

Comparative Bicameralism: A Survey of Global Approaches

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Prasad and Mukherjee present an interesting and detailed case study of what is for them the erosion of democratic governance in India. Focusing on a single piece of controversial legislation passed into law by extraordinary means, their cause for concern, is the perceived marginalization of the upper house, Rayja Sabha, in the national policy making process and their hope in highlighting the sources of its marginalization is to 'reinvigorate bicameralism in India'. The modest claim of this article is that their argument is better understood and their hopes for upper house "reinvigoration" better assessed when seen in the context of the political role and experience of upper houses in other political systems of the world. This note is intended to sketch the broader, global context within which Indian bicameralism operates.

Bicameralism is far from the norm across the political world. According to the Inter-Parliamentary Union, there are today 193 national parliaments in the world and no more than 79 (or 40.1 percent) of them are bicameral; the remainder are unicameral. Generally speaking, bicameralism is found in larger, often more diverse States and unicameralism in smaller, more homogeneous ones. This distribution is less skewed in the world's 35 OECD democracies where 50.0 percent of parliaments are bicameral. But even in this latter group, the democratic credentials of upper houses are undermined to the extent that their memberships are not always directly elected. In point of fact, the membership of only half of them is elected in this fashion. In the remainder of them, and as also tends heavily to be the case for non-OECD countries, it is determined by indirect election, appointment or some combination of the two. Moreover, variation in method of appointment is but the tip of the iceberg as concerns the differences between upper houses. Generally speaking, they are bodies that are, at least outwardly, unique aggregations, each with its own history, its special traditions and customs, its time-honoured norms and practices, its constitutional status, and its impact on the law of the land. Digging deeper, however, they share

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much in common in their underlying justification, purpose and rationale. To put it briefly, they allow for differentiation in political representation and they provide the redundancy in policy making that may prevent error, delay action until alternatives have been vetted satisfactorily or postpone decisions until the disputants achieve consensus. The theory of bicameralism, in short, underscores both representation and redundancy.

A powerful justification for a two-house parliament lies in demands for representation. According to bicameral theory, one house, usually the lower one, is composed of popularly elected members representing the citizens directly. The other, usually upper, house enjoys a different basis of representation and may give voice to the interests of social classes, economic interests or territorial diversity. Territory is the most common of these, with the US Senate being perhaps the best-known example. In contrast, the representational basis of the UK's House of Lords, for example is social class and the Irish Senate's, or *Senead's*, a form of functional representation whereby most members are chosen in functional clusters—in culture and education, agriculture, labour, industry, and commerce, public administration and social services. Representation underpins Prasad and Mukherjee's "demos enabling" function of upper houses. Thus, reflecting their perhaps greater linguistic, ethnic and racial diversity, federal states tend to create bicameral assemblies, while unitary ones tend to establish unicameral parliaments, but this is not to say that the representation of diversity, in the form of territory, does not take place in the parliamentary structure of unitary states. Rather it is to say only that constitution makers have sought to accommodate population differences by other means. A case in point is France with its unitary constitution. Its senators are chosen so as to represent the departments and overseas territories and French citizens living abroad.

Redundancy is the second function common to upper houses in democracies. Second chambers are held to 'provide for a second opinion' that can help to shape the content, quality and consistency of policy outputs from government by virtue of their capacity to review and revise lower house legislative proposals.¹ This is Prasad and Mukherjee's 'demos constraining' role of upper houses and it may be pursued by various methods. They may, for example, ferret out and correct laws proposed by the popular house, or sponsor 'second thoughts' about provisions of law or check the influence of interest groups. Following from such activities, it is argued that delay and discussion can allow the expression of a wider range of public sentiments on policy issues or dampen or mitigate popular passions or hasty judgments. The outcome is improved legislative performance.

¹ KC Wheare, *Legislatures* (2nd ed, OUP 1967) 140.

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In practice, however, upper houses vary substantially in the extent to which they are able to influence the content and shape of policy outputs as there are numerous constraints on their influence in the legislative process. Prominent among these, are constitutional constraints. At one end of the scale are upper houses that enjoy equality with lower houses in the letter of the constitution. In the US, both for Congress and for the forty-nine bicameral state legislatures (excluding unicameral Nebraska), or in Italy, the two houses carry equal powers and laws must be approved by both. In the American case, a truly ‘bicameral perspective’ is in order, a viewpoint that recognizes the co-equality of the two legislative houses, such that they provide a checking and balancing of one another.² In the Italian case, the Chamber of Deputies and the Senate are co-equal constitutionally. Both must enact legislation and governments must be invested by and enjoy the confidence of both chambers.³ But toward the other end of the scale, there is a clear asymmetry of power. In most parliaments, the influence of upper houses in the legislative process is more constrained since they are constitutionally subordinate to their lower house counterpart. A salient example is the UK House of Lords, which in the wake of fundamental reform in 1911 is empowered only to revise, reconsider or delay legislative proposals, and constitutional provisions govern the circumstances under which it can be overridden by the lower house. Certain pieces of legislation are even outside its influence. Directly relevant to Prasad and Mukherjee’s article, for example, is the fact that the upper house in India as well as the UK cannot amend “money bills” dealing with taxation and government spending, although their recommendation for amendment can be accepted at the discretion of the lower house.

Constitutional provision notwithstanding, bicameral relations are not static and the longer-term trend has been for upper houses to become less influential to the benefit of their lower house counterparts. This is most obvious in the abolition of a number of upper houses. Since the end of World War II, upper houses have been disestablished in a number of states, including New Zealand in 1950, Denmark in 1953, Sweden in 1970, Iceland in 1991, Peru in 1993, and Mauritania in 2017. Morocco is the rare example of an upper house being added in 1991. In 1992, Estonia chose not to re-introduce an upper house when it enacted its post-Soviet constitution. Almost adding to this list, it took a constitutional referendum to avert upper house abolition in Ireland in 2013. Morocco is the rare example of an upper house being added in 1996. But even if not

² Richard Fenna Jr, *The United States Senate: A Bicameral Perspective* (American Enterprise Institute 1982)

³ Paul Furlong, ‘Parliament in Italian Politics’ in Philip Norton (ed), *Parliaments in Western Europe* (Frank Cass 1990).

abolished, it is still the case that upper houses generally play a lesser role in the legislative process and it may even be that there has been an even further diminution of their role, even in the case of originally co-equal upper houses. Belgium and Italy are cases in point. Created in 1831, the Belgian Senate was created fully equal to the Chamber of Representatives, but after notable reforms in 1993 and 2014 it is now a shadow of its former self. It has a much smaller number of members who are now drawn from community and regional parliaments or are co-opted rather than being directly elected. Playing only a very minor role in the federal legislative process, it has become a platform for discussion and reflection about differences between the country's territorially defined language communities. Similarly for Italy, it was only direct popular consultation in the form of a constitutional referendum that prevented its Senate from following the same path. In 2016, a law was passed that effectively abolished the Senate as an elected chamber and sharply restricted its ability to veto legislation, but the proposed change was rejected in December 2016 in a referendum.

Such changes reflect upper houses being 'essentially contested' in the sense that their very existence is inherently a matter of dispute (Gallie 1955-56).⁴ Two criticisms are generally levelled against them. The first is practical in the sense that upper houses are claimed rarely to represent the population at large or to enhance legislative performance. Rather, their interference with the normal relationship of political responsibility between the lower house, the putatively democratic body, and the executive is said to produce obstruction and frustration of the popular will more often than contributing salutary delay, and it may particularly do so when the two houses are in the hands of different political party majorities. Thus, they introduce inefficiencies in the processing of important legislation, and they may even fail to provide a critical review of legislative proposals. The second, and weightier criticism is that upper houses challenge the essence of parliamentary democracy. A co-equal US Senate is consistent with a governing philosophy of minoritarian democracy and a constitutional separation of powers that legitimizes opposition to the House of Representatives, even if that opposition comes from political actors who, unlike members of the lower house, are not themselves directly elected, namely, the president, the justices of the Supreme Court or senators prior to the 1913 constitutional reform that introduced their popular election. But the overriding goal of this form of democratic government is to protect the interests of minorities against the potential

⁴ WB Gallie, 'Essentially Contested Concepts' (1956) 56 (1) Proceedings of the Aristotelian Society 167.

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tyranny of the majority. By contrast, parliamentary systems of government are based on a majoritarian philosophy of democracy and a concentration of legislative powers in the directly elected lower house. The goal is to allow the popular will, as expressed in periodic elections to be put into practice for as long as the government holds office and retains the support of a majority of elected representatives.

Generally speaking, the case against strong upper houses has carried the day and debate about bicameral change and reform, even abolition, is forever in the air in many countries. Rarely are all significant political actors satisfied with the balance achieved between the criteria (most commonly, indirect election or appointment) according to which senators are recruited and the powers of influence and veto they might enjoy. Moreover, the members of upper houses themselves seem to accept the legitimacy of their subordination to the lower house, even when those members function in directly elected co-equal houses. Lodici explains lower house primacy in a formally equal bicameral system in terms of ‘the major influences on Italian public opinion’ coming from the Chamber of Deputies, ‘which prefers a senate whose role is one of mediation, wisdom, and moderation, and not with a senate with coequal legislative or government-making power’.⁵ As is evident from the directly elected and co-equal Australian Senate’s history, upper houses are especially prone to accept their subordination to the lower chamber when both are controlled by the same party. The senate changed tack to enjoy a substantial upsurge in its ability to counter the majoritarian tendencies of the House of Representatives when minor parties came to hold the balance of power, partly as the result of a proportional representation voting system being introduced for upper house elections in 1948.⁶

This short article has presented a mile-high overview of the political role of upper houses of parliaments in the contemporary world. Its purpose has been to place Prasad and Mukherjee’s study of the implications for Indian democracy of a particularly controversial piece of legislation in the context of the democratic role of upper houses more generally. This legislation was passed into law over strong objections of the Rajya Sabha, an indirectly elected upper house whose objections were rejected by a lower house dominated by the Bharatiya Janata Party (BJP). This kind of confrontation may have been unusual and unpopular in

⁵ Claudio Lodici, ‘Parliamentary Autonomy: The Italian Senato’ in Samuel Patterson and Anthony Mughan (eds), *Senates: Bicameralism in the Contemporary World* (Ohio State University Press 1999).

⁶ John Uhr, ‘Generating Divided Government: The Australian Senate’ in Samuel Patterson and Anthony Mughan (eds), *Senates: Bicameralism in the Contemporary World* (Ohio State University Press 1999).

India, but it is commonplace on a global scale. Short of some sort of constitutional revision, it might be premature to talk about “reinvigorating bicameralism in India,” at least for as long as the iconoclastic **BJP** remains in the ascendancy.