e).

Such rules allow the upper house to make it more difficult for the lower house to make the final decision on a disputed bill. They require the majority party or coalition to secure the support of some opposition parties in the lower house to override the objections of the upper house and pass the disputed bill.

A variation on these options is found in Argentina, where bills can originate in either chamber and are reviewed in the other chamber. If amendments are made by the reviewing chamber, the originating chamber can either pass the bill with the amendments, or reject the amendments and pass the original bill, with an absolute majority. However, if the reviewing house makes amendments with a two-thirds majority, the originating house can only pass its original bill with a two-thirds majority (Constitution of Argentina, articles 77, 81).

Some federal constitutions require a qualified majority vote in the first house to override objections from the second house.

The mechanism used to deal with or resolve inter-house disputes can vary depending on the subject matter of the disputed bill.

5.6. VARIATIONS OF DISPUTE RESOLUTION MECHANISM DEPENDING ON THE TYPE OF BILL

In most federal countries, the type of veto power granted to the upper house and the type of dispute resolution mechanism that is applicable vary depending on the type of bill under consideration. Upper houses are often granted a stronger form of veto power over bills that affect the federal scheme or the constituent units in some way. Accordingly, the mechanism used to deal with or resolve inter-house disputes can vary depending on the subject matter of the disputed bill (Table 2).

Table 2. Variations of veto power of the upper house and dispute resolution mechanism, by type of bill

	Austria	Germany	South Africa
Constitutional amendment bills affecting constituent units	<p>Absolute veto on constitutional amendment bills that restrict the legislative or executive competences of the constituent units (Länder). Amendments that change the division of responsibilities between the federal government and the constituent units must be approved by each chamber through a two-thirds majority vote (article 44.2).</p> <p>Absolute veto on constitutional amendment bills that alter the selection and composition of the second house. Amendment to the selection and composition of the second house must be approved by the first house through a two-thirds majority, and by the second house through a double majority (i.e. a two-thirds majority of all its members, and a majority of representatives from at least four Länder) (article 35.4).</p>	<p>Constitutional provisions related to the division of the federation into constituent units (Länder), the participation of the constituent units in the legislative process, and the principles of human dignity, democracy, rule of law, constitutional supremacy and the federal state structure cannot be amended (article 79.3).</p> <p>Passage of constitutional amendments on other provisions requires an absolute two-thirds majority of the lower house and a simple two-thirds majority of the upper house (article 79.2).</p>	<p>Absolute veto on constitutional amendment bills affecting the competences, institutions and boundaries of provinces or bills affecting the upper house. All amendment bills affecting the provinces require a two-thirds majority in the lower house, and the support of at least six of the nine provinces in the upper house (article 74.3.b).</p>

Table 2. Variations of veto power of the upper house and dispute resolution mechanism, by type of bill (cont.)

	Austria	Germany	South Africa
Constitutional amendment bills not affecting constituent units	<p>No veto</p> <p>Passage of an ordinary constitutional amendment bill requires a two-thirds majority vote in the presence of at least half of the members of the first house (article 44.1).</p> <p>Passage of a constitutional amendment bill affecting the basic principles (i.e. democracy, federalism, republic, rule of law, separation of powers) requires a two-thirds majority vote of the first house and approval by the people in a referendum (article 44.2).</p>	<p>Absolute veto</p> <p>Passage of constitutional amendment requires an absolute two-thirds majority of the lower house and a simple two-thirds majority of the upper house (article 79.2).</p>	<p>No veto</p> <p>Passage of a constitutional amendment bill not affecting provinces does not require approval of the upper house (article 74.3.a).</p> <p>Exceptions:</p> <ul style="list-style-type: none"> • Absolute veto on amendments to the bill of rights. Such amendments require a vote of two-thirds of the lower house and the support of six provinces in the upper house (article 74.2). • Absolute veto on amendments to the principles of human dignity, constitutional supremacy, non-racialism and universal suffrage. Such amendments require the approval of a three-quarters majority in the lower house, and the support of at least six of the nine provinces in the upper house (article 74.1).
Money bills	<p>No veto</p> <p>The budget is discussed and approved by the first house only. The second house has no voice in budgetary matters (article 42.a).</p>	<p>Suspensive veto on the budget act (that determines the level of federal revenue and expenditure each year) that can be overridden by the lower house (articles 77, 78 and 110).</p>	<p>Suspensive veto that can be overridden by the lower house through a simple majority vote (articles 77, 74).</p>

Table 2. Variations of veto power of the upper house and dispute resolution mechanism, by type of bill (cont.)

	Austria	Germany	South Africa
Bills affecting federal member units	Absolute veto on approval of international treaties that affect constituent units' (Länder) competences. Approval of such a treaty requires a two-thirds majority vote in each house (article 50).	Absolute veto on 'consent bills', which require the approval of each chamber through a simple majority (article 77.2.a). 'Consent bills' are scattered throughout the constitution, and mainly include statutes that have financial implications for the constituent units (Länder) or change the distribution of financial resources between the federations and Länder (articles 105.3, 104.a) and statutes that prescribe the administrative procedures to be followed when the Länder implement a federal law (article 84).	Suspensive veto that can be overridden by the lower house through a two-thirds majority vote (article 76).
Bills not affecting federal member units	Suspensive veto that can be overridden by the first house through a simple majority vote (article 42).	<p>Suspensive veto that can be overridden by the lower house through an absolute majority vote (if the objection of the upper house was lodged by a simple majority vote) (articles 77.4, 78).</p> <p>Suspensive veto that can be overridden by the lower house through a two-thirds majority vote (if the objection of the upper house was lodged by a two-thirds majority) (articles 77.4, 78).</p>	Suspensive veto that can be overridden by the lower house through a simple majority vote (article 74).

Source: Author's own research using constitutional provisions from the Constitute Project, <<https://www.constituteproject.org>>, accessed 1 December 2022.

Chapter 6

EXAMPLES OF SECOND CHAMBERS IN FEDERATIONS

While almost all federations have bicameral federal legislatures, there is significant variation in the composition and mandate of the second chamber. Table 3 compares second chambers in different federations.

Table 3. Second chambers in federations

Country	Composition and term of second chamber	Veto powers and dispute resolution mechanisms
<p>Argentina</p> <p>Presidential republic</p> <p>Global State of Democracy (GSoD) regime type:¹ mid-range performing democracy</p> <p>Constituent units: 23 provinces</p> <p>Population: 45.8 million</p>	<p>Senate</p> <p>72 members: three from each province (equal representation) and three from the capital city of Buenos Aires, all directly elected through a majority plurality vote in multi-member constituencies. In each state, the party list that receives the most votes wins two seats, and the list that receives the second-highest number of votes wins one seat.</p> <p>Six-year term with one-third of the members elected every two years.</p>	<p>Both chambers have a suspensive veto on legislative bills that can be overridden by an absolute majority or a two-thirds majority vote. Bills can originate in either chamber and are reviewed in the other chamber. If amendments are made by the reviewing chamber, the originating chamber can either pass the bill with the amendments or reject the amendments and pass the original bill, with an absolute majority. However, if the reviewing house makes amendments with a two-thirds majority, the originating house can only pass its original bill with a two-thirds majority.</p>
<p>Australia</p> <p>Parliamentary monarchy</p> <p>GSoD regime type: high-performing democracy</p> <p>Constituent units: six states and two mainland territories</p> <p>Population: 25.7 million</p>	<p>Senate</p> <p>76 members: 12 from each state (equal representation) and 2 from each mainland territory, all directly elected through a proportional representation system in multi-member constituencies. Each state constitutes one senatorial constituency from which 12 members are elected through a party-list proportional representation system.</p> <p>Six-year term with one-half elected every third year, subject to double dissolution procedure.</p>	<p>Absolute veto on all legislation, but can be followed by a double dissolution procedure and joint sitting.</p>

¹ Regime type classification is based on International IDEA, Global State of Democracy Indices, 2021, <<https://www.idea.int/gso-d-indices/democracy-indices>>, accessed 23 November 2022.

Table 3. Second chambers in federations (cont.)

Country	Composition and term of second chamber	Veto powers and dispute resolution mechanisms
<p>Austria</p> <p>Parliamentary republic</p> <p>GSoD regime type: mid-range performing democracy</p> <p>Constituent units: nine Länder</p> <p>Population: 8.9 million</p>	<p>Bundesrat</p> <p>Weighted representation ranging from 12 members for the most populated Land to 3 members for the least populated. The Bundesrat currently has 61 members.</p> <p>All members are elected by their respective Land legislature through a proportional representation system. At least one seat must be given to the party with the second-largest number of seats in the Land legislatures.</p> <p>Members of the Bundesrat serve the same term as their respective Land legislature they are elected by (i.e. five or six years depending on the Land).</p>	<p>Absolute veto on constitutional amendment bills restricting the legislative or executive competences of the Länder or affecting the composition and powers of the Bundesrat, and on approval of international treaties that affect Länder competences.</p> <p>Suspensive veto on ordinary bills that can be overridden by the first house through a simple majority vote.</p> <p>Money bill is discussed and approved by the first house only.</p>
<p>Canada</p> <p>Parliamentary monarchy</p> <p>GSoD regime type: high-performing democracy</p> <p>Constituent units: 10 provinces and 3 territories</p> <p>Population: 38.2 million</p>	<p>Senate</p> <p>105 members: 24 from each division (group of provinces) plus six from Newfoundland and one from each of the three territories.</p> <p>Appointed by federal government.</p> <p>Senators serve their term until the mandatory retirement age of 75 years old.</p>	<p>Absolute veto on all bills, but very rarely used because of its executive appointment and lack of democratic legitimacy.</p>

Table 3. Second chambers in federations (cont.)

Country	Composition and term of second chamber	Veto powers and dispute resolution mechanisms
<p>Ethiopia</p> <p>Parliamentary republic</p> <p>GSoD regime type: hybrid regime</p> <p>Constituent units: 11 regions and 2 chartered</p> <p>Population: 117.8 million</p>	<p>House of Federation</p> <p>Approximately 135 members: composed of representatives of nations, nationalities and peoples. Each group is represented by at least one member in the upper house, and gets one additional seat for each million inhabitants. The number of representatives is not fixed and changes with the evolving population of each group.</p> <p>Members are elected either indirectly, by the nine state councils, or directly by the people upon a decision by the state councils.</p> <p>Five-year term.</p>	<p>Due to its ethnic composition, the second chamber has uncommon responsibilities. The House of Federation is not involved in the ordinary legislative process. Instead, it is mainly responsible for interpreting the Constitution, resolving constitutional and intergovernmental disputes, and determining the division of revenues derived from joint tax sources and the subsidies that the federal government may provide to the states.</p>
<p>Germany</p> <p>Parliamentary republic</p> <p>GSoD regime type: high-performing democracy</p> <p>Constituent units: 16 Länder</p> <p>Population: 83 million</p>	<p>Bundesrat</p> <p>Approximately 60 members.</p> <p>Delegations of provincial governments vote as bloc; weighted voting ranging from six votes for the most populated Länder to three for the least populated.</p> <p>Staggered terms (based upon the duration of provincial governments).</p>	<p>Absolute veto on legislative bills concerning concurrent legislative powers, and bills requiring implementation by provinces need the approval of both houses.</p> <p>Suspensive veto on ordinary legislative bills that can be overturned by a majority of the lower house: a veto imposed by an absolute majority of the Bundesrat may be overturned by an absolute majority of the lower house, and a veto imposed by a two-thirds majority of the Bundesrat can only be overturned by a two-thirds majority of the lower house.</p>

Table 3. Second chambers in federations (cont.)

Country	Composition and term of second chamber	Veto powers and dispute resolution mechanisms
<p>India</p> <p>Parliamentary republic</p> <p>GSoD regime type: mid-range performing democracy</p> <p>Constituent units: 28 states and 9 union territories</p> <p>Population: 1.3 billion</p>	<p>Rajya Sabha</p> <p>Maximum of 250 members: 12 members appointed by the president and the rest elected by state and union territory legislatures.</p> <p>Weighted representation of states ranging from 31 members for the most populated state to 1 for the least populated states.</p> <p>Six-year term.</p>	<p>Suspensive veto on all legislative bills resolved through joint sitting.</p> <p>Suspensive veto on money bills that can be overturned by a simple majority vote of the lower house.</p>
<p>Nepal</p> <p>Parliamentary republic</p> <p>GSoD regime type: mid-range performing democracy</p> <p>Constituent units: seven provinces and a federal capital territory</p> <p>Population: 29.6 million</p>	<p>National Assembly</p> <p>59 members: 8 members from each province elected through an electoral college (comprising members of provincial legislatures, chairpersons and vice chairpersons of village councils, and mayors and deputy mayors of municipal councils) plus 3 members appointed by the president.</p> <p>Six-year term with one-third elected every two years.</p>	<p>Suspensive veto on all legislative bills resolved through joint sitting.</p> <p>No veto on money bills.</p>
<p>Nigeria</p> <p>Presidential republic</p> <p>GSoD regime type: hybrid regime</p> <p>Constituent units: 36 states</p> <p>Population: 211.4 million</p>	<p>Senate</p> <p>109 members: 3 members from each state plus 1 member from the federal capital territory.</p> <p>Senators are directly elected through FPTP in single-member constituencies.</p> <p>Four-year term.</p>	<p>Absolute veto on all legislative bills with joint committees to resolve deadlocks.</p> <p>Suspensive veto on taxation and appropriation bills resolved by joint sitting.</p>

Table 3. Second chambers in federations (cont.)

Country	Composition and term of second chamber	Veto powers and dispute resolution mechanisms
<p>South Africa</p> <p>Parliamentary republic</p> <p>GSoD regime type: mid-range performing democracy</p> <p>Constituent units: nine provinces</p> <p>Population: 60 million</p>	<p>National Council of Provinces</p> <p>90 voting members: one delegation of 10 members from each province (equal representation).</p> <p>Mix of delegates elected by provincial legislatures and delegates appointed by provincial executives.</p> <p>10 non-voting members representing local governments.</p> <p>Five-year term.</p>	<p>Veto varies with type of legislation (see Table 2 for details):</p> <p>Absolute veto on constitutional amendment bills affecting the competences, institutions, or boundaries of provinces or bills affecting the upper house. All amendment bills affecting the provinces require a two-thirds majority in the lower house, and the support of at least six of the nine provinces in the upper house (article 74.3.b).</p> <p>No veto on constitutional amendment bills that do not affect the provinces.</p> <p>Suspensive veto on legislative bills affecting provinces that can be overridden by the lower house with a two-thirds majority vote (article 76).</p> <p>Suspensive veto on legislative bills that do not affect provinces and on money bills that can be overridden by the lower house through a simple majority vote (article 74).</p>

Table 3. Second chambers in federations (cont.)

Country	Composition and term of second chamber	Veto powers and dispute resolution mechanisms
<p>United States</p> <p>Presidential republic</p> <p>GSoD regime type: high-performing democracy</p> <p>Constituent units: 50 states</p> <p>Population: 331.8 million</p>	<p>Senate</p> <p>100 members: 2 from each state (equal representation).</p> <p>Direct elections: in each state, senators are directly elected through the FPTP system, except in Alaska and Maine where they are directly elected through ranked-choice voting, and Georgia, where senators are directly elected through a two-round system.</p> <p>Six-year term with one-third elected every two years.</p>	<p>Absolute veto (with shuttle procedure and mediation committee).</p>

Source: Author's own research using population data from the World Bank, Population, total, [n.d.], <<https://data.worldbank.org/indicator/SP.POP.TOTL>>, accessed 1 December 2022; regime type classification from International IDEA's Global State of Democracy Indices, <<https://www.idea.int/gsod-indices/democracy-indices>>, accessed 1 December 2022; and constitutional provisions from the Constitute Project, <<https://www.constituteproject.org>>, accessed 1 December 2022.

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Federalism is a constitutional mechanism for dividing responsibilities between different levels of government in a country. It grants constituent units (i.e. substate territorial entities that may be called states, regions, provinces, Länder or cantons) a certain degree of autonomy (or self-rule) in regulating some policy areas.

Another key component of federalism is shared rule: constituent units are represented and participate in decision making at the federal or central level. In most federations, this takes place through a bicameral legislature (i.e. a legislature composed of two legislative chambers) at the federal level, in which the first chamber represents the people of the country and the second chamber represents the constituent units in some way. While almost all federations have bicameral federal legislatures, there is significant variation in the composition and mandate of the second chamber, and consequently in its role in the overall federal system.

When negotiating the design of a future federal system, stakeholders in a given country will need to consider various constitutional design alternatives and agree on the structure and responsibilities of the upper house insofar as it is meant to achieve shared rule. This Report highlights key considerations and provides an overview of these alternatives based on comparative analysis.

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