REFLECTIONS ON THE CANADIAN CONSTITUTION AFTER THE FIRST CENTURY*

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Continuing controversy is a hallmark of federalism; and certainly our history is dotted with debates that have been intermittently responsive to constitutional issues. What makes the current debate different from the many that preceded it, is not so much the questioning of the distributive basis of our constitutional system—that has been a recurring feature of constitutional argumentation—but rather the questioning of its political basis. In the result, voices have been raised in support of a new Constitution, without (so far as I have been able to judge) any bill of particulars to demonstrate the fatal shortcomings of our existing one.

Perhaps I mistake the implications of the words "new Constitution," as they are used by the proponents of what on the face of it is a suggestion for revolutionary change. We have been witnesses in recent months to word usages that appear to have lost meaning in translation; we should not be surprised by confusion of thought in communication in the same language. Perhaps all that is sought is revision of the Constitution in some particulars and its consequent repromulgation. If so, this should be underlined, because there are serious problems, legal as well as political, involved in the jettisoning of one Constitution and its replacement by another.

Clamour for a new Constitution has been fed by an increasing politicization of our federalism. It is as if a stalemate has been reached in the legal relations of Canada and the Provinces, but with no legal, no judicial means of resolving current conflicts. In fact, there are such means. But what has been evident for many acquiescence in a judicial order of constitutional change through years is that the mood of our political leaders is less and less for

*Paper delivered at the ceremonies for the opening of the new building of the College of Law, University of Saskatchewan on September 22nd, 1967. It is published with the permission of the College of Law.

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reinterpretation of the division of legislative powers. The courts themselves cannot, of course, force such a mood; their jurisdiction must be activated by the initiative of private litigants or by governments; and above all, the exercise of jurisdiction must be founded on actual or proposed legislation as the subject of challenge.

It is my opinion that this question of mood for orderly constitutional change through judicial action is related to a failure to see the law as a strong strand in the cultural evolution of our country. Law has suffered arrested development as an indigenous, independent force in our lives, because long after we were political masters of our domestic affairs, and even a generation after we were political masters of our external involvements, we still remained judicially subservient to an overseas tribunal. It takes time to develop judicial standards for constitutional evolution; it takes an understanding of shifting social and economic forces to provide a basis for those standards. The Privy Council had worked towards a particular equilibrium in Dominion-provincial relations; and when appeals to that court were abolished there was no legacy of working norms to guide constitutional change through judicial statesmanship. Hypotheses, abstract standards, could be found in abundance in Privy Council judgments; but the Supreme Court of Canada, inheriting the Privy Council's role as umpire of our federal system, was left on its own to give them concreteness; and its function as such umpire has come under criticism because of anticipated fear that it may be more activist in constitutional interpretation than was the Judicial Committee.

Moreover, from the late thirties on, the political disposition appeared to be to rely on constitutional amendment for effective change; and, failing that, to seek to reconcile the difficulties of divided jurisdiction through administrative co-operation which would permit unified action while leaving existing judicially-declared limits of constitutional authority undisturbed. Clearly enough, political federalism has been, for many years, much more dominant than legal federalism in this country. I do not, indeed it would be foolish to, deprecate ongoing political adjustments to facilitate harmonious relations between centre and units in a federal state. The question that I raise, however, is whether freezing the legal balance at a particular point in time will not ultimately weaken the political foundation upon which any written constitution must rest. Is this not particularly hazardous for Canada when even amendment is more a matter of convention than of law?

Amendment, as we all know, has also become enmeshed in the politics of federalism, rather than having a domestic legal base, because the British North America Act contains no formula for its amendment. No one could sensibly quarrel with the wish to "patriate" the Constitution; but the recent and ultimately abortive (although nearly successful) attempts to introduce a domestic amending procedure told us more about the frozen character of Dominion and provincial legislative jurisdiction than they did about the utility of an amending procedure in a federal constitution. Indeed, it is fair comment, in my view, to say that both the Fulton and Fulton-Favreau formulas for amendment reflected a veto theory of Canadian federalism; a new compact theory, if you will, under which unanimity would be required to accomplish amendments respecting legislative power. To secure agreement on an amending formula on the principle that no one need agree is akin to organized chaos. I believe that a workable federalism requires a disciplined attachment of the units, the Provinces, to the constitutional order; and such a discipline will not be reflected in an amending procedure which allows the disagreement of any one Province to scuttle proposals for change.

The existing balance in federal-provincial law-making power is sharply in favour of the central government in two major fields, taxation and monetary control. (Another field where the central government has a dominating voice is transport and communication). Even singly, they are powerful levers; together, they represent a formidable capacity for regulating social and economic policy. The taxing power, more than other legislative powers (whether belonging to the Dominion or to the Provinces) specified in the Constitution, is less an end in itself than a means of realizing other ends. One of the persistent issues in our constitutional system, an issue more of political policy than of law, is whether the central government should use its taxing power to underwrite, and thus influence if not control, social and economic programmes for which it cannot directly legislate. Involved in this issue are so-called co-operative federalism, with its opting in and opting out features; programmes of subventions and subsidies; price support programmes and the like.

The issue arises because the balance in federal-provincial law-making power is sharply in favour of the Provinces in the field of social welfare and economic regulatory authority. If this is not clearly so in the constitutional text, it is undoubtedly so under the governing judicial interpretation of that text. What is also impor-

tant is that extensive programmes have been implemented in the respective Provinces on the faith of the immutability of this favourable balance, and I have the impression that the federal authorities and, indeed, federal party leaderships, are not inclined to challenge it.

Many of the provincial programmes, such as those in the fields of health insurance and education, require heavy financing. This cannot be secured without the Provinces coming to an arrangement with the Dominion on the sharing of tax revenue. The Dominion is told, on the one hand, that it must not intrude upon the constitutional responsibilities of the Provinces through resort to its overriding taxing and spending authority; and, on the other hand, that it must yield enough of its taxing power or resulting tax receipts or leave enough play for the exercise of provincial taxing power, to enable the Provinces to meet those responsibilities in whatever manner the Provinces see fit to discharge them.

I do not question the political logic of this position, given the assumption that the constitutional divison of powers must remain untouched, either by the molar process of amendment or by the molecular process of judicial review. The assumption is, however, unacceptable to an evolving society, whatever be the political postures of the moment. A federal state is a legal expression of a poltically-agreed balance of centralizing and decentralizing features, and of a politically-agreed means of adjusting that balance from time to time without destroying the state in the course of any such adjustment. The responsibility of the courts, and especially of the Supreme Court of Canada, as an agency of adjustment is, of course, a heavy one; but we strike at the legal roots of the country if we deprecate the exercise of this constitutional function or seek to paralyze it when it has achieved a power balance that is particularly congenial to either provincial or federal proponents, as the case may be.

Not all constitutional difficulties in this or any other federal state stem from alleged maldistribution of legislative power or alleged misconstruction of that power by the courts. There are questions that may aptly be termed constitutional that can be answered by an affirmative exercise of legislative power, by the enactment of a statute or by amendment of existing statutes. Among such questions in Canada are distribution of constituencies, size of the legislative assembly, duration of the legislature and so on. I suggest to you that the question of the use of French in the Provinces of Canada other than Quebec, and elsewhere in Canada,

is one that can be met by the enactment of legislation by the various provincial legislatures and by the Parliament of Canada. I do not say that this is a matter that should not be made the subject of constitutional protection, but do point out that the federal government is not to be charged with dereliction in a matter that is within provincial constitutional authority in each Province.

Of course, no Province, under present conditions, has extra-territorial rights in another or constitutionally declared claims upon another; and Quebec cannot force the other Provinces to act affirmatively to give their French-speaking inhabitants the linguistic and cultural advantages that they would enjoy in Quebec. It is, hence, not likely that Quebec will be satisfied on this score by anything else than a constitutional amendment. I shall not speculate on the reach of any such amendment, but merely ask the question whether it can reasonably be expected to go beyond linguistic and educational guarantees.

I confront the question whether linguistic and educational guarantees respecting the French language exhaust the scope of the "deux nations," the "two peoples" principle about which so much has been heard. The issue is whether that conception invites a realignment of law-making power between the Dominion and the Provinces, or in favour of the Provinces or any one of them. Let me make myself clear about the "deux nations" conception, at least to indicate my understanding of what it is not. It does not connote two states, two rival political entities exercising similar legislative powers, without any paramountcy of one against the other in the case of inconsistent or incompatible laws. I regard the principle of paramountcy as an operative principle of federalism whether clearly expressed (as in the Australian Constitution and in that of the United States) or not so clearly, as in Canada where it is presently a feature of our Constitution. (I should add that the Supreme Court has in recent years given the principle a narrow scope so as to favour provincial legislation).

On this view of the "deux nations," the "two founding peoples" conception, the view that we are not envisaging two autonomous states, I see no necessary relationship between it and the distribution of law-making power between the Dominion and the Provinces. Acceptance of the "deux nations" conception at the federal level as well as at all provincial levels must surely involve its realization in the exercise of such legislative power as is committed to the one or to the other level of government.

The conclusion from this must be that no special treatment

in the way of expanded law-making authority at the expense of the central government should be accorded to Quebec because of its French-speaking majority or to British Columbia or any other Province because of its English-speaking majority. The federal Parliament and government, in exercising legislative and executive power would be expected to reflect application, where appropriate, of the conception of "deux nations," as would the various Provinces in their exercises of authority. One can conceive, for example, of the federal authorities imposing a limitation on the jurisdiction of the Supreme Court of Canada to entertain appeals in matters arising purely under the Quebec Civil Code; and similarly limiting its jurisdiction in respect of appeals from other Provinces in matters arising under peculiarly local legislation.

In short, apart from the guarantees, statutory or constitutional, for underpinning the "deux nations" conception, differences about the appropriate ranges of legislative power must be assessed on the merits of our federal system without intrusion of that conception. I find it difficult to believe that our federal system can endure unless Ottawa is accepted as a source of national power and authority exercisable in respect of and for all citizens of Canada, wherever resident. The manner of exercise may, of course, have to be attuned to regional as well as provincial requirements. This is, however, a familiar situation, common to all federalisms. What I underline is that federal-provincial contentions about the reach of law-making power should not be embarrassed by interposing ethnic-linguistic-cultural qualifications which would make the central government less one for the people of a particular Province than it is for the people of other Provinces.

I take one final point which I shall not attempt to embellish. It is this. Apart from the tax question, to which I have already alluded, is there any such unbalance in constitutional text and constitutional interpretation in favour of the central government and against the Provinces as would, in terms of the experience of other democratic federal systems, suggest the need for remedial action in favour of the Provinces? Or, is there a case to be made for more consonance between federal tax authority and federal responsibility in the fields of social welfare and economic regulatory legislation? On these two related questions I would observe that I know of no federal system in which the constituent units have as extensive a regulatory authority as have the Provinces of Canada and in which the federal commerce power is as truncated as is that of the central government. One need only look at the

position in insurance regulation, in securities regulation, in the marketing of natural products, in manufacturing, in the retail, distribution and service trades, in labour relations. I borrow a phrase from my friend Professor Frank Scott, "provincial autonomy [means] national inactivity"; and I would add that the more we have of the one, the more we have of the other. Of course, the issue is that of striking a proper balance. The question that I leave with you is not whether the existing unbalance should be carried further, but whether it should be guaranteed in its present dimensions both against constitutional amendment and constitutional re-interpretation.

I have spoken in the context of a surviving federalism. My words will mean nothing for those who preach separation, whether forthrightly or through verbal obfuscation; and they will probably mean very little to exponents of a limping federalism under which the central government will be one with dependent status, whether in respect of one Province or all the Provinces. I, for my part, reject both.