Social Revolution and Constitutional Revolution in Canada: Some Reflections on the Philosophy of Legal Change

Edward McWhinney *

The Fulton-Favreau formula (the planned new, autonomously Canadian, self-operating, amending machinery for the British North America Act of 1867), has disappeared into history, and so far as one knows not a dog has barked at its passing. I personally felt that, so far as constitutional amending machinery goes, it was a not unreasonable compromise: the best evidence of its reasonableness, surely was that, where it was opposed, it seems to have been opposed for wildly conflicting reasons — by some English-speaking socialists or left-of-centre political opinion on the score that it would put the constitution "into a strait-jacket" by arresting the war-time and post-war trends to concentration of social and economic powers in Ottawa; by some English-speaking, right-wing political leaders or publicists on the score that it represented a "shameful surrender" by Ottawa to the demands of Quebec nationalism; by French-speaking nationalists and separatists on the argument that it would frustrate and defeat Quebec claims for a re-writing of the constitution on behalf of Quebec separatism or at least of a constitutionalism of biculturalism for the future. A formula with so many different enemies on so many different grounds must have had something affirmative to recommend it, after all !

There is reason to believe that very many of the Provincial premiers who supported adoption of the Fulton-Favreau formula in their own Provincial legislatures, went along, not so much out of positive enthusiasm for it, as in an acceptance of its more modest virtues of reasonableness and compromise, as between a number of conflicting viewpoints on the constitution. Certainly Conservative Premier John Robarts of Ontario, in a number of public addresses, and for that matter also the Opposition (Liberal) leader in the Ontario legislature, Andrew Thompson, and the Ontario NDP leader, Donald MacDonald, have indicated more or less that. In the Ontario

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* Edward McWhinney, Professor of Law and Director, Institute of Air and Space Law, McGill University, Montreal: formerly Professor of Law, Special Lecturer in Political Science, and Member of the Centre for Russian and East European Studies, University of Toronto, Toronto.

legislature, at least, the all-party, non-partisan support for the Fulton-Favreau formula's adoption seems to have been in the ultimate, an exercise in "good Canadianism", and this the more so because a number of provincial leaders seem to have had considerable private reservations about the wisdom of the federal government's bringing the formula forward in the first place. These provincial leaders also had doubts about whether the devising of an autonomous, self-operating amending machinery for the BNA Act was really a matter of high constitutional, or political, priority for Canada at the present time, warranting the diversion of any really substantial intellectual resources and energies to its achievements.

Premier Robarts of Ontario, as a provincial Conservative, has indicated his public opposition to federal Opposition (Conservative) leader, John Diefenbaker's, call for a national constituent assembly to draft a new constitution for Canada, as indeed has the Ontario Opposition (Liberal) leader, Andrew Thompson. While the actual political motive, in the case of both Premier Robarts and Opposition leader Thompson, may be different, I believe the constitutional law thought is essentially the same, rooted as it is in distinctively common law, pragmatic, empirically-based, problem-oriented, scientific legal method. On the record of past historical experience, constituent power, whether exercised in terms of new constitution-making or else of fundamental re-writing of an old constitutional instrument, has not really been too successful in terms of yielding viable, enduring constitutional change. The recourse to constituent power, in comparative constitutional law, has been all too often a recourse or abandonment to constitutional oratory, with very little regard to the practical legal results to be achieved thereby. In fact, as with the effectuation of legal codes, there are very few times that seem to be ripe for constitution-making as such, where, on balance of pains and gains, the social cost of the exercise in constituent power, when properly quantified, would be outweighed by the social results to be achieved by that exercise.

The really fundamental changes, in Western constitutional law experience, have tended to come, not by direct change through formal amendment, or formal re-writing, but indirectly, or interstitially, through developing constitutional custom and convention.[1] It is clear that law must change, as society itself changes: otherwise an

[1] Some of the general concepts referred to here are developed in greater detail in other writings of the author, for example, *Judicial Review in the English-Speaking World* (1st ed., 1956; 3rd ed., 1965); *Comparative Federalism* (1st ed., 1962; 2nd ed., 1965); *Federal Constitution-Making for a Multi National World* (1966).

impossible tension will develop between law and society, leading, at a pathological stage, (such as reached, for example, in Imperial Russia by the end of 1916), to a break-down of the organised society and of course, concomitantly, of the positive law that is supposed to represent it. This notion of the necessary, and more or less inevitable, symbiosis between law and society, and the correlative notion of continuing change or revolution in the positive law, is central to Common law legal thinking of the North America pragmatist-realist schools. On this view, law is not a frozen cake of doctrine that jelled once and for all in some bygone age, but a dynamic *process* of continuing adjustments and reconciliation of old positive law doctrine to new societal expectations and demands. The positive law, if it is to continue to be viable, must reflect, in measure, the complex of *de facto* claims and interests pressed in society at any particular time.

These propositions are, of course, sufficiently well-known and accepted, by now, among Common lawyers as to amount almost to articles of legal faith. They are also, however, not altogether unknown to Civil Lawyers, and were indeed partly anticipated by well-known Continental European jurists like Gény, von Ihering, Stammler, Duguit, Durkheim, Ehrlich and Max Weber.[2] It is therefore rather surprising to find so much of the *Sturm und Drang* of current French-speaking legal nationalist thinking directed to such matters as an overthrow of the B.N.A. Act or fundamental novation of its key institutional provisions. In legal scientific, experiential terms, such an emphasis and thrust seems unwarranted and unnecessary,

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[2] The debt of the North American Sociological school, and of Roscoe Pound in particular, to von Ihering, Stammler, Duguit, and Durkheim, is patent: less direct and obvious as a general source of ideas, but powerful nevertheless in individual cases, is the influence of Gény, Ehrlich, and Max Weber on various members of the North American legal realist group. Yet while Continental European legal theory and North American legal theory thus acknowledge, equally, the continuing and decisive role of organic, customary change in general legal development, this does not seem to have been fully accepted or acknowledged, as yet, in Civil Law thinking in Canada. Marcel Faribault chides me, in a recent issue of the *Revue du Barreau de la Province de Québec*, [vol. 26, no. 5, at pp. 333-5, (May, 1966)], for sharply contrasting, in this regard, the intellectual attitudes of Common Law lawyers and Civil Law lawyers, in Canada, as to legal change generally and as to the best instrumental devices available for practically achieving and effectuating it. Yet the point seems basic, and incontrovertible on the facts of the actual published record of the contributions of Civil Law layers to the current constitutional "great debate" in Canada. One might add, too, that there seems to be also a certain weakness in general legal theory, among Canadian Civil Law lawyers at the present time in comparison not merely to Canadian Common Law lawyers but also, and more importantly perhaps, to Continental European Civil Law.

and to miss the main possibilities as to legal effectuation of fundamental social and economic change in Canada.

In many respects, it seems to me, such current French-speaking legal nationalist thinking commits the pre-Marxist legal error of confusing the legal superstructure with the social reality — the underlying base of productive relationships in any given society which so materially shapes and determines the substantive content of its laws, constitutional or private, at any time. On any legal realist-based, ruthlessly empirical, examination of the Canadian constitution-in-action, since its adoption in 1867, it is apparent that, while the formal superstructure, or B.N.A. Act, has not changed too markedly, (in its actual written terms), in the century since 1867, in actual substantive content it has been fundamentally transformed and recast, and this over a number of distinct periods during that century. The history of the B.N.A. Act, as law-in-action, is in fact one of pendulum-like swings in meaning and practical import. To over-simplify somewhat, from an initially highly centralist constitution, the B.N.A. Act was transformed by pressure of Canadian political events that were amply recognized in Privy Council and Canadian Supreme Court decisions, into a markedly decentralized, provincially-weighted constitution. It is only, really, since the era of World War II planning and the post-war reconstruction, that the pendulum can be said to have swung at all noticeably the other way. There is no reason at all why the World War II, centralising, trend could not be reversed in the future, and this without any formal change in the B.N.A. Act's terms: indeed, such a process seems already to have begun, and to be recognized, as such, in the decisions of the Canadian Supreme Court of the 1960's.

The point is, of course, that the B.N.A. Act, as written, is, as befits a document conceived of and adopted in the Imperial, "Roman" era of British constitutional history, largely value-neutral. It was expected, of course, to be supplemented, in its practical, day-by-day, workings, by general constitutional philosophy — in the particular space-time dimension in which the B.N.A. Act was drafted, *laissez-faire* liberalism with its determinedly politically libertarian, economically non-interventionist, credo. But so politically impartial is the B.N.A. Act, as written, that even today it could, without fundamental institutional change, encompass just about any political system within it — whether liberal Capitalist, Socialist, Fascist, or even Communist (if Vyskinsky's constitutional dogmas and polemics against separation of powers were to be dismissed, as I am sure they would be now by contemporary Soviet legal theorists, as latter-day, Stalinist public law perversions) — provided only that the necessary supporting community opinion or *"Volksgeist"* were there.

In some respects, the absence, in terms, of fundamental limitations on governmental power, within the B.N.A. Act itself, could be a source of great political danger, if the present, predominantly relatively bland, governmental philosophies should ever be replaced by authoritarian anti-libertarian, political creeds. The facts remains however, that there is nothing in the B.N.A. Act as it now stands that provides any real barrier to the practical effectuation of a constitutionalism of biculturalism, or even of outright separatism, provided of course the necessary community support for that should emerge. There would certainly be no need for either a new constitution or even a major re-writing of the existing one; and to say that there is is really to confuse the constitutionally honorific and trifling with the constitutionally substantial.

This leads me to my last main point. There are at least two distinct and different revolutions going on in Canada today. One is the Quebec "revolution" whose exact dimensions and scope and direction are not yet clearly a matter of general agreement or consensus even within the Province of Quebec. The other revolution in Canada is simply a projection, in a new form, of that continuing revolution that occurs all the time in any viable political community — the dynamic process of legal growth and change represented by the continuing struggle and tension between old positive law and new societal conditions and expectations. We are witnessing, I think, another of those pendulum-like swings in the weighting and emphasis of the B.N.A. Act as between the federal government and the provinces. The powers and responsibilities of the federal government in the World Community are noticeably contracting today as part of the general movement to concentration of decision-making, as to defence and foreign policy, at the supra-national, or at least political-bloc, level. Canada's international military role, for example, is declining markedly in proportion as Canada's power of independent political-military decision declines: this means a corresponding reduction in the need for large defence expenditures. (A French international jurist quipped to me, recently, that President de Gaulle had kindly saved the Canadian tax-payers some fifteen million dollars annually, by enforcing the closing of Canadian military bases in France). On the other hand, Provincial responsibilities in the fields of education and of social services are increasing greatly, in proportion as community expectations and the desire not to lag behind other countries increase.

It seems desirable that greatly increased provincial responsibilities in these fields be matched by revenues, and perhaps also revenue sources, appropriate to the new responsibilities. By the same token, it is also clear that a more permissive attitude on the part of the courts

is needed to new provincial initiatives in community policy-making, in areas where the B.N.A. Act may not be too explicit, one way or another, and where there is no obvious conflict of the provincial action with overall, national interest. It is, of course, a new Supreme Court of Canada that we now have in the 1960's — less interesting intellectually, and certainly less exciting and colourful personally, but maybe a little more pragmatic and politically practical than the court of the 1950's; and so we are beginning to notice, in recent court decisions, elements of a new jurisprudence of common-sense and reason that tries to avoid conflicts of governmental power in the abstract and to concentrate on saving (and not destroying) exercises in community policy-making, whether provincial or federal, wherever possible.

It is as to this wider, constitutional revolution that one notes the rapidly increasing area of common ground, as between the Province of Quebec and other provinces, especially perhaps the more heavily industrialised provinces like Ontario. That this should be so is, of course, simply another demonstration of the elements of truth in the Marxist, and in the North America legal realist, teachings, equally, that, in the ultimate, basic societal and economic factors are the really significant determinants in community change. It would be suprising, indeed, if it were not true that the wealth and well-being of the inhabitants of two communities that have attained such relatively similar stages of social and economic development, as Quebec and Ontario, would best continue to be achieved and extended by essentially similar methods and techniques, focussing on continuing economic and industrial expansion and the attraction of large-scale financial investment from outside as the key to that growth.

All of this suggests, then, that the prime legal device for translating societal change into constitutional change, in Canada, will continue to be indirect or interstitial change, to be achieved through developing constitutional custom and convention and either expressly sanctioned or else tacitly accepted by the courts; and that the main arena for constitutional law-making, in this way, will continue to be the Dominion-Provincial conferences where mutual advantage and reciprocity of interest can be best effectuated in the give-and-take and bargain, and the compromise, inherent in inter-person negotiations between political leaders, provincial and federal. I would venture to predict, also, that the current trend to constitutional decentralisation, in terms of and within the framework of the B.N.A. Act, will be maintained; and that the substance of Quebec claims (so far as they are, really, at bottom, social and economic), will tend to become increasingly identical with those of other provinces that are at similar levels of economic and industrial development.