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Bicameralism in Slovenia throughout a Three-Dimensional Approach

System dwuizbowy w Słowenii w ujęciu trójwymiarowym

ABSTRACT

The scientific article discusses bicameralism in Slovenia using a three-dimensional approach. The main objective is to identify whether Slovenian bicameralism is weak or strong, using the criteria of symmetry, congruence, and perceived legitimacy. To achieve this, the authors use the descriptive and analytical method. In their opinion, Slovenian bicameralism has always been categorized as weak based only on its formal powers in the legislative procedure. Therefore, all proposed changes related to the National Council aim to change its formal powers without taking into account the congruence and perceived legitimacy criteria. The authors provide a unique insight into the other two criteria and suggest that calls for reform of the National Council should primarily deal with the congruence and perceived legitimacy criteria. The novelty of the research lies in the fact that

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no scientific papers have dealt with bicameralism in Slovenia using a three-dimensional approach. The authors believe that the article has cognitive value in times of constant calls for reform of the National Council.

Keywords: bicameralism; National Council; three-dimensional approach; congruence; perceived legitimacy

INTRODUCTION

Bicameralism is an institutional design with a two-chambers representative assembly.[1] The relationship between those chambers is strongly influenced by the strength of the bicameral system in place. A. Lijphart has found that formal powers and composition distinctiveness amongst the two parliamentary chambers represent the main criteria of bicameral strength.[2] This definition was widely accepted by scholars worldwide which strongly influenced the analysis of strong and weak bicameral systems around the world. M. Russell found that additionally to the two criteria used by Lijphart (symmetry and congruence) legitimacy should be added.[3] She claimed that the legitimacy criteria could be the one that could change a perceived weak upper chamber to a relatively strong upper chamber.[4]

The purpose of this article is to identify the strength of Slovenian bicameralism by using a three-dimensional approach that Russell presented. This will enable to assess how the other two factors – congruency and legitimacy could or could not change the evaluation of the Slovenian bicameral system. The authors argue that the Slovenian bicameral system is weak, using the Lijphart approach, but even weaker using the Russell criteria or the perceived legitimacy dimension. It should be emphasized that until the Constitutional Court's decision U-I-295/07,[5] scholars mostly dealt with the question of whether the Slovenian parliament is bicameral. That being the most important question the overall assessment of its strength or weakness missed. D. Štrus characterized Slovenian bicameralism as weak using just the criteria of formal powers, without researching the other two criteria (con-

[1] See S. Patterson, A. Mughan, *Senates and the Theory of Bicameralism*, [in:] *Senates, Bicameralism in the Contemporary World*, Columbus 1999, p. 1.

[2] See A. Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, New Haven 1984.

[3] See M. Russell, *Rethinking Bicameralism Strength: A Three-Dimensional Approach*, "Journal of Legislative Studies" 2013, vol. 19(3), pp. 370–391.

[4] Eadem, *A Stronger Second Chamber? Assessing the Impact of House of Lords Reform in 1999 and the Lessons for Bicameralism*, "Political Studies" 2010, vol. 58(5), pp. 866–885.

[5] See judgment of the Constitutional Court of the Republic of Slovenia of 22 October 2008, U-I-295/07.

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gruence and perceived legitimacy).[6] F. Grad noted that the National Council has no authority power because all its competences are tied to the National Assembly and it only functions through the activities of the National Assembly.[7] C. Ribičič explained that the competences of the National Council are designed in such a way that it does not itself make final decisions, but mainly advises and intervenes in other ways in the legislative process, the undisputed master of which is the National Assembly.[8] In theory, there are several arguments about the accentuated asymmetry of the relationship between the National Assembly and the National Council.[9]

The article begins with briefly explaining all three factors defining the strength of bicameralism. Then it analyses the National Council's strength or weakness throughout the lens of symmetry, congruence, and perceived legitimacy criteria. Finally, the authors provides us with a presentation of how change in the congruence and perceived legitimacy would amount to a stronger upper chamber in Slovenia.

RESEARCH AND RESULTS

1. Three dimensions of bicameralism

Symmetry refers to the extent that the legal powers of both chambers are equal. Lijphart has classified the balance of power between parliamentary chambers in bicameral systems as symmetrical, moderately asymmetrical, and extremely asymmetrical.[10] A symmetrical bicameral system combines two chambers equal or nearly equal in formal powers but different in the political and policy viewpoints represented which have public legitimacy.[11] In symmetrical bicameral systems, draft legislation has to go through the coordination procedure, since laws can only be passed by consensus of both chambers. In the asymmetric bicameral systems (moderately and extremely) the lower chamber has greater legislative powers than the upper chamber of the parliament. J. Coakley and M. Laver note that amongst the upper chambers of the parliament only two, the US Senate and the House of

[6] See D. Štrus, *Reshaping the National Council of the Republic of Slovenia*, [in:] *Constitutional Reform of National Legislatures: Bicameralism under Pressure*, ed. A. Richard, Cheltenham–Northampton 2019.

[7] See F. Grad, *Parlamentarno pravo*, Ljubljana 2013, p. 100.

[8] See C. Ribičič, *Dvodomnost*, [in:] *VII. dnevi javnega prava*, Portorož 2001, pp. 131–132.

[9] See M. Senčur, *Dvodomnost slovenskega parlamenta*, Ljubljana 2010, p. 178.

[10] See A. Lijphart, *Democracies…*

[11] See idem, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, New Haven 1999.

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Peoples of Bosnia and Hercegovina, have greater powers than the lower chambers.[12] In practice, 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.[13]

Congruence describes the similarity of parliamentary chambers in terms of their partisan composition. Regarding the composition of bicameral parliaments, the legal theory distinguishes between congruent composition and incongruent composition of the two chambers of the parliament.[14] If both chambers are constituted in a similar way, i.e. if both are directly elected in accordance with the general popular representation and in the same period of time, their composition is congruent. The congruency of the composition depends also on other elements, such as the length of the term of office or the time of elections of both houses. However, different method of composition of the two chambers does not necessarily means that their composition is incongruent. Congruency can usually also be achieved through other elements, e.g. if some members of the upper house are appointed by the prime minister, this increases the possibility of the ruling coalition to create a majority in the upper house (the case of the Irish Senate).[15] The ration of bicameralism has been to include a different group of individuals in the decision-making process. In the past, this inclusion represented elite-based chambers[16] which are nowadays replaced by territory representation-based chambers. The advantage of the territorial model is that it gives the upper chamber a distinct representational basis which result in distinct chambers with different perspective and types of members.[17] This arrangement has the potential to bind the nation together, minimize the dangers of fragmented decision making and encourage common positions with benefit the nation and its territories.[18]

The legitimacy of the upper chamber is an important question because of the composition of the upper chambers and the mere fact that the upper chamber contests the decisions which were adopted in directly democratically elected lower chamber.[19] Lijphart has perceived legitimacy as a limited contributor to the strength of bicameralism but nevertheless claimed that a lack of legitimacy may

[12] See J. Coakley, M. Laver, *Options for the Future of Seanad Eireann*, [in:] *The All-Party Oireachtas Committee on the Constitution: Second Progress Report*, ed. S. Eireann, Dublin 1997.

[13] See A. Mughan, *Comparative Bicameralism: A Survey of Global Approaches*, "University of Oxford Human Rights Hub Journal" 2020, no. 2, pp. 117–122.

[14] See A. Lijphart, *Patterns of Democracy…*, p. 207.

[15] See M. Russell, *Reforming the House of Lords: Lessons from Overseas*, New York 2000, pp. 250–254.

[16] See G. Tsebelis, J. Money, *Bicameralism*, Cambridge 1997.

[17] See M. Russel, *The Territorial Role of Second Chambers*, "Journal of Legislative Studies" 2001, vol. 7(1), pp. 105–118.

[18] *Ibidem*.

[19] See J.S. Mill, *On Liberty and Other Essays*, Oxford 1998, p. 386.

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render a second chamber unable to use its full powers.[20] We use Y. Papadopoulos and P. Warin's division of perceived legitimacy as input, throughput, and output legitimacy.[21] Input legitimacy can be perceived as democratic legitimacy achieved through election or throughout representation of special groups or expertise of its members.[22] Procedural legitimacy can be seen when the upper chamber decision making processes are not influenced by party political ethos. Output legitimacy resonates when upper chamber contests unpopular or ill-thought policy, even when they have first chamber support.

2. Slovenian parliamentary symmetry

The Slovenian parliamentary symmetry should be evaluated through its competences granted in the legislative procedure, especially the power of legislative initiative, the power to amend draft legislation, the power to give opinions on all draft legislation, and the veto power.

The legislative initiative is laid down as the first of the Slovenian National Council's powers.[23] This power gives the National Council the right to request the initiation of the legislative procedure.[24] The Slovenian National Council has stronger power of legislative initiative, normatively, than numerous other upper chambers around the world,[25] because it can submit finance-related draft laws to the legislative procedure (although its powers are limited with regard to the state budget). Some upper houses, such as the French Senate,[26] Irish Senate,[27] and House of Lords in the UK, have the power to initiate legislative procedures, but they are limited to proposing legislative initiatives that are not of a financial nature. In practice, the Slovenian National Council cannot exercise its full power of legislative initiative in draft laws that have financial consequences. The reason lies in the Rules of Procedure of the National Assembly, which stipulate that among the draft law components are the financial consequences of the law if it were to

[20] See A. Lijphart, *Patterns of Democracy…*, p. 207.

[21] See Y. Papadopoulos, P. Warin, *Are Innovative, Participatory and Deliberative Procedures in Policy Making Democratic and Effective?*, "European Journal of Political Research" 2007, vol. 46(4), pp. 445–472.

[22] *Ibidem*.

[23] See Article 97 of the Constitution of the Republic of Slovenia.

[24] The Rules of Procedure of the National Assembly determines that the legislative procedure starts when the President of the National Assembly forwards the proposed law to all deputies for first reading.

[25] F. Grad also stated that the State Council has such strong powers that they exceed the powers of many other houses in modern parliaments. See F. Grad, *op. cit.*, p. 100.

[26] See French Senate, *Bicameral System in the World System: Meeting of the Senates of the World*, Paris 2000, p. 132.

[27] See Article 20 of the Constitution of Ireland.

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be adopted.[28] The National Council cannot redistribute the financial resources in the state budget to provide sufficient funds to cover the financial consequences of some draft laws, which can sometimes result in the National Council postponing the enforcement of a law for one or two years (depending on the time frame for which the state budget was approved).

The Slovenian National Council is not vested with the power to amend draft laws,[29] but it does, however, have to possibility to participate in the work of the working bodies of the National Assembly. The National Council or its commission can submit amendments to the competent working body of the National Assembly at the second reading. These amendments, included in its opinion,[30] are not binding for the lower chamber. The National Assembly doesn't have to vote on the National Council's amendment if none of the formal proponents of amendments decides not to table it. Such arrangement is not typical for bicameral representative bodies. Usually, one house of the parliament cannot table amendments to law proposals until the procedure within the other house was terminated and the law was passed.

The National Council, in contrast to some other upper houses, has a suspensive and not absolute veto power.[31] The absolute veto power allows the upper house to obstruct the decision of the lower house; the suspensive veto on the other hand can be overruled by the lower chamber. The lower house may overrule the suspensive veto by way of a majority vote, which is as a rule more demanding to achieve than an ordinary majority. The suspensive veto of the National Council is overruled by the way of an absolute majority of the members of the lower house.[32] The time frame to file a suspensive veto for the National Council is only seven days.[33]

The National Council in Slovenia plays a consultative role by offering its opinions to the National Assembly on all matters falling within the competence of the National Assembly.[34] It may offer its opinion not only on legislation, but also on constitutional amendments, declarations, EU matters, nominations, etc. By offering its opinions to the National Assembly, the National Council promotes and communicates to the National Assembly the interests of all interest groups that are represented in the National Council. What is more, the various committees of the National Council also formulate opinions when draft legislation is debated.

[28] See Article 115 of the Rules of Procedure of the National Assembly.
[29] See Article 129 of the Rules of Procedure of the National Assembly.
[30] See Article 56 § 2 of the National Council Act.
[31] See Article 91 of the Constitution of the Republic of Slovenia.
[32] *Ibidem*. Absolute majority is 46 out of 90 members of the National Assembly.
[33] *Ibidem*.
[34] See Article 97 of the Constitution of the Republic of Slovenia.

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3. Congruence of the Slovenian Parliament

The composition of the National Council of the Republic of Slovenia is incongruent. In Slovenia, the two houses of the parliament are different, not only in the way they are formed, their powers, mandate, and professional performance of their members, but also in their composition. The National Assembly represents all citizens of the Republic of Slovenia, and local and various functional interests are represented in the National Council.[35] Local and functional interests face each other in the National Council in an institutionalized way. Its composition is supposed to neutralize the excessive influence of political parties, which mainly participate in the legislative process in the National Assembly.[36] Many associations and organizations of civil society, which are independent of politics, participate in the elections to the National Council. Depending on the number of members, they can nominate electors and candidates and, in this way, ensure their member's representation in the National Council.[37] Since political parties do not have a direct influence on their election, they cannot influence their performance during the mandate of the National Council, which is significantly reflected in the work of the National Council. Compared to the sessions of the National Assembly, the sessions of the National Council are therefore less politically colored, and the debates are more substantive, which significantly affects the quality of the functioning of the parliament in Slovenia.

However, it turned out in practice that political parties cannot be avoided even in the National Council. It is true that the legislation does not define any formal role for political parties in the election process of the National Council (nomination of candidates, members of electoral committees, etc.), but electors and candidates for members of the National Council are also elected by representative bodies of local communities, i.e. municipal councils.[38] Given that political parties play an important role in municipal council elections and are thus still involved in the work of representative bodies of local communities, political parties also play an informally strong role in the elections of electors and candidates for members of the National Council. Namely, they determine electors and candidates for members of the National Council in all 22 constituencies for elections to the National Council. In practice, therefore, a majority of members of the National Council representing local interests are members of political parties.

[35] See Article 82 § 1 and Article 96 § 2 of the Constitution of the Republic of Slovenia.

[36] See F. Grad, I. Kaučič, C. Ribičič, I. Kristan, *Državna ureditev Slovenije*, Ljubljana 1999, p. 129.

[37] See Articles 24–40 of the National Council Act.

[38] See Article 40 of the National Council Act.

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4. Perceived legitimacy of the National Council

If we test the perceived legitimacy of the National Council through its input, throughput, and output legitimacy we can see that the legitimacy of the National Council is low. The democratic legitimacy which can be achieved through election is lowered because of the indirect election of the National Council's members. Although indirect elections are reasonable giving the composition of the National Council, it has to be emphasized that the question of legitimacy often arises amongst the members representing local interests. Those members are, like members representing functional interests, elected for a five-year mandate,[39] meanwhile local elections take place every four years.[40] In practice often members who represent local interests at the National Council during their terms of office lose their mandate at local communities, which disables them to represent a bond with the local communities they represent at the National Council. This is definitely one of often contested issues because the ratio behind the unprofessional performance of the function of members of the National Council was to provide a link and the knowledge about questions arising in local communities that have to be dealt at state level. Grad notes that the mandate of the members of the National Council is to a large extent actually imperative and derives from the nature of interest representation.[41] Nevertheless, the electoral base of the National Council cannot demand the recall of a member of the National Council during the mandate. Since 2011 when the incompatibility of function of members of the National Assembly and Majors was introduced that became even more important.[42] On the other hand, members of the National Council who represent functional interests seem to have more expertise in their field of representation and a stronger connection with their electorate which can be confirmed with the vast amount of their activities at the National Council.[43]

Notwithstanding the procedural rules that are in place at the National Council, his decisions are often influenced by party political ethos, especially in the part of

[39] See Article 98 § 2 of the Constitution of the Republic of Slovenia.

[40] Elections of the members of the National Council in 2022 took place almost at the same time as the local elections, and candidates for the National Council members and electors were chosen by the outgoing municipal councils. Municipal councils elected in 2022 will thus have no influence at all on the composition of the National Council, as their mandate will end in 2026, while the next elections to the National Council are in 2027.

[41] F. Grad, *op. cit.*, p. 178.

[42] See Act Amending the Act on Members of Parliament (Official Gazette of the Republic of Slovenia of 25 May 2011, no. 39/11).

[43] In the 6th mandate (2017–2022) of the National Council, members of the National Council, representatives of functional interests, proposed 24 out of a total of 42 legislative initiatives of the National Council. Ten out of 42 legislative initiatives were proposed in the field of health and social care, which are represented by only two members of the National Council.

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local interest representatives. Their connection to political parties seems to be one of the major setbacks to the National Council's functioning because experience has shown that the National Council is often used for the ideological interests of the opposition parties in the National Assembly. During the COVID-19 epidemic, the National Council abused its powers by bypassing its own procedural rules regarding its veto power which amounted to an even lower perceived legitimacy.

Until today there has been no thought analysis of the perception of the National Council's work but if we take into account the various populistic aims to abolish the National Council, its parable to a toothless tiger that is often portrayed in the media and various newspaper headlines regarding the National Council as an obstacle in the legislative procedure, we can see that the output legitimacy is low. Because of the abuse of its veto power regarding socially unacceptable governmental politics during the COVID-19 pandemic, the situation even worsened.

DISCUSSION AND CONCLUSIONS

The analysis of bicameralism in Slovenia throughout a three-dimensional approach confirms the thesis that the National Council is a weak upper chamber, not just because of its asymmetry in powers with the National Assembly but also because of its congruence in the view of the local interests' representatives and especially because of its low perceived legitimacy. Using the three-dimensional approach, especially the criteria of perceived legitimacy could serve us as a starting point in rethinking the reform of the National Council through the lens of improving its legitimacy prior to the implementation of other normative changes (changes regarding its composition, election, power, etc.).

The input legitimacy of the National Council could be enhanced without changing the method of election of its members, but just by changing their mandate in the imperative one. Notwithstanding indirect elections, based on positive legislation, members of the National Council cannot be recalled by their electoral base and are not bound to act by their electoral base instructions. They have a duty to inform their electoral base about their activities and to submit proposals and initiatives at their request,[44] but there isn't any sanctioning mechanism in place if they omit their duty. If the imperative mandate would be introduced the dilemma around the information asymmetry and diverging goals between elected members and their electoral base[45] could be resolved. Input legitimacy could additionally be achieved by enabling representatives of other civil society groups to elect their members at the National

[44] See Article 28 of the Rules of Procedure of the National Council.

[45] See Y. Papadopoulos, P. Warin, *op. cit.*, p. 455.

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Council as the Slovenian Constitution does not stipulate who does six members of non-commercial interests represent, rather does the National Council Act.[46]

To lower the level of politicization in decision-making and shift the deliberation towards the preparatory phase of policymaking, the National Council should increase its consultations with civil society and provide the Government (as the main legislative initiator) with its opinion during the public consultation phase.

Output legitimacy is one of the most contested issues, because the National Council in its 30 years of functioning has never had a reputation of improving the legislation but of delaying the legislative procedure. Undoubtedly the nature of the suspensive veto of the National Council and the procedure of reconsideration of laws amounted to this reasoning, but unfortunately all the attempts to change this procedure (even if it was just a change in the Rules of Procedure of the National Assembly) didn't receive enough political support. Interestingly the output legitimacy of the National Council when it uses its other powers, especially the legislative initiative power, is much higher which could signal that the proactive role of the National Council in the legislative procedure is publicly better accepted.

The National Council should avail itself more of its powers in contesting National Assembly's decisions which directly affect the areas that its members represent and they have the knowledge and expertise to better support their decisions. This would enable it to reject the accusation of politicalize in its work and maybe as Russell has pointed out, increase its output legitimacy as the House of Lords did by contesting controversial governmental decisions.[47]

The above-presented findings could offer scholars and politicians a new view in the quest for reform of the National Council and an alternative instead of just rethinking its competences. The founding fathers of the Slovenian constitution made a compromise by the establishment of the National Council and by doing so raised more questions that provided answers but today, more than ever, their initial idea about contributing to a better legislation seems to come to light by some small but important changes that could provide increased legitimacy of the National Council.

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[46] See Article 34 of the National Council Act.

[47] See M. Russell, *Rethinking Bicameralism Strength*..., p. 381.

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ABSTRAKT

W artykule omówiono system dwuizbowy w Słowenii z wykorzystaniem podejścia trójwymiarowego. Głównym celem jest ustalenie, czy słoweńska dwuizbowość ma charakter słaby czy mocny, z zastosowaniem kryteriów symetryczności, przystawalności i postrzeganej legitymacji. Aby to osiągnąć, autorzy stosują metodę opisową i analityczną. Ich zdaniem system dwuizbowy w Słowenii zawsze był określany jako słaby jedynie w oparciu o formalne uprawnienia w procedurze ustawodawczej. Dlatego też wszelkie proponowane zmiany dotyczące Rady Państwa nakierowane są na zmianę jej uprawnień formalnych bez uwzględniania kryteriów przystawalności i postrzeganej legitymacji. Autorzy proponują wyjątkowe spojrzenie na dwa pozostałe kryteria i sugerują, by wezwania do reformy Rady Państwa skupiały się na kryteriach przystawalności i postrzeganej legitymacji. Innowacyjność badania polega na tym, że dotąd brak było artykułów opisujących bikameralizm w Słowenii z perspektywy podejścia trójwymiarowego. Autorzy są przekonani co do poznawczej wartości artykułu w czasach ciągłych wezwań do reformy słoweńskiej Rady Państwa.

Słowa kluczowe: system dwuizbowy; Rada Państwa; podejście trójwymiarowe; przystawalność; postrzegana legitymacja