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

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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.).