The Judicial Process and National Policy — A Problem for Canadian Federalism

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I. Introduction

The present constitutional review in Canada already appears to accept consideration of the possibility of incorporating a limited *Bill of Rights* into the Constitution; of the possible "entrenchment" of new forms of language and school rights; of institutionalizing certain fundamental notions of intergovernmental cooperation and consultation; and even of attempting to define certain features of the responsible government and the political — party processes complex, now left to the "customs" and "conventions" of the Constitution. Should there be added to these an amending formula — as well there must be — to make possible the amendment of a Canadian Constitution within Canada itself, foresaking thereafter any recourse to Westminister, this group of additional Constitutional principles and procedures inevitably invites the possibility, indeed even the necessity, of judicial interpretation. Clearly, such a list of possible changes and additions to a partially amended or wholly re-written Constitution will impose upon Canadian Courts burdens that may be different, not only in spirit and detail, but in the very principles and scope of their operations, as well as in the style of their performance. It is the purpose of this paper to explore these possible changes in the role and activities of Canadian Courts (and of the final Supreme or "Constitutional Court" in particular) should the above Constitutional additions and changes, now being debated, come into effect in whole or in part.

II. Some Structural Dilemmas of Federal Systems in Deciding upon "Powers" and "Jurisdiction"

The many structures of government in dealing with wellrooted political traditions, with geographic, linguistic or ethnic differences, and their frequent efforts to avoid high concentrations of political power, are among the explanations that account for the varied forms of many modern federal states. Once a federal design, however, is

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undertaken, and powers are distributed among the central and provincial or state governments, there inevitably is presented the question as to how to make so complex a system operate efficiently in the face of at least two main, inherent difficulties, apart from the "functional" versus "doctrinal" views of power. First, there is the question of "interpreting" the Constitution which describes the structures of government, and the distribution of powers, since language can never be so clear as to avoid the continuing need for its definition and application to controversies as they arise; and, second, the means whereby cooperative activities can be undertaken among two or more of the governments concerned, particularly the federal government in association with one or more of the provinces — although inter-state or inter-provincial cooperation may be of almost equal importance in some few cases — and the political constitutional, administrative or legal devices employed to provide the framework for such cooperation.

There is, of course, a third problem which in a sense often transcends these others, namely, that whenever a federal state may wish to set out in a *Charter* or *Bill of Human Rights*, some statement of fundamental values governing the behaviour of all the legislative and executive apparatus, at every level, then the interpretation of that *Charter* or *Bill* also poses serious problems. These interpretations may not merely have the effect of negatively setting "limits" as to what the legislative or executive branches of government may do, but may also set "standards" of high policy through which the judicial system may have an opportunity, or even may be required, to give instructions to the legislatures or administrators concerned ordering them to take positive action in the execution of economic, social or legal policies expressly stated by, or assumed by necessary implication to be in, the *Bill of Rights* itself — or elsewhere in the Constitution as well.

Thus a central dilemma for any federal state — for its general public and political opinion — is how far it may be prepared to accept or encourage indirect or direct policy-making roles for the Courts either through interpreting the Constitution generally, with particular reference to the distribution of powers, the structures and procedures of government, and the institutions for a "cooperative federalism", or in applying the "negative" and "positive" mandates expressed clearly, or by implication, in a *Bill of Rights*.

It is obvious that both on principle, or viewed empirically through the evidence of federal systems in operation, that varieties of approaches to these federal difficulties are possible. The Swiss have managed to get along without a systematic, judicial approach towards

general constitutional interpretation and have left the crucial jurisdictional questions of Federal power — but not Cantonal authority — to essentially the political process — except for a referendum device that gives public opinion the "last word" in a dispute. West Germany has employed a special Constitutional Court to which all such issues are referred both as a matter of original jurisdiction, or even when the case may have begun in the regular courts, before the constitutional issue was identified, it may thereafter be sent for adjudication on the Constitutional question alone to the Constitutional Court. There is, however, a good deal of early evidence that certain selflimiting standards as to how far the Constitutional Court should make statements of high policy ran through the court's behaviour and there seemed to be a kind of contradiction in the theoretically powerful role of the court contrasted with its self-limiting image — although recently litigants, both private and public, may be making new demands for a more direct policy function by the Court than heretofor.

Australia, beginning with a strong theory of state rights, and of residual powers in the constituent states, has nevertheless managed through judicial interpretation to emerge with a rigorous central government, balanced, however, by the continuing (and even more recently emphasized) assertions of state power offsetting the functional difficulties by the use of inter-state and federal-state agreements wherever social and economic needs required, e.g. transportation.

The United States perhaps is the most obvious example of the impact of the courts on the allocation of power and on the shaping of policy in a federal structure, and powerfully affecting the system's operational dynamics. Ever since Chief Justice Marshall in *Marbury* v. *Madison* [1] asserted the right of the Court to review and determine the "validity" of legislation, enacted by Congress or the States, and ever since that Court discovered the power of the first ten amendments (the *Bill of Rights*) and later of the 14th Amendment in the hands of determined judges, the role of the Supreme Court of the United States has been the illustration *par excellence* of the candid sharing of political power, by Courts, in a federal system. The irony of the American experience is that it began with an essentially "confederal" attitude and systematically became more and more "centralist" for varieties of reasons that had to do with westward expansion, war-making, civil and foreign, and industrialization. All these gave a drive to national policy and development where the federal courts became important agents of clarifying federal power

[1] 1 Cranch, 5 U.S. 49 (1803).

but were not its mainsprings. Indeed, the influence of the South on the Court before the Civil War dramatized for example by the *Dred-Scott* case,[2] and general economic conservatism from 1880 to 1935, showed certain contradictions in the lines of development where the judicial process was both an aid to the evolution of federal power but also a considerable brake on it. Indeed, the use by the Court of the "due process" clauses of both the Fifth and Fourteenth Amendments, placing limits on federal and state social and welfare legislation from the last quarter of the 19th Century down to the middle years of the New Deal, demonstrated that the judiciary in applying the Constitution could be a quite "conservative" force, however that concept may be defined.

Yet the overall image of the Supreme Court of the United States is one suggesting the evolution of a powerful tribunal, self-confident, politically aware and ready to undertake policy-making whenever a "case or controversy" was presented to it — (it has no "advisory" role).

It must be recognized, however, that apart from the dramatic achievements under Chief Justice Marshall and a few key judges over the generations it was really not until the years from about 1937 onward that the position of the Court in taking a "direct" hand in social and economic policy matured to the point it now has reached — or over-reached. Such historic decisions based upon the First, the Fifth and the Fourteenth Amendments, and other provisions, that have led to its varied involvements in Criminal justice administration, racial equality in schools, transportation, accomodation and employment, as well as ordering the restructuring of electoral representation in the States and Federally, are among the best-known of these more recent and candid exercises of the power to make fundamental social policy. Directly or indirectly, the Courts may compel legislative and executive action by way of creating new obligations on the part of those branches of government to re-state and implement the positive law in accordance with the broad policies and principles as enunciated by the Court.

The Canadian experience on many points seems more analogous to the Australian than to the American in terms of the technique and the spirit of the judicial function but the Australian Judges — Sir Owen Dixon, C.J. is a good example — and the Australian Bar often seem to have been more frankly policy-oriented in basic argument and decisions — if not in forensic technique *per se* — on the interpretation of the Australian Constitution, than has been

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[2] 19 How., 60 U.S. 393 (1856).

the case, with some few exceptions, in Canada. Partly this may be the result of the leadership of certain very creative Australian judges on the High Court and the role that the Australian Court has had as a "final" court of appeal, effectively, for a longer period of time than is the case of Canada (except for a number of special matters that have gone from Australia to the Judicial Committee until 1968 when all Federal appeals to the Privy Council were abolished.)

Indeed, a central characteristic of the Canadian experience had been its reliance for almost eighty years on the Judicial Committee in London, a tribunal distant in geography, and often in "feel", from the Canadian scene and with Anglo-Canadian techniques of argument at the Bar and of judgment-writing by the Bench, not frankly oriented toward analysing the policy alternatives almost always underlying constitutional questions. So generally absent from both argument and decision has been this dealing, in the Canadian tradition, with policy that it is not difficult to identify the several instances where policy in fact has been debated with frankness and skill, at least at the level of the Supreme Court of Canada. Examples such as Duff, C.J.'s judgment in the Reference on the *Alberta Press Case*,[3] the Supreme Court and Privy Council judgments in the *Radio Case*[4] and *Aeronautics Cases*[5] and the Supreme Court judgments, mostly under the leadership of Mr. Justice Rand, in the series of civil liberties' decisions that began with the *Boucher Case*[6] in 1951, almost exhaust the more conspicuous illustrations of serious policy discussion.[7] For the rest, the Canadian Supreme Court has been influenced significantly in its technique of judicial review by the Privy Council's exegetcal search for meaning within the language of the *British North America Act* itself or through finding answers in the principles of the common law wherever constitutional questions of a non-*B.N.A. Act* character were before it.

To put is bluntly the Canadian record of judicial "philosophizing" in the course of interpreting the *B.N.A. Act*, or in dealing with constitutional principles in general, has been greatly influenced by the "inhibited" standards of the Judicial Committee, and except for the 'golden' moments of the civil liberties decade which generally

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[3] [1938] S.C.R. 100.

[4] [1931] S.C.R. 541; [1932] A.C. 304.

[5] [1930] S.C.R. 663; [1932] A.C. 54.

[6] [1951] S.C.R. 265.

[7] To which now should be added of course the *Drybones Case* ((1970), 9 D.L.R. (3d) 473) for its significance both as a creative exercise of the Judicial process and for its importance in relation to the Canadian *Bill of Rights* and its application to existing positive law, and perhaps equally some of the criminal law contributions of Oartwright, C.J.

seems to have ended with the late Mr. Justice Rand's departure from the Bench, the Supreme Court has continued to move along a line of conceptual and technical interpretation predictably cautious and quite unwilling to be drawn openly into policy discussions or the use of data, social and economic, in furtherance of such an approach.

At the same time, it remains an interesting question whether the dependence upon written constitutions for any statement of great principles is always so necessary after all — apart from the specific problems defining governmental structures and processes, and the distribution of powers in a federal state. For example, two very constitution-minded countries get along with minimal documentation expressing either structures or principles — although both are unitary states, e.g. the United Kingdom and Israel. The U.K., of course, has a great deal more written instrumentalities than is often remembered from *Magna Carta* through the *Petition of Right*, the *Habeas Corpus Act*, the *Bill of Rights*, the *Act of Union*, the *Act of Settlement*, the various *Parliament Acts* affecting the powers of the House of Lords and House of Commons, and some other related instruments. But perhaps more important are the "customs and conventions" of the constitution over which the great battles were fought and which are the true source of the containment of the Royal Prerogative, of modern responsible government and of the interplay between the political-and-party structures and systems and constitutional principles and framework. Above all there is the use of the word "constitution" to describe the network of legal relationships between the individual and the state, many of which have been evolved through the ordinary processes of the courts in dealing with private actions at law but where the behaviour of one of the parties may give rise to a principle involving state powers, privileges or immunities of the kind characterized as requiring some "constitutional" identification and definition.

The judicial role in the United Kingdom, therefore, has never been consciously "constitution-oriented" as must be the case for federal states, with a written constitutional framework. But in at least three ways the United Kingdom has been very constitution-minded through (i) the interpretation of old and new statues or instruments involving "constitutional" principles or governmental structures; (ii) through the evolution of the common law of the constitution coming up through ordinary actions at law and in equity before the courts but involving an issue directly or indirectly identifiable as "constitutional"; and (iii) the recognition that there are certain over-riding concepts of government and society to which all statutes and executive orders are presumed to conform. This is

apparently the meaning of the celebrated doctrine of "avoidance" where it is assumed that an open challenge to established constitutional principle is not intended in a given statute — although there is nothing to prevent a supreme 'Diceyan' parliament from wilfully doing so if it chooses.

In Israel the situation is even simpler, or more complex, depending how it is viewed. There the total "written" constitution in one sense is the fundamental proclamation of the independence of the State, of May 14/15, 1948. To these should be added all the instruments of public law affecting the principles and structure of government remaining from the British mandatory period and continued in general by the new state; as well as those principles of law and procedure which had within them certain constitutional components for the protection of the subject, as described above for the United Kingdom itself (e.g. *Habeas Corpus,* "the rule of law" concept generally operative in administrative law, contracts, torts, etc.)

Now the point about both the United Kingdom and Israel is that serious, "rights" and "freedom-minded" societies can exist with minimally codified systems of rights; and the role of the judges under these conditions tends to be paradoxically both a good deal more and a good deal less significant in the proportion of specific power allocated to them in the development of constitutional policy as a whole. Yet even here, of course, the Court's role becomes crucial. But unlike a federal state, or a state that is both federal and has a *Bill of Rights* of some kind, there is not in the U.K. or Israel the scope for specific policy-making through the mechanism of judicial interpretation and action, either through a written constitution generally or through a *Bill of Rights* in particular, or through both. But of course, not all unitary states are without written constitutions. Indeed France has a written constitution containing administrative protections and *Bill of Right* provisions but apparently subject to review generally by the *Conseil d'Etat* rather than by the regular courts.

The point of all of this is to emphasize, on the one hand, the role of courts even without elaborate constitutions and *Bills of Rights* to interpret, yet at the same time to demonstrate how varied can be the functions of courts even where there are complex 'federal' (or *Bill of Rights*?) provisions to apply. Perhaps a carefully formulated view of the problem is C.K. Wheare's summary of the role of the Courts in the constitutional process, at least in federal states, and it is not without significance that he quotes at some length, Dr. O.D. Skelton, a Canadian:

> Yet it is wise to recall what the function of a court is and how far the judges, the politicians and the people should feel entitled to expect of a court that it should undertake the function of adapting a constitution to the needs of the time. Courts may adapt, but they may not amend. They may follow common sense, but they may not follow mere expediency. They may have opinions but they may not be partisan. They may choose to treat a constitution as a living instrument, but they must treat it first of all as a constitution. And, although it may be wise for a court to give the legislature the benefit of the doubt, where there is a doubt, it is no part of a court's duty to do for a legislature or for a majority of the electors what a Constitution has not done for them. Many of these restrictions upon a court's powers and duties are forgotten in discussions which emphasize the great powers which courts in a federal system do possess. It is true that their powers are great. But there are definite limits to their powers. They have a discretion, but it is a discretion within the law and not above the law. "Courts may modify, they cannot replace. They can revise earlier interpretations as new arguments, new points of view are presented; they can shift the dividing line in marginal cases; but there are barriers they cannot pass, definite assignments of power they cannot reallocate. They can give a broadening construction of existing powers, but they cannot assign to one authority powers explicitly granted to another"...[8]

III. Some questions and possible guidelines for the role of the Judicial Process in a changing Canadian constitutional structure and system

A number of interesting questions now arise from the present constitutional review and possible program of reform and their probable effects on the position of the Canadian Courts in the future. These questions may be put as follows:

1. Will the role of the final court of appeal in constitutional matters in Canada be 'enlarged' by the proposed constitutional changes in governmental powers and structures; in now attempting to define the classical principles of government, e.g. responsible government; in possibly having a *Bill of Rights* in the Constitution, or in possibly entrenching language rights in such a *Bill* or outside of it?

2. Will the Courts have a new function to perform dealing with problems of inter-governmental cooperation — province to province and federal-provincial — in the event that such cooperation or consultation is given institutional and "mandatory" definitions in the Constitution?

3. How will the present or changing character of the Bench, the Bar and the Law Schools influence the methods of analysis to be

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[8] K.C. Wheare, *Federal Government*, 4th ed., Oxford University Press, at pp. 222-223.

employed by Courts in constitutional matters and what feedback will such changes, if any, have on the policy role of Courts and on the making of "new" public policy in general, and also on the work of the Bar and the direction, of research, teaching and training in the law schools?

4. Are there advantages or disadvantages to be considered in choosing constitutional mechanisms that increase or otherwise vary the role of the Courts as we have known that role heretofore, in Canada, in constitutional matters?

Re: 1: *Will there be an enlarged role for judicial action in a reformed Canadian Constitution?*

Despite the quite severely self-limiting and strict interpretation traditions, generally, of the Canadian Courts (and of the Judicial Committee) in constitutional matters (except for the philosophizing of Rand, J., Duff, C.J. and one or two others at the Supreme Court level) it seems improbable that, whatever may be the form of the final court of appeal in constitutional matters, its role should not be enlarged by several of the proposals for constitutional change now being considered by all governments. Altogether apart from changing allocations of power that possibly may result from some new statement of distribution between the federal and provincial legislatures, (if any), some of the proposals clearly will require judicial attention in areas now exclusively determined by the "customs and conventions" of the Constitution. If, for example, there is a definition of the nature and operation of responsible government; the status and power of the Governor General; or even the legal position of political parties (as some have suggested), such constitutional language, however skilfully drafted, will at least in the early years of the new provisions clearly be an invitation to judicial review and interpretation.

However, even if these new areas were to be well fitted within the existing traditions of Canadian constitutional interpretation, the insertion of a *Bill of Rights* manifestly will require a degree of judicial participation in both the negative and positive aspects of policy-making that may far exceed what is presently the customary Canadian pattern. The "draft" federal *Charter of Human Rights*, for example, cannot be imagined as having anything but the most comprehensive impact on litigation, on new standards by which to judge legislative, executive and administrative behaviour, as well as on new principles and procedures to "command" the legislative and executive branches of the Government to take action or to interrupt such action in areas of important social policy, in the name

of the higher 'norms' of the *Charter* or *Bill of Rights* itself. The possible scope for such directives by the Court can be envisaged by considering the scope of the directives given by the Supreme Court of the United States in the school desegregation and the reapportionment cases. To a very large extent, the areas and dimension of such judicial participation will depend upon the initiatives of the Bar, and of governments, in directing the attention of the Courts to these new provisions and the response of the Bench in moving within a quite unaccustomed field of action, at least in this first period.

Similarly, if Language Rights are to be found in such a *Charter* or *Bill of Rights*, or if they are 'entrenched' outside of such a *Charter* but in the Constitution elsewhere, then interesting questions will arise as to how far new authority will have been given to the Courts to measure standards of federal and provincial legislative and administrative action in accordance with the litigated demands for such rights, brought to the attention of the Courts by various levels of government or by private actions. In any event all these possibilities envisage a much more dynamic use of litigation both to stimulate policy and its judicial interpretation and application and envisage perhaps, even more, an increasing confidence in the judicial process to perform such functions in the name of adjudication, functions which heretofore had a high degree of autonomy in the administrative or legislative branches of the government with policy generally reserved to government itself, to initiate and administer.

Yet the moment it is admitted that greater precision is desired in any statement of so-called "rights", through a *Charter* or otherwise, it must at the same time be admitted that Courts will be required to determine their meaning and application. Whether there are social gains or losses here in terms of new protections on the one hand, or the disutility of too broadly shared power on the other, remains to be seen. But a new level of duties will clearly be assigned to the courts, and particularly the final court of appeal in constitutional matters, and correspondingly some new sense of self-limiting caution may now equally be envisaged in the operations of the legislative and executive processes.

Re: 2: *The Courts and Inter-Governmental Cooperation* [9]

If the above description of the potentially changing role of the Canadian judiciary suggests a new dimension, such a change will

[9] This paper does not discuss the Court's specific role in dealing with provisions for amendment or delegation. But these other principles here analyzed apply *mutatis mutandis* to the amending power itself to be entrenched in the constitution.

perhaps be even more striking should any future Constitution institutionalize methods of intergovernmental cooperation. On the simplest level disputes between Provinces or the federal and provincial governments could, of course, be dealt with through providing original jurisdiction in any final court of appeal in constitutional matters. As to Federal-provincial disputes this should present no particular difficulty although any increase in such litigation may require new standards of judicial analysis since now the issues will often be no longer related essentially to the classical questions of the distribution of powers; rather there will be presented new questions having to do with governmental rights and duties, under some as yet "novel" and unclear theories of Canadian federalism, to cooperate or consult whenever some essential common interest was involved, should that obligation to consult or cooperate now be incorporated in constitutional terms in any new instrument.

It will at once be evident how sensitive and difficult it will be to convert the practices of the presently voluntary and strategic negotiations and cooperation between governments, into constitutional rights and duties that may be subjected to the compulsion of Courts and the burdens of litigation. Clearly the advantages of compulsory cooperation may have to be considered against the disadvantages of the reduction in the political discretion that may seem essential to the federal or provincial governments as they view their own problems and strategies from time to time. Yet if the demand for federal-provincial cooperation and consultation is as insistent and as extensive as it often has been in recent times, it is not unlikely that there will be demands to "compel" that consultation not only as a matter of political custom or wisdom but as a matter of constitutional duty. It will be a markedly different federal system if the Federal Government or any Province or group of Provinces can be compelled to "consult" and to "cooperate", and their legislatures ordered to take action or to stop action, until some standard of consultation and cooperation among them has been completed either as set out specifically in the Constitution or as interpreted and developed, on the basis of some general principles, by the Courts themselves.

Any such program of constitutional reform must accept the reach of the judicial arm quite beyond any contemporary Canadian experience in dealing with high policy other than those questions that have come before the Supreme Court or the Privy Council through the traditional requirements of interpreting the *British North America Act* or formulating large principles of the "common law" of the Constitution. But little of this experience really prepares

Canadian society for the prospect for having judges command legislatures to cooperate, for example, in the coordination of their budgets or not to take steps through executive action to market their securities without the permission of some common agency. This may be an extreme illustration of the consultative or cooperative technique constitutionalized to the point where judges are given a degree of discretion to intervene, not dissimilar from commands by the Supreme Court of the United States that the state legislatures should move toward desegregation by legislative and executive action, with all "deliberate speed", reporting back from time to time to the Courts, as required and ordering a "speed-up" accordingly.

Finally, on this point, some new forms of political insight may be required of the judges, but there is no reason to believe that they would not have the wisdom to employ their authority within those reasonable bounds intended by such constitutional changes — namely, to make new systems of federal-provincial cooperation, now institutionalized, work as well as possible but subject to countervailing realities of leaving governments severely alone up to the last alternative moments before such judicial intervention would be justified. Yet the Courts in their timing may largely be in the hands of the litigants who will choose the issues and the moment for their actions.

Re: 3: *The Capacity of the Bar and the Bench to play these new roles*

It is likely that the introduction of a changed role for the Courts, in the application of these new constitutional concepts and procedures, may present, initially, some considerable technical difficulties as, for example, the kind of information that the parties through evidence, factums and counsel, will be required to present. Equally there will be much adjustment for those governments which valued the "absolute" discretion of the older "voluntary" days of intergovernmental cooperation. Nevertheless, it would be wise to recognize that theories of strict interpretation, of finding "simplistic" answers within the framework of the "new" constitutional document itself, probably will not suffice for the enlarged scope of interpretation and action now presented by a *Bill of Rights*, a new system of language rights, the definition of responsible government and the institutionalizing of consultation and cooperation in a "new" federalism. Clearly the magnitudes of potential litigation and of judicial responsibility will have altered substantially, and in turn may well influence the volume of actions in the Courts initiated both from the public and private sector.

Will the next generation of Canadian judges, and will the Canadian Bar functioning within its established and technical adversary tradition, be able to meet, constructively, these new challenges to having them play ever more sophisticated informational and interpretative roles in the management of Canadian federalism? Some preliminary doubts may be raised about expectations here. Much depends upon the quality of the men involved and upon the character of legal education itself and the willingness of the Bench to relate the new roles to the kind of informational input, or sources of authority, which heretofore cautious Canadian Courts have been reluctant to accept — sources now to be supplied by government documents and the behavioural sciences. It is highly probable, however, that once given the fact of constitutional change and that such a new role must be played, there would be reason to expect that the Courts, the Bar and the Universities will respond accordingly. But there may be a period of at least a decade or more within which Canadian judges, and more particularly the final "constitutional" tribunal, will be feeling their way toward the appropriate balance to be found in performing these new and often more direct policy-making functions. Moreover, once such doctrinal changes take place in the key areas referred to, decisions on them will likely have pervasive effects throughout the whole of the constitutional process. It would be unlikely to discover that the same judges will be reluctant to discuss, frankly, the policy content in cases concerned with the distribution of powers, while having no such inhibitions in their interpretative roles affecting the *Bill of Rights* or the new institutions of federal-provincial cooperation.

Re: 4: *What are the possible advantages or disadvantages of these prospective changes in the role of the Courts and National Policy?*

Central to the above analysis has been the assumption that Canadian federalism for over a hundred years, on the whole, has been a considerable success in the management of a very complex country whose linguistic, geographic and economic divisions, and regional disparities, have created tensions, possibly exacerbated also by certain structural weaknesses in the forms, principles and operations of the governments concerned. Indeed this success was achieved despite some very obvious distortions in the Canadian constitutional development because of a local government bias generally on the part of the Judicial Committee and the enlargement of *de facto* federal authority because of depression, war and post-war needs. Viewed realistically therefore, an enlargement of the

role of the Courts (now exclusively Canadian) may possibly signify some corresponding reduction in the discretionary "political" position of the legislative and executive branches of all governments. Yet the fact will remain that judges cannot replace politicians or civil servants in conducting the regular business of government and for the most part, the mass of traditional governmental business doubtless will be carried on as heretofore by elected leaders and their permanent officials.

What will change, however, is the ability of one or more governments to act beyond, or outside, or not within the spirit of a more detailed, structured constitution. Indeed, in some cases governments will find that they may be compelled to take actions because the Constitution or the Courts have said so, actions that previously (today) they otherwise might have been able to refuse or at least to have politically determined for themselves; whether they would act, and when? While judges, law and "constitutions" are familiar and indispensible to the operations of any organized society, the degree of acceptable judicial intervention into policy-making will depend both upon the Constitution itself and the individual political-constitutional tradition. The two extremes in the English-speaking world are the United Kingdom, with the judges compounding the absence of a "written" constitution by a theory of self-limitation,[10] in contrast to the United States where the Supreme Court has escalated its constitutional status within a written constitution to become truly the third branch of government in political-administrative fact as well as in constitutional theory.

It is unlikely that Canada or Canadian judges will quickly leap to achieve the often controversial heights of the Supreme Court of the United States; but it is certainly to be expected that the possible introduction of some of the critical changes now being discussed for a future Canadian Constitution may enlarge the role of the judicial process in policy-making, however cautious the Canadian tradition heretofore may have been. Considering the threats to Canadian federalism and solidarity that have appeared in recent years, it very well may be that a shift of some power from the purely political-administrative plane to a constitutional-judicial level might, in fact, help to bring some new measure of stability into the relations of all the governments concerned — assuming always

[10] But see the recent line of cases in the United Kingdom pointing toward a more candid statement of policy, *e.g.*, *United Engineering* v, *Devanayagam*, [1967] 2 All E.R. 367; *Liyanage* v. *The Queen*, [1967] A.C. 259; *Conway* v. *Rimmer*, [1968] A.C. 910; *Ridge* v. *Baldwin*, [1964] A.C. 40.