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# Canadian Multiculturalism in Historical and Comparative Perspective: Is Canada Unique?

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## Introduction

The title of this conference implies that there is something unusual or distinctive about the way Canada deals with issues of cultural diversity. Is this true? In his introductory remarks, Professor Abu-Laban suggested that what is distinctive to Canada is not the sheer fact of diversity — one can find equally high levels of ethnic, linguistic and religious diversity in the United States, Brazil or Nigeria — but rather the legal and institutional response to diversity.[1] Canada is unique, he suggested, in that our laws and institutions accommodate and promote diversity, most obviously through the Multiculturalism policy.

I think that this is potentially misleading. There have been dramatic changes throughout the western democracies in the way states deal with ethnocultural diversity. The laws and institutions that accommodate and promote diversity in Canada have counterparts in many other countries. Situating the Canadian case within this larger comparative framework helps us understand the deeper forces that have pushed Canada, along with many other countries, in the direction of accommodating diversity.

In this paper, therefore, I will begin by discussing recent trends throughout the western democracies regarding diversity. These trends concern the treatment of immigrant groups, indigenous peoples and substate/minority nationalisms. I will then try to identify what, if anything, is truly distinctive to the "Canadian model." In each of the three areas identified, our progress has been matched, if not overtaken, by other countries. But no other country has confronted the same range of issues as Canada has. Therefore, I will argue that our uniqueness lies not in the way we have responded to these issues, but in the sheer breadth of the challenges we have faced due to the unique composition of Canadian society. In addition, Canadians are distinctive in the way that they have incorporated Canada's policy of accommodating diversity into their sense of national identity. I will conclude with some speculations about the likely future of the Canadian model.

## Trends Regarding Ethnocultural Diversity

There have been dramatic changes in the way western democracies deal with ethnocultural diversity in the last thirty to forty years. For the purposes of this paper, we can highlight three basic trends.[2]

The first trend concerns the treatment of immigrant groups. In the past, Canada, like other immigrant countries, had an assimilationist approach to immigration. Immigrants were encouraged and expected to assimilate to the pre-existing society. The hope was that, over time, they would become indistinguishable from native-born Canadians in their speech, dress, recreation and general way of life. Any groups that were seen as incapable of this sort of cultural assimilation were prohibited from immigrating to Canada, or from becoming citizens.[3] However, since the late 1960s, we have seen a dramatic reversal in this approach. There have been two related changes. First, there was the adoption of race-neutral admissions criteria (the "points system"), so that immigrants to Canada were increasingly from non-European (and

[1] B. Abu-Laban, "Conference Agenda," presented at a conference on "Canada: Global Model for a Multicultural State?" (Canadian Multicultural Education Foundation, Edmonton, 26–29 September 2002) [unpublished].

[2] For a more detailed discussion of these three trends see W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford: Oxford University Press, 2001) cc. 5–9.

[3] For example, Asians were prohibited from entry to Canada for much of the first half of the twentieth century.

often non-Christian) societies. Second, there was the adoption of a more "multicultural" conception of integration, one which expects that many immigrants will visibly and proudly express their ethnic identity, and which accepts an obligation on the part of public institutions (like the police, schools, media, museums, *etc.*) to accommodate these ethnic identities.

These two changes have dramatically changed Canadian society. However, it is important to realize that precisely the same two-fold change has occurred in all of the other traditional countries of immigration like Australia, New Zealand, the United States and Britain. All of them have shifted from discriminatory to race-neutral admissions and naturalization policies. And all of them have shifted from an assimilationist to a more multicultural conception of integration. Of course, there are differences in how official or formal this shift to multiculturalism has been. In Canada, as in Australia and New Zealand, this shift was formally and officially marked by the declaration of a multicultural policy by the central government.[4] But even in the United States, we see similar changes. The United States does not have an official policy of multiculturalism at the federal level, but if we look at lower levels of government, such as states or cities, we find a broad range of multiculturalism policies. For example, if we look at state-level policies regarding the education curriculum, or city-level policies regarding policing or hospitals, we find that they are often indistinguishable from the way provinces and cities in Canada deal with issues of immigrant ethnocultural diversity. As in Canada, they have their own diversity programs and/or equity officers.[5] As Nathan Glazer, a Harvard sociologist, puts it: "we are all multiculturalists now."[6] Similarly, in Britain, while there is no nation-wide multiculturalism policy, the same basic ideas and principles are pursued through their race relations policy.[7] All of these countries have accepted the same two-fold change that is at the heart of the Canadian model: adopting a race-neutral admissions and naturalization policy, and imposing on public institutions a duty to accommodate immigrant ethnocultural diversity.

The second trend concerns the treatment of indigenous peoples, such as the Indians, Inuit and Métis in Canada. Other indigenous peoples in the western democracies include the Aboriginal peoples of Australia, the Maori of New Zealand, the Sami of Scandinavia, the Inuit of Greenland and Indian tribes in the United States. In the past, all of these countries had the same goal and expectation that indigenous peoples would eventually disappear as distinct communities by dying out, inter-marriage and assimilation. Various policies were adopted to speed up this process, such as stripping indigenous peoples of their lands, restricting the practice of their traditional culture, language and religion, and undermining their institutions of self-government.

However, there has been a dramatic reversal in these policies; this change, in Canada, started in the early 1970s.[8] Today, the Canadian government accepts, at least in principle, the idea that Aboriginal peoples will exist into the indefinite future as distinct societies within Canada, and that they must have the land claims, treaty rights, cultural rights and self-government rights needed to sustain themselves as distinct societies.

Again, Canada is not unique in this shift. We see the same pattern in all of the other western democracies. Consider the revival of treaty rights through the *Treaty of Waitangi* in New Zealand,[9] the recognition of land rights for Aboriginal Australians in the *Mabo* decision,[10] the creation of the Sami Parliament in Scandinavia, the evolution of "Home Rule" for the Inuit of Greenland and the laws and court cases upholding self-determination rights for American Indian tribes (not to mention the flood of legal and constitutional changes recognizing indigenous rights in Latin America).[11] In all of these countries, there is a gradual but real process of decolonization taking place as indigenous peoples regain their lands and self-

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[4] F. Hawkins, *Critical Years in Immigration: Canada and Australia Compared* (Kingston: McGill-Queen's University Press, 1989); S. Castles, "Multicultural Citizenship: The Australian Experience" in V. Bader, ed., *Citizenship and Exclusion* (New York: St. Martin's Press, 1997) 113; A. Fleras, "Monoculturalism, Multiculturalism and Biculturalism" (1984) 15 Plural Societies 52.

[5] See *infra* note 6.

[6] N. Glazer, *We Are All Multiculturalists Now* (Cambridge: Harvard University Press, 1997). Experts on immigration and integration issues have repeatedly demolished the mythical contrast between the American "melting pot" and the Canadian "mosaic," and yet the myth endures in the popular imagination.

[7] For the British model of multiculturalism through race relations see A. Favell, *Philosophies of Integration: Immigration and the Idea of Citizenship in France and Britain* (New York: St. Martin's Press, 2001).

[8] Key events include the repudiation of the assimilationist 1969 "White Paper on Indian Policy" (Canada, *Statement of the Government of Canada on Indian Policy* (Ottawa: Queen's Printer, 1969)), the Supreme Court's recognition of Aboriginal title in *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313, the Mackenzie Valley pipeline inquiry (Canada, *Mackenzie Valley Pipeline Inquiry* (Toronto: James Lorimer, 1977) (T.R. Berger)), and the James Bay agreement with the Inuit and Cree — the first modern-day treaty in Canada (*James Bay and Northern Quebec Agreement*, 1975).

[9] *Treaty of Waitangi* (6 February 1840).

[10] *Mabo v. Queensland (No.2)* (1992), 175 C.L.R. 1 (F.C.).

[11] P. Havemann, ed., *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Toronto: Oxford University Press, 1999); A. Fleras & J.L. Elliot, *The "Nations Within": Aboriginal-State Relations in Canada, the United States, and New Zealand* (Toronto: Oxford University Press, 1992).

government. This is the second main shift in ethnocultural relations throughout the western democracies.

The third shift concerns the treatment of substate/minority nationalisms, such as the Quebecois in Canada, the Scots and Welsh in Britain, the Catalans and Basques in Spain, the Flemish in Belgium, the French and Italian minorities in Switzerland, the German minority in South Tyrol in Italy, or Puerto Rico in the United States.[12] In all of these cases, we find a regionally concentrated group that conceives of itself as a nation within a larger state. These groups mobilize behind nationalist political parties to achieve recognition of their nationhood, either in the form of an independent state or through territorial autonomy within the larger state. In the past, all of these countries (except Switzerland) have attempted to suppress these forms of substate nationalism. A regional group with a sense of distinct nationhood was seen as a threat to the state. Various efforts were made to erode this sense of distinct nationhood, including restricting minority language rights, abolishing traditional forms of regional self-government, and encouraging members of the dominant group to settle in the minority group's territory so that the minority becomes a minority even in its traditional territory.

However, there has been a dramatic reversal in this situation as well. Today, all of the countries I have just mentioned have accepted the principle that these substate national identities will endure into the indefinite future, and that their sense of nationhood and nationalist aspirations must be accommodated in some way or other. This accommodation has typically taken the form of what we can call "multination federalism": creating a federal or quasi-federal subunit in which the minority group forms a local majority, and can therefore exercise meaningful forms of self-government. Moreover, the group's language is typically recognized as an official state language, at least within their federal subunit, and perhaps throughout the country as a whole.

At the beginning of the twentieth century, only Switzerland and Canada had adopted this combination of territorial autonomy and official language status for substate national groups. Since then, however, virtually all western democracies that contain sizeable substate nationalist movements have moved in this direction. For example, there was the adoption of autonomy for the Swedish-speaking Aland Islands in Finland after the First World War, then there was autonomy for South Tyrol and Puerto Rico after the Second World War, then federal autonomy for Catalonia and the Basque Country in Spain in the 1970s, for Flanders in the 1980s, and most recently for Scotland and Wales in the 1990s.[13] This, therefore, is the third major trend: a shift from suppressing substate nationalisms to accommodating them through regional autonomy and official language rights.

In all three of these areas, Canada's shift to accommodating diversity is simply one manifestation of a much larger trend throughout the west. It is important to emphasize this larger context, for several reasons. First, the fact that most other western democracies have moved in similar directions should, I think, give us some confidence in our policies. It would be puzzling and distressing if no other country had seen the rationality or wisdom of these approaches. Second, it requires us to think more deeply about the underlying causes of these trends. We have a tendency in Canada to personalize our political conflicts, while ignoring the deeper, structural causes at work. For example, some people describe multiculturalism as the product of Pierre Trudeau's distinctive political and philosophical preoccupations, or as the result of the particular electoral strategies and coalitions of the Liberal Party. But these personalistic and parochial explanations cannot explain why multiculturalism was subsequently adopted in Australia or New Zealand, countries with very different types of political leaders and party systems.

Putting the Canadian experience into a broader comparative perspective also allows us to identify the relationship between the three different trends. For example, some commentators, particularly in Quebec, have supposed that multiculturalism was adopted as part of a Machiavellian strategy to attack Quebec nationalism, by encouraging Canadians to think of the Quebecois as just another immigrant group rather than as a distinct nation. There may indeed have been one or two people in Ottawa in 1971 who had this thought. But if this were the only reason for adopting the policy of multiculturalism, then why would Australia or New Zealand adopt it? They do not face any comparable problem of substate nationalism. Instead, they emulated

[12] M. Keating & J. McGarry, eds., *Minority Nationalism and the Changing International Order* (Oxford: Oxford University Press, 2001); M. Guibernau, *Nations Without States: Political Communities in a Global Age* (Cambridge: Polity Press, 1999).

[13] France is the main exception in its refusal to grant autonomy to its main substate nationalist group in Corsica. However, even in France legislation was in fact adopted to accord autonomy to Corsica, and it was only a strange ruling of the Constitutional Court which prevented its implementation. See F. Daftary, "Insular Autonomy: A Framework for Conflict Settlement? A comparative study of Corsica and Aland Islands" ECMI Working Paper 9 (Flensburg: European Centre for Minority Issues, 2000). France too, I think, will soon join the bandwagon.

the Canadian policy because they viewed it as a successful policy for accommodating immigrants.[14]

In any event, the Machiavellian strategy clearly failed. All of the evidence shows that support for multiculturalism in English Canada is positively, not negatively, correlated with support for recognition of Quebecois nationalism (it is also positively correlated with support for Aboriginal rights). In Canada, as in other countries, support for multiculturalism has strengthened, not weakened, support for other forms of accommodation. Examining the experience of other countries can teach us something about the ways in which these three trends can work together.

## IS THE CANADIAN MODEL DISTINCTIVE?

Thus far, I have suggested that the "Canadian model" is much less distinctive than many people suppose. But there are, I think, a few features that are somewhat distinctive about the Canadian experience. The first is simply that we have to deal with all three forms of diversity. Australia and New Zealand, for example, have been grappling with issues of immigration and indigenous peoples, but have no substate nationalist movements. Belgium, Switzerland, Spain and Britain, in contrast, have been grappling with issues of both substate nationalism and immigration, but have no indigenous peoples. Canada is unusual in having to confront all three issues at the same time.

Indeed, I think that this is the only, or primary, sense in which one could describe Canada as a "world leader" in the accommodation of diversity. With respect to any particular form of diversity, there are other countries which probably do a better job than Canada. For example, I think we could learn something from Australia's multiculturalism policy. Australia may have started by emulating Canada's policy, but it has now moved faster and farther than Canada, at least in certain aspects of accommodating immigrant ethnicity.[15]

Similarly, I think we could learn something from New Zealand's treaty regime with the Maori, or the Home Rule provisions for the Inuit in Greenland. Both were initially influenced by developments regarding indigenous peoples in Canada, but have since moved beyond our own, more halting, efforts. And we could learn something from Belgium and Switzerland in terms of the use of federalism and official language rights to accommodate substate nationalism.

However, although other countries may have made better progress in certain areas, none of these countries have made as much progress on as wide of a range of issues as Canada. We are distinctive in the breadth of the challenges we have faced, rather than in the depth with which we have successfully tackled any particular challenge.

Second, Canada is distinctive in the extent to which we have not only legislated, but also *constitutionalized*, our practices of accommodation. Our commitment to multiculturalism is enshrined not only in statutory legislation, but also in section 27 of the Constitution.[16] No other western country has constitutionalized multiculturalism. Our commitments to Aboriginal and treaty rights are similarly constitutionalized, in section 35,[17] in a stronger or more explicit fashion than most western countries. Our commitments to federalism and official language rights are also constitutionalized.

This decision to constitutionalize our practices of accommodation is one example of a more general feature of the Canadian experience: the decision to highlight these practices in our national identity and national narratives. While the actual practices of accommodation in Canada may not be that distinctive, we are unusual in the extent to which we have built these practices into our symbols and narratives of nationhood. We tell each other that accommodating diversity is an important part of the Canadian identity; it is a defining feature of the country. This is quite unlike the United States for example. In practice, as I have noted, the United States does accord self-government and treaty rights to American Indians, regional autonomy and language rights to Puerto Rico, and multicultural accommodations to immigrant groups. But these are all quite peripheral to the self-conception of most Americans, and are not considered defining features of the American identity or its

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[14] Similarly, the Machiavellian theory does not explain why multiculturalism has remained in force in Canada for the past thirty-one years, and through several different governments, many of whom were committed to accommodating rather than attacking Quebec nationalism. If the motivation for adopting multiculturalism was to attack Quebec nationalism, then Brian Mulroney would presumably have cancelled the policy. Yet, on the contrary, he strengthened it through adoption of the *Canadian Multiculturalism Act*, R.S.C. 1985 (4th Supp.), c. 24 [*Multiculturalism Act*]. The Machiavellian theory not only cannot explain why other countries adopted multiculturalism, it cannot explain its persistence in Canada.

[15] For example, Australia has done a better job of accommodating immigrant languages than has Canada. See D. Forbes & J. Uhr, "Multiculturalism and Political Community: Australia and Canada," paper presented at the American Political Science Association Annual Meeting, Boston, 4 September 1998.

[16] *Canadian Charter of Rights and Freedoms*, s. 27, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[17] *Constitution Act*, *1982*, s. 35, being Schedule B to the *Canada Act 1982*, *ibid*.

national narrative. Americans accommodate diversity in practice, but they do not shout that fact from the rooftop the way that Canadians sometimes do.

In other words, accommodating diversity has a symbolic importance in Canada that is not matched in most other western countries. This is probably a mixed blessing. I think that the self-conscious affirmation of diversity at the symbolic and constitutional levels has probably helped provide members of various groups in Canada with a stronger sense of security and comfort, and given them the courage and conviction to fight more effectively for changes in their neighbourhoods, schools and public institutions. On the other hand, the preoccupation with symbols has sometimes diverted attention from the actual practices of accommodation. It is sometimes seen as sufficient to adopt a symbolic declaration of the importance of inclusion and diversity, without actually doing the hard work of tackling the barriers and stigmatization that affect various groups.

## UNDERLYING SOURCES OF THE TREND TOWARDS ACCOMODATING DIVERSITY

From a legal and constitutional point of view, the *Multiculturalism Act*[18] and the multiculturalism clause of the *Constitution Act, 1982*[19] provide the foundation for Canada's approach to diversity. But as I have tried to emphasize, the multiculturalism policy did not arise out of thin air. It has its own foundations, rooted in deeper social forces, and the future of the Canadian model depends on the strength of these underlying forces.

In my view, there are four central factors that have made the trend towards accommodating diversity possible, and perhaps even inevitable in the western democracies.

### (a) Demographics

The first factor is simply demographics. In the past, governments had the hope, or the expectation, that minorities would simply disappear by dying out or being assimilated. It is now clear that this is not going to happen. Indigenous peoples, with very high birth rates, are the fastest-growing segment of the Canadian population. In addition, the percentage of immigrants in the Canadian population is growing steadily, and everyone agrees we will need to admit even more immigrants in the future to offset our aging population. Francophones in Canada are growing both absolutely throughout Canada, and as a percentage within Quebec. One can no longer have the dream or delusion that minorities will disappear. The numbers count, particularly in a democracy, and the numbers are shifting in the direction of non-dominant groups. The same demographic trend applies in most western democracies.

### (b) Rights-Consciousness

The second factor is the human rights revolution, and the resulting development of a "rights consciousness." Since 1948, we have an international order that is premised on the idea of the inherent equality of human beings, both as individuals and as peoples. The international order has decisively repudiated older ideas of a racial or ethnic hierarchy, according to which some peoples were superior to others and thereby had the right to rule over them.

It is important to remember how radical these ideas of human equality are. Assumptions about a hierarchy of peoples were widely accepted throughout the west until the Second World War, when Hitler's fanatical and murderous policies discredited them. Indeed, the whole system of colonialism was premised on the assumption of a hierarchy of peoples, and was the explicit basis of both domestic policies and international law throughout the nineteenth century and first half of the twentieth century.

Today, however, we live in a world where the idea of human equality is unquestioned, at least officially. What matters is not the change in international law per se, which has little impact on most people's everyday lives. The real change has been in people's consciousness. Members of historically subordinated groups today demand equality, and demand it as a *right*. They believe they are entitled to equality, and entitled to it *now*, not in some indefinite or millenarian future.

This sort of rights-consciousness has become such a pervasive feature of modernity that we have trouble imagining that it did not always exist. But if we examine the historical records, it is striking how minorities in the past typically justified their claims: not by appeal to human rights or equality, but by appealing to the generosity of rulers in according "privileges," often in return for past loyalty and services. Today, however, groups have a powerful sense of entitlement to equality as a basic human right, not as a favour or charity, and are angrily impatient with what they

[18] *Supra* note 14.
[19] *Supra* note 17 at s. 27.

perceive as lingering manifestations of older hierarchies.[20]

## (c) Democracy

The third key factor, I believe, is democracy. Put simply, the consolidation of democracy limits the ability of elites to crush dissenting movements. In many countries around the world, elites ban the political movements of minority groups, pay thugs or para-militaries to beat up or kill minority leaders, or bribe the police and judges to lock them up. The fear of this sort of repression often keeps minority groups from voicing even the most moderate claims. Keeping quiet is the safest option for minorities in many countries.

In consolidated democracies, however, where democracy is the only game in town, there is no option but to allow minority groups to mobilize politically and advance their claims in public. As a result, members of minority groups are increasingly unafraid to speak out. They may not win the political debate, but they are not afraid of being killed, jailed or fired for trying. It is this loss of fear, combined with rights-consciousness, that explains the remarkably vocal nature of ethnic politics in contemporary western democracies.

Moreover, democracy involves the availability of multiple access points to decision-making. If a group is blocked at one level by an unsympathetic government, then they can pursue their claims at another level. Even if the Canadian Alliance were to win the next federal election, and attempted to cut back on the federal multiculturalism policy, or on indigenous rights, then groups could shift their focus to the provincial or municipal levels. Even if all of these levels are blocked, then they could pursue their claims through the courts, or even through international pressure. This is what democracy is all about: multiple and shifting points of access to power.

Where these three conditions are in place — increasing numbers, increasing rights-consciousness, and multiple points of access for safe political mobilization — I believe that the trend towards greater accommodation of diversity is likely to arise. Indeed, I think that it is virtually inevitable. This is the lesson I draw, not only from the Canadian experience, but from the other western democracies as well. These trends have not depended on the presence or absence of particular personalities, particular political parties or particular electoral systems. We see enormous variation across the western democracies in terms of leadership personalities, party platforms and electoral systems. Yet the basic trends regarding diversity are the same, and the explanation, I believe, rests in these three deep sociological facts about numbers, rights-consciousness and opportunity-structures.

## (d) Desecuritization

However, there is one additional factor which may block or reverse the trend towards accommodating diversity. States will not accord greater powers or resources to groups which are perceived as disloyal and, therefore, a threat to the security of the state. In particular, states will not accommodate groups which are seen as likely to collaborate with foreign enemies. In Canada, as in most western democracies, we are very fortunate that this is rarely an issue. For example, if Quebec gains increased powers, or even independence, no one in the rest of Canada worries that Quebec will start collaborating with Iraq, the Taliban or China to overthrow the Canadian state. Quebecois nationalists may want to secede, but an independent Quebec would be an ally of Canada, not an enemy. Quebec would cooperate together with Canada in NATO and other western defence and security arrangements.

This may seem obvious, but it's important to remember that in most parts of the world, minority groups are often seen as a kind of "fifth column," likely to be working for a neighbouring enemy. This is particularly a concern where the minority is related to a neighbouring state by ethnicity or religion, so that the neighbouring state claims the right to intervene to protect "its" minority.

Under these conditions, we are likely to witness what political scientists call the "securitization" of ethnic relations.[21] Relations between states and minorities are seen, not as a matter of normal democratic politics to be negotiated and debated, but as a matter of state security, in which the state has to limit the normal democratic process in order protect the state. Under conditions of securitization, minority self-

[20] Of course, there is no consensus on what "equality" means. Conversely, there is no agreement on what sorts of actions or practices are evidence of "hierarchy." People who agree on the general principle of the equality of peoples may disagree about whether or when this requires accommodating diversity, as opposed to simply identical treatment. In my own view, accommodating diversity is in fact often central to achieving true equality. Treating people as equals is often quite different from treating them identically. While controversial, it seems clear that this conception of equality is increasingly shared by Canadians, and has now been affirmed by the Supreme Court itself. For more on this subject see W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995) c. 5.

[21] For a more extensive discussion of the "securitization" of ethnic relations, see W. Kymlicka & M. Opalski, eds., *Can Liberal Pluralism be Exported?* (Oxford: Oxford University Press, 2001) at 66–68, 366ff.

organization may be legally limited (*e.g.* minority political parties banned), minority leaders may be subject to secret police surveillance, the raising of particular sorts of demands may be illegal (*e.g.* laws against promoting secession) and so on. Even if minority demands can be voiced, they will be flatly rejected by the larger society and the state. After all, how can groups that are disloyal have any legitimate claims against the state? So securitization of ethnic relations erodes both the democratic space to voice minority demands, and the likelihood that those demands will be accepted.

In Canada, however, as in most western countries, ethnic politics have been almost entirely "de-securitized." Ethnic politics in Canada is just that — normal, day-to-day politics. Relations between the state and minority groups have been taken out of the "security" box, and put in the "democratic politics" box.[22] This allows the three factors I discussed earlier to operate freely, and the result is the trend towards accommodation.

## The Future of the Canadian Model

In my view, these are the four main sociological foundations of the Canadian model: demographics, rights-consciousness, multiple access points and the desecuritization of ethnic relations. As long as these four factors remain strong, I think that the Canadian model will also remain strong, and will endure the vicissitudes of particular leaders, parties and election cycles.

The key question, then, is how stable are these sociological foundations? Is there any likelihood that one or more of these factors might change dramatically? I am not a futurologist, and so have no real basis upon which to make predictions. However, I find it difficult to imagine any dramatic changes in the first three factors, at least not in the near to mid-term future. The demographic trends have deep structural causes that will not change overnight. It is almost inconceivable that the human rights consciousness will disappear in the foreseeable future — if anything, it continues to further consolidate its hold in popular consciousness, domestically and internationally, and becomes further institutionalized in our schools, courts and international organizations. And the democratic system in Canada, with its multiple access points, is robust.

So the only real potential threat that I see concerns the fourth condition: the potential (re)-"securitization" of ethnic relations. This, I think, is the main potential obstacle to the future of multiculturalism and minority rights, whether in Canada or in other western democracies. If ethnic relations become securitized, then all bets are off and the progress we have seen towards accommodating diversity may be reversed.

Personally, I think that this too is quite unlikely. Western countries have the good fortune of living in a very stable geopolitical region. One reason why we do not fear that minorities will collaborate with neighbouring enemies is that we do not have neighbouring enemies. Most western democracies are surrounded by allies, not potential enemies. Most western democracies do not fear being invaded by neighbouring countries, and hence do not even consider the question of how minorities would respond in the event of such an invasion. Our enemies are far away, and few if any of our minorities could plausibly be seen as a fifth-column for these distant enemies.

However, geopolitics are unpredictable, and unexpected events could change the picture quickly. Indeed, we have seen a small glimpse of how this might work after 11 September. Relations between Muslim and Arab immigrants and the Canadian state have, all of a sudden, become "securitized," at least in part. The question of funding Muslim schools, for example, is now seen by some Canadians as a question of state security, rather than of democratic debate and negotiation. Some Canadians worry that such schools could indeed become a fifth-column, training or recruiting extremists or terrorists who would then collaborate with our enemies, and potentially even attack us.

Whether this securitization of relations between the state and Arab/Muslim minorities will endure is likely to depend, I think, on whether there are further dramatic terrorist attacks, and/or whether terrorist cells are uncovered in Canada. If not, then I suspect it will prove to be a passing phase, although it will leave many painful scars for those Arabs and Muslims in Canada who have been labelled as disloyal simply because of their ethnicity or religion.

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[22] It is worth noting that this de-securitization of ethnic politics in Canada even applies to the issue of secession. Even though secessionist political parties wish to break up the state, we assume that they must be treated under the same democratic rules as everyone else, with the same democratic rights to mobilize, advocate and run for office. The same is true of secessionist politics throughout the west, be it in Scotland, Flanders or Catalonia. The reason for this remarkable tolerance of secessionist mobilization, I believe, is precisely the assumption that even if substate national groups do secede, they will become our allies, not our enemies. No one fears that Quebecois, Scottish, Flemish or Catalan nationalists will collaborate with our enemies.

In any event, the securitization of relations with Arab/Muslim groups in Canada is, I think, quite contained. As far as I can tell, it has not led to the securitization of ethnic relations more generally. Issues about Quebec's status or about Aboriginal rights, for example, remain firmly inside the "normal democratic politics" box, even after 11 September, as do most issues about levels of immigration or models of multiculturalism. I doubt that Canadian attitudes towards the claims of Guatemalan or Vietnamese immigrants, for example, have substantially changed since 11 September. Particular groups may periodically enter and exit the harsh glare of securitization, depending on changing geopolitical events, but it seems unlikely that these episodes will erode the more general level of public commitment to accommodating diversity.

If this analysis is correct, then the future for the Canadian model is fairly bright, as indeed it is for the practices of accommodating diversity in other western democracies. The sociological foundations of multiculturalism and minority rights in Canada look pretty strong to me. This optimistic conclusion runs counter to that of many commentators, who say we are witnessing a retreat from multiculturalism. It would take another paper to discuss why other people have reached such opposite conclusions. But I would like to conclude by offering one small suggestion in this regard. It seems undeniable that the *word* multiculturalism has lost some of its lustre, and is less likely to cross the lips of politicians and public intellectuals. I think that this is the inevitable fate of any word that begins as a rallying cry for progressive dissident social movements but which is then adopted by state bureaucracies. To use the word "multiculturalism" today, unlike in the 1960s, is to speak the language of bureaucrats, and hence is deeply unfashionable amongst both the right and the left. However, I believe that the ideas that were once conveyed by that word — in particular, the idea that assimilationist policies are illegitimate, and that public institutions must fairly accommodate diversity — remain as powerful and as persuasive today as ever before, if not more so. People have simply found other terms to convey these ideas, and to work through their implications, including terms like "integration," "inclusion," "equity," "citizenship," "tolerance," "non-discrimination," "participation," "opportunity," "diversity" and so on.

We should measure the success of multiculturalism, not by how often people use the word, but by the extent to which *all* of our words are now interpreted in light of multiculturalist ideals. We may not use the word "multiculturalism" as often, or with the same enthusiasm, and we may prefer to talk about "integration" or "citizenship" instead. But our conceptions of what integration and citizenship mean have themselves been radically altered over the past 30 years by multiculturalist ideals. All of these alternate terms have a different meaning today than they had 30 years ago. We have a different idea about what integration, inclusion and participation mean, and about what the barriers to them are.

In a sense, I think that "multiculturalism" is a victim of its own success. Multiculturalism has so strongly changed the way we think about society and politics that we no longer need the term the way we did thirty years ago. In the past, we needed to talk explicitly about multiculturalism, as a way of pushing us to rethink earlier ideas about citizenship, community and nationhood in the light of the realities of diversity. We needed the term and the symbol of multiculturalism to remind us that older models of assimilation and exclusion were unacceptable and unworkable. But today we do not need the reminder. We all know that those older models are dead. We have not yet worked out what to replace them with, but virtually all of the terms and concepts we use to think about those alternatives are premised on the twin pillars of multiculturalism: the rejection of assimilationist policies and the acceptance of a duty to accommodate. The word multiculturalism may be unfashionable, but those twin assumptions are more widely accepted than ever before, and indeed are often simply taken for granted. In that sense, as Glazer says, "we are all multiculturalists now,"[23] however much or little we like the word.


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23 *Supra* note 6.

# THE PERSPECTIVES OF ABORIGINAL PEOPLES OF CANADA ON THE MONARCHY: REFLECTIONS ON THE OCCASION OF THE QUEEN'S GOLDEN JUBILEE

James (Sákéj) Youngblood Henderson

## INTRODUCTION

The Constitution of Canada is a prismatic hodgepodge of treaties, royal instructions and proclamations, and UK legislation. The unifying factor is the constitutional monarchy that holds together a topocratic and collegiality federation. Treaties with Aboriginal nations created treaty federalism; subsequent UK legislation created provincial federalism. Both of these imperial documents are more prismatic than systematic. Prismatic thought is reflective of an infinite variety of perspectives of the same core of truth, which is simultaneously solid and shifting. This has been recognized as representing the federation called "the ironic confederation."

At the Queen's Golden Jubilee, it is time to reflect on the constitutional tradition and its meaning to Aboriginal peoples. While Aboriginal peoples have a distinct understanding of the meaning from other British citizens and subjects, the amalgamating principle of the federation is a shared principle of imperial treaties and acts. Both sources of federation create a constitutional duty to govern Aboriginal peoples by respecting their different laws and customs as vested in treaties. However, Aboriginal and treaty rights are independent from the medieval fiction of the king and queen represented by the absolute sovereign in British traditions. This nostalgic tradition inspired by the idea of British empire has concealed the constitutional realities of compacts and treaties that create the birthrights of the British and Aboriginal peoples and the legal pluralism of United Kingdom and British Commonwealth.

The constitutional monarchy in Canada is built on a consensual foundation that respects the law and customs of the Aboriginal peoples. The affirmation of Aboriginal laws, customs, traditions, and treaties is integral to the constitutional framework of Canada. Aboriginal rights and treaties are constructed or shaped on distinct foundations from the law and customs of the English peoples. They reflect the shared sovereign between the British and Aboriginal sovereigns that establishes and maintains Canada. Aboriginal peoples are part of the sovereignty of Canada. Aboriginal and treaty rights are integral parts of the Queen of Canada and her governments. This constitutional manifestation should not be ignored by Canadians, since it reveals the deep structure and unwritten law of legal pluralism upon which British traditions were blended with Aboriginal traditions to generate a new life-world. This vision continues to provide a guiding light to the dark past where colonization and racism was legally justified to multicultural peoplehood in a post-colonial era.

## LAW AND CUSTOMS OF THE ENGLISH PEOPLE

The constitutional birthright of the English people has been codified into a series of statutes. The *Statute of Monopolies, 1623*, prohibits the exercise of legislative power to abrogate those rights.[1] The *Petition of Right, 1627*, prohibits the exercise of executive power to abrogate those rights.[2] The *Habeas Corpus Act, 1640*, prohibits the exercise of judicial power to abrogate those rights.[3] The *Coronation Oath Act, 1688*,[4] the *Act of Settlement, 1700*,[5] and the *Union with Scotland Act, 1706*[6] require the sovereign to affirm and recognize the constitutional birthright of the peoples, throughout the realm and kingdom.

At the Coronation Oath in 1688, at the beginning of colonization, the Archbishop of Canterbury asked the King and Queen: "Will you solemnly promise and swear to govern the People of this Kingdom of England, and the Dominions thereto belonging,

1 *Statute of Monopolies, 1623* (U.K.), 21 Jam. I, c. 3.
2 *Petition of Rights, 1627* (U.K.), 3 Car. I, c. 1.
3 *Habeas Corpus Act, 1640* (U.K.), 16 Car. I, c.10.
4 *Cornation Oath Act, 1688* (U.K.), 1 Will. & Mar., c. 6.
5 *Act of Settlement, 1700* (U.K.), 12 & 13 Will. 3, c. 2.
6 *Union with Scotland Act, 1706* (U.K.), 6 Anne, c. 11.

according to the Statutes in Parliament agreed on, and the Laws and Customs of the same?" They each responded, "I solemnly promise so to do."[7] This Oath created a constitutional compact with the English people in the dominions. William Blackstone notes that the Coronation Oath is a compact or contract for life between the sovereign and the peoples of the UK and Commonwealth.[8] It is a example of the Lockean social compact theory of government.[9] *Halsbury's Laws of England* identifies the Coronation Oath as an integral part of the constitutional law of the UK.

The Oath outlines the essential duties of the sovereign.[10] It established the sovereign's constitutional duty to govern the people of the United Kingdom of Great Britain and Northern Ireland according to the statutes of Parliament, to govern the peoples of the dominions by the law and customs of the same, and to cause law and justice in mercy to be executed in all judgments, to the utmost law of the sovereign's power. The Oath recognizes and affirms the imperial duty of protection of peoples' law and customs. This compact cannot be broken by a vote in Parliament. It can be broken only by the mutual consent of the sovereign and the people.

Queen Elizabeth II's Coronation Oath in 1953 reflected the new global context of the UK. Elizabeth II solemnly promised "to govern the Peoples of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand, the Union of South Africa, Pakistan and Ceylon, and of your Possessions and other Territories to any of them belonging or pertaining, according to their respective laws and customs."[11] This Oath affirms the constitutional responsibility of the sovereign and its governments to respect the diverse peoplehood of certain members of the Commonwealth, especially the peoples of Canada. It is consistent with the *Universal Declaration of Human Rights* in 1948.[12] As it is based on the legal plurality of the peoples' laws and customs, it affirms the constitutional principle of multi-legal and multicultural governance. It affirms the constitutional category of peoplehood and their different laws and customs as the integral purpose of governance. Also, it affirms constitutional protection of the heritage, laws, and customs for the peoples of Canada in governance.

## LAWS AND CUSTOMS OF ABORIGINAL PEOPLES

Elizabeth II's Oath constitutionally assured Aboriginal peoples in Canada that the Crown would respect their Aboriginal birthrights. Since the *Coronation Oath Act*, the birthrights of Aboriginal peoples of Canada are to be governed by Aboriginal law and customs as well as treaties with the sovereign. In the *Canada Act 1982*, these Aboriginal birthrights were recognized and affirmed in the patriation of the Constitution of Canada. In the final constitutional enactment for Canada made by the Crown in Parliament of the UK, section 35 provided: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[13] These rights affirm the laws and customs of the Indians, Inuit, and Métis.[14] They are guaranteed equally to male and female person.[15] They are part of the supreme law of Canada with which every legitimate law must comply.[16]

The Supreme Court of Canada has interpreted the purpose of section 35(1) as providing "the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose."[17] This statement reaffirms the imperial protection of ancient laws and customs of the Aboriginal peoples of Canada as well as their treaties with the sovereign in the constitutional order of an independent state.

Aboriginal rights are developed from the ancient laws and custom of peoples of various Aboriginal nations. The Supreme Court has acknowledged that Aboriginal legal orders are *sui generis* — generated distinct from British or French laws and customs. They have existed independently of British or French law; they do not depend on consistency with British or French law.[18] The source and validity of these laws and

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7 *Cornation Oath Act, 1688*, *supra* note 4.

8 W. Blackstone, *Commentaries on the Law of England,* 14th ed. (Oxford: Clarendon Press, 1765) at book 1, c. 6.

9 Other statutes created the peoples duty to the sovereign as allegiance, which is either natural, local, or acquired. *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1991) vol. 6 at paras. 459–64.

10 *Ibid.* at para. 459. In Canada, the foreign jurisdictions of the sovereign were the last vestige of monarchical supremacy in the constitutional law of Great Britain. *Ibid.* at paras. 806, 981, 991.

11 See Elizabeth II's Coronation Oath, online: Oremus Homepage <www.oremus.org/liturgy/coronation/cor1953b.html>.

12 GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

13 *Constitution Act, 1982*, s. 35(1), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

14 *Ibid.* at s. 35(2).

15 *Ibid.* at s. 35(4).

16 *Ibid.* at s. 52(1).

17 *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 31 [*Van der Peet*]; *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 32, 82 [*Quebec Secession Reference*].

18 *R. v. Côté*, [1996] 3 S.C.R. 139 at paras. 48, 49, 52 [*Côté*].

customs are embedded in Aboriginal heritages, languages, and laws.[19]

Aboriginal law and customs predate imperial power in North America.[20] They operate by their own force and are protected by British law either through imperial or Canadian constitutional law, or the common law. Justice L'Heureux-Dubé of the Supreme Court stated: "[I]t is fair to say that prior to the first contact with the Europeans, the native people of North America were independent nations, occupying and controlling their own territories, with a distinctive culture and their own practices, traditions and customs."[21] Justice McLachlin agreed, stating: "[A]boriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question."[22] She also concluded that the "golden thread" of British legal history was "the recognition by the common law [of] the ancestral laws and customs the aboriginal peoples who occupied the land prior to European settlement."[23] The Lamer Court held that if Aboriginal people were "present in some form" on the land when the Crown asserted sovereignty, their pre-existing right to the land in Aboriginal law "crystallized" in British law as a *sui generis* Aboriginal title to the land itself.[24] Imperial law vested the pre-existing Aboriginal sovereignty in British constitutional law,[25] which protected the totality of the Aboriginal legal order from intrusion by either the reception of the common or statutory law in the British settlements. [26]

The Supreme Court has recognized that Aboriginal law is distinct from British or French law.[27] It reaffirmes the third constituitonal legal system or "order" in Canada. In *Côté*, Lamer C.J.C. stated that "[a]lthough the doctrine [of Aboriginal rights] was a species of unwritten British law, it was not part of English common law in the narrow sense, and its application to a colony did not depend on whether or not English common law was introduced there."[28] Aboriginal legal orders are distinct from the principles and abstract rights of the Enlightment;[29] they not only created modernity and its legal system but also underly the *Charter* interpretations of personal rights.[30] Neither the British nor the French legal tradition can adequately describe or characterize Aboriginal legal traditions.[31] The judicial interpretative principles are consistent with the sovereign's constitutional duty to govern the Aboriginal peoples of the dominions by their law and customs. It affirms as a principle of constitutional supremacy the right of the judiciary to generate justice in all judgments, to the utmost of its power.

Treaty rights are intimately related to Aboriginal sovereignty and law. The treaties establish an innovative transnational legal regime. They are the consensual reconciliations of Aboriginal sovereignty with British sovereignty. They are based on Aboriginal sovereignty and legal orders. They extend the constitutional duties of the Coronation Oath to protection of peoples' law and customs. The treaties are more detailed agreements about the sovereign's obligations than is the *Coronation Oath Act*. They affirm Aboriginal sovereignty and constitutional power within the British Commonwealth, the UK, and Canada. They established treaty rights of most of the Indian and Inuit peoples. They establish treaty delegation and obligations for the British sovereign and governments. This prerogative compact cannot be broken by any vote in any Parliament or assembly.[32]

The Supreme Court has held by virtue of Aboriginal law and spirituality, Aboriginal nations

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19 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 84–88, 114, 126, 145–46; *Van der Peet*, *supra* note 17 at paras. 29, 31, 60.

20 *Delgamuukw*, *ibid.*

21 *Van der Peet*, *supra* note 17 at para. 106.

22 *Ibid.* at para. 247.

23 *Ibid.* at para. 263.

24 *Delgamuukw*, *supra* note 19 at para. 145. Also see *Delgamuukw v. British Columbia*, [1993] 5 C.N.L.R. 1 (B.C. C.A.) at para. 46, citing *Mabo* v. *Queensland,* [1992] 5 C.N.L.R. 1 at 51 per Brennon J. (Austl. H.C.); *Côté*, *supra* note 18 at para. 49.

25 For a description of the development of imperial constitutional law, see M.K. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw* v. *British Columbia*" (1992) 17 Queen's L.J. 350; M.K. Walters, "*Mohegan Indians v. Connecticut* (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33 Osgoode Hall L.J. 785 at 789-803; and M.K. Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 McGill L.J. 711.

26 *Côté*, *supra* note 18 at para. 49. Also, the Supreme Court has held that the law of Aboriginal title represents a distinct species of federal common law rather than a simple subset of the common or civil or property law operating within the province. *Roberts v. Canada*, [1989] 1 S.C.R. 322 at 340.

27 *Van der Peet*, *supra* note 17 at paras. 17, 20, 42.

28 *Côté*, *supra* note 18 at para. 48.

29 *Van der Peet*, *supra* note 17 at para. 19: "Aboriginal rights, however, cannot be defined on the basis of the philosophical precepts of the liberal enlightenment."

30 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. [*Charter*].

31 *Delgamuukw*, *supra* note 19 at paras. 130, 189; *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657 at para. 14; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R 85 at para. 34 per Dickson C.J.C.; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 at 678; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 382.

32 *Campbell v. Hall* (1774), 1 Cowp. 204, aff'd *R. v. Secretary of State*, [1981] 4 C.N.L.R. 86 at 99 per Denning M.R. (C.A.).

possessed pre-existing Aboriginal sovereignty at the time the British Crown asserted sovereignty over their territory.[33] Imperial prerogative treaties, instructions, proclamation and acts creating imperial constitutional law confirmed the inherent sovereignty of the Aboriginal nations.[34] The treaties created a constitutional order of treaty governance and established a framework of duty and obligations defining the government of the country through the Chief and Headmen and distributed power between the Chiefs and imperial Crown.[35] This is analogous to the *Magna Carta*, *Coronation Act*, and other constitutional documents that affirmed the law and customs of the people.

These consensual treaties replaced the general protective jurisdiction of the British sovereign over Aboriginal nations by its assertion of sovereignty over a foreign territory.[36] Under treaty federalism with the prismatic British sovereign, the diverse sovereigns jointly and consensually reign over most of Canada.[37] The Queen of Canada operates through the permission of the Aboriginal nations in the imperial treaties and constitutional law. In imperial law,[38] the treaties establish and acknowledge the shared sovereignty of Canada.

Under imperial law, the prerogative treaties operated independently from executive and legislative power in the UK, colonies and dominions.[39] The treaties reflect the constitutional monarch's duty to govern Aboriginal peoples by their laws and customs, and to protect their territorial possessions. The treaties were protected from any interference by the UK or colonial or dominion governments, which reflect the laws and customs of other peoples.

Elders of the Victorian treaties teach that the Aboriginal purposes in entering into the treaties or "covenant" with the British sovereign were to ensure that future generations: (1) would continue to govern themselves and their territory according to Aboriginal teachings and law; (2) would making a living (*pimâchiowin*) providing for both spiritual and material needs; and (3) would live harmoniously (*wîtaskêwin*) and respectfully with the treaty settlers.[40] These are fundamental obligations of Aboriginal peoples and the Great Mother, the Queen.

In the shared imperial treaty order, the British sovereign in the Victorian treaties affirmed territorial jurisdiction to Treaty chiefs and their laws and customs. The Chief's "promised and engaged" the British sovereign "that they will strictly observe [the] treaty, obey and abide by the law, and maintain peace and good order between each other."[41] The purpose of the

33 *Delgamuukw*, *supra* note 19 at paras. 145–48.

34 See R. Dupuis & K. McNeil, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, vol. 2 (Ottawa: Supply and Services Canada, 1995) Domestic Dimensions at 4-47.

35 *R. v. Marshall*, [1999] 1 S.C.R. 456 at para. 78 [*Marshall*]; *R. v. Sundown*, [1999] 1 S.C.R. 393 at para. 24 [*Sundown*]; *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 78 [*Badger*]; *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 404. See also J.Y. Henderson, "Interpreting *Sui Generis* Treaties" (1997) 36 Alta. L. Rev. 46; and L.I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997) 36 Alta. L. Rev. 149.

36 *Delgamuukw*, *supra* note 19 at paras. 145, 166–69, 174, 176, 178.

37 See J.Y. Henderson, "Empowering Treaty Federalism" (1994) 58 Sask. L. Rev. 241; Canada, *Final Report of the Royal Commission on Aboriginal Peoples*, vols. 1–5 (Ottawa: Supply and Services, 1995) vol. 2 at 20 (social contract), 52 (sacred compact) [*Report*]; Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Supply and Services, 1993) at 36.

38 George R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No. 1, prohibited British governors and subjects from encroaching on the lands of those "Nations or Tribes of Indians with whom We are connected." Rights confirmed by the Proclamation take precedence over other constitutional rights in accordance with s. 25 of the *Charter*, *supra* note 30, preserving their original priority as royal prerogative grants. Also, prerogative treaties and acts are protected under the *An Act to remove Doubts as to the Exercise of Power and Jurisdiction by Her Majesty within divers Countries and Places out of Her Majesty's Dominions, and render the same more effectual*, *1843* (U.K.), 6 & 7 Vict., c. 94; and *An Act to remove Doubts as to the Validity of Colonials Laws, 1865* (U.K.), 28 & 29 Vict., c. 63, which are acts of Parliament of the UK.

39 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 9, 12, 129. See *Walker v. Baird*, [1892] A.C. 491 (J.C.P.C.); *Johnstone v. Pedlar*, [1921] 2 A.C. 262 (H.L.); *Eshugbayi Eleko v. Government of Nigeria*, [1931] A.C. 662 (J.C.P.C.); *Attorney General v. Nissan*, [1970] A.C. 179 (H.L.); *Buttes Gas and Oil Co. v. Hammer*, [1975] Q.B. 557 (C.A.). See generally J.D. Chitty, *A Treatise on the Law of the Prerogative of the Crown; and the Relative Duties and Rights of the Subjects* (London: Butterworths & Son, 1820).

40 H. Cardinal & W. Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day be Clearly Recognised as Nations* (Calgary: University of Calgary Press, 2000) at 31–47.

41 *Treaty 1*, The Queen and the Chippewa and Cree Indians (3 August 1871); *Treaty 2*, The Queen and the Chippewa Tribe of Indians (21 August 1871); *Treaty 3*, The Queen and the Saulteaux Tribe of the Ojibbeway Indians (3 October 1873); *Treaty 4*, The Queen and the Cree and Saulteaux Tribes of Indians (20 July 1874); *Treaty 5*, The Queen and the Saulteaux and Swampy Cree Tribes of Indians (24 September 1875); *Treaty 7*, The Queen and the Blackfeet and other Indian Tribes (28 June 1877); *Treaty 8*, The Queen and the Cree, Beaver, Chipewyan and other Indian Tribes (21 June–14 August 1899); *Treaty 9*, The King and the Ojibeway, Cree and Other Indians (6 November 1905 & 5 October 1906); *Treaty 10*, The King and the Chipewyan, Cree and Other Indian Tribes (1906); *Treaty 11*, The King and the Slave, Dogrib, Loucheux, Hare and Other Indian Tribes (27 June 1921). This clause was in *Treaty 1* (1871) and the 1923 Treaty, The King and Mississauga Indians, in a modified form.

"obey and abide" clause in the treaty article was to establish that the Chiefs would maintain peace and good order by the rule of law, rather than discretionary or arbitrary rule. This article is of no less constitutional authority in North America than the original grants of the king's prerogative authority to the courts and Parliament in England.

According to the English drafters of the treaties, the Chiefs promised to obey and abide by "the" law. The treaties made no mention of "Her Majesty's" law, or Canadian or territorial law, thus affirming Aboriginal law and custom they knew and lived by.[42] The Treaty Chiefs could not have agreed to engage the unknown customary or statute law of the British peoples. Even if the "obey and abide" clause is judicially interpreted to include Her Majesty's law, the prime constitutional duty of any of Her governments would be to respect the laws and customs of Aboriginal peoples.

The peace and good order clause of the written treaties affirms the residual Aboriginal authority in Treaty Chiefs to maintain their inherent authority throughout the ceded land, and affirms their Aboriginal law and customs as treaty governance. This clause operates similarly in spirit and purpose to the "peace, order, and good government" clause in section 91 of the *Constitution Act, 1867*.[43]

Moreover, in the Victorian treaties, the Treaty Chiefs and Indians "'solemnly promise and engage' to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen."[44] This is acquired treaty allegiance that brings treaty Indians under the protection of the sovereign and involves the sovereign's obligation to govern them by Aboriginal law and customs.

The treaty rights, obligations, and promises — as well as their underlying principles — acknowledge inherent Aboriginal orders, systems of law and rights, and way of life.[45] The promises and obligations of the treaties are the source of specific jurisdiction of the sovereign. Imperial law and the constitutional law of Canada have always protected them.[46] These "inviolable" compacts"[47] are exchanges of solemn promises[48] which are sacred.[49] The Crown's honour requires the courts to always assume that the sovereign intended to fulfill its promises to Aboriginal peoples.[50] Aboriginal rights not specifically delegated to the sovereign, or placed under its administrative jurisdiction in a treaty, are reserved in the Aboriginal orders.[51]

## SHARED CANADIAN SOVEREIGNTY

The Queen of Canada has always affirmed and recognized the law and customs of Aboriginal peoples as part of Canadian sovereignty. As the Treaty Commissioner had emphasized to the Chiefs and Headmen in the Victorian treaties, the Queen is "always just and true. What she promises never changes."[52] "[T]he Queen always keeps her word, always protects her red men."[53] "I have told you before and tell you again that the Queen cannot and will not undo what she has done."[54] On 5 July 1973, Queen Elizabeth II confirmed her treaty obligations. The monarch stated that her government in Canada "recognizes the importance of full compliance with the spirit and terms of your Treaties."[55] In the *Canada Act 1982*, the Queen in Parliament affirmed that Aboriginal and treaty rights are part of the supreme law of Canada, and any law inconsistent with those provisions is of no force or effect.[56] The constitutional supremacy principle and the rule of law principle require that all government action

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[42] *Ibid*. *Treaty 1* and the 1923 Treaty do not have similar "obey and abide" clauses.

[43] *Constitution Act, 1867*, *supra* note 39.

[44] See *supra* note 41. *Treaty 1* and the 1923 Treaty are silent on treaty subjects.

[45] *Sundown*, *supra* note 35 at paras. 6, 11, 25, 33, 35–36; *Badger*, *supra* note 35 at paras. 76, 82; *Van der Peet*, *supra* note 17 at para. 31.

[46] *Constitution Act, 1867*, *supra* note 30 at ss. 9, 12, 129; *Constitution Act, 1982*, *supra* note 11 at ss. 35(1), 52(1).

[47] See *Campbell v. Hall*, *supra* note 32 at 204. See also Chitty, *supra* note 39 at 29.

[48] *Sundown*, *supra* note 35 at paras. 24, 46; *Badger*, *supra* note 35 at paras. 41, 47.

[49] *Badger*, *ibid.* at paras. 41, 47; *Sioui*, *supra* note 35 at para. 96; *Simon*, *supra* note 35 at para. 51; *Campell*, *supra* note 32. By comparision, in British common law the most sacred principles appear to be the sovereignity of the king and the rule of law, while the sacred principles of British positive law was parliamentary supremacy. In the Canadian constitutional order, the most sacred principles are federalism, democracy, constitutional supremacy and the rule of law, and the protection of minorities; see *Quebec Secession Reference*, *supra* note 17 at paras. 32, 49–82.

[50] *Sundown*, *supra* note 35 at para. 46; *Marshall*, *supra* note 35 at para. 49; *Badger*, *supra* note 35 at para. 47.

[51] *Marshall*, *ibid.* at para. 48; *Sioui*, *supra* note 35 at paras. 58, 87, 100, 120.

[52] A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Saskatoon: Fifth House Publishers, 1991) at 94.

[53] *Ibid.* at 95.

[54] *Ibid.* at 105.

[55] Queen Elizabeth II, as quoted in J. Chrétien, "Statement Made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People" (8 August 1973).

[56] *Constitution Act, 1982*, *supra* note 11 at s. 52(1).

comply with the Constitution, including Aboriginal and treaty rights.[57]

The affirmation of Aboriginal laws, customs, and traditions in constitutional framework and remedies protecting the *sui generis* nature of the Aboriginal people of Canada was an exceptional transformation in Canadian law. It rejected colonial laws and changed the constitutional vision of Canada.[58] Each Aboriginal person brings this framework as their "birthright" or constitution heritage to the courts and to government consultations. Courts and public servants may not ignore these special constitutional rights that inform Aboriginal dignity and identities by relying on the law and customs of the English or French peoples. Every Canadian needs to grasp and respect the distinct Aboriginal order, its laws, heritage, knowledge, and languages.

As illustrated above, Aboriginal rights and treaties are constructed or shaped based on different traditions and distinct constitutional documents from the laws and customs of English people. However, these documents are based on similar principles. In comprehending constitutional governance of Canada, it is a mistake to rely exclusively on the imported parliamentary governance, laws, and customs of the newcomers.[59] Such a perspective ignores the shared, prismatic sovereignty that established and sustains Canada. Also, it violates the British sovereign's promises and agreements to govern Aboriginal peoples by their laws, customs and treaties. If the colonialists' quest was for self rule and responsible government from the imperial authority, they wrongfully ignored the Aboriginal and treaty rights of Aboriginal peoples.[60] The existing constitutional order has, however, corrected this mistake.

Canadian understanding of the nature of the mistaken relationship comes slowly. The legacy of protecting the laws and customs of Aboriginal peoples as shared sovereignty emerges from the deep past and from complex histories. The legacy is not a sentimental exercise in charity or guilt, but rather it develops out of constitutional supremacy and the rule of law. This vision continues to provide a guiding light for the dark past, where colonization and racism was legally justified.

The Supreme Court has rejected most of the colonial legal regimes and legal precedents, keeping only those principles that create constitutional convergence between powers and rights.[61] It stated: "Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal recognition and approval of European colonizers."[62] The Court sought to determine the legalities of the precolonial situation of Aboriginal law and customs and the sacredness of the treaties,[63] and to allow for their relevance to the present (postcolonial-to-be) and future situations. Their interpretative principles bracket and displace colonialism and its justifications in order to affirm the laws and customs of Aboriginal peoples in Canada.[64]

The protection of Aboriginal and treaty rights in imperial constitutional law and British common law created legally binding fiduciary obligations on government. These obligations regulate and supervise the actions of Canadian governments and citizens toward *sui generis* Aboriginal orders, and are articulated as constitutional and statutory fiduciary duties on the Crown.[65] These duties ensure the integrity and honour of the Crown.[66] This is the prismatic legacy of constitutional monarchy in Canada for Aboriginal peoples.

## CONCLUSION

Aboriginal and treaty rights should not be ignored in reflections on constitutional monarchy, the shared sovereignty of Canada or constitutional governance. The affirmation of the laws, customs, and treaties of Aboriginal peoples reveals the deep structure and unwritten constitutional principles of legal pluralism upon which British traditions were blended with Aboriginal traditions to generate a new life-world. Nothing is wrong or unfair with Aboriginal peoples being part of the prismatic sovereignty of Canada. Aboriginal and treaty rights have always been part of

[57] *Quebec Sesession Reference*, *supra* note 17 at paras. 70–78.

[58] *Côté*, *supra* note 18 at para. 51.

[59] In the *Constitution Act, 1867*, *supra* note 39 at s. 91(25), the newcomers are constitutionally called "aliens."

[60] See generally B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32 Am. J. Comp. L. 361; and *Report*, *supra* note 17.

[61] *Quebec Secession Reference*, *supra* note 17 at paras. 49–50, 91; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 373 per McLachlin J.

[62] *Côté*, *supra* note 18 at para. 52.

[63] *Badger*, *supra* note 35 at para. 41. See also *Campbell v. Hall*, *supra* note 32.

[64] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at paras. 23–27. The Court refused to constitutionalize federal or provincial bureaucratic law of the colonial era. See also in treaty interpretation, *Simon*, *supra* note 35 at 399.

[65] *Sparrow*, *ibid.* at para. 59.

[66] *Ibid.* at paras. 58, 65; *Badger*, *supra* note 35 at para. 78; *Sundown*, *supra* note 35 at para. 24; *Marshall*, *supra* note 35 at paras. 49–52.

the integral foundation of the authority of the Queen of Canada and her governments. The affirmation of these first principles of constitutionalism in Canada and the Supreme Court's interpretation of these rights are remarkable affirmations of the laws and customs of Aboriginal peoples. It re-established the tradition of transnational legal order, legal pluralism, and peoplehood to Canadian constitutionalism. It ends the dark legacy of colonization and its oppressive legal order.

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# GOVERNING THE CANADIAN STATE: THE CONSTITUTION IN AN ERA OF GLOBALIZATION, NEO-LIBERALISM, POPULISM, DECENTRALIZATION AND JUDICIAL ACTIVISM

Harry W. Arthurs

## INTRODUCTION: A DONKEY'S PERSPECTIVE ON THE CONSTITUTION

Viewer discretion is advised. I am going to offer you a perspective on the constitution which is stranger even than the Trudeau vision which twenty years ago sparked his epic battles with Merv Leitch and Peter Lougheed over the National Energy Policy, the *Charter*,[1] and repatriation of the Constitution. And worse yet, though I worry about the Constitution, I do not know much about it; I do not often write about it, and as I will demonstrate in a moment, I am not even sure what it is. I did, however, read something recently in a book on modern European history which seemed to capture my own sentiments almost exactly — an observation attributed to a peasant in Salonika, then under Turkish rule, in 1908: "Constitution is such a wonderful thing," said this peasant, "that he who does not know what it is, is a donkey."[2] I identify with the donkey, not the peasant.[3]

This puts me at a serious disadvantage in today's world. Scores of post-colonial and post-communist societies are attempting to turn the page of history by drafting new and more perfect fundamental laws. Established democracies are attempting to solve their complex political, social and economic problems by reinterpreting or rewriting their constitutions. And here in Canada, especially in academic circles and in the appellate courts, constitutional concerns and *Charter* chatter dominate the agenda though, I suspect, Canadian peasants do not show quite the same enthusiasm for constitutions as did that rustic sage of Salonika. So here I am, playing donkey: what exactly is a constitution?

I start with a simple notion. Constitutions constitute. They define or redefine states, sub-state entities, their institutions, and the relationship amongst all of the above. They set out the rights and duties of citizens and articulate the values, aspirations and understandings by which ethnic, class, gender, cultural, regional, religious, linguistic and other groups associate within the state. They prescribe a framework within which state law, administration and policies must be conducted. Finally, constitutions are iconic symbols of continuity or discontinuity with the past, of legitimacy for the present, of promise for the future. Constitutions constitute.

However there is a difficulty. Constitutions — at least in the lawyer's sense of the term — constitute less in practice than in theory. Some states with written constitutions utterly transform themselves over time with few, if any, formal constitutional amendments and sometimes even without recourse to judicial review. Others adopt one constitutional amendment after another and nothing changes. Similarly, while some states without written constitutions adapt easily to changing ideas of what is fundamental, indispensable or appropriate in their juridical and political arrangements, others do not.

So constitutions count for something: but not that much. True, states do need a foundation of fundamental norms. But such a foundation does not have to be the formal, juridical "constitution." It may consist of many other things: the deep structures and conventions of

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1 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

2 M. Mazower *The Dark Continent: Europe's Twentieth Century* (New York: Vintage Books, 2000) at 6. Mazower does not cite his source.

3 My identity arguably puts me on the side of the angels. As recounted in Numbers 22:21 *et seq*, a donkey was three times beaten by his master, the prophet Balaam, for refusing to carry him on a mission on behalf of the princes of Moab to curse the children of Israel. In fact, the donkey had balked in order to save Balaam from the wrath of an armed angel — invisible to Balaam, but visible to the donkey — who had been dispatched to forestall the Moabite persecution. I am grateful to Tsvi Kahana for drawing this sometimes overlooked biblical episode to my attention, thereby diminishing my embarrassment at labelling myself a donkey.

political life; long-standing compacts amongst "founding peoples," religious communities or geographic regions; the conventional wisdom and habitual practices of mandarin classes, judges, corporate elites and knowledge communities; the tutelary influence of imperial or transnational institutions; or some vague sense amongst citizens of shared experience, interests and values. In practical terms, any of these — or the end of any of these — can reinforce, modify or displace the practical, the juridical, even the symbolic, functions of a "constitution." These are odd ideas about a constitution; I will acknowledge that. However, since donkeys are not only stupid but stubborn, I am going to stick with them.

## THE CONSTITUTIONALIZATION OF POLITICS

As indicated in the title of this paper, I believe that our Constitution — in the expanded sense that I have just described — is being reshaped by five powerful forces: neo-liberalism, globalization, populism, decentralization and judicial activism. Our institutions are changing; our values are changing; the way we talk and think about things is changing. Moreover, the changes I describe are not just part of the normal evolution of institutions, values and political discourse that takes place in any healthy society. They are constitutional in character. Whether that is our intention or not, we are making it much more difficult to reverse present tendencies, to return to old values, institutions and discourses, or to adopt new ones at some point in the future. Our new constitution, I maintain, is being chiselled in stone.Now many people will argue that this is a good thing, that this is exactly what constitutions are supposed to do, and that Canada is facing such serious challenges that it has to reinvent itself. I agree; we do face serious challenges; we have to reinvent ourselves.

Here is one list of what many Canadians would identify as our greatest challenges: How can we free up the energy and imagination of Canadians so that we can regain our status as one of the world's most productive and affluent nations? How can we ensure that our economy is not strangled by government regulation, that our entrepreneurs and brightest minds are not driven abroad by excessive taxation, that our young people do not succumb to habits of dependency and self indulgence? How can we ensure that power is exercised by governments which are close to the people, rather than by remote bureaucrats in Ottawa? How can we make all public institutions more accountable, more responsive to the opinions and desires of ordinary Canadians? How can we protect the social values and cultural traditions which built this country and which remain our best guide for the future?

That is one version of a list, but there are lots of versions. My own is somewhat different: How can we exercise our sovereignty and preserve our identity in the shadow of the American colossus? How can we succeed in a globalized world without control over key sectors of our own domestic economy, and with our relatively small pool of human and financial capital? How can we accommodate the aspirations of Quebec, of aboriginal nations and of assertive provinces, regions and metropolitan areas within a federation in which the central government is already precluded from addressing key issues which no one else can resolve? How can we interest our citizens in electoral politics and other forms of civic engagement? How can we pay for the public services and infrastructure that we want and need? And what will be left of the Canada we once knew — the state which built our economic infrastructure, which breathed life into our cultural institutions, which provided economic security and social services to Canadians — what will be left of that Canada once we have finished stripping the state of resources, of legitimacy and of any hope or means of recovering these?

Now to ask an obvious question. If our visions of the challenges facing Canada are so very different, how can we as a nation get on and do something about them? I have a short and simple-minded answer to that question: we try to elect the political party which comes closest to our sense of where the country needs to go. Of course we can not realistically expect that any government will follow through completely: it wants to stay in power, so it must build some bridges to people who opposed it; it will never have enough resources, so it needs to set priorities and arrange compromises amongst its supporters; it may develop new analyses or confront new circumstances and have to change its policies; it may be unable to deal quickly with some problems because they are structural or others because they are totally beyond its powers. And we have to accept that — being composed of fallible people — some governments will simply disappoint us. If they do, however, at some point discontents will accumulate, new ideas and personalities will emerge, public opinion will shift, and a new government will be elected.

This rather boring, highly imperfect — some would say terminally ineffectual — process answers to the name of parliamentary democracy. Some people who are frustrated by it — and I am not one of them — favour radical solutions, all of them arguably democratic though not necessarily parliamentary. These solutions come down to an attempt to permanently change the rules of Canadian politics. Its advocates

hope that by some process — constitutional amendment, judicial intervention, restructuring of the social and economic fabric of the nation, privileging certain communities or values over others — it will be made impossible for people who hold opposing views to ever gain power, or if they do, to implement those views. This strategy of seeking to permanently change the rules of politics and fix forever the future course of government, I am going to refer to as the constitutionalization of politics.

## Constitutionalizing Neo-liberalism

The constitutionalization of politics enjoys considerable support on the left, from the so-called Court Party of equality-seeking groups, from progressive lawyers and law professors and from social democrats who only ten years ago promoted a Social Charter as part of the Charlottetown Accord. But these groups are pretty marginal today. Most of the people who want to make their ideas permanent, who want to forever preempt alternative visions, are neo-liberals. They have one primary goal: they want to drive a stake through the heart of the activist state; to "constitutionalize" neo-liberalism; to entrench low taxes, smaller government, unregulated markets and free trade with the United States; and to reallocate powers amongst the various branches and levels of government in such a way as to forever foreclose egalitarian, social democratic, centralizing, nationalist or other deviations. To reiterate an earlier point: little of this requires amendment to our Constitution Act; yet the intended result is meant to be chiselled in juridical stone. I will explain quickly, beginning with taxes, from which much else follows.

Canadians aspire to maintain social services, support our national cultures, and avoid American-style extremes of economic inequality — all of which cost money. However, Canadians have also been persuaded that they are overtaxed, and that our economy will suffer so long as we have higher corporate and personal tax rates than the United States. As a result, many provinces have adopted legislation forbidding governments to raise taxes or run deficits. In Ontario, my own province, new legislation provides that taxes cannot be increased, and new taxes cannot be introduced, without a referendum; if the government budgets for a deficit, cabinet members automatically forfeit a portion of their annual salary.[4] While perhaps not, in a formal sense, "constitutional," this legislation is for practical purposes unrepealable. This ensures that all decisions hereafter are zero-sum decisions. If the government needs to spend money, for example, to prevent another tragedy such as occurred in the small town of Walkerton, Ontario — where seven people died from drinking contaminated water and over 2000 became ill[5] — it must cut something else, say workplace safety inspections; if it wants to spend more on the homeless, it must cut culture or education. Worse yet, future Ontario governments with different views about public spending will be effectively denied the chance to reintroduce Keynesian policies of counter-cyclical public expenditure to stimulate the economy, to redistribute wealth through progressive taxation, to maintain or increase state-provided services, or to rebuild a public service with the energy and talent to conceive, design and administer welfare and regulatory strategies.

I want to stress that this is not a complaint about the fact that today's government happens to believe that the wisest policy is to lower taxes and deregulate the economy while yesterday's or tomorrow's government might prefer to increase state activities and expenditures and therefore to raise taxes. Such divergences are inevitable; they are of the essence in a democracy. My complaint is about the attempt by politicians of one persuasion to make it legally and practically impossible — to make it constitutionally impossible — for politicians of another persuasion to govern according to their view of what is necessary, right or feasible.

## Constitutionalizing Globalization

Second, I want to point out that increasingly in today's globalized world, our constitution is being revised as much by international treaties and relationships as it is by domestic law and politics. Both the WTO and NAFTA constrain Canadian governments from embarking on various forms of activism — say regulation of consumer markets, the environment, competition or cultural industries. Chapter 11 of NAFTA, for example, allows foreign corporations to seek compensation from a private arbitrator if they are adversely affected by regulatory legislation enacted by a Canadian government. Several U.S. corporations have already received compensation — including lost future profits — for environmental and health regulations imposed by Canada; and not only have they succeeded in specific cases, they have intimidated Canadian governments into settling several claims prior to

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4 *Taxpayer Protection Act, 1999*, S.O. 1999, c. 7, Sched. A; *Balanced Budget Act*, 1999, S.O. 1999, c. 7, Sched. B.

5 See Ontario, *Report of the Walkerton Inquiry: The Events of May 2000 and Related Issue* (Toronto: Queen's Printer for Ontario, 2002).

arbitration, and into abandoning controversial legislative projects. To restate the issue in formal, constitutional terms, NAFTA has introduced into Canadian jurisprudence a more virulent form of the American "takings" doctrine than prevails in its country of origin — though it benefits only foreign firms, not Canadian firms.

Other international developments also affect the legislative competence of Canada's Parliament. Our commitment to harmonize our intellectual property laws with those of our trading partners, especially the United States, forced us to repeal legislation which allowed us to produce cheap generic drugs. We may find ourselves unable to prevent the export of water or electrical power or the import of foreign cultural products and banking services because that would constitute discrimination against foreign firms. Our public health scheme might even be struck down as an illicit export subsidy or — if selected services are privatized — opened up more generally to foreign competition. Nor is the constitutional effect of globalization restricted to treaties like NAFTA . I want to briefly mention three other developments which have underscored the extent to which globalization — and continental economic integration — have altered our "real," if not our juridical, constitution.

The first is the process of what I call "globalization of the mind." "Right thinking people" in Canada and around the world, especially members of influential policy elites such as politicians, civil servants, academics and media people, have come to accept the premises of neo-liberalism as axiomatic, as needing no justification or explanation. The ideas that governments should be smaller, taxes lower, markets freer and states more open to trade and investment may not be quite as deeply ingrained amongst Canadian elites as amongst Americans. But it is a long time since these beliefs were challenged by anyone in public life who hoped to be taken seriously. They have become as much a part of our unwritten constitution as, say, the former belief that we have an obligation to share a little of our wealth with our fellow citizens so we can all enjoy reasonably equitable access to public goods and services.

Second, these beliefs became the guiding principles of our public policy not simply because they were espoused by influential and powerful Canadians, but because they were also held by bond dealers, currency traders and major investors in London, New York and Tokyo. If these people deem our welfare state too generous or our regulatory policies too aggressive, our dollar may decline even further, our stock markets may be trashed, our economy vandalized, our tax revenues diminished and our prosperity laid waste. I said these things "may" happen; but they may not. It doesn't really matter. What does matter is that governments are sensibly reluctant to find out. The stakes are just too high. So we now have a new analytic, a new set of values, a new constituency of interest — the global economy — with power to trump almost every other consideration in public policy debates. Whether we are talking about industrial policy, tax levels, public infrastructure or culture, we cannot ignore the reaction, or anticipated reaction, of global markets. In effect, globalization has made market-friendly policies a first principle of our constitution, which politicians violate at their peril.

And third, we have experienced a "hollowing out" of corporate Canada. Not only are many sectors of our economy dominated by foreign-owned multinationals; those same multinationals have been increasingly depriving their Canadian subsidiaries of autonomy, and transferring many of their key functions from regional head offices in Toronto or Calgary to global head offices in New York or Chicago. Nor are Canadian-owned firms immune from this trend. As more and more of them are bought up by foreign-based corporations, their local executive cadres are dismantled or reduced in authority. As a result, leading elements of the Canadian business community are disappearing or shrinking, thus endangering key groups connected to them on the food chain — law firms, consulting firms, advertising agencies, real estate companies, software designers, and all the people from whom they in turn buy goods and services or whom they support with their tax dollars and charitable contributions — like universities for example.

How does this affect our Constitution? Canada depends on a strong civil society, on strong business leadership, strong financial institutions, strong knowledge-based industries, strong professions, strong urban centres, strong charities and universities supported by private donations as well as public funds — all of which are put at risk by this process of hollowing out. In this way, the real constitution, the operational constitution, adapts to the changing reality brought on by globalization and continental integration.

My point is not to deny the inevitability — let me say even the great benefit — of Canada joining NAFTA or the WTO or of importing American capital, ideas and ideologies. I simply want to point out that these developments have brought about a root-and-branch transformation of Canada's political economy. That transformation — which has been going on for a long time — intensified from about 1980 to 1990, the very period when we were repatriating the Constitution, adopting the *Charter* and attempting to rewrite the terms of our federation at Meech Lake and Charlottetown. Like the changes in our formal

Constitution, the transformation accomplished by globalization involved legal changes — repeal of the old legal regimes which had regulated international trade and capital flows, and their replacement by new, liberalized arrangements. However, the new legal framework of the global economy was hammered out in international forums where governments more powerful than our own set the agenda and shaped the outcomes. Thus, although globalization changed our Constitution even more profoundly than anything we did to the *Constitution Act, 1982*, there were no federal–provincial negotiations, no public consultations, no referenda, no Supreme Court references. Once we decided to accede to the new global legal order, all that remained was for parliament to pass laws implementing these treaties and to repeal legislation which did not conform to them. But make no mistake: the transformations wrought by globalization were pervasive and seemingly permanent. They were in a profound sense "constitutional."

## CONSTITUTIONALIZING POPULISM

Canada has been experiencing a change in the discourse and deep structures of its political system. Populist movements — mostly of the right but occasionally of the left — have mobilized support for direct democracy which, they believe, would translate "the will of the people" promptly and without distortion into binding public policy. Consequently, they have disparaged representative governments, denied the legitimacy of both the courts and the executive, denigrated the views of professionals and public intellectuals, devalued the concept of public service, made the term "politician" a pejorative and in all these ways, removed activist government from our lexicon of plausible political choices. Ontario, for example, enacted its "Fewer Politicians Act" to great acclaim although, when combined with other legislation, its effect was first to shift power from local governments to the province, then to dilute access by citizens to their now-fewer provincial and municipal representatives, and finally to inscribe in legislative language the notion that reducing the number of "politicians" was comparable to the reducing the population of pests or predators.[6] Simultaneously, Ontario dismantled public consultative bodies which were thought to be dominated by "special interests" such as women, labour and visible minorities and closed down "ivory-tower" agencies such as the Law Reform Commission. Finally, populists in and out of government right across the country favour referenda and recall elections to keep elected representatives on a short leash; they favour electoral laws which ensure a greater role for single-issue organizations in the political process; they favour constitutional amendments which permanently privilege rural voters and discount the power of metropolitan voters. In all this, populists have been aided and abetted — not to say incited — by powerful financial interests, rapidly consolidating media empires, and influential local elites, as well as by people of principle who are genuinely concerned about the alienation of ordinary citizens from the theory and practice of parliamentary government.

Ironically, populist mistrust of governments has been acknowledged and legitimized by both the courts and the legislature. Judicial decisions have overturned government action, held governments liable in damages for neglect or wrongdoing in the discharge of their functions, and imposed new procedural requirements on government agencies. And legislators at both the provincial and federal levels have proffered hostages to fortune in the form of new laws, policies and practices designed to create the appearance, if not the reality, of greater government accountability, transparency and responsiveness.

In short, we are gradually internalizing and institutionalizing, and thus constitutionalizing, populist attitudes and values. This may be a good thing or a bad one. But it is clear that the success of populism will reduce the influence of sophisticated ideas and expert analysis on policy formation, will undermine the parliamentary party system which advocates and propagates activist public policies, will deflate the willingness and capacity of ministers and members to rally support for such policies, and will diminish respect for the public service whose professionalism once earned it considerable trust. In other words, though perhaps an unintended consequence, to the extent that populism succeeds, it will construct constitutional barriers to the activist state.

All of this may be sweet music to people who believe that activist government deserves its fate, that it has left us legacies of debt and dependency which did considerable harm to Canada and Canadians. Maybe so, maybe not. My concern is that sometime in the future we may want more from the state than we think we want now. But we will not be able to get more. If populism becomes the way we think about government and politics, if populist ideas are entrenched in laws and institutions, if populist values are constitutionalized, we would not have the kind of state that can deliver what may someday be expected of it.

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6 *Representation Act, 1996*, S.O. 1996, c. 28.

## CONSTITUTIONALIZING A WEAK CENTRAL GOVERNMENT

Fourth, there are strong decentralizing tendencies at work in the Canadian federation. A visitor from Mars or Moscow or east-end Montreal might think that the Constitution Acts give ultimate power to the federal government, but in practice things have turned out quite differently. The federal government's residual power over peace order and good government, like its jurisdiction over foreign affairs, trade, commerce and interprovincial undertakings, was emasculated early on by the conservative judges of the Privy Council. As a result, the federal government was unable to protect workers' rights, consumer interests or the environment. During the two world wars, and for some time after 1945, the federal government was able to use its powers to tax and spend in order to entice or coerce the provinces into cooperating in national social welfare schemes, public enterprises and regulatory programs. However, over the past twenty years, federal power has again shrivelled. Fear of secession has made the federal government wary of challenging Quebec's expansive use of its powers in the areas of education, immigration and foreign relations; other provincial governments refuse to collaborate in national strategies — such as implementation of the Kyoto Accord — which they deem to be hostile to their own interests; regionally-based populist parties ridicule Ottawa as remote and unresponsive; and the populist tax revolt has forced the federal government to reduce or abandon the shared cost programs which gave it the financial leverage with which to shape national social policies and economic strategies.

But the federal government is the only government that could conceivably stand up for Canada's interests as the nations of the world negotiate the rules of the global economy. It alone has any prospect of regulating transnational corporations and capital flows. It alone might be able to orchestrate the development of Canada's human, natural and capital resources to create the strongest possible economy. And it alone could animate social or cultural policies which would bind Canadians together. However, the federal government lacks the legal power, political will or financial clout to really do any of these things. As a consequence of this power vacuum at the centre of our federation, there is essentially no Canadian government today which can manage the issues thrown up by neo-liberalism and free trade, much less take us in a different direction if we decide that is where we want to go. In this sense decentralization is helping to cast in stone — to constitutionalize — a number of neo-liberal policies whose shelf life might expire some time within the next election or two.

## CONSTITUTIONALIZING JUDICIAL POWER AND INFLUENCE

Fifth, a word about the juridification of our public life. From the inception of our federation, courts refereed disputes between the national and provincial governments, often favouring the provinces. From at least the 1920s and 1930s, right down to the 1970s, our judiciary was active — perhaps hyper-active — in reviewing administrative action, generally favouring individuals and corporations, rather than the state, unions or the environment. To say the least, these decisions were not regarded as brilliant by most academic experts and many political observers. But this judicial activism did not matter too much: determined governments found ways around court rulings, and generally got on with their programs. In 1982, however, we adopted a constitutional *Charter of Rights and Freedoms* which had several important effects.

First, it tempted marginalised groups such as women, aboriginal peoples and the disabled to seek magical, rights-based solutions, and thereby diverted their scarce resources and energies into litigation strategies and out of direct social action and progressive coalition politics. Alas, they gained little as a result. Judges, it turns out, cannot reconstruct cultures, reallocate public resources or pry the hands of rich people off the levers of power. Second, the *Charter* to some extent diverted public expenditure from social programs to legal services, institutions and processes, and prompted a shift from informal to adversarial procedures in many contexts. This has been a boon for lawyers, but costly for public bureaucracies, civil society actors and relationships between them. And third, the *Charter* has converted corporations into empowered citizens, who can finance endless litigation thus enabling them to dominate the electoral process, poison people with tobacco and frustrate whatever regulatory impulses still survive in government. This new juridified paradigm of social relations and politics in Canada has also weakened the activist state and strengthened neo-liberalism.

To sum up, but not quite to conclude: Canada's constitution is changing quite dramatically. However, except for the *Charter*, it has not been formally amended. The changes have resulted primarily from treaties, legislation, and judicial interventions, and especially from the restructuring of our economy, and the reconfiguration of our political discourse, processes and culture. Under this latest version of our constitution, the Canadian state is no longer active but passive, no longer powerful but weak, no longer centralized but devolved, no longer responsive to domestic policy preferences but to global market forces

and ideologies, no longer governed by parliamentary politics and the civil service but increasingly by populist impulses and legal proceedings. These new attributes of the Canadian state are said to be essential for our national interest and uniquely congenial to our national character. That is why they are "constitutional": they have become normative bedrock; they are long-lasting, they find their way into legislation and judicial interpretations; they become embedded in invented traditions and imagined conventions; they fundamentally shape the way we think about things as lawyers and citizens; and they are as difficult to change as any provision of the *Constitution Act*[7] itself.

Whether as a cause or a consequence of juridification, lawyers and judges are starting to talk differently about the constitution than they used to. In particular, we are hearing a lot these days about the "unwritten constitution." Counsel have argued, and judges have agreed in cases like the Patriation Reference[8] and the Secession Reference,[9] that "the unwritten constitution" allows courts to make authoritative — but not legally binding — pronouncements about highly controversial political issues. The Supreme Court addressed these issues not, for the most part, by applying the law of the constitution, but by "finding" long-lost constitutional practices or conventions, rewriting Canadian and British history, proclaiming a consensus about the rule of law, democracy and pluralism, piggy-backing on international law and custom, and responding to the felt necessities of our time. Likewise, in interpreting the written constitution, the Court in cases like *Egan*[10] and *Vriend*[11] used some unusual techniques — notably, extending *Charter* protection to groups "analogous" to those named — to make a different kind of political decision. I applaud the outcome of all these cases. But I disagree strongly with the Court's methodology because it opens the door to more juridification, more frequent and sweeping challenges to parliamentary politics, and more intrusive review by judges of executive action on the basis of ideology disguised as history, self-evident truth or fundamental principle.

Is it possible to mount a legal challenge to juridification on the grounds that courts are exceeding their mandate and making political decisions for which they have no special competence or authority? Such a challenge is unlikely to be successful. Courts have a way of pulling themselves up by their jurisdictional bootstraps Ask a judge, for example, where courts get the power to issue labour injunctions or to review the decisions of administrative tribunals. "Simple," the judge will say: "we have inherent jurisdiction." This is something of a conversation stopper since there is no way to challenge that statement, except by appealing to another judge who will tell you the same thing. This does make things a bit awkward sometimes, as when courts tell us that the exercise of inherent jurisdiction can neither be precluded by Parliament[12] nor held to *Charter* standards.[13] But let that pass. Let pass too the somewhat unseemly spectacle of judges claiming that as the human embodiment of "the rule of law" they have the right to prescribe the procedures for setting their own salaries[14] or — on their own motion — to hold in contempt people lawfully picketing their courthouse.[15] The point I want to make is that concepts such as "inherent jurisdiction" or "unwritten constitution" hint that like myself, judges may be — to some extent and with great respect — constitutional donkeys. They too are not quite certain what the constitution is, and they too conceal their uncertainty in vague, emotive language which enables them to reach political conclusions.

However, I do not want to be too hard on judges. After all, some clever lawyer made them do it. But I do want to be a bit hard, just for a moment, on the cleverest, the most loveable, lawyers of them all — those who teach in law schools. They too — we too — are guilty of some serious heresies which have helped to shape Canada's new constitution. Until fairly recently, they — we — accepted that law was made by the legislature, interpreted by the courts and enforced by the executive. Lately, however, we have been revising our map of the legal system. My own heresy is called "legal pluralism," a socio-legal theory which holds that the state has no monopoly on law-making, that law emerges from all social and economic contexts — from universities, workplaces, families and business networks. Another, somewhat similar heresy, is embraced by law professors who advocate a new constitutional status for first nations and a recognition of their traditional rights and legal processes. A third, with quite different roots, is the law and economics movement, which argues that markets generate their own legal and political logic. These are quite different theories, but they have this in common: all of them envisage systems of law which do not originate in or

7 *Constitution Act, 1982*, ss. 38–49, being Schedule B to the *Canada Act 1982* (U.K.), c. 11.

8 *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

9 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

10 [1995] 2 S.C.R. 513.

11 [1998] 1 S.C.R. 493.

12 *Crevier v. Quebec (A. G.)*, [1981] 2 S.C.R. 220.

13 *R.W.D.S.U. v. Dolphin Delivery*, [1986] 2 S.C.R. 573.

14 *Reference re Remuneration of Judges of the Provincial Court*, [1997] 3 S.C.R. 3.

15 *British Columbia Government Employees' Union v. British Colu mbia*, [1988] 2 S.C.R. 214.

derive from the Canadian state. In that sense, they are all pretty radical constitutional heresies.

Of course, you might say that law without the state is a typical academic flight of fancy, and does not deserve further consideration. Would that it were so. But life these days has an odd way of imitating art, and we are in fact making great strides in detaching law from the state Today there are more private police in Canada than public police; prisons are being privatized; voluntary corporate codes of conduct are replacing statutes; public enforcement of environmental and labour standards is giving way to self-regulation or being contracted out to the private sector; arbitration and other forms of private dispute resolution account for a growing share of litigious business. In other words, legislation, public security, law enforcement and the administration of justice — the original and, as we once imagined, the core functions of the state — are no longer constitutionally sacrosanct.

All of this, I want to say, has potentially huge implications for a lawyer's understanding of the constitution. What is law, and what is the rule of law, now that the state no longer claims a monopoly over making, administering and enforcing it? On what grounds might a court claim jurisdiction over, say, discipline in a private prison? What liability does government have for the acts or omissions of private agents which have assumed its previous functions? Our legal vocabulary, I think, is starting to adjust to this new constitutional reality. For example, we seem to be using the word "governance" more and more, and the word "government" less and less. "Government," we might say, is the process by which states exercise the power they are given by their constitutions. By contrast "governance" is a more generic process which encompasses the ways in which private as well as public organizations direct their affairs: hence "university governance" or "corporate governance" or "governance of the global economy." We use the word governance in order to focus on how things get done, with no special importance being attached to who or what is doing them. Like conceptions of law without the state, "governance" conjures up a new constitutional order in which the state is no longer regarded as the ultimate source of power and legitimacy in our society, in which government is no longer the indispensable instrument of our collective ambitions and the guarantor of social justice. In such a constitutional order, it follows that government is merely one supplier amongst many of public goods and public services, and that its performance must be judged by the same bottom line standards as competing providers such as corporations or markets.

This new constitutional order has not escaped the notice of lawyers who are suing governments more often and more successfully for acts or omissions that were once considered acts of state or political questions beyond the purview of the courts. Such litigation, in turn, changes public perceptions and expectations of the state, and reinforces underlying disaffection with the state. As a law professor, I know that it is easy to overestimate the capacity of myself, my colleagues, my students and the few readers of my articles to rewrite the constitution. And in this case, frankly, I would be happy to learn that I made no contribution whatsoever. Nonetheless, I do mutter the odd *mea culpa* now and again.

## CONCLUSION: THE DONKEY'S PERSPECTIVE REVISITED

I have argued that neo-liberalism, globalization, populism, decentralization and juridification are transforming Canada's political economy, and reshaping its constitution. But I must confess that I have neither asked nor answered what is arguably the most important question of all: what does it really mean to say that our constitution has been reshaped, that some new constitutional assumption, value or process has been chiselled in stone? If I had to answer that question, to be honest, I am not sure how I would. Remember: I am a constitutional donkey. I do not know whether constitutions are a cause or an effect of fundamental change, or neither of the above. I do not know whether we think their provisions are chiselled in normative bedrock because constitutions actually do make the state the way it is — or whether they are just categorical statements about how we want things to be or believe them to be. On the contrary — I sometimes ask myself — is it possible that constitutions in the full, extended sense of the term are in fact not so fundamental or long lasting after all, that they are always being re-imagined, always being rewritten? To a donkey like me, this last is a very intriguing prospect.

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