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The European Union's Trap of Constitutional Politics: From the Convention Towards the Failure of the Treaty of Lisbon

Arthur Benz*

The Project of a European Constitution and the Treaty of Lisbon

In a national referendum held on 12 June 2008, 53.4 percent of Irish citizens voted "no" to the *Treaty of Lisbon*. As its provisions require ratification by all member states, the Irish vote marks a further setback for attempts at constitutional reform of the European Union (EU). The Lisbon reform treaty, officially entitled the *Treaty of Lisbon* amending the *Treaty on European Union and the Treaty establishing the European Community*,[1] was signed by the prime ministers and presidents of EU member states in December 2007. It was the result of a process set in motion by the European Council in a meeting held in Laeken, Belgium in December 2001. Intended to make the "ever closer union" more democratic, and to facilitate the adjustment of European institutions to the new political situation brought on by the accession to the EU of Central and Eastern European states, the "Laeken Council" issued a declaration triggering efforts to constitutionalize the European Union. To this end, a reform process was initiated involving a body called the Convention on the Future of Europe (Convention), made up of European and member state government representatives and parliamentarians.[2] This reform process resulted in the recommendation in 2003 of a draft *Treaty Establishing a Constitution for Europe* (*Constitutional Treaty*),[3] which was subsequently approved by the Intergovernmental Conference and the European Council in Rome in October 2004. Despite several member states ratifying the *Constitutional Treaty*, it was rejected by popular referenda in France and the Netherlands in the spring of 2005. At that time, and in view of the obvious risks to ratification in some other member states, the process of constitutionalization ground to a halt.

The "no" majorities in France and the Netherlands can indeed be explained by different national factors; in discussions following the referenda, it came to light that it was the very idea of a European constitution, rather than the substantive amendments proposed, that was the main issue in dispute. Although there is no doubt that the *Treaty on European Union*,[4] signed in Maastricht and in force since 1992, implies a set of basic institutional rules typical of any constitution, many have argued that the Convention process signified a kind of state-building exercise without the necessary social conditions for legitimizing such a change. Thus, the project of a European constitution was revealed to be a trap, inhibiting institutional reform.

After a two-year period of stagnation (or "reflection" for those judging the time lag more positively), the German presidency of 2007 sparked negotiations aimed at breaking the impasse. These negotiations were backed by a group of experienced member state politicians headed by Giuliano Amato of Italy, and were

further supported by two members of the European Commission, who had worked on a revised text for the *Constitutional Treaty*. Based on the proposals put forth by this group, the European Council began the negotiations on treaty reform which led to the *Treaty of Lisbon*. Disputes concerning the representation of states in the European Parliament and European Commission, as well as voting procedures in the European Council, were eventually settled by compromise. The drafters of the proposed *Treaty of Lisbon* were determined that it be ratified using an accelerated procedure in all member states; it should, if the original schedule is maintained, come into force before the next European Parliament elections in 2009.

If entered into force, the *Treaty of Lisbon* introduces a number of changes to make the EU more effective and democratic. All of the changes go back to the work of the Convention:

- European legislation would become more democratic as the European Parliament would gain powers. The codecision procedure would be turned into an "ordinary legislative procedure" and, with a few exceptions, the Council and Parliament would participate in legislation on an equal basis, including, importantly, decisions on the budget. This reform would turn the two institutions into something resembling a genuine bicameral legislature. Moreover, decision procedures would become more transparent in that the Council of Ministers would meet in public when consulting on legislation.

- Following evolving practice, the *Treaty of Lisbon* includes two rules designed to bring the institutional structure of the EU closer to that of a "responsible" parliamentary democracy. It explicitly states that the Commission shall be responsible to the Parliament, which shall be able to force the Commission to resign by a motion of censure. In addition, the Parliament shall elect the president of the Commission on the recommendation of the European Council.

- Further strengthening democracy at the European level, national parliaments would be given an enhanced role in the EU governance structure. The *Treaty of Lisbon*'s new article 33 acknowledges the right of national parliaments to acquire information from European institutions, and to evaluate EU policies in the areas of freedom, security, and justice. Moreover, the *Treaty of Lisbon* endorses the power of national parliaments to control European Commission powers according to the 2004 *Protocol on the Application of the Principles of Subsidiarity and Proportionality*;[5] it also provides for the participation of national parliaments in a convention that in future shall prepare any further treaty reforms. While national parliaments gain veto powers over changes to the *Treaty of Lisbon*, citizens will also be able to initiative policy proposals for consideration by the EU. Of course, since both procedures require the coordination of many actors, only experience can reveal their actual impact.

- To make the enlarged EU more effective, the European Council's complicated decision rules, laid out in the 2003 *Treaty of Nice*,[6] have been revised. Under the *Treaty of Lisbon*, a qualified majority shall require the agreement of 55 percent of Council members, provided that they represent countries with at least 65 percent of the EU's population. The presidency of the European Council, currently rotated every six months, shall be elected for a two-and-a-half year term to improve the coordination of EU strategic policies, and thus make them more effective. After 2014, the size of the Commission shall be reduced to eighteen members.

- Regarding EU foreign policy, the *Treaty of Lisbon* would end the dual positions of High Representative for the Common Foreign and Security Policy, and the Commissioner for External Relations and European Neighborhood Policy. The revised High Representative shall at the same time be a vice-president of the Commission. As a result, the need for coordination would be reduced, and the EU would be better able to act in a unified manner in its relations with other states or international organizations.

It should not be ignored that in contrast to the *Constitutional Treaty* proposed by the Convention in 2003, the *Treaty of Lisbon* involves some backward steps that are the result of the compromises struck by the heads of member state governments. For example, the word "constitution" was explicitly avoided in the wording of the *Treaty of Lisbon*, as was all symbolism which might have implied EU statehood. Ironically, this triggered discussions about whether the *Treaty of Lisbon* might be a "constitution in disguise."

More significant is a substantial loss of transparency for citizens. Instead of consolidating existing treaties into a single document (as the proposed *Constitutional Treaty* would have done), the legal foundation for the EU polity would continue to exist in separate documents: one still called the *Treaty on European Union*, the other renamed the *Treaty on the Functioning of the European Union*. The 2000 *Charter of Fundamental Rights of the European Union* (*Charter*)[7] is not one of the treaties considered part of the legal foundation of the EU, although the *Treaty of Lisbon* does makes reference to the Charter, and its provisions are binding (except on the United Kingdom and Poland). The new decision procedures in the Council would not come into effect until 2014, and, until 2017, each member of the Council will be able to request that the decision rules established in the *Treaty of Nice* be applied.

In spite of the abovementioned shortcomings, agreement on the *Treaty of Lisbon* remains an important step in overcoming the crisis faced by the EU after the failure of the *Constitutional Treaty*. After the *Constitutional Treaty* received widespread support in public debate (and in the ratification process), the heads of member state governments had every reason to build on the work of the Convention. The *Treaty of Lisbon* is the product of this effort. Despite some compromise revisions arising from intergovernmental bargaining, the improvements of the existing treaties would be significant, both in the effectiveness of governance, in and the democratic legitimacy of the EU.

State of Ratification

As of August 2008 twenty-two member states have signed the *Treaty of Lisbon*.[8] So far only Ireland has chosen not to ratify it. In Germany, the Czech Republic, Finland, and Poland, parliaments have approved the *Treaty of Lisbon* according to the required procedures. However, the formal signatures of heads of state are still pending in these countries. In Germany and the Czech Republic, this delay is related to proceedings in their respective constitutional courts; in Poland, delay is due to the hesitations of a Eurosceptic president. In Sweden and Italy (where the Senate has already given its approval), parliaments have yet to decide on the *Treaty of Lisbon*, but plan to finish ratification in the fall of 2008.

Nevertheless, the Irish "no" vote has raised doubts about the future of the ratification process, as the *Treaty of Lisbon* cannot be set into force without the unanimous approval of all member states. In turn, it is likely that the Irish referendum will have repercussions on ratification processes in other member states. (This is the case even in the United Kingdom where ratification debates have put pressure on the prime minister to call a referendum.) Meanwhile, the Irish government has endorsed a continuation of the ratification process, and has promised to issue proposals on how it might respond to the failed referendum. Still, the future of EU reform has become bleak.

The EU is in a paradoxical situation: the *Treaty of Lisbon*, like the draft of the *Constitutional Treaty* elaborated by the Convention, is designed to improve decision-making transparency; nevertheless, the Lisbon treaty's reforms — directed at democratizing the EU, and providing for better control of subsidiarity — have been jeopardized by a citizen majority in a small member state. While this does not in itself signify a crisis of the EU, the blockade of important EU reforms calls for a consideration of ways out of this situation.

Out of the Trap

The situation created by the recent Irish referendum should remind us of the risk posed to successful amendment of EU treaties, when

the ratification process provides every member state with a veto. Notably, ratification problems have occurred in nearly all treaty reform exercises between 1992 and 2001.

The reaction of the European Council to the events discussed here has not helped to resolve the problem. The history of the drafting of the *Constitutional Treaty* is revealing in this regard. Following the negative referenda in France and the Netherlands (after the two-year lull), the European Council began the negotiations which eventually led to the *Treaty of Lisbon*. Some substantial and symbolic changes, as well as an accelerated ratification process, were agreed to in order to save the Convention project. Although Convention negotiators included elected representatives from European and national parliaments, the Lisbon treaty was essentially the result of intergovernmental negotiation. The shift between the parliamentary and governmental decision settings hardly bolstered the legitimacy of the treaty amendment process. Rather, it led to the Convention appearing as an attempt to circumvent the broader input of democratically elected politicians in favour of government interests. Not surprising, citizens reacted negatively to this strategy. I am not claiming that the shift from a supranational constitutional process to intergovernmental negotiation necessarily explains the outcome of the Irish referendum. Nevertheless, from a normative point of view, this feature of the ratification process is problematic. To continue this practice of having governments renegotiate EU treaties can only lead European integration further towards a dead end.

But what can be done in the current situation if the option of intergovernmental renegotiation of the *Treaty of Lisbon* is no longer available? A number of strategies have been debated, most of them going back to the recommendations which followed previous problematic ratification exercises:[9]

- The first option is for Ireland to opt out of those provisions of the *Treaty of Lisbon* which might have wrankled Irish voters. However, important constitutional provisions like decision rules and legislative procedures should not be subject to an opt-out for a single state. Moreover, in the Irish case, we do not really know which provisions were rejected by a majority of citizens. If the *Treaty of Lisbon* were only partially applied to Ireland, this might still go against the will of a majority of Irish citizens; as a result, this strategy bears significant risks.

- A second strategy would be to adopt something like the informal mechanisms used by Canadians to solve their constitutional problems after the failure of reform attempts in 1990 and 1992. Indeed, once the *Treaty of Lisbon* gains the support of a broad majority of member state parliaments, it could be implemented through "implicit change."[10] New rules could be applied in practice, or implemented by informal interinstitutional or intergovernmental agreement. Such a process could be used to reallocate jurisdiction, for instance, by the application of the rules of enhanced cooperation (were an individual member state to rebut EU authority over a particular policy field). Implicit change may also be acceptable for amendments to European legislative procedures, although it is obviously inappropriate for other changes, including changes to European Council decision rules, or to significant institutional changes such as the introduction of an EU president.

Even for those rules that could be adjusted implicitly, a "no" vote on a proposed amendment should prevent the Council and the European Parliament from proceeding with treaty changes. To do otherwise would go against the minority will of EU member states, which, according to existing amendment rules, have veto power. Indeed, under current conditions, the legitimacy of a policy of implicit change is dubious.

- A third, pragmatic way to save the *Treaty of Lisbon* might be to ask the Irish people to vote again, after a period of time has passed. This may be the simplest and best solution to the current deadlock, not least because it worked in October 2002 to overcome a failed referendum on the *Treaty of Nice*. However, this procedure makes sense only on the condition that the referendum ques-

tion submitted to citizens, along with other referendum conditions, be different from the first vote. Otherwise, a new referendum would not be taken seriously.

Even if these strategies worked, repeated ratification failures should encourage further general discussion of treaty amendment procedures. Experience with the difficulties involved in securing treaty amendments since the early 1990s, tells us that a clear majority of member states tend to support ratification, whereas only one or two tend to oppose it. Blockades preventing necessary reform could be avoided if treaty amendments were ratified with less than unanimous approval.

But is this possible? Given the character of the EU as a union of states, there seems to be no normative way to justify doing away with (or ignoring) the veto of a single member state. To suggest otherwise renders insecure the constitutional protection afforded to a member state's existing influence over EU affairs, and would facilitate the transfer of powers from a member state to the EU against the will of a national parliament or citizenry. To allow this to occur would imply that constituent power has shifted to the European level. It is, however, debatable whether the necessary societal foundation exists for such a constitutional transformation in the EU.[11] Indeed this transformation would require citizens to identify more with the community of Europeans than with their own nation. To be sure, a deviation from the existing unanimity rule would also require changing the existing amendment rules for EU treaty change; to expect this change to occur is far from realistic.

The difficulty with such reasoning is that it seems to lead us back to a dead end. The requirement of unanimous member state ratification will remain as long as the treaties are not revised in a kind of "constitutional moment." But, as explained above, it was the very discussion of the constitutionalization of Europe that blocked the development of the EU some years ago. Treaties in general, and in particular the treaty rules presently in force, require the consent of all partners; there seems to be no alternative to member state unanimity.

There is, however, the possibility of a moderate *de facto* deviation from the unanimity rule, with the proviso that member states voluntarily and explicitly allow themselves to be outvoted in the ratification process. A procedure which may allow this was proposed by the so called "Penelope" group, a group of experts who drafted a constitutional treaty proposal for the then president of the European Commission.[12] The idea was to introduce a qualified-majority rule through the mechanism of a second treaty, ratified alongside primary treaty reforms. This procedure could be defended with the argument that actors might accept rules which informally reallocate decision-making power if they are asked to do so under a "veil of ignorance"; in other words, it they do not know how they are affected by new decision rules, or if their decisions are guided exclusively by general norms. In reality, these "Rawlsian" conditions rarely apply among individual actors, not to mention relations among member state governments. Therefore, it is not likely that they will agree to a majority decision rule, particularly if those member states rejecting an amendment are ultimately confronted with the alternative to leave the European Union.

There is, however, another way to arrive at majority decisions without depriving individual member states of their right to decide on the course of EU treaty reform. In contrast to the "Penelope proposal," which requires all member states to conditionally surrender their veto without knowing the result of the ratification process, it is possible to give member states in which ratification failed the opportunity to declare their position *after* they know the decision made by other states.

This would lead to the following procedure: if four-fifths of member states (which should represent a qualified majority of the EU's population) have ratified a treaty amendment, those member states that have voted "no" will decide a second time, in accordance with their national constitutional provisions. In considering the "yes" vote already taken by a strong majority of other EU member states, the "no"–voting minority would be required to decide whether or not to accept the majority decision in favour of

proposed amendments. In this second decision on a revised question (and in a different political context), it is probable that the existence of a weak solidarity among European citizens will encourage citizens in holdout member states to vote in favour of treaty amendment.[13] If a member state national parliament or citizenry votes "no" in a second referendum, the European Council should determine how to proceed, after consideration of the substance of treaty amendments and the outcome of the ratification process. The Council could be permitted to come to the conclusion that the amendment process should be completed without a change to the proposals at issue; however, in the case of a single state blocking amendments which all other member states have explicitly accepted, the Council would have good reason to require the holdout state to decide either to secede from the EU, or accept the majority vote. In view of the consequences of secession, it is not very likely that a member state would opt for that course of action. A "no" vote on secession in the respective member state would then grant strong legitimacy for the EU to proceed with treaty amendments through the mechanism of implicit change.

This solution requires neither changing nor bending treaty law, and it avoids playing political games with member state parliaments and citizens. Ultimately, what is necessary to avoid the EU's trap of constitutional politics is an implicit, but legal change to the ratification rules, so that a majority decision on a particular amendment will be accepted by all member states. A second Irish referendum could be an adequate opportunity to test the merits of this solution.

Notes

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1 17.12.2007 OJ C 306/1.

2 Carlos Closa, "The Convention Method and the Transformation of EU Constitutional Politics" in Erik Oddvar Eriksen, John Erik Fossum & Agustín José Menéndez, eds., *Developing a Constitution for Europe* (New York: Routledge, 2004) at 183-206; Carlos Closa, "Deliberative Constitutional Politics and the Turn Towards a Norms-Based Legitimacy of the EU Constitution" (2005) 11 European Law Journal at 377-524; Alain Lamassoure, *Histoire secrète de la Convention européenne* (Paris: Lavoisier, 2004); Paul Magnette & Kalypso Nikolaidis, "The European Convention: Bargaining in the Shadow of Rhetoric" (2004) 27 West European Politics at 381-404; Peter Norman, *The Accidental Constitution. The Making of Europe's Constitutional Treaty* (Brussels: EuroComment, 2003); Sonja Puntscher-Riekmann & Wolfgang Wessels eds., *The Making of a European Constitution: Dynamics and Limits of the Convention Experience* (Wiesbaden: Verlag für Sozialwissenschaften, 2006).

3 18.7.2003 OJ C 169/1.

4 29.7.1992 OJ C 191/1.

5 16.12.2004 OJ C 310/207.

6 10.3.2001 OJ C 80/1.

7 18.12.2000 OJ C 364/7.

8 See "Ratification of the Treaty of Lisbon," online: COSAC <http://www.cosac.eu/en/info/Treaty>.

9 For a summary and discussion see Stanislaw Biernat, "Ratification of the Constitutional Treaty and Procedures for the Case of Veto" in Ingolf Pernice & Jirí Zemánek, eds., *A Constitution for Europe: The IGC, the Ratification Process and Beyond* (Baden-Baden: Nomos 2005).

10 Stefan Voigt, *Explaining Constitutional Change: a Positive Economics Approach* (Cheltenham: Edward Elgar, 1999) at 145-76.

11 Dieter Grimm, "Does Europe Need a Constitution?" (1995) 1 European Law Journal at 282-302.

12 Bruno de Witte, "European Treaty Revision: A Case of Multilevel Constitutionalism" in Ingolf Pernice & Jirí Zemánek, eds., *A Constitution for Europe: The IGC, the Ratification Process and Beyond* (Baden-Baden: Nomos, 2005).

13 There is a precedent for the proposed proceeding. The U.S. Constitution was to be based on a consensus of all the then-existing thirteen states. For practical reasons, the founding fathers decided to set the Constitution in force after only nine states had ratified, but for those states only (Article VII U.S. Constitution). The remaining states then had to decide whether they would join the new federal union or not. Two states, Rhode Island and North Carolina, first rejected the Constitution, but ultimately ratified it after a second decision was taken. See Russell Hardin, *Liberalism, Constitutionalism and Democracy* (Oxford: Oxford University Press, 1999) at 108; Vincent Ostrom, *The Political Theory of a Compound Republic* 2d ed. (Lincoln: University of Nebraska Press, 1987) at 84-85.

Faith in Rights: the Struggle Over Same-Sex Adoption in the United Kingdom

Carl. F. Stychin*

Introduction

Over the past decade of Labour government in the United Kingdom (U.K.), the regulation of sexual orientation through law has frequently been explained by its supporters through a narrative of progress and even emancipation. The most recent junction in this journey came in 2007, with the coming into force of the *Equality Act (Sexual Orientation) Regulations* on 30 April 2007.[1] These *Regulations* contain measures prohibiting discrimination on grounds of sexual orientation in the provision of goods, facilities and services, education, the use and disposal of premises, and the exercise of public functions.[2]

The *Regulations* must be set within the wider context of the still fairly new *Equality Act 2006*,[3] which created the Commission for Equality and Human Rights (the enforcement body for the *Act*), and which replaces the piecemeal system of equality rights protection previously found in the Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Rights Commission. The *Equality Act 2006* outlawed discrimination on the grounds of religion or belief, and imposed duties related to sexual discrimination on persons performing public functions, but left for a later day the issue of sexual orientation discrimination in the provision of goods and services.

Understood in this context, and given the fact that legal change addressing this issue came about by statutory instrument rather than primary legislation,[4] the sexual orientation *Regulations* might be interpreted as a mere tidying up exercise. However, this would be a misinterpretation of events. The issue of sexual orientation was held over to be dealt with by secondary legislation, in part because of the perceived complexity and controversial nature of the issue and, perhaps, in the hope that extensive public debate and discussion would be avoided.[5] Ultimately, the *Regulations* were approved by Parliament in March 2007, and entered into effect on 30 April 2007.

Even before the *Regulations* were laid before Parliament, a storm of controversy erupted which raised wide-ranging concerns related to rights, sexuality, religion, beliefs, secularism, the limits of tolerance of minorities, as well as to how minorities are socially constructed. This article focuses on parliamentary and print media representations of the issues at stake. Central to the controversy was the future status of Catholic adoption agencies, which are subject to the *Regulations* in that they provide a service to prospective parents.[6] The widely discussed question was whether those agencies should be exempt from a duty to consider same-sex couples on an equal basis in the application of the "best interests of the child" test, in placing children for adoption.

The issue assumed a symbolic importance far beyond its practical relevance. It was widely agreed that there were many avenues open to same-sex couples wishing to pursue adoption aside from the Catholic agencies and, intuitively, it seemed unlikely that many same-sex couples

would be adamant on pursuing adoption only through a Catholic agency. Nevertheless, same-sex adoption came to stand for a larger principle concerning the extent to which faith-based groups, which receive public subsidy, could be exempted from anti-discrimination legislation when providing a public service. Conversely, the principle was expressed as concerning the extent to which the discourse of equality and gay rights trumped the sincerely held faith-based views of a minority, views which were being expressed through the provision of adoption services. Not surprisingly, the adoption issue also fuelled well-worn discourses around the best interests of children, same-sex parenting, and the heterosexual family as the "gold standard" in the raising of children.[7]

Constructing the Minority Group

Opposition to the sexual orientation *Regulations* was articulated through a mixture of old and new tropes. While my particular interest in this article is the new discourses around secularism and the rights of religious minorities to exist in a secular society — a characterization which I want to problematize — there is still plenty of space for longstanding old arguments which centre on children. Not only do these discourses focus upon the way in which the best interests test should be applied, but also on other claims familiar to those who have studied anti-gay rhetoric.[8] For example, much attention was paid to the family run bed-and-breakfast establishment, and the alleged right of proprietors to turn away same-sex couples because the proprietors' faith would not allow them to create opportunities for those couples to engage in sodomy within the family home (a home which, of course, had been turned into a commercial operation).[9] This example allowed both sides to demonstrate the manipulability of the binaries of public/private, commercial/residential, and home/work, in support of their arguments. It also gave rise to interesting references to the act/identity distinction related to sexual orientation. Couples would be turned away, not because of who they are, but because of what they would potentially do (on the assumption that the act of doing sodomy is an *inevitable* result of being given an *opportunity* to practice it).[10] The language of child protection also figured prominently in this example, appearing in claims defending children in hypothetical families from the infiltration of homosexuals into the family home. Such language resonates with *very* old tropes concerning pollution and infection.[11]

In both political and media debate, considerable time was also given over to schools. Baroness O'Cathain, for example, recounted that:

> a pro-gay group . . . is already going around the country telling schools that the regulations mean they have to normalise homosexuality to seven-year-olds and read gay fairy tales in the classroom.[12]

Here, the longstanding trope concerning the promotion of homosexuality through education reappears; this trope has a pedigree dating back to the now repealed section 28 of the *Local Government Act*,[13] which prohibited the promotion of homosexuality by local authorities as a "pretended family relationship."[14] Opponents of the *Regulations* feared that the letter of the law, as well as the "climate of fear"[15] created by the *Regulations*, would force schools, including faith-based schools, to promote homosexuality through gay sex education classes. In this way, faith-based schools would be prevented from promoting sexual monogamy through the institution of marriage.

However, there was also a new focus in popular and parliamentary debate, which turned on faith-based, conscientious objectors to homosexuality — those who provide goods and services to the public. In this argument, the wedding photographer and the caterer become the oft-cited examples of those who might feel morally compelled to turn away lesbian or gay clients.[16] The objectors to homosexuality are consistently constructed as a minority group, and an increasingly oppressed minority, which will be forced to act against its genuinely and deeply held religious beliefs. In the process, the minority's rights are trumped (and trampled upon) in the service of the rights of "well organised and intolerant lobbies,"[17] who have the backing of political elites. While supporters of the sexual orientation *Regulations* describe the

law as achieving a balance among conflicting rights; for opponents, the law does precisely the opposite — it throws the relationship between equality and freedom of religion out of balance, and does so in such a way as to counter the historic Englishness of protections for liberty, speech, and the freedom of groups to practice their beliefs. As one opponent of the *Regulations* puts the point: "It is a development entirely at variance with our well rooted tradition of religious tolerance and liberty."[18] In this way, the law ignores the interests of an increasingly persecuted minority and puts innocent, morally upstanding individuals in fear of prosecution.[19] Thus, "religions are now seen not primarily as beneficiaries of rights of protection from the state, as subjects enjoying religious freedom, but as potential sources of human rights breaches. Religion is a problem."[20]

The Silenced Majority

At the same time, critics of the *Regulations* suggest that the law has *also* ignored the voices of the (silenced) majority, which occupy the genuine "middle ground" of politics. The sexual orientation *Regulations* are "a weapon *promoting* discrimination against both majority and minority religious faiths,"[21] which have been marginalized by the actions of political elites seeking to find favour with a well organized, articulate, and powerful lesbian and gay constituency. This middle ground is constructed through "common sense," but common sense which also includes the practice of disclaiming homophobia.[22] That is, opponents of progressive gay rights legislation increasingly make clear — and this has always been true to some extent — that they are not homophobic. Indeed, many commentators and politicians go further and are at pains to point out that they have supported gay rights in the past, but that this is a step too far.[23] While these critics proclaim their support for anti-discrimination legislation in employment, possibly even for civil partnership legislation (probably because it is not marriage in name), and occasionally even support anti-discrimination legislation with respect to goods and services in general, the moral or common sense objection to gay rights should also be respected and protected. Scepticism regarding the value of same-sex adoption provides one such example of common sense which is self-evidently true, but which has been silenced by the totalitarianism of gay rights.[24] Thus, critics seek to defend both the rights of a minority, as well as the views of the majority. They can also portray themselves as defenders of the faith, and all faiths, by pointing to both the established Church and to the country's Christian heritage (which is being eroded by the government), as well as to the importance of a multifaith, multicultural society. Finally, critics are the defenders of the best interests of children who are otherwise sacrificed to a political correctness, which protects the rights of lesbians and gays as *consumers* of adoption services.

In response, proponents of the *Regulations* rely heavily on the rhetoric of equality rights, fairness, and balance: "the measures we have brought forward protect the rights of individuals and organisations to hold religious beliefs while also ensuring that everyone lives a life free from harmful discrimination."[25] Analogies are drawn between sexual orientation, race, and gender, all of which are deserving of the same level of legal protection: "I start from a very firm foundation: there is no place in our society for discrimination."[26] The need for compliance with international obligations is also mentioned.[27] The discourse of child welfare, moreover, is countered on its own discursive terrain. Arguments are made that the *Regulations* will protect gay youth from bullying in schools, protect children of gay parents from discrimination in education, and could ensure that children, who would otherwise not be adopted, will find loving homes with same-sex couples (although the gold standard of heterosexual parenting remains largely untroubled in these arguments). Many supporters of the *Regulations* also bolster their positions by proclaiming their own Christian faith, which is articulated through competing, progressive principles of tolerance, fairness, and social justice.[28]

But this discursive battle becomes abstracted to a further degree in the debates, as it is increasingly reformulated in terms of a struggle between secularism and faith. Opponents cas-

tigate the *Regulations* as yet further evidence of a secular ideology, which has become the dominant and guiding principle of the Labour government and, indeed, of political elites more generally. In this narrative, it is rights discourse, and specifically the *Human Rights Act 1998*,[29] which is central to the undermining of freedom and pluralism, and which has created a literal perversion of "right reason." Through the protection of human rights, a secular society is being forced upon the population; this secular society is one in which religion is relegated to a narrow private sphere, closeted from public display. The *Regulations* do provide for exceptions for religious organizations. However, for their opponents, these exceptions only protect the narrow sphere of worship (that is, religious *identity*), rather than the "doing" of religion in the public realm (the *practice*). As Julian Rivers argues, "at best, this seems to create a category of 'tolerated' religion which may be permitted between consenting adults in private, but which ideally would be eradicated."[30] Therefore, in an unlikely twist, the distinction between act and identity — often deployed to regulate sexual identities and practices — now gets knowingly reversed by opponents of the *Regulations* in defence of the right to practice religion.[31] By contrast, proponents argue that the religious exceptions ensure that a balancing of rights is achieved, and the key distinction is the line between the religious and the commercial. Once that line is crossed, religious groups must act in a nondiscriminatory fashion. Moreover, faith-based schools, it is argued, can continue to promote monogamous heterosexuality within the institution of marriage, while providing emotional support to *all* children.[32]

Secularism as Fundamentalism

Despite the exceptions for religion in the *Regulations*, opponents remain adamant that secularism has become the dominant ideology and, indeed, they claim that it is the new religion of the political class, which has trampled over and silenced all others. In making this claim, ambiguity is apparent as to whether *all* religions have been unfairly treated, which is sometimes claimed, or whether, more specifically, it is the country's Christian tradition which is under constant threat from the secular. At this point, there are interesting analogies that can be drawn with the way in which Christianity is constructed as under threat from multiculturalism. The focus on Catholic adoption agencies, and the extent to which this issue resulted in extensive joint lobbying of government by Catholic bishops and the Church of England hierarchy, underscores the extent to which the issue was seen as an attack on Christianity. This is further supported by the way in which secularism has been constructed, not only as the new religion, but as a fundamentalist religion, in which thinly veiled comparisons are drawn to Islam.[33] As Rivers warns:

> [I]t seems that a new moral establishment is developing, which is being imposed by law on dissenters. Those filling public offices are well advised to avoid challenging it, and even the most measured and reasoned public questioning of its truth can trigger formal investigations. This new orthodoxy masks itself in the language of equality, thus refusing to discuss its premises and refusing to articulate its conception of the good.[34]

Even Catholics on the progressive left, in defence of gay rights, resort to language that is not altogether dissimilar: "in the post-socialist age, non-faith based progressives are deadly serious about imposing their liberalism."[35]

In this regard, the debate provides a flavour of the way in which secularism is invoked in the U.K. as the sign of a contemporary ideological struggle. On this point, Judith Butler has recently addressed how secularism is deployed in the admittedly very different political culture of France to interrogate how it works to bolster anti-Islamic "progressive" politics.[36] In doing so, she also makes the general argument that "secularism does not so much succeed religion sequentially, but reanimates religion as part of its ideas of culture and civilization."[37] I would argue that the controversy around the *Regulations* could be interpreted in support of this thesis. Rather than the totalitarian imposition of a secular ideology upon a faith-based population — with the replacing of religion by a new faith (in liberal rights) — we find instead a "mix of

religious and secular ideals,"[38] in which secularism does not succeed religion but coexists, perhaps uneasily, with it.

Butler argues, and here she mirrors the views of many opponents of the *Regulations*, that "secularism has a variety of forms, and many of them involve forms of absolutism and dogmatism that are surely as problematic as those that rely on religious dogma."[39] However, in the U.K. the evidence of the absolutism of secularism is far from compelling. Stewart Motha makes this very point in relation to the juxtaposition of liberalism and the construction of Islamic fundamentalism, when he argues that "the repression of the religious as the condition of modern politics reveals itself to be the unfinished enterprise threatened by the eternal return of religion."[40] Motha refers to a British culture which can claim to be both "secular in outlook" and, at the same time, "committed to Christian institutions, political and juridical formations."[41]

There is much evidence for Motha's claim in the events surrounding the *Regulations*. A superficial examination of the structure of the *Regulations* themselves reveals that faith is embedded within the law in the form of exemptions. Religious faith is taken to be synonymous with the integrity of belief, and serves to exempt the application of the law.[42] While opponents may argue that the exemptions are drawn too narrowly, the relevant point is that they are drawn on the basis of religion rather than, for example, on the basis of sincerely held belief. Moreover, parliamentary debates are virtually devoid of any criticism of faith-based homophobic views.[43] Instead, supporters of the *Regulations* argue that when religious groups offer a service to the public, they have crossed a line (the religious/commercial, public/private binary) such that the application of the law is appropriate.[44] But there is little discursive space for a critique of religion (especially of Christianity), or for a discussion of the offensiveness of some religious doctrine.[45] Furthermore, faith-based schools, which remain high on the government's agenda, are still allowed to promote marriage and heterosexuality as the most desirable way of life.[46] The one notable exception to this uncritical acceptance of religion can be found in the speech of the openly gay and Muslim member of the House of Lords, Lord Alli, who makes clear that discriminatory views grounded in religious texts are unacceptable in a liberal democracy, and not just when religious actors enter the public, commercial sphere:

> When I read the Koran, it tells me in some passages that I must kill Jews. If I believe strongly enough that I must kill Jews, does that mean that I have the right to say, 'Exempt me from legislation because I believe it strongly enough. Let me discriminate against Jews, at least, because I believe it strongly enough and it is written in the Koran?'[47]

However, what further undermines the claim of the absolutism of secularism in the way in which it is deployed by opponents of the *Regulations*, is the place given to religious voices in political debate in the U.K. The Catholic Church and Church of England played prominent roles around the same-sex adoption question, facilitated by the membership of Church officials in the House of Lords, hardly a secular institution.[48] But the political terrain was further complicated by the religious beliefs of prominent Labour politicians, and the way in which religion, particularly for politicians of the centre-left, has been partially closeted from the public sphere. Most famously, Tony Blair's admission of his deeply held religious beliefs and his conversion to Catholicism immediately after leaving office, combined with his openly admitted fear of being labelled a "nutter" for his faith, underscore the complexities of religion for the Labour Party.[49] The then Secretary of State for Communities and Local Government, Ruth Kelly, is well known as a practising Catholic and member of the Opus Dei organization, and rumour had it that she had difficulty supporting the *Regulations*, despite having responsibility for social cohesion and inclusion as part of her government portfolio.[50] Even the *Civil Partnership Act 2004*,[51] although often described as a further sop to the lesbian and gay communities, prevents the forming of civil partnerships in religious buildings, and ensures that marriage is restricted to the union of one man and one woman.[52]

The need for discretion that seems to be felt

by some British politicians — with respect to Roman Catholicism at least — could be seen as evidence that practising Christians have been forced into a sphere of privacy — even secrecy — by the dominance of secularism on the left. Equally, however, the need for discretion might be the result of age-old stereotypes regarding Catholics, secret societies, and foreign allegiance to the Vatican. I would suggest that it indicates, at a minimum, a complex and contested relationship between religions, but more crucially between Christianity and politics in Britain today, which is informed by the historic roles played by the established Church and Roman Catholicism.[53]

Kate Nash has argued that human rights politics in the U.K. is best described in terms of a "communitarian rights culture," in which the values of dialogue, compromise, and "the attempt to reach and sustain agreement over conflict and divergence in understandings of social relationships" is paramount.[54] She finds that the *Civil Partnership Act* exemplifies this culture, in which the divisive debates which have characterized struggles over same-sex marriage have been largely absent from British political life. In my view, there is much merit to this position, but the sexual orientation *Regulations* demonstrate the precariousness of such communitarian approaches to rights, as well the potential for rights struggles to produce polarized positions. Although the *Regulations* carve out religious exemptions, and are characterized by proponents as a sensible, reasonable balancing of equality rights and religious freedom in a democratic society, the language of balance and compromise always leaves open the possibility of further struggle over the proper balance of competing rights, and over the question of whether society has gone too far: "this legislation effects a rearrangement of discriminatory attitudes and bias to overcompensate and skew the field the other way."[55] In this moment, rights are constructed as a zero-sum game.[56] They favour individualism over "the rights of voluntary societies."[57] Given that the *Human Rights Act* itself was a skilful attempt at balancing fundamental rights and the principle of parliamentary supremacy, leaving inevitable rights compromises to be resolved in the political realm, it is hardly surprising that British rights discourse has become a site of struggle, and that debates over human rights have been described as a quagmire.[58] Furthermore, it may be that the issue of same-sex adoption adds a particularly combustible fuel to the politics of rights because of the complex relationship between children, parents, and sexuality.[59] In part, this is because it is far too easy to move from the rights of consumers of services to the right to possess and perhaps "consume" our children.[60] Such arguments leave supporters of the *Regulations* to rely on their faith in the judicial application of the best interests test to ensure that children's interests are adequately protected.

Concluding Thoughts

To conclude, the Critical Legal Studies movement long ago taught us to be cautious about putting too much of our faith in rights.[61] The experience of rights struggles around sexuality over the past decade reveals that the language of rights lends itself to anti-gay arguments which not only deploy rights talk, but which can mirror the arguments advanced by progressive actors. The debate over same-sex adoption highlights this point. Opponents of the sexual orientation *Regulations* can construct faith-based groups as disenfranchised, oppressed minorities which are increasingly forced to exercise discretion, and keep their beliefs in the private sphere, closeted away from public view. According to them, the *being* of religion may be their right, but the *doing* of religion is subject to intense legal regulation by the state, undermining the core of their freedom. In this narrative, rights are being undermined by the secularist totalitarianism of the political elites and the fanatics of the lesbian and gay movement. Simultaneously, rights discourse is deployed in the name of the common sense majority and on behalf of vulnerable children needing protection from rights seekers themselves.

However, the very fact that the *Regulations* have come into force may suggest cause for optimism, and the increasing marginalization of voices of opposition. On the other hand, the need felt by government to postpone application of the *Regulations* to Catholic adoption

agencies until 31 December 2008, pending further analysis of their potential impact, suggests that the supposed triumph of secularism is far from complete.

Notes

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1 *Equality Act (Sexual Orientation) Regulations*, S.I. 2007/1263 (BAILII) [*Regulations*].

2 The offence is created by section 3 of the *Regulations*. Section 3(1) states: "For the purposes of these Regulations, a person ("A") discriminates against another ("B") if, on grounds of the sexual orientation of B or any other person except A, A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances)."

3 (U.K.), 2006, c. 3 (BAILII).

4 The issue of employment discrimination on the basis of sexual orientation had previously been dealt with by the *Employment Equality (Sexual Orientation) Regulations* S.I. 2003/1661 (BAILII) in 2003, which implement the European Community Equal Treatment Directive 2000/78/EC of 2000.

5 In fact, little opportunity to debate the question was made available in Parliament. However, the choice to use secondary legislation was itself subject to some fierce criticism, and not only from critics of the substance of the *Regulations*.

6 By comparison, in some states in the United States statutory restrictions remain in place prohibiting the adoption of children by lesbians and gays. See Carlos A. Ball, "The Immorality of Statutory Restrictions on Adoption by Lesbians and Gay Men" (2007) 38 Loyola University Chicago Law Journal 379.

7 On heterosexuality as the gold standard of parenting, see Judith Stacey & Timothy J. Biblarz, "(How) Does the Sexual Orientation of Parents Matter?" (2001) 66 American Sociological Review 159 at 162.

8 See *e.g.*, Didi Herman, *The Anti-Gay Agenda: Orthodox Vision and the Christian Right* (Chicago: University of Chicago Press, 1997).

9 Section 6 of the *Regulations*, however, contains an exception in relation to the family home if the premises do not accommodate more than two households or six individuals (in addition to the landlord and his/her near relative).

10 See *e.g.*, Lord Mackay: "They must be prepared to allow them, if appropriate, to use the facilities that they provide for the purpose of homosexual practice. That is quite different from other types of discrimination." U.K., House of Lords, *Official Report*, session 2 (2007), vol. 688, col. 184 (9 January 2007) (Lord Mackay of Clashfern).

11 See *e.g.*, Viscount Brookeborough: "This is about having people among your family . . . the Government are introducing into a family something from which it is surely the right of the parents to protect their children until they are at an age at which they can decide for themselves." *Supra* note 10 at col. 194-5.

12 U.K., House of Lords, *Official Report*, session 4 (2007), vol. 690, col. 1298 (21 March 2007).

13 *Local Government Act 1988* (U.K.), 1988, c. 9 (BAILII).

14 For a discussion of the discourses surrounding section 28 and its repeal, see Carl F. Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Oxford: Hart Publishing, 2003); see also Momim Rahman, "The Shape of Equality: Discursive Deployments During the section 28 Repeal in Scotland" (2004) 7 Sexualities 150.

15 *Supra* note 10 at col. 192 (Lord Tebbit).

16 See *e.g.*,

> They make it possible for homosexual activists to sue people who disagree with a homosexual lifestyle because of their religious beliefs. Bed and breakfast owners and Christian old people's homes will be sued for not giving a double bed to homosexual civil partners. Wedding photographers will be made to pay compensation for not taking bookings for civil partnership ceremonies. Christians in business could even be sued for sharing their faith with customers. Worst of all, they require religious organisations to choose between obedience to God and obedience to the state.

Ibid. at col. 180 (Lord Morrow).

17 *Supra* note 12 at col. 1305 (Lord Anderson of Swansea).

18 *Ibid.* at col. 1302 (Lord Bishop of Southwell and Nottingham); see also Julian Rivers, "Law, Religion and Gender Equality" (2007) 9 Ecclesiastical Law Journal 24 at 52: "Freedom of religion in English law has not simply been about the freedom to believe and manifest that belief in worship and doctrine, but about the construction of a plurality of protected social and material spaces in which believers could live faithfully to their religion."

19 See *e.g.*, Lord Tebbit: "these regulations would leave perfectly innocent people in fear of legal action by the fanatical wings of the lesbian and gay pressure groups," *supra* note 15.

20 Rivers, *supra* note 18, at 35.

21 Melanie Phillips, "A law that turns sexual tolerance into tyranny" *Daily Mail* (19 June 2006).

22 The practice of disclaiming homophobia is discussed by Burridge in the context of opposition to the repeal of section 28 of the Local Government Act: see Joseph Burridge, "'I am not Homophobic *But . . .*': Disclaiming in Discourse Resisting Repeal of Section 28" (2004) 7 Sexualities 327. The practice of disclaiming is not a new phenomenon: see Anna Marie Smith, *New Right Discourse on Race and Sexuality: Britain, 1968-1990* (Cambridge: Cambridge University Press, 1994).

23 See Phillips, *supra* note 21: "We have therefore exchanged one deep intolerance for another."

24 See *e.g.*, Lord Blackwell, *supra* note 12 at col. 1320:

> we should allow adoption agencies to have, as one of the criteria that they use in selecting parents, the preference, if that can be achieved, for having two parents of opposite sex.

25 Communities and Local Government, *Guidance on New Measures to Outlaw Discrimination on Grounds of Sexual Orientation in the Provision of Goods, Facilities and Services* (London: Department for Communities and Local Government, 2007) at 5.

26 Tony Blair, "No place for discrimination in society," online: 10 Downing Street <http://www.number10.gov.uk/output/Page10869.asp>.

27 *Supra* note 10 at col. 202 (Lord Lester of Herne Hill).

28 See *e.g.*, Lord Lester of Herne Hill, *supra* note 12 at col. 1323: "the principles of human rights are universal . . . they derive not only from the secular Enlightenment but from all the great religions." See also, Baroness Andrews, *supra* note 10 at col. 1328: "there is no polarity between Christianity and our joint commitment to put an end to discrimination,"

29 (U.K.), 1998, c. 18 (BAILII).

30 Rivers, *supra* note 18 at 36.

31 See Rivers, *supra* note 18 at 46:

> [exceptions] tend to address what are centrally 'religious' activities, and they do not address peripheral difficulties that might be experienced by religious people trying to work in a changed ethical environment.

32 See Department for Education and Employment, *Sex and Relationship Education Guidance* (Nottingham: DfEE Publications, 2000) at 4:

> pupils should be taught about the nature and importance of marriage for family life and bringing up children. But the government recognises . . . that there are strong and mutually supportive relationships outside marriage. Therefore pupils should learn the significance of marriage and stable relationships as key building blocks of community and society.

33 See *e.g.*, Carla Powell, "Beware the Taleban of Tolerance," *The Spectator* (10 February 2007).

34 Rivers, *supra* note 18 at 52.

35 Conor Gearty, "Sex and the Secular Liberal" *The Tablet* (10 February 2007) 9.

36 Judith Butler, "Sexual Politics, Torture, and Secular Time" (2008) 59 British Journal of Sociology 1.

37 *Ibid* at 14.

38 *Ibid*.

39 *Ibid* at 13.

40 Stewart Motha, "Liberal Cults, Suicide Bombers, and other Theological Dilemmas" (2009) 5 Journal of Law, Culture and the Humanities in press, unpublished manuscript on file with author.

41 *Ibid*.

42 See *e.g.*, section 14(3) of the *Regulations*:

> Nothing in these Regulations shall make it unlawful for an organisation to which this regulation applies, or for anyone acting on behalf of or under the auspices of an organisation to which this regulation applies – (a) to restrict membership of the organisation, (b) to restrict participation in activities undertaken by the organisation or on its behalf or under its auspices, (c) To restrict the provision of goods, facilities or services in the course of activities undertaken by the organisation or on its behalf or under its auspices, or (d) to restrict the use or disposal of premises owned or controlled by the organisation, in response of a person on the ground his sexual orientation." Section 14(3) applies, by virtue of s 14(1) "to an organisation the purpose of which is – (a) to practice a religion or belief, (b) to advance a religion or belief, (c) to teach the practice or principles of a religion or belief, (d) to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief.

43 See *e.g.*, Lord Rooker, *supra* note 10 at col. 209:

> "The regulations have been drafted to allow for the views and opinions of religious groups and organisations to be protected where it is necessary to comply with doctrine."

44 See *e.g.*, Baroness Andrews *supra* note 12 at col. 1291:

> The Government have provided an exemption for religious or belief organisations, and those acting under their auspices, where that is necessary to avoid conflicting either with the doctrine of the organisation or the strongly held beliefs of a significant number of a religion's followers. But where religious

> organisations choose to step into the public realm and provide services to the community, either on a commercial basis or on behalf of and under contract with a public authority, that surely brings with it a wider social responsibility to provide those services for the public as they are, in all their diversity, and not to pick and choose who will benefit or who will be served.

45 Lord Rooker, *supra* note 10 at col. 208: "It is not the Government's intention to attack religious ethos."

46 *Supra* note 32 at 8: "Schools of a particular religious ethos may choose to reflect that in their sex and relationship education policy."

47 *Supra* note 12 at col. 1317. However, some opponents do make the claim that religion is not homophobic: "Christians and other faiths across the country have a gracious and loving attitude towards their neighbours, regardless of their orientation," *ibid*. at col. 1317 (Lord Browne of Belmont); "The Catholic Church is not homophobic," *ibid*. at col. 1306 (Baroness Morris of Bolton).

48 This increasing vocal role of religious leaders in openly lobbying politicians has not abated since the *Regulations* were passed, and can be seen graphically in the recent Human Fertilisation and Embryology Bill debates in 2008, in which Catholic bishops exhorted Catholic Members of Parliament to oppose the legislation on the grounds of conscience. Indeed, at the time of the sexual orientation *Regulations*, a Roman Catholic Cardinal "felt about to write a letter to the Prime Minister and the entire Cabinet setting out 'Catholic teaching about the foundations of family life,'" Gearty, *supra* note 35 at 8.

49 "Blair feared faith 'nutter' label" *BBC News* (25 November 2007) online BBC News < http://news.bbc.co.uk/1/hi/uk_politics/7111620.stm>.

50 "Kelly's views on gays questioned" *BBC News* (9 May 2006) online BBC News <http://news.bbc.co.uk/2/hi/uk_news/politics/4756399.stm>.

51 (U.K.), 2004, c. 33 (BAILII).

52 See Carl F. Stychin, "Not (Quite) a Horse and Carriage: The Civil Partnership Act 2004" (2006) 14 Feminist Legal Studies 79.

53 The hostile reactions to the Archbishop of Canterbury's reflections on Sha'ria Law suggest that issues of law, religion and politics remain a potent combination.

54 Kate Nash, "Human Rights Culture: Solidarity, Diversity and the Right to be Different" (2005) 9 Citizenship Studies 335 at 346.

55 *Supra* note 12 at col. 1309 (Archbishop of York).

56 *Ibid*. at col. 1298 (Baroness O'Cathain): "The Government have taken the view that gay rights trump religious rights . . . A citizen's right to manifest sexual orientation is absolute, but the right to manifest religious belief is not."

57 *Ibid*. at col. 1304 (Lord Pilkington of Oxenford).

58 *Ibid*. at col. 1311 (Archbishop of York).

59 The issue has also been legalized through a case before an Employment Appeal Tribunal, concerning whether a magistrate could refuse to follow the Regulations in relation to adoption, on the basis of a moral objection: *McClintock v. Department of Constitutional Affairs* (2007) WL 3130902, Appeal No. UKEAT/0223/07/CEA at p. 62. His arguments failed at the original tribunal as well as on appeal. The Tribunal concluded:

> he expressed his objections on grounds which the Tribunal was entitled to find did not engage the terms of the Religion and Belief Regulations. Even had they done so, the Tribunal found that the Department was fully justified in insisting that magistrates must apply the law of the land as their oath requires, and cannot opt out of cases on the grounds that they may have to apply or give effect to laws to which they have a moral or other principled objection.

By way of contrast, an Employment Tribunal has recently ruled that the failure to exempt a registrar from performing civil partnership registrations, because the requirement to do so clashed with her Christian beliefs, amounted to both direct and indirect discrimination on the grounds of religion and belief: *Ladele v London Borough of Islington* (2008) Case No. 2203694/2007.

60 Of course, the tragic irony in this narrative is the historic role of Christian denominations in the abuse of children (especially those in care), which for so long remained shielded in a protected sphere of privacy and secrecy.

61 See *e.g.*, Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997); Judy Fudge & Harry Glasbeek, "The Politics of Rights: A Politics with Little Class" (1992) 1 Social & Legal Studies 45.

Spain's Multinational Constitution: a Lost Opportunity?

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Introduction

The Spanish Constitution of 1978 provided an opportunity for minority nationalities within Spain to achieve a degree of political autonomy not shared by others within the state. During the constituent process, the non-Spanish speaking national communities of Catalonia and the Basque Country were the only political entities demanding political autonomy to accommodate their national identities in the new Constitution. Today, after thirty years of democratic and constitutional development, we can see that the possibilities offered by the Spanish Constitution to recognize and accommodate the multinational character of the Spanish state have been lost. This article examines causes of this failure to take advantage of the possibilities provided by the Spanish Constitution to provide for asymmetrical political autonomy for minority nationalities.

The Spanish Constitution and the Model of Autonomous Communities

After forty years of fascist dictatorship, and at a delicate moment in the modern history of the Spanish state, the Spanish Constitution of 1978 (SC) emerged as the juridification of the transition to a new democracy in Spain. During the constituent process, divergent political forces were aware that for an acceptable constitutional formula to be found, any new model of territorial organization would have to balance the need for unity in the Spanish state with the claims of different historic nationalities for political autonomy. The SC opted for an underdefined formula made up of two elements. First, the Spanish state would be founded on the basis of the unity and singularity of the Spanish nation, with a unitary Constitution and judicial system. Second, the Spanish Constitution would recognize and be able to accommodate a right to political autonomy for the nationalities and regions making up the Spanish state.[1] This open, flexible model designed by the SC emerged as the result of the need for political consensus, and as an essential means for the political and institutional recognition of historic nationalities in Spain.[2]

A deliberate vagueness in the constitutional text with respect to the organization of subunit governments within the state was another vehicle of consensus among the different political forces represented in the SC. Consequently, the Constitution did not establish a fixed model of federal or regional-territorial organization; it did not define the territorial map of the nationalities and regions; and it did not create autonomous communities, fix their organization, determine their powers, or provide them with specific jurisdiction. Rather, the creation of the Spanish state model emerged postconstitutionally as a gradual and complex — and as yet unfinished — process.

Although the Spanish Constitution does not formally establish or refer to "autonomous communities," it does refer to territorial entities

that, in the Spanish constitutional order, are gifted with legislative autonomy and executive jurisdiction (including administration through their own representatives). In other words, the SC establishes some general rules concerning who can gain autonomy and how they can achieve it, but leaves these general rules without resolution or specification. Spain therefore does not have an official or constitutionalized name for its state model; nevertheless, doctrine referring to the Spanish state frequently uses terms such as: "autonomic" model, model "of autonomy," or model of the "autonomous communities."

Autonomous communities within the Spanish state include regions as well as nationalities.[3] These communities are *preconstitutional* in that the processes through which they gain a degree of autonomy were developed before the Constitution came into force. They are also *subconstitutional,* in that the specification of the model of autonomous communities took place — and still continues — via a set of rules and decisions not found in the Constitution but rather below it, in the *constitutional block*.[4]

The SC specifies the procedure for drawing up the basic institutional rules for a future autonomous community; this procedure culminates in the passage of a statute of autonomy.[5] It is this statute and not the SC that determines the powers of each autonomous community. The statutes of autonomy provide the rules by which the autonomous communities govern and legislate. That is, they provide the rules allowing the nationalities and the regions to access self-government and to legally constitute themselves as autonomous communities as conceived in the SC (article 2). These statutes specify the system of institutions and powers for the autonomous communities, within the scope of the openness and flexibility set out by the Constitution. Thus autonomous communities are permitted a margin of differentiation with respect to the various legal provisions addressing the content of autonomy. The result is potentially an element of both uniformity and heterogeneity in the system as a whole.[6] A statute of autonomy, adopting the form of special organic state law, also becomes the basic institutional norm for each autonomous community, and is thus integrated into the Spanish juridical system. As part of the *constitutional block*, a statute of autonomy thus forms the basic institutional regulations of the community, regulating its own institutions, and the powers it assumes in relation to the state.

Once a community has asserted the will to achieve political autonomy, it can do so via the appropriate access route. The SC establishes different routes for communities to achieve autonomy.[7] If the statute of autonomy is drawn up by the general route (article 146), the autonomous community can assume only the powers listed in article 148, and must wait five years from the approval of the statute to extend them. By contrast, if the statute is drawn up using the procedure identified in article 151 (and in the Constitution's transitional provisions), the autonomous community can immediately assume the powers it wants, except those reserved for the Spanish state (article 149.1). The result is a distinction between "slow" and "fast" track autonomous communities.

The SC therefore facilitates the creation of a flexible state model, structuring Spain as an autonomic, multinational state. The Constitution was designed to be an eclectic model that, from every angle, aims to establish a composite, politically decentralized state. Although not a federal state, it does theoretically have some characteristics similar to federal political systems. For this reason, Spanish constitutional doctrine has frequently evolved on the basis of preconceptions about the character of the decentralized model of the autonomous communities, placing that model in line with quasi-federal, federal-regional, unitary-federal, dualist federal, or cooperative models of federalism. For a large majority, the Spanish model of autonomous communities is conceived of as a heterogeneous combination of federal-regional and unitary principles.

Despite the fact that the SC shares a common element with federations — decentralization designed for all rather than some of the territorial subunits — the model of autonomous communities corresponds closest to a decentralized regional-state model.[8] Indeed, the devolution principle, though an unwritten

principle of the SC, guides the whole process of community autonomy (together with the constitutional principles of unity and autonomy). Territorial communities seeking to achieve autonomy regulate all decisive issues concerning the territorial organization of the power of the state not regulated by the Constitution itself. Because of the devolution principle, the model of autonomous communities shows notable potential for asymmetry,[9] allowing different solutions for very diverse territories and different degrees of political will.

The Current Status of Autonomous Communities Within the Constitutional Framework

Currently, there are nineteen statutes of autonomy in Spain, implementing political autonomy of varying degree for seventeen autonomous communities (Basque Country, Catalonia, Andalusia, Galícia, País Valencià, Navarra, Cantabria, Astúrias, Múrcia, La Rioja Aragón, Castilla la Mancha, Canary Islands, Extremadura, Balearic Islands, Madrid, Castilla León), and two autonomous cities in North Africa (Ceuta and Melilla).[10] The sum of these territories, currently provided with constitutionally guaranteed political autonomy, is equivalent to the whole territory of Spain.[11]

In the long run, it has not been possible to resolve the latent problem of fitting the historic nationalities into the Spanish state. The practical development of the model of autonomous communities has revealed limitations in achieving the SC's main objective: political accommodation of a multinational society, particularly with respect to the political recognition of the historic nationalities in a single Constitution.[12] These limitations stem from the political elaboration of the model of autonomous communities, which has made poor use of the possibilities offered by the SC for accommodating multinationality in the Spanish state.[13] The *constitutional* recognition of this multinationality has not materialized, and the initial distinction made by the SC between nationalities and regions (a mechanism designed to recognize the different positions of Catalonia, the Basque Country, and Galicia within the state of autonomous communities) has been diluted beyond recognition. Indeed the potential for asymmetry in the devolution of powers to the autonomous communities has been reduced, and the extent of communities' political autonomy is notably less than that which could have obtained under the SC.

In observing the development of the model of autonomous communities, it must be stated that the degree of autonomy of the historic autonomous communities is low. Leaving aside possible deficiencies in the Constitution and the statutes of autonomy, the reason for this limitation is found in the interpretation and practical application of this autonomy. In effect, political autonomy has been transformed into an essentially administrative autonomy, with a corresponding loss of capacity for political decision making by the autonomous communities.

Different mechanisms have been used by the central state to expand its own powers.

Distribution of Powers

The system for distributing legislative and executive powers — identified in the Constitution and the statutes of autonomy — is based on the Spanish state determining basic standards or "bases" binding for all. Statutes of autonomy are the means through which these common bases have been developed by the central state, with the result being that autonomous communities law has been used to constrain the autonomy of the parliaments of the autonomous communities. Indeed, the indeterminate nature of the notion of basic standards in the Constitution has made it easy for the state to classify *any* legislative, regulatory, or executive activity it considers relevant as "basic," considerably limiting the scope of the autonomous powers of the autonomous communities.[14]

Expanded state powers have also developed by so-called *horizontal state rights*, which are particularly important in the economic sphere,[15] or by the fixing of basic conditions for the exercise of public rights. Third, article 149.1.1 of the SC, which attributes to the Spanish state the power to regulate basic conditions guaranteeing the equality of all Spaniards, has been used er-

ratically and expansively. Its normal interpretation includes all public activities necessary to ensure uniform treatment of citizens' rights and duties.

In addition, the state's recovery of powers that were initially assigned to the autonomous communities has been achieved through more subtle means. For instance, the central state has laid claim to jurisdiction over autonomous community law or policy with extraterritorial scope. As soon as a matter coming within the powers of an autonomous community reaches beyond that community's territorial boundaries, the state takes over the matter, claiming the supracommunity nature of the subject being regulated. Rather than establish a formula for joint action among affected autonomous communities, the state simply assumes a general interest in the matter and takes it over.

Ultimately, the majority of the laws made by the autonomous communities has subsidiary, organizational, or procedural content; only a minority has significant policy content. The development of these laws often amounts to a more-or-less literal reproduction of higher-ranking state laws.

Political Capacity and Reform

Another important indicator of the inadequacy of community autonomy under the Spanish Constitution is the limited capacity of autonomous community bodies to adopt their own policies in discrete, coherent areas.[16] Central state intervention has prevented the autonomous communities from developing policies in their own areas of jurisdiction. But even in areas where an autonomous community has *exclusive* powers, the central state maintains *de facto* rights of intervention in certain cases. There are no matters, not even those reserved for the exclusive jurisdiction of an autonomous community, where the state has not fixed policy directives to be followed, often with an extraordinary degree of detail. Likewise, there is no matter of jurisdiction within an autonomous community that, from the point of view of social reality, has not been legally fragmented to permit state intervention.

For example, although the current statute of autonomy in Catalonia attributes to the Catalan government exclusive powers over housing — and the same is true of other autonomous communities — this area has been affected by up to seven subsidiary areas over which the Spanish state has power (civil legislation, commercial legislation, bases of health, transport and communications, telecommunications, bases of environmental matters, legislation on compulsory purchase). On this basis, the state has adopted specific measures concerning housing; approved action plans and programs; dictated laws; and, finally, created a ministry. This means the Catalan government's capacity to create policy on a matter of great social importance is, as a general rule, reduced to the rather unglamorous and less far-reaching role of putting state policies into practice, frequently in interstitial and often residual areas.

Furthermore, because the Spanish state is the result of an act of sovereignty of a single constituent subject — the Spanish nation — which is the sole holder of national sovereignty, only the state and its representatives have "constituted constituent power" to reform the Constitution. Therefore, the autonomous communities cannot take part in the process of constitutional reform, and their only chance to participate is reduced to the phase of the legislative initiation of the reform.

State Participation and Representation

It must be stressed that in the current Spanish state there are no effective and stable procedures — whether bilateral or multilateral — for participation or collaboration among the different levels of government (the autonomous communities and central state institutions) to determine joint policies. The autonomous communities do not take part in appointments to state institutions such as the Constitutional Court (which has among its functions the resolution of conflicts of jurisdiction between state and autonomous community authorities), or the general judicial authority. There is no legislative chamber within the system of state institutions in which the autonomous communities are represented or permitted to codetermine law and policy. Indeed, the auton-

omous communities hold a clearly subordinate position with respect to the Congress, and they do not have sufficient power to properly defend their territorial interests. Moreover, Senate representation is not linked to the autonomous communities, as the majority of senators are elected by provinces. Nor does the Senate function as a mechanism to decentralize jurisdiction, or facilitate autonomous community participation in state decision making.[17]

Until recently, there has been a lack of political will to devise suitable intergovernmental mechanisms for participation, coordination, and cooperation between the central state and autonomous communities to put into practice common policies which must be jointly defined (particularly those with extraterritorial effect). There has been a similar lack of political will to defend the power of the historic autonomous communities to develop their own policies in their own way in areas where they have exclusive jurisdiction, and where they should enjoy full political decision-making autonomy.

Self-Government

Another factor constraining the political autonomy of autonomous communities is the lack of a constitutional guarantee of self-government in the Spanish Constitution. A guarantee of self-government generally ensures that the powers attributed to politically decentralized bodies is consecrated in a constitution. In Spain, this constitutional guarantee is diluted by the fact that the criteria for the distribution of powers between the state and the autonomous communities — as defined by the Constitution and the statutes of autonomy — are generic, indeterminate, and have significant gaps. The distribution of powers remains at the mercy of state legislators who have occupied those gaps, especially by means of setting basic standards.

When an autonomous community accepts a statute of autonomy, the SC provides no mechanism to facilitate the constitutional recognition of that community as a nation.[18] This omission deprives those autonomous communities with boundaries potentially corresponding to the historical nationalities of the capacity to speak as a nation, which is definitive in the international and domestic sphere. As a result, there are no mechanisms to provide for autonomous community participation in the field of relations with the European Union (EU). In the sphere of the EU, the autonomous communities are therefore not considered political agents of the Spanish state. This gap is particularly serious because the EU exercises many powers that are under the exclusive jurisdiction of the autonomous communities. In direct contrast, the *Länder* of the Federal Republic of Germany have the power to act directly before EU bodies if a matter over which they have exclusive power is affected. The Spanish state has not even firmly upheld the linguistic rights of Catalan or Basque in European institutions or the state Parliament.[19]

Taxation

Almost all taxes are established and collected by the central state, with the exception of the Basque Country and Navarre, which have asymmetrical taxation agreements with the central authority based on preconstitutional "historical rights." It must be stated that the issue of finance is a site of contestation for Catalonia, for example, which has not had a finance system to match its tax capacity and political autonomy. As a result of this taxation system, some autonomous communities lack the financial capacity to carry out their own policies.

Ultimately, these features of the development of the autonomous communities under the SC reveal that the process has not led to the establishment of a viable multinational state. In practice, only national claims that are compatible with the national will as expressed in the Constitution are acted upon. Of course, the majority of those who live in the Spanish state — whether by goodwill or force — respect the SC because it is the basic legal regulation that controls everyone's lives. However, Catalan, Basque, or Galician nationalists, for example, cannot be asked to consider the SC as their own, because it has not given rise to a multinational system. To expect as much would be like asking these nationalists to renounce their national convictions and adopt the point of view of the Spanish nation; it is equivalent to asking them to become national turncoats, so to speak. Of

course, they cannot be asked to do this, particularly not in name of freedom, respect, and democracy.

The Consequences of Homogenization: Reforms to the Statutes of Autonomy

After the SC's thirty-odd years in force, it is undeniable that the initial conception of constitutional flexibility underlying the right to community political autonomy and the devolution principle, has not resulted in self-government for autonomous communities; rather, the law and policy made by one autonomous community is generally indistinguishable from that made by the others. The state of autonomous communities began with an initially open-ended and "differentiated" interpretation, consecrating unique autonomous communities for Catalonia, Galicia, and the Basque country. This interpretation, however, has given way to a homogenization of the model. Indeed, homogenization started with the first Autonomous Community Agreements (1981), and continued with the second Autonomous Community Agreements (1992) (the aim of which was to reduce the scope of the devolution principle).[20]

In effect, the opportunity provided by the Spanish Constitution of 1978 to turn the Spanish state into an asymmetrically decentralized state has been missed. The materialization of the model of autonomous communities has been the result of the specification of constitutional principles relating to territorial organization, through the so-called process of autonomy. But this specification has resulted in the loss of the constitutional objective of flexibility and asymmetry, which seemed able to give rise to the development of a model of autonomous communities adequate to the multinational character of the Spanish state. According to the thesis of some Spanish constitutional specialists, the major defect of the current constitutional design is that an attempt has been made to resolve two different issues at the same time, and with the same techniques of territorial organization: the decentralization of a state *and* the articulation of its multinational nature.

By way of example of the restrictiveness of the symmetrical reading of the SC of 1978, and its effect on Spanish state policy, one might point to the nonacceptance of the term "nation" in the Basque and Catalan draft statutes of autonomy (approved by the parliaments of these nations but not accepted by the Parliament of the Spanish state), and the rejection of the possibility of a federation between the Basque Autonomous Community and the Autonomous Community of Navarre (explicitly recognized in the Spanish constitution in its fourth transitional provision).

The avenues available to improve or overcome this situation are diverse. Changes should address in particular the autonomous communities' lack of capacity to establish and develop their own policies; the lack of capacity for self-organization in a broad sense (institutional development, territorial organization, and legal instruments to carry it out); and the lack of financial capacity to carry out policies appropriately.

In order to seek solutions to the deficits noted above, several different possibilities could be explored, including: reinterpreting the Constitution and the statutes of autonomy (which has been suggested and attempted throughout this period without any positive result); constitutional reform (which has not yet firmly appeared on the agenda of the various political parties); and statutory reform within the existing constitutional framework (which is, in fact, being carried out).

Whatever else happens, statutory reforms for the different autonomous communities are now being tackled. Catalonia has carried out its own statutory reforms to overcome the Constitution's gaps and deficits related to its capacity for self-government, finance, and the organization of the Catalan government. These reforms also address new political requirements such as the recognition of new rights and duties; principles guiding public policies; and the definition of a new system of relations with the EU, the Spanish state, and the other autonomous communities. The degree to which the state is prepared to accept political heterogeneity across the autonomous communities (and within the

framework of the Constitution) can be seen in these reforms.

Future reforms must emphasize that proposals for statutory reform cannot attempt to amend the Constitution, but must scrupulously respect its constraints and principles. However, reforms can attempt to take maximum advantage of the possibilities offered by the statutes of autonomy to facilitate and preserve the political autonomy of the autonomous communities, and should encourage, as far as possible, the constitutionalization of the division of powers between the state and autonomous communities. While, ultimately, political pacts will largely determine the level of autonomy each autonomous community can achieve, as well as its relations with the state, the devolution principle, and the potential for asymmetry in the possible agreements between the state and autonomous communities, are sufficient bases for believing that there is a very broad legal margin for deepening the political autonomy of the autonomous communities. At the very least, it can be said that the Spanish constitution of 1978 can indeed accommodate the evolution of Spain as a multinational state; that the SC has not been so used is a lost opportunity, but one that could be regained.

Notes

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1 Isidre Molas, *Derecho Constitucional* (Madrid: Tecnos, 2005) at 176.

2 This situation has resulted in the autonomous communities facing significant constitutional instability. M.A. Aparicio Pérez, "L'adequació de l'estructura de l'estat a la constitució (reforma constitucional vs. reforma dels estatuts)" (2005) 31 Revista Catalana de Dret Públic 61.

3 The dominant Spanish constitutional doctrine draws no legally relevant conclusion from the distinction made in article 2 between "nationality" and "region." In contrast to this position, we understand that there is, indeed, a legally relevant constitutional distinction between nationality and region, otherwise the differentiation established in the Constitution itself would not make sense. Nevertheless, the wording of the Constitution is ambiguous as the constitutional text attempted to combine two opposing traditions: one upholding a single Spanish nation, governed from the centre; the other claiming the existence of different nationalities with the right to self-government. So as not to break the political consensus on the wording of the Constitution, it eventually included the two concepts in a single precept (article 2 SC), making it tremendously difficult to locate a coherent understanding of the constitutional text. Ultimately, it can be concluded that the Constitution uses the term nationality, which has the essential meaning of a nation without a state. In this way, "nationality" implies (as does the term "nation") a higher level of consciousness of collective identity than "region," which describes mere historic and cultural roots or common economic links.

4 E. Fossas i Espadaler & J.Ll. Pérez Francesca, *Lliçons de dret constitucional* (Barcelona: Enciclopèdia Catalana, 1994) at 281 and following. The *constitutional block* is the set of rules whose function is to distribute and organize the division of powers between the central state and the autonomous communities; it is the set of rules the Constitutional Court has to apply when it resolves conflicts of power among the various instances of government. It is made up of the Spanish Constitution, the statutes of autonomy, laws granting powers, and the non-statutory laws amending powers (See article 150 of the SC).

5 The SC provides two broad procedures for drawing up a statute of autonomy: a general one (article 146) for those gaining access via article 143; and a special one (article 151.2) for those gaining access via 151.1 and the second transitional provision.

6 Institute of Autonomous Community Studies, *Report on the Reform of the Statute* (Barcelona: Government of Catalonia. Institute of Autonomous Community Studies, 2003) at 43-44.

7 The SC establishes two procedures for achieving autonomy for the whole territory: a general one (article 143.2, with the variant of the first transitional provision), which was followed by all the autonomous communities except Andalusia; and a special one (article 151.1), which requires a broader manifestation of the wish for autonomy, as in the case of Andalusia. Besides these procedures, specific means are to be used by particular territories, including: The second transitional provision for Catalonia, the Basque Country and

Galícia; the first additional provision and the fourth transitional provision for territories with traditional rights, especially Navarre; and article 144.b and the fifth additional provision, for Ceuta and Melilla.

8 In the regional states, a dual level of government is established through a process of political decentralization, guaranteed by the constitution of the state. The "devolutionary" transfer of political powers involves the existence of a previous centre and, in practice, has normally been established for only some regions of a state. The autonomous communities follow the idea of devolution much more closely than they do that of federation. Concerning the distinction between these two concepts see J. Kincaid, "The Devolution Tortoise and the Centralization Hare" (May-June 1998) New England Economic Review 13-40.

9 This has been recognized in Constitutional Court Judgment 76/1983, 5 August, indicating that the "system of autonomous communities is characterized by a balance between homogeneity and diversity in the public legal statute of the territorial entities making it up."

10 An "autonomous city" is a special administrative division. Only the cities of Ceuta and Melilla have had this status since 1995. The main difference between autonomous communities and cities is that the latter do not have legislative capacity.

11 *Supra* note 4 at 322, 333.

12 *Ibid*. at 291.

13 *Ibid*. at 292.

14 Because the Constitutional Court initially accepted this view of the scope of "bases," it has been unable to exercise effective control over their extension.

15 Examples include general planning of economic activities (a right referred to in the Statute of Autonomy of Catalonia), to conditional or override powers of the Catalan government in the economic sphere.

16 M. Corretja i Torrens and C. Viver Pi-Sunyer, "La reforma de l'Estatut d'Autonomia i les competències de la Generalitat" (2005) 7 *Revista Activitat Parlamentària* 1 at 17-23.

17 The reform to the Spanish Senate has created a significant debate for many years.

18 In this context we highlight the projects to reform the Basque (Ibarretxe Plan) and Catalan statutes.

19 *Some* efforts have been made concerning the use of the Catalan language before European institutions: in December 2004, the central government presented a memorandum to the European Union to obtain official recognition of the languages other than Spanish which have been declared official by the statutes of autonomy; on 13 June 2005, the Council of Ministers of General Affairs and Foreign Relations agreed that members states could ask the institutions of the EU to allow the use of currently non-official languages; and, more recently, on 16 November 2005, an agreement was signed allowing the use of the Catalan language in the Committee of the Regions.

20 *Supra* note 4 at 286.

Upper House Reform in Germany: the Commission for the Modernization of the Federal System

Greg Taylor*

Introduction

As the debate on a possible new second legislative chamber proceeds both in the United Kingdom (U.K.) and Canada, it is useful to note recent amendments to the German Constitution (Basic Law) affecting the federal upper house of Parliament (*Bundesrat*). Despite all the differences among the House of Lords, the Canadian Senate,[1] and the *Bundesrat*, there are some points on which a comparison is useful. Moreover, some of the impetus behind the German reforms — a conviction that there had been too much emphasis on cooperative federalism and too little on healthy competition — is reminiscent of debates about such matters in other federations in general, and Canada in particular.

As we shall see, the German constitutional changes are the result of a process of reform uniting Christian Democrats and Social Democrats — the two principal political parties of the left and right — which together form a federal coalition government called in the jargon of German politics the grand coalition (the Canadian equivalent would be a Conservative-Liberal coalition in place of a minority government). As part of the reform process, which started before the grand coalition was formed but continued into its time in office, proposals for the reform of the federal political system were considered by a specially formed Commission for the Modernization of the Federal System, a body which in German bore the acronym KoMbO.[2] The Commission's initial concentration on the *Bundesrat* was the result of the realization on all partisan sides that the workings of the *Bundesrat* could be improved. The main complaint was that the *Bundesrat* had too often blocked reforms passed by the federal lower house of Parliament (*Bundestag*) for party-political reasons unconnected to the *Bundesrat's* role as a legislative house of representation for the states (*Länder*).

Unsurprisingly, the level of dissatisfaction with the *Bundesrat*'s workings as an upper house has tended to be higher among political parties with a majority only in the federal lower house; dissatisfaction is rather noticeably lower among opposition parties with a majority in the *Bundesrat*. However, as both major parties, and all but one of the minor parties,[3] have enjoyed the fruits of office and control of the lower house in the recent past, all have had some insight into the frustrations attendant upon dealing with a noncooperative second chamber, and all have their own tales to tell of their reforms being blocked by an obstreperous *Bundesrat*. The formation of the governing grand coalition offered a clear opportunity for reform, as it meant that the government had the necessary two-thirds majority in both houses of Parliament to carry out any constitutional changes advocated by KoMbO.

The constitutional change chosen to ensure the work of the lower house (and thus of the government) would not be unduly encumbered by the upper house was a peculiar German adapta-

tion of the idea of the *Bundesrat* as a peculiar German institution. The principal change altered the rule under which the *Bundesrat* had a full rather than suspensive veto over legislation affecting the jurisdiction of the *Länder*. Under the new approach, the general rule is that the *Länder* are not bound by federal legislation, and so are free to enact their own independent legislation. This being so, the need for *Bundesrat* consent to federal legislation affecting *Länder* jurisdiction was dispensed with (although, as we shall see, an absolute veto for the *Bundesrat* remains in some cases). The aim of this new approach is to ensure both that the upper house is less likely to be an incubus to reform of the federal system, and also to promote a greater degree of federal diversity and competition within Germany.

While the German model, for reasons to be discussed, is not likely to be directly applicable in Canada or most other federal countries, this development is interesting in its own right, and the reasoning behind it permits the drawing of some broader conclusions that are perhaps applicable outside Germany.

The German experience reminds us of the delicate balance that must be achieved in the design of an upper house. This balance is particularly important when the second chamber possesses an element of democratic legitimacy (as is the case with the *Bundesrat*), and so is not subject to informal constraints on the exercise of its power. On the one hand, an effective upper house must have substantial powers, and be able to effectively contradict the lower house from time to time. On the other hand, an upper house which frequently contains a majority for a principal opposition party may well block the government's plans often enough to be a hindrance to its effectiveness, rather than a useful corrective to possible abuses of power (at least in countries like Canada and Germany in which responsible government prevails). An upper house must, in short, be different, but not too different, from the lower house, and complement rather than contradict the lower house's role in governance. Cutting across these considerations is the extent to which the upper house can claim an element of democratic legitimacy. This too is a coin with two sides: an upper house which is democratically legitimate may be tempted to be too much of a hindrance to effective governance and, in extreme cases, may even seek to share with the lower house its role in selecting the government, while an upper house with no democratic legitimacy faces questions as to why it exists at all.

Background to the 2006 Reforms

It is well known that the *Bundesrat* is not an elected body,[4] consisting rather of delegations from the German state governments, which are themselves of course elected. This means that the *Bundesrat*'s democratic legitimacy is indirect, or mediated through the legitimacy of the state governments. It should be noted that the *Bundestag* is elected on a system of proportional representation, which provides an adequate opportunity for minor parties to be represented. In some jurisdictions a principal aim of a second legislative chamber is to provide for broader representation of popular opinion than is possible in the legislative chamber from which governments are formed; but in Germany, the *Bundestag* already provides for broad representation of interests. Thus, it is quite rational from this structural point of view for the German second legislative chamber to be not only unelected, but also made up of representatives of another tier of government.[5]

Each state has a certain number of votes in the *Bundesrat*, and those votes are allocated according to population (although smaller states are overrepresented, as is usual in a federation). The delegation from a state government in the *Bundesrat* usually consists of state ministers, and often includes the state premier him or herself. The Basic Law[6] requires each state to cast all its votes as a bloc, something which can cause difficulty when, as happens frequently on the Continent, a coalition government is formed from somewhat disparate partisan elements. Article 53(3) of the Basic Law states further that an absolute majority in the *Bundesrat* is necessary for bills to pass. Thus, abstention by a state has the same effect as a "no" vote, not an unimportant rule given that state coalition governments may well find themselves unable to agree

upon a common position.[7]

The powers of the *Bundesrat* are limited. The constitutional presumption is that it has only a suspensive veto over federal legislation, which the *Bundestag*, as the elected lower house, can override. However, this presumption is displaced by various provisions of the Basic Law in several situations. Such provisions are "inconveniently scattered throughout the Basic Law."[8] When a provision contradicts the presumption, the *Bundesrat* has an absolute veto. As matters have turned out, the presumption is more frequently displaced than not: from 1949 to 2005, the *Bundesrat* had an absolute veto (whether or not it was actually exercised) over 53.1 percent of all successful bills.[9]

A study of all cases in which the presumption was displaced between 1981-99 indicates that two provisions account for this high figure. 58 percent of all cases in which the *Bundesrat* had an absolute veto are attributable to article 84(1) of the Basic Law, and 28.5 percent to article 105(3).[10] Until the 2006 reforms, article 84(1) required the *Bundesrat*'s consent for laws prescribing administrative procedures at the state level, or regulating the organization of state civil services; article 105(3) required (and still requires) that the *Bundesrat* consent to tax legislation which in whole or in part provides for revenues to be distributed to state or local authorities.

Under the Basic Law, therefore, a majority of state governments have veto power over about half of all federal legislation (if they choose to exercise it). The background to this arrangement, as the previous paragraph has already implied, is that the states are frequently required to implement federal legislation. The Basic Law provides for a highly integrated form of federalism under which legislative power on most matters rests with the federation, while states are often charged with the responsibility of carrying out that same federal legislation.[11] Vertical cooperation under federal leadership is by no means an entirely unfamiliar arrangement to practitioners of federalism in North America and elsewhere, but the explicit nature of the Basic Law's decision for this form of integration, and the extent to which it is practised in German federalism, are certainly surprising by our standards. Extralegal factors such as the great diversity among some Canadian provinces would, for example, render a comparable degree of interlocking responsibility close to impossible.[12] In the German setting, however, it is understandable that the states are entitled to a larger direct say in federal legislation than in many other federations, especially when legislation proposes to dictate to them the manner in which their responsibilities are to be carried out.

It is generally thought that a much higher percentage of laws have turned out to require *Bundesrat* consent, rather than be subject merely to a suspensive veto, than was intended by the constitutional drafters of 1948-49.[13] In fact, the *Bundesrat* has turned into a full-fledged second chamber with substantial powers,[14] even though it is not directly elected. This growth in power has been aided by the Federal Constitutional Court's holding that a single line in a bill requiring the *Bundesrat*'s consent makes the entire bill subject to its consent,[15] a rule that has not been affected by the 2006 reforms.

In the lead up to the reforms of 2006, dissatisfaction with the system's design grew for a variety of reasons. First, there was a general move away from the idea of cooperative federalism as a means of structuring and operating the federal state. Indeed this federalism ethos underlay the *Bundesrat*'s consent requirement regarding federal legislation.[16] In Germany this was connected to the growth in the number of jurisdictions after Reunification and to greater diversity among states,[17] but it was also part of a wider international trend. While the German Basic Law assumes a significant level of cooperation between the two levels of government, there has been a growing appreciation of the perils of too much cooperation. In the German context, cooperative federalism has been linked to slower decision making, a loss of transparency in the decision-making process, and to an increase of behind-the-scenes deals, making it difficult for people to know who is responsible for what decision. Furthermore, if uniform solutions are reached, the very rationale of federalism is called into question; this means that

experimentation at the state level, and a healthy degree of competition among the states, is impossible.

Second, the direct involvement of state governments in so much federal legislation has tended to further obscure the importance of state issues in state elections, and has turned state elections into *de facto* elections for the federal upper house. Furthermore, the *Bundesrat*, in its present form, provides great advantages for state premiers and executives over state legislatures, which in Germany have increasingly ceased to be real centres of power in their own right. The states, for their part, have even been complicit in this process from time to time, preferring significant influence at the federal level to substantial powers of their own.[18]

The third set of reservations about the *Bundesrat*'s role is that it has, on occasion, been used not for the purpose of protecting state interests, but for federal party-political purposes. If a majority of states represented in the *Bundesrat* are from the party in opposition at the federal level,[19] quite clearly such a temptation will exist. For long stretches of time, one of the two major German parties has been in federal office while the other has controlled a clear majority in the *Bundesrat*.[20] Some electors even vote at the state level for the party that is out of office federally or *vice versa*, further accentuating the differences between the two federal houses.[21] Indeed, it might be argued that such electors are using the *Bundesrat* as a traditional upper house, designed to check the lower, rather than as a specifically federal institution.

Unsurprisingly, an empirical study confirms that when the government does not have a majority in the *Bundesrat*, more bills are blocked there; conversely, there have been governments with a friendly *Bundesrat* majority that never once suffered that indignity.[22] The *Bundesrat*'s veto may render an elected government unable to keep its election promises, or alternatively, the government may use the *Bundesrat* as a good excuse for not keeping its promises when they become inconvenient. It is not for a mere lawyer to say when, in blocking bills, an opposition majority in the *Bundesrat* has been used responsibly (in accordance with the purpose for which the *Bundesrat* was created), and when it has been used merely as a continuation of federal politics by other means. But the latter situation has clearly occurred from time to time. Conversely, situations have occurred in which the opposition has let through government bills for one reason or another. This blurs dividing lines between the parties, and associates the opposition with proposals it would prefer not to be associated with.[23]

Many will take the view, however, that a polity is better off with an effective second chamber, and if the *Bundesrat* was not meant to be effective, then the founders' intentions should not observed. The Australian Senate, for example, has largely failed as a means of protecting state interests, but it might be applauded as a successful generalist second chamber. The difficulty with making this argument in Germany is that the *Bundesrat*'s democratic legitimacy is mediate, as it is derived through the state governments.

Now, it would be quite incorrect to assume that in disputes over legislation, the *Bundesrat* has always been wrong, and the government always right. Doubtless, the *Bundesrat*'s suggestions regarding (or obstruction of) legislation have been beneficial to the polity on occasion.[24] What occasions these are, however, is largely a nonlegal question on which there is not likely to be general agreement. Equally implausible is the suggestion that the *Bundesrat* has always been a detriment to the federation.

While the number of bills ultimately blocked by the *Bundesrat* has never been very high, those that are blocked tend to be important, and not just minor fine-tuning exercises or noncontroversial improvements that would be carried out no matter who was in office. While there are no figures for the number of bills the government does not introduce because they would be sure not to pass, this too has occurred.[25] The blocking of the major tax reform initiative of Dr. Kohl's conservative government during 1996-97 by the opposition majority in the *Bundesrat* is sometimes plausibly cited as an example of the misuse of that body for the purpose of federal party politics.[26] Various Social Democrat governments have also, on occasion, had grounds to believe that they were the victim of federal

opposition party politics, rather than divergent states interests in the *Bundesrat*.[27] It would, of course, be very surprising if this were otherwise. State premiers will always be able to find some disadvantage for their local polities in a federal proposal, which premiers are likely to oppose for reasons other than those connected with strictly state interests (if there even is such a thing as a strictly state interest). They will, needless to say, be subjected to pressure from their federal colleagues. And the German *Länder* tend to be rather uniform on the broad level (some states, above all Bavaria, certainly do stand out, but there is no Quebec), which means that in most situations the main fault lines of policy debate will divide political parties rather than pit federal against state governments.[28]

For all these reasons, reducing the number of laws subject to the *Bundesrat*'s absolute veto was one of the principal matters which occupied the attention of the Commission, in session until the end of 2004. KoMbO's co-chairs came from the two major parties: Franz Müntefering, from the federal Social Democrats, and the then Premier of Bavaria, Dr. Edmund Stoiber, from the Christian Democrats.[29] KoMbO concluded without agreement at the end of 2004, but the lack of agreement did not extend to the proposals relating to the *Bundesrat*. A general federal election occurred on 18 September 2005 after a disastrous showing for the governing Social Democrats in state elections in the most populous state, North Rhine/Westphalia.[30] The federal election resulted in neither of the two large parties being able to form a coalition capable of achieving a majority. As a result, the two large parties chose to coalesce and, as mentioned in the introduction, formed a grand coalition of Social Democrats and Christian Democrats, still in office at the time of writing (the unlikelihood of such a coalition in Canada underlines the greater emphasis placed on cooperation over adversarial competition in Germany).

The alliance between the two major parties gave KoMbO's conclusions new impetus: first, the two major parties had largely been responsible for the political input provided to the co-chairs of KoMbO; and second, the grand coalition — after state elections in early 2006 increased its numbers in the *Bundesrat* — had a sufficient (two-thirds) majority in both Houses of Parliament to amend the Basic Law. An agreement between the two parties on constitutional reforms was thus no mere idle exercise.[31] Internal disagreement regarding the Comission's late-2004 conclusions was patched up, and a slightly revised package was presented to both the *Bundestag* and *Bundesrat*. This package was approved in 2006. The amendments to the *Bundesrat*'s powers were at the centre of this wide-ranging reform package.[32]

The Reforms

Given that article 84(1) of the Basic Law had first place in the league table of constitutional provisions requiring the *Bundesrat*'s approval of bills, attention was concentrated on it during all reform discussions. Reform of German financial arrangements, including the distribution of taxes for which article 105(3) required the *Bundesrat*'s consent, was to be the next major field examined by the Commission (that provision was left to one side for the time being). In short, the solution adopted was a simple one: the requirement in article 84(1) for *Bundesrat* consent to bills affecting the state civil service or administrative procedures was abolished, and in its place states received the right to enact their own legislation deviating from any enacted federal law. Thus a requirement for collective assent was replaced with the right of each state to dissent — a solution which, it was hoped, would increase the opportunities for federal diversity and competition.[33] In effect, states lost influence at the federal level with the abolition of some *Bundesrat* consent requirements, but gained power over their own affairs.

Nevertheless, if independently enacted state laws contradict federal laws, federal legislators may restore uniformity, thus overruling state deviations from federal norms. To allow time for states to react, federal laws restoring uniformity among states cannot come into force for six months (without *Bundesrat* approval). If there is competition between federal and state law enacted under this procedure, the law enacted later, be it federal or state, prevails.

The capacity of states to legislate in derogation of federal laws is hedged in with a number of subsidiary rules, which may well affect the success of this innovation in reducing the number of bills that have to pass through the *Bundesrat*. The most notable of these is the provision in the new article 84(1) itself, which states that federal laws passed with *Bundesrat* consent may "in exceptional cases" — those in which there is "a special need for a rule that is uniform across the federation" — regulate state administrative procedures (although not the structure of the state civil service),[34] thus overriding the states' right to enact inconsistent legislation. Although the matter has not yet been tested in the courts, the general view of German scholars is that the restrictions just quoted ("exceptional cases"; "special need") are primarily appeals to the self-restraint of the legislature, and are either nonjusticiable or too vague to be subject to anything more thoroughgoing than a basic check by a court as to whether there is sufficient evidence to justify the finding that the case is exceptional and the need special.[35] The explanatory notes on the bill which became the act amending the Basic Law state that the federation and the states agree that procedural rules in environmental law were to be regarded as exceptional cases.[36] That they did not bother to record this agreement in the Basic Law itself suggests that they too see the issue as primarily one for political resolution.

It will certainly be interesting to see whether the federal Parliament is able to muster the necessary degree of self-restraint assumed by this provision. Current indications provide some ground for hope: a recent study reported that in the first months of the grand coalition — from its taking office to the coming into force of the amendments — 56.8 percent of all laws required the *Bundesrat*'s consent. This is within the usual pre-2006 rate, and with the unusual circumstance of coalition government and consequently weak opposition, this figure is no cause for surprise.[37] However, in the year after the reforms came into force the number of laws requiring the consent of the *Bundesrat* dropped (a journalist would hardly be able to resist "plummeted") to 42.7 percent,[38] a reduction of about one-third. There are good explanations for most of the instances concerned. For example, when uniform federal administrative rules were promulgated in an exceptional case, thus requiring the *Bundesrat*'s consent, the rules subsequently enacted were generally required by a European Union (EU) directive or other binding international rule of some sort.[39] While this reduction in the number of bills requiring *Bundesrat* consent falls short of the wilder hopes entertained for the reforms,[40] the figures indicate some pleasing progress after just one year. There are grounds for expecting that the figure may decline further as people both get used to the reforms, and the grand coalition ends (terminating the federal government's certain majority in the *Bundesrat)*. When this happens, the question of whether to put forward a bill requiring *Bundesrat* approval will again become a real issue for the federal government.[41]

However, it would be foolish to declare the battle won or to make any firm predictions in the frequently changing world of politics. The high figure under the old version of article 84(1) was reached even though there was an easy way for the federal government to avoid having its major bills subjected to *Bundesrat* consent under the old arrangements:[42] it could divide its legislation into separate bills, one with the provisions not requiring the second chamber's consent, and the other containing the provisions on the structure of the civil service and administrative procedures. For that matter, the federal government might simply increase the frequency of bills not including provisions about administrative matters and the civil service in the states.[43] The separation of proposed legislation into different bills to get around *Bundesrat* consent requirements has been done in controversial cases,[44] but the lure of administrative uniformity is clearly too great for a substantial degree of progress to be made by either means suggested. The *Bundesrat*, for its part, was hardly likely to object to the resulting increase in its powers.[45] With this convergence of interests, only time will tell how well the reforms have succeeded in their principal aim. After all, success is, in some part, dependent upon changes in legislative and bureaucratic cultures and success in working against centripetal forces.

It is also worth noting that the reforms of 2006 added to the potential for *Bundesrat* blockades in that two further requirements for its consent were added in two policy areas. The less surprising of these two was article 104a(4), under which *Bundesrat* approval is required of federal laws requiring the states to provide money, "money's worth," "or comparable services" to third parties of any sort. Recalling that the *Bundesrat* is a body composed of state government delegations, it is easy to see why this rule was adopted. Nevertheless, it may mean that more laws require *Bundesrat* consent, and this possibility illustrates the limitations of the project of reducing entanglements between federal and state governments. Futhermore, the concepts of money's worth and comparable services are vague and clearly need filling out.

Less far-reaching in quantitative terms, but perhaps more surprising, is the requirement in article 73(2) that laws under the new federal exclusive power over defence against international terrorism — a power expressly restricted to cases extending beyond one state's borders or beyond state jurisdiction — receive *Bundesrat* consent. An upper chamber veto in this politically sensitive field — within exclusive federal power — suggests that the *Bundesrat* is still being conceived as the general second chamber it is not supposed to be, rather than as the states' organ at the federal level. This rule is surely explicable only as the product of politicians who do not trust each other, and therefore want a veto over what other politicians are doing.[46]

Commentary and Assessment

Needless to say, the innovation under which states may enact legislation inconsistent with federal legislation has not gone unnoticed by commentators of all descriptions. As a lawyer, my attention naturally turns in the first instance to legal questions and commentary. One or two German legal commentators have declared the very possibility of state legislation which is inconsistent with federal norms undesirable, because it is inconsistent with their usual systematics (under which federal law always prevails over inconsistent state law).[47] Although I find the German gift for systematic legal thought very helpful, the impression sometimes arises that some German lawyers consider the accepted systematic structure to cover all logically possible states of affairs — as if handed down by a divine source — with the result being that anything which does not fit into the existing system must therefore be wrong. This is a remarkably limited viewpoint, but unfortunately not entirely surprising in a country in which systematic legal structures sometimes appear to be the master rather than the servant of legal analysis. As a German political scientist involved in the KoMbO process sensibly points out,[48] if the Basic Law provides for the later law to prevail even if it is a state law, then academic constitutional lawyers' systematics will just have to adapt to this new fact.

More surprising, but no more convincing, is opposition to the idea of independent state laws on the part of some practising lawyers — including the Constitutional Law Committee of the German Lawyers' Association — on the grounds that it requires lawyers to look beyond federal legislation to determine what the state of the law is![49] No doubt such a requirement will be a terrible inconvenience to busy solicitors, but (should this essay reach them) they will be pleased to learn that there is at least a term of constitutional law already available to describe legal systems in which research extending beyond one level of government may be required. It is "federalism." The lawyers' criticism, however, while surprising both in its content and for the lack of guile with which the complaint about the horrifying possibility of meaningful state legislation is made, is another reason to wonder how much commitment there really is to a substantial measure of federalism in Germany involving not merely administration by the states, but also independent legislation with the concomitant possibility of interstate competition. It should also be noted that states will, of course, remain bound by European law and their own (and federal) constitutions, which should also ensure that there is no wild variation among them.[50]

More serious, although certainly not insuperable, are the various interpretative difficulties that may arise under the new arrangements

by which later laws trump earlier laws, regardless of which level of government enacted them. It is easy to imagine some difficulty in determining which is the later law,[51] not only if a federal and a state law are coincidentally assented to on the same day but also if, for example, a federal law — in force in some states but superseded by state legislation in others — is amended in a minor particular. Would this make the whole law count as a later law, and thus bring it back into force in those other states in which a deviating law was previously in force? Could the federation expressly rule out this result by enacting that it has no such intention? What if a federal law is re-enacted as a whole simply as an exercise in consolidation, without any material amendments? In order to deviate from federal law, is it sufficient for the states to enact inconsistent laws or must they, where the provisions themselves are silent,[52] also state an express intention to deviate from the federal law, perhaps even naming the federal law from which they wish to deviate? No doubt such cases will be dealt with, if they arise, by curial decision.

One further issue for which there is a surprising lack of legal rule, not to mention consensus among commentators, is the status of the states' capacity to deviate from federal law in those cases in which a federal law was enacted with the consent of the *Bundesrat*, pursuant to some rule other than the "exceptional circumstances" rule in article 84(1). If a constitutional rule, aside from article 84(1), requires *Bundesrat* consent to proposed federal legislation, but that legislation does not expressly exclude the possibility of deviating state legislation, is such state legislation still permissible? In one commentator's view the answer is no, as the states have had their chance to participate in the legislative process *via* the *Bundesrat* itself.[53] The better view, however, is the contrary one — more faithful to constitutional text — which avoids treating the states as an undifferentiated lump (a state which voted against the law in question in the *Bundesrat* may feel somewhat aggrieved if its right to enact deviating legislation were lost as well) yet also preserves state autonomy in general (in line with what is supposed to be the highly exceptional status of federally imposed uniformity).[54]

On the political level, it is easy to imagine the possibility of absurdity resulting from a rule that the later federal or state law prevails in a case of conflict between the two;[55] indeed, the possibility of endless backwards-and-forwards trumping of one level of government's laws by the other has led to this solution receiving the derogatory name "ping pong" law making. Nevertheless, too much could be made of the possibility of endless "ping pong." Certainly we cannot design constitutions on the assumption that those who operate them will engage in wilfully stupid and counterproductive behaviour for an indefinite time.[56] I suspect that this solution will work better than its detractors think it will; it is, in any event, certainly worth trying.[57]

Moving from legal detail to broader questions of institutional design, it is apparent that the U.K., despite moving in the federal direction over the past decade, is clearly not going to copy the *Bundesrat* as it proceeds on its own search for a reformed or wholly new second chamber.[58] The *Bundesrat* is also unlikely to become a model for Canada, given that the election of senators is the reform currently being experimented with there. The diversity among the Canadian provinces would, moreover, make it highly inadvisable to further reduce the federal government's freedom of action by requiring provincial consent to its legislation, not only in the House of Commons, which can be fractious enough, but also in a *Bundesrat*-like upper house.[59] Indeed, it has now been some years since any serious proposals have been put forward for the adoption of a *Bundesrat* in Canada,[60] and German experience over the last decade or so, combined with a resurgence in the idea of competitive rather than cooperative federalism, suggests that the moment for such proposals has passed. The *Bundesrat* is also a far less obvious model for Canada because Canadian federalism is nowhere near as integrated as Germany's — while there are areas in which comparable arrangements do exist in Canada, there is far less of the German type of entanglement involving entrenched local administration of federal laws.[61]

Nevertheless, the German experience does provide some lessons for other countries. The

principal lesson is that a second chamber dominated by the opposition can degenerate into a worse than useless tool of party politics, and can be the source of obstruction and blockade. A second chamber must not be an alternative centre of power to the first, in the sense that it simply blocks everything (or everything controversial) that the first chamber does. This situation has arisen in Germany because the method by which the *Bundesrat* is chosen often produces a majority for one or other of the major parties (major parties are most likely to form and/or dominate state governments).[62] German experience shows that the British government, in its latest white paper, is right to emphasize the importance of ensuring that, except in very exceptional situations, no one party should ever have a majority in a reformed second chamber.[63]

However, the recent reforms of the *Bundesrat* must not lead us to conclude that a second chamber should always have significantly lesser legislative powers than the first — I come in a moment to its role in "confidence" questions affecting the composition of the executive (supply, for example). The reduction in the legislative powers of the second chamber undertaken in Germany in 2006, and in the U.K. in 1911, is clearly connected to limiting each chamber's role, due to a lack of direct democratic legitimacy. Thus, this development is not necessarily applicable to an upper house which has been reformed to enhance its democratic legitimacy.

The alternative and obviously much more radical response to the fact that the *Bundesrat* has been exercising powers beyond those for which it is suited by its composition and purpose would have been to make the *Bundesrat* elected (preferably by some system which did not involve the likelihood of majorities solely for the main opposition party), thus making its veto power more legitimate. As noted earlier, however, it is not easy to think how that could be done in a productive way in Germany, given that the first chamber is already elected by proportional representation.

While permanent opposition majorities in a powerful second chamber are not to be desired, few will quarrel with the well-known *dictum* which asserts the superfluity of a second chamber that merely agrees with the first. In the U.K., where the electoral method for the House of Commons, and the nature of the country in which it operates, combine to produce grossly exaggerated majorities — an outcome for which there is certainly something to be said in a house that chooses the government — it is, nevertheless, possible to create a second chamber which is a real variant of the first chamber, and which is neither dominated by the opposition nor by the government: namely, a chamber elected by proportional representation.

An anomalous period in Australia has just concluded in which the federal government had a majority in the Senate. Experience with nongovernmental majorities in the Australian Senate from 1981-2005 suggests that a Senate in which the government needs the support either of the opposition or of minor parties and independents in order to have its legislation passed can work rather well. The workings of Parliament are enhanced by the variety of opinions taken into account, and by the increase in the level of transparency in political decision making. In Canada, on the other hand, some considerable diversity of views already exists in the House of Commons, so the need for a second chamber serving many of those purposes is perhaps less, and the danger of superfluity — or worse, complete deadlock between the lower and upper houses — is correspondingly greater.

While the method of election to an upper house is clearly an important topic in countries which have adopted, or are considering, the introduction of an elected upper house, the formal legal powers of the upper house are a topic of equal importance, since an elected upper house may feel inclined to use its powers to the fullest. Australian experience in 1975 provides a reminder that a too-powerful upper house can indeed be mischievous — towards the end of that year, the Senate was again dominated by one party, this time the opposition, and it refused to allow the government to pass its budget, leading to the Crown's intervention (in the view of many, including this author, far too early) to break the deadlock by forcing a general election. In fact, an upper house elected by proportional

representation may even come to imagine that it has a mandate superior to the House of Commons' given that its method of election would allow for a broader range of opinions to be represented.

To my mind this would confuse two separate roles: while there may be many good reasons for requiring that legislation receive the endorsement of two legislative bodies composed in different ways, only one chamber can exist to elect the government. In many systems of responsible government, the proper chamber can be easily identified because it is the one provided with an electoral system that exaggerates majorities, and thus makes the task of electing the government easier. In Canada, however, this is far less often the case because the House of Commons has not recently had a clear majority for one or other party, given the highly fractious party landscape there. This makes it crucial that there should be no confusion about which chamber is the one that chooses the government. It would hardly be desirable to have two highly fragmented chambers, and a dispute between them for supremacy to boot.

But it is possible to put the question of institutional supremacy beyond the reach of subtle argument. The upper house could simply be deprived of all power over supply bills — beyond, perhaps, a short suspensive veto so that the anomalous phenomenon of legislation enacted by only one of two chambers is reserved for situations in which there is no alternative. This would not be difficult to do in the U.K., given that this is the current constitutional position of the House of Lords (in written constitutional law anyway). In Canada, a suspensive veto on supply bills was proposed in the Charlottetown Accord,[64] and already exists in relation to some constitutional amendments in section 47 of the *Constitution Act, 1982*. This rule could easily be extended to supply bills. Some upper houses in the Australian state parliaments provide examples of such restrictions imposed upon elected second chambers.[65] Thus, it is possible to learn from German (and Australian) experience in designing an elected second chamber that is a real centre of power, in greatly enhancing the representativeness of Parliament, and in avoiding rivalry with the Commons in its central task of electing the government.

Notes

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1 It would be presumptuous of me to attempt to summarize the Canadian debate here. Instead, I refer to a useful recent article which summarizes the position to date and provides a review of a proposal to reform the Canadian Senate with some similarity to the structure of the *Bundesrat*: Daniel Pellerin, "Between Despair and Denial: What to Do about the Canadian Senate" (2005) 11 Review of Constitutional Studies 1.

2 Indeed, the very name of the Commission was part of a commitment to encourage consensus. See Hans-Günter Hennecke, "KoMbO 2004 – ein Werkstattbericht zur Föderalismusreform" (2004) Niedersächsische Verwaltungsblätter 250 at 253.

3 The exception is the party that is now pleased to call itself "the Left," which includes the successors of the old East German communists and some left-wing breakaways from the Social Democrats, who are largely from the west.

4 For general descriptions of the *Bundesrat* in English, see, *e.g.*, David P. Currie, *The Constitution of the Federal Republic of Germany* (Chicago: University of Chicago Press, 1994) at 61-66; Thomas O. Hueglin & Alan Fenna, *Comparative Federalism: A Systematic Enquiry* (Toronto: Broadview Press, 2006) at 198; Werner J. Patzelt, "The Very Federal House: The German Bundesrat" in Samuel Patterson & Antony Mughan, eds., *Senates: Bicameralism in the Contemporary World* (Columbus: Ohio State University Press, 1999), chapter 3; David E. Smith, *The Canadian Senate in Bicameral Perspective* (Toronto: University of Toronto Press, 2003) at 42-46.

5 See Bruce Hicks, "Can a Middle Ground be Found on Senate Numbers?" (2007) 16 Constitutional Forum 21 at 32.

6 Article 51 (3); BVerfGE 106, 310.

7 Proposals floated as part of the recent reform process to change the rule requiring an absolute majority did not meet with the states' approval.

See Irene Kesper, "Reform des Föderalismus in der Bundesrepublik Deutschland" (2006) 6 Niedersächsische Verwaltungsblätter 145 at 147. A variety of other suggestions are reviewed by Gerrit Mulert, "Der Bundesrat im Lichte des Föderalismus" (2007) Die öffentliche Verwaltung 25 at 26-29. He rejects some, and I suspect that others he endorses — such as providing the *Bundesrat* with an independent presiding officer — would not change matters greatly.

8 David P. Currie, *supra* note 4 at 62.

9 Konrad Reuter, *Praxishandbuch Bundesrat*, 2nd ed. (Heidelberg: C.F. Müller, 2007) at 705.

10 No other provision requiring the consent of the *Bundesrat* in a particular situation made it into double percentage figures. Christian Dästner, "Zur Entwicklung der Zustimmungsbedürftigkeit von Bundesgesetzen seit 1949" (2001) 32 Zeitschrift für Parlamentsfragen 290 at 296. There is a comparable figure in Karl Rauber, "Artikel 84 und das Ringen um die Verwaltungshoheit der Länder" in Rainer Holtschneider & Walter Schön, eds., *Die Reform des Bundesstaates : Beiträge zur Arbeit der Kommission zur Modernisierung der bundesstaatlichen Ordnung 2003-2004 und bis zum Abschluß des Gesetzgebungsverfahrens 2006* (Baden-Baden: Nomos, 2006) at 40.

11 Hueglin & Fenna, *supra* note 4 at pp. 146f, 151, 163; Hans-Peter Schneider, "The Federal Republic of Germany" in Akhtar Majeed *et al*., eds., *Distribution of Powers and Responsibilities in Federal Countries* (Montreal: McGill-Queen's University Press, 2006) at 124 and 134.

12 There is an excellent comparison of Canada and Germany in Martin Painter, "Intergovernmental Relations in Canada: An Institutional Analysis" (1991) 24 Canadian Journal of Political Science 269.

13 Currie, *supra* note 4 at 62; Hueglin & Fenna, *supra* note 4 at 199; Ferdinand Kirchhof, "Die Beeinflussung der Organisationsautonomie der Länder durch Gesetze des Bundes : zur neuen Kompetenz des Bundes nach Artikeln 84 I und 104a IV GG über die Einrichtung der Behörden und das Verfahren der Länder" in Rainer Pitschas & Arnd Uhle, eds., *Wege gelebter Verfassung in Recht und Politik : Festschrift für Rupert Scholz zum 70. Geburtstag* (Berlin: Duncker & Humblot, 2007) at 637; Rauber, *supra* note 10 at 39; Schneider, *supra* note 11 at 145. The numerous assertions, such as those just quoted, generally tend to be unsupported by historical evidence. But such assertions are plausible for a number of reasons such as the general presumption against the *Bundesrat*'s having a power to consent against the regulation of state administrative procedures by the federation, and the choice of an unelected body as the upper chamber. In fact, it is probably the case that the development of the *Bundesrat* into a party-political body, and the possibility of mixed laws (some parts requiring *Bundesrat* consent, others not) was not foreseen by most of the drafters. See Katrin Haghgu, *Die Zustimmung des Bundesrates nach Artikel 84 I GG : wider die sogenannte Einheitsthese* (Berlin: Duncker & Humblot, 2007) at 99-102 and 149f.

14 Peter Huber, "Reform der Kompetenzen (Gesetzgebungskompetenzen, Organe, Bundesrat)" in Stiftung Gesellschaft für Rechtspolitik, ed., *Bitburger Gespräche 2005/I* (Munich: C.H. Beck, 2006) at 30.

15 BVerfGE 8, 274, 294f and successor cases.

16 Winfried Kluth, "Die deutsche Föderalismusreform 2006 : Beweggründe – Zielsetzungen – Veränderungen" in Winfried Kluth, ed., *Föderalismusreformgesetz* (Baden-Baden: Nomos, 2007) at 50. The social and political background of the development of federalism in Germany and the causes of its excessive centralism are well summarized by Fritz W. Scharpf, "Recht und Politik in der Reform des deutschen Föderalismus" in Becker/Zimmerling, eds., *Politik und Recht* (Wiesbaden: Verlag für Sozialwissenschaften, 2006) at 306-310.

17 Hartmut Bauer, "Entwicklungstendenzen und Perspektiven des Föderalismus in der Bundesrepublik Deutschland" (2002) Die öffentliche Verwaltung 837 at 841.

18 Otto Depenheuer, "Verfassungsgerichtliche Föderalismusreform" (2005) Zeitschrift für Gesetzgebung at 83; Marcus Höreth, "Zur Zustimmungsbedürftigkeit von Bundesgesetzen : eine kritische Bilanz nach einem Jahr Föderalismusreform I" (2007) Zeitschrift für Parlamentsfragen 712 at 714-17; Huber, *supra* note 14 at 36; Günter Krings, "Die Beratungen der Föderalismuskommission" in Winifried Kluth, ed., *Föderalismusreformgesetz* (Baden-Baden, Nomos, 2007) at 62; Patzelt, *supra* note 4 at 67; Hans-Werner Rengeling, "Föderalismusreform und Gesetzgebungskompetenzen" (2006) Deutsche Verwaltungsblätter at 1537; Scharpf, *supra* note 16 at 311; Christian Schimansky & Bernhard Losch, "Warum die Föderalismusreform keinen Erfolg haben wird" (2007) Recht und Politik at 18 and 18f; Schneider, *supra* note 11 at 128, 140 and 144f.

19 The situation is often more difficult to assess than the text implies, given that sometimes state coali-

tion governments may include one party that is in office federally, and one that is in opposition federally. In such circumstances, the state coalition must attempt to agree on the manner in which its votes will be cast in the *Bundesrat*. On what may happen when this is not possible, see Nina Arndt & Rainer Nickel, "Federalism Revisited: Constitutional Court Strikes Down New Immigration Act for Formal Reasons" (2003) 4 German Law Journal 71.

20 Given frequent changes and coalition governments at the state level, the question whether the government has a majority in the *Bundesrat* is harder to determine than one might think. More detailed study is needed, but see Gerd Strohmeier, "Der Bundesrat : Vertretung der Länder oder Instrument der Parteien?" (2004) Zeitschrift für Parlamentsfragen at 717, who mentions that the Social Democrat/Free Democrat government in power from 1969-82 never had a majority in the *Bundesrat*. Ludger Helms, "Föderalismus und Bundesstaatlichkeit in Deutschland : eine Analyse aus der Perspektive der vergleichenden Politikwissenschaft" (2006) Jahrbuch des Föderalismus at 115 and 130f, states that only Australia has had a higher rate of non-government domination of the second chamber. As he points out, and as we shall see below, there have also been important differences in the nature of the non-government majority in Australia.

21 Michael Nierhaus & Sonja Rademacher, "Die große Staatsreform als Ausweg aus der Föderalismusfalle?" (2006) Landes- und Kommunalverwaltung at 385 and 386.

22 Strohmeier, *supra* note 20 at 717 and 723-28.

23 Peter Huber, "Deutschland nach der Föderalismusreform – in bester Verfassung!" in Pitschas & Uhle *supra* note 13 at 597; Jörn Ipsen, "Die Kompetenzverteilung zwischen Bund und Ländern nach der Föderalismusreform" (2006) Neue Juristische Wochenschrift at 2801 and 2803; Krings, *supra* note 18 at 61f; Patzelt, *supra* note 4 at 85; Thilo Ramm, "Große Koalition, Föderalismusreform und Staatsbankrott" (2006) Neue Justiz at 337 and 340; Werner Reutter, "Regieren nach der Föderalismusreform" (2006) 50 Aus Politik und Zeitgeschichte 12 at 12f; Norbert Röttgen & Henner Jörg Behl, "Abweichung statt Zustimmung – Die Readjustierung des Verhältnisses von Bundestag und Bundesrat durch Änderung des Artikels 84 GG" in Holtschneider & Schön *supra* note 10 at 19; Fritz W. Scharpf, "Föderalismusreform – warum wurde so wenig erreicht?" (2006) 50 Aus Politik und Zeitgeschichte at 6 and 7; Scharpf, *supra* note 16 at 311. Patzelt nevertheless puts forward the view (at 87) that there have as yet been no extreme cases of blockading. What counts as an extreme case is also a matter of degree and personal opinion, of course. Certainly it is right to say that there have never been attempts wholly to paralyse the federal government's workings through the *Bundesrat*, or to make it impossible for a federal government to continue in office.

24 Hans-Peter Bull, "Föderalismusreform auf falscher Fährte" (2007) Recht und Politik at 67 and 69.

25 Haghgu, *supra* note 13 at 114f; Helms, *supra* note 20 at 115 and 132; Strohmeier, *supra* note 20 at 717 and 729; Wilfried Swenden, *Federalism and Second Chambers : Regional Representation in Parliamentary Federations – the Australian Senate and German Bundesrat Compared* (Brussels: Peter Lang, 2004) at 86.

26 Röttgen & Behl *supra* note 23 at 20.

27 Helms claims that the Social Democrats have actually experienced more difficulties than the Christian Democrats, *supra* note 20 at 115 and 131.

28 Kluth *supra* note 16 at 51; Patzelt *supra* note 4 at 86f.

29 The present author is of course aware of the different name of the Bavarian branch of the principal conservative party. There is a summary of KoMbO's work and the background in general in English in Rudolf Hrbek, "The Reform of German Federalism: Part I" (2007) 3 European Constitutional Law Review 225 at 231-35.

30 Simon Apel, Christian Körber & Tim Wihl, "The Decision of the German Federal Constitutional Court of 25th August 2005 – Dissolution of the National Parliament" (2005) 6 German Law Journal at 1243.

31 In the final *Bundestag* vote, the proposal obtained 428 votes, eighteen more than the 410 needed for the two-thirds majority: *Bundestag*, Debates, 30 June 2006, at 4295-98. In the *Bundesrat*, fourteen of the sixteen states voted yes: *Bundesrat*, Debates, 7 July 2006, at 222.

32 This is the view of a number of eminent commentators, *e.g.,* Christian Starck, "Einführung" in Christian Starck, ed., *Föderalismusreform* (Munich: C.H. Beck, 2007) at 3.

33 Martin Stock, "Konkurrierende Gesetzgebung, postmodern: Aufweichung durch 'Abweichung'?" (2006) 21 Zeitschrift für Gesetzgebung 226 at 232; Trute, "Verwaltungskompetenz und Art. 33 V," *ibid*. at 76f. There is a keen awareness that competition cannot be practised as enthusiastically in the public sector as in the private:

Bauer, *supra* note 17 at 844f; Huber, *supra* note 14 at 37; Thomas Mayen, "Neuordnung der Gesetzgebungskompetenzen von Bund und Ländern" (2007) Die öffentliche Verwaltung 51 at 56; Helmuth Schulze-Fielitz, "Umweltschutz im Föderalismus – Europa, Bund und Länder" (2007) Neue Zeitschrift für Verwaltungsrecht 249 at 251.

34 This is expressly stated in the provision and is also mentioned by Mayen, *ibid*. at 53.

35 Kesper, *supra* note 7 at 147; Alexander Thiele, "Die Neuregelung der Gesetzgebungskompetenzen durch die Föderalismusreform – ein Überblick" (2006) Juristische Ausbildung 714 at 718; Trute, *supra* note 33 at 85. It may be that Peter Selmer, "Die Föderalismusreform – eine Modernisierung der bundesstaatlichen Ordnung?" (2006) Juristische Schulung 1052 at 1057, is putting forward a broader view of the Court's role.

36 *Bundestag*, printed paper 16/813 at 15.

37 During the only previous Grand Coalition of 1966-69 the figure was 51.7 percent; as mentioned earlier the average for 1949-2005 was 53.1 percent; the range was from 41.8 percent (over the first electoral cycle) or (if that run-in period is excluded) from 49.4 percent to 60.0 percent. All these figures are from Reuter, *Praxishandbuch*, *supra* note 9 at 705.

38 A higher figure is arrived at by Höreth, supra note 18 at 727, but on the basis of a smaller sample.

39 Horst Risse, "Zur Entwicklung der Zustimmungsbedürftigkeit von Bundesgesetzen nach der Föderalismusreform 2006" (2007) Zeitschrift für Parlamentsfragen 707 at 709-11.

40 Summarised and attacked in Simone Burkhart & Philip Manow, "Was bringt die Föderalismusreform? Wahrscheinliche Effekte der geänderten Zustimmungspflicht" (Cologne: Max-Planck-Institut für Gesellschaftsforschung, 2006).

41 Höreth, *supra* note 18 at 732 thinks that the figure will increase after the grand coalition terminates. I am inclined to think, rather, that a government with a majority in the *Bundesrat* such as the grand coalition may be more inclined, in cases in which a choice exists, to make use of that majority, while a government without such a majority is less likely to introduce bills that need the *Bundesrat*'s consent. Time will tell.

42 Provided that that provision was the only one which attracted the requirement of consent in relation to a bill.

43 Dästner, *supra* note 10 at 307f; Ulrich Häde, "Zur Föderalismusreform in Deutschland" (2006) Juristenzeitung 930 at 934; Kesper, *supra* note 7 at 147; Kirchhof, *supra* note 13 at 638.

44 I deal with one such case and the Federal Constitutional Court's endorsement of this procedure as constitutionally valid in "New Gay and Lesbian Partnership Law in Germany" (2003) 41 Alberta Law Review 573 at 603.

45 Haghgu, *supra* note 13 at 85.

46 Thiele, *supra* note 35 at 715, thinks it is a good idea on the grounds that the topic is especially important. That could be said about many topics.

47 Kesper, *supra* note 7 at 150; Schulze-Fielitz, *supra* note 33 at 253 (referring to the equivalent provision in article 72(3)). Huber, *supra* note 23 at 607, agrees that the sacred system has been violated, but goes on to add that the advantages of doing so in this case probably outweigh the disadvantages.

In fact, the new provision is slightly different from the old rule that federal law makes state law invalid, because under the new provision earlier laws are not made invalid by later ones but become merely ineffective. The concept of ineffectiveness was borrowed from European jurisprudence. The chief practical effect of this difference lies in the fact that under the new provision, if the latest law were repealed, the second-latest would revive, as it was never invalid.

It should also be noted that article 72(3) contains a further list of topics also introduced in 2006 on which the states are allowed to deviate and with the later law prevailing.

The solution recently adopted is traced back to 1849 by Hans-Jörg Dietsche and Sven Hinterseh, "Ein sogenanntes Zugriffsrecht für die Länder – 'konkurrierende' Gesetzgebung beim Wort genommen? Zur Entwicklung einer verfassungsrechtlichen Diskussion" (2005) Jahrbuch des Föderalismus 187 at 193. More recently it was suggested as a possible solution in 1976 by Scharpf, *supra* note 16 at 325.

48 Scharpf, *ibid*. at 328. On the following page of his contribution he adds, no doubt building on his experience in KoMbO, that lawyers are of limited use in constitutional reform, as they can only deduce norms from other norms and have no wider-reaching means of analysis. This is a fair criticism of the less intelligent German legal reaction to the proposed reforms, and a fair reflection on the excesses to which systematization is sometimes carried by lawyers trained in that country.

49 Constitutional Law Committee of the German Lawyers' Association, "Föderalismusreform: Nichts wird einfacher" (2006) Anwaltsblatt 614

at 615. Others put forward a similar fear, such as Mayen, *supra* note 33 at 53-55; Nierhaus & Rademacher, *supra* note 21 at 389.

50 This is pointed out by a number of writers, *e.g.*, Oliver Klein & Karsten Schneider, "Artikel 72 GG n.F. im Komptenzgefüge der Föderalismusreform" (2006) Deutsche Verwaltungsblätter 1549 at 1554.

51 The following scenarios are based in part on Constitutional Law Committee of the German Lawyers' Association, *supra* note 49 at 616.

52 Peter Fischer-Hüftle, "Zur Gesetzgebungskompetenz auf dem Gebiet ‚Naturschutz und Landschaftspflege nach der Föderalismusreform" (2007) Natur und Recht 78 at 79.

53 Lars Rühlicke, "Bericht aus Berlin – März 2006" (2006) Jura 234 at 236.

54 Thiele, *supra* note 35 at 719.

55 Mayen, *supra* note 33 at 55.

56 Schulze-Fielitz, *supra* note 33 at 255, points out that other provisions of the Basic Law designed for cases of wilful silliness or non-cooperation have remain unused because no one has brought about a situation in which their use has been necessary. Also optimistic are Klein & Schneider, *supra* note 50 at 1553.

57 Kirchhof, *supra* note 13 at 641. It is also possible that the Courts might feel able, on the unwritten principle of *Bundestreue*, to strike down federal laws enacted solely for the purpose of driving the states out of a particular field. See Trute, *supra* note 33 at 80.

58 I do not agree that the *Bundesrat* model is the only "truly federal" or "genuinely federal" one (whatever that means), as is alleged by Hueglin & Fenna, *supra* note 4 at 199 and 214, even though those same authors accurately conclude that the *Bundesrat* has facilitated centralization.

59 Painter, *supra* note 12 at 286. See also Smith, *supra* note 4 at 44, referring to different styles of politics in the two countries.

60 There is a list of such proposals in Jack Stilborn, "Forty Years of Not Reforming the Senate" in Serge Joyal, ed., *Protecting Canadian Democracy : The Senate You Never Knew* (Montreal: McGill-Queen's University Press, 2003) at 32; Ronald Watts, "Bicameralism in Federal Parliamentary Systems" in *ibid*., at 92.

61 Lowell Murray, "Which Criticisms Are Founded?" in *ibid*. at 141; Watts, *ibid*. at 93.

62 While broadly correct, this is subject to the qualifications I made earlier in footnotes 19 and 20.

63 U.K., House of Commons, "The House of Lords: Reform," Cmnd 7027 in *White Papers* (February 2007) 1 at 27.

64 Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Scarborough: Thomson Carswell, 2007) at 9-19, provides a brief but very useful discussion of the issues canvassed here in the Canadian context.

65 See, for example, section 65 (4),(5) of the *Constitution Act 1975* (Vic.).