

Constituent Assemblies: A Comparative Survey

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FOREWORD

Many Canadians have been talking about a constituent assembly as a means to reform our constitution. Several prominent Canadian political leaders and academic commentators have endorsed the idea, and there is strong support for the concept among the general public, according to recent opinion polls. At the same time, most established political leaders and several analysts have been highly sceptical of the idea. When one gets beneath the surface of this issue, it is apparent that there is little consensus on what "constituent assembly" means; and a number of significant issues would have to be addressed if such an institution were to have a role in the process of constitutional reform.

In order to provide a more informed basis for discussion on this issue, the Institute of Intergovernmental Relations undertook in the spring of 1991 to study the practice of constituent assemblies in historical and comparative perspective. The study focused on the use of constituent assemblies, constitutional conventions, task forces and similar special institutions and processes created in other federal countries in order to establish a constitution or to amend one. The study also examined the process in countries that were not then federal, but whose practice has specific relevance to the current debate such as Spain, Newfoundland, and Namibia.

This publication neither endorses nor condemns the idea of a constituent assembly for Canada. It does draw out from the comparative experience the types of conditions that have made such processes successful elsewhere, and poses some difficult questions which need to be addressed if a constituent assembly or similar body is to be effective in the Canadian context.

The first results of this study, commissioned by the Federal-Provincial Relations Office of the Government of Canada, were released to the public in June 1991, so that they might be of some use to the current debate, in particular the deliberations of the Special Joint Committee of the Senate and the House of Commons on the Process for Amending the Constitution of Canada. This version of the study has the benefit of the comments of two external reviewers, and has been revised to place the basic comparative material within a broader context of democratic theory and the current Canadian debate.

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*Douglas M. Brown
Acting Director
November 1991*

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This manuscript is based on a report originally prepared for the Federal-Provincial Relations Office of the Government of Canada. We gratefully acknowledge the support from the federal government for the original research.

Closer to home, we would like to thank Professor Ronald Watts, Director of the Institute of Intergovernmental Relations and currently on leave, serving with the Federal-Provincial Relations Office in Ottawa. Professor Watts provided a great deal of guidance in the preparation of the original study. We would also like to thank Douglas M. Brown, the Acting Director of the Institute of Intergovernmental Relations. He carefully reviewed the entire text and effectively wrote much of the conclusion. Finally, we would like to thank Dwight Herperger, Patti Candido, and especially Ualerie Jarus, for their assistance and encouragement.

Patrick Fafard and Darrel R. Reid

SOMMAIRE

L'échec de l'Accord du lac Meech aura remis en question la légitimité du fédéralisme exécutif comme processus pour négocier des modifications constitutionnelles majeures au Canada. L'après-Meech a vu moult mécanismes alternatifs être proposés dont notamment le recours plus fréquent aux audiences publiques, la tenue de référendums et la création d'assemblées constituantes. Cette monographie aborde de façon spécifique ce dernier modèle participatif dans une perspective comparative.

Si la formule de l'assemblée constituante n'a jamais été réellement mise en pratique au Canada, il en fut tout autrement dans d'autres pays tels les Etats-Unis, l'Australie, l'Allemagne, la Suisse, l'Inde, le Pakistan, la Malaisie, les Antilles, le Nicaragua et la Namibie. Cette étude propose un survol historique du modèle d'assemblée constituante — vue comme instrument de modification constitutionnelle — et examine l'application qui a été faite de ce type de forum dans nombre d'Etats. Ces expériences sont ensuite soigneusement analysées, dans une optique comparative, sous différents angles: l'origine et les antécédents des assemblées constituantes, les structures et le mandat, les modalités d'opération, les résultats obtenus et, sur un plan plus général, le contexte qui a marqué le déroulement de ces assemblées constituantes. Finalement, les auteurs de la recherche tirent les conséquences des cas ci-hauts au regard de la situation canadienne.

Cette étude suggère que les assemblées constituantes ou conventions constitutionnelles obtiennent généralement un succès maximal en deux types de circonstances historiques : 1) juste après une rupture significative avec le passé comme à l'occasion d'une révolution, d'une guerre civile ou d'un bouleversement traumatisant de cette même nature; 2) ou lorsque de nouveaux Etats — soit d'anciennes colonies ou des Etats indépendants — décident de s'unir pour former une fédération ou encore une confédération. En revanche, l'assemblée constituante produit des résultats beaucoup moins probants lorsque la tentative de modification constitutionnelle a lieu dans des pays dotés déjà d'une constitution et fondés sur des institutions démocratiques. A la lumière des expériences tentées à l'étranger, cette étude soutient qu'une assemblée constituante version canadienne serait assujettie aux mêmes pressions partisans qui, en définitive, ont compromis la réussite de telles assemblée ailleurs. Au surplus, les auteurs traitent de plusieurs questions cruciales ayant trait au mandat, à la

ABSTRACT

With the collapse of the Meech Lake Accord has come a fundamental challenge to the legitimacy of executive federalism as a forum for negotiating major constitutional amendments in Canada. In the post-Meech period a number of alternatives to this process have been suggested including more extensive public hearings, the use of referenda and the establishment of constituent assemblies. This paper focuses on the last of these in comparative perspective.

Although in the full sense never used in Canada, constituent assemblies have been used in a number of other countries, including the United States, Australia, Germany, Switzerland, India, Pakistan, Malaysia, the West Indies, Nicaragua and Namibia. This paper provides an overview of the nature and significance of constituent assemblies for constitutional change and examines the experiences of other countries that have used this approach to constitution-making. These cases are then compared in detail through a set of specific characteristics such as the background and origin of constituent assemblies, their structures and mandate, operating procedures, results and the broader contextual factors in which these assemblies have operated. The implications of this broader experience are then drawn for the Canadian case.

This study of the comparative experience of other countries suggests that constituent assemblies or constitutional conventions have been most successful in two sorts of historical circumstances: in the aftermath of a significant break with the past such as a revolution, civil war or traumatic disruption of this sort; or when new states — whether former colonies or independent states — come together to form federations or confederations. As a means of constitutional change in countries with an existing constitution and established democratic institutions, however, constituent assemblies have proven much less successful. In light of the experiences of other countries, this study suggests that a constituent assembly in Canada would be subject to the same partisan stresses that have diminished the success of such assemblies elsewhere. It then puts forward a number of critical questions related to mandate, representation, delegate selection, and the role of political parties and decision-making that would have to be addressed in the design of any constitutional constituent assembly in Canada.

CONSTITUENT ASSEMBLIES: A COMPARATIVE SURVEY

INTRODUCTION

With the collapse of the Meech Lake Accord has come a fundamental challenge to the legitimacy of executive federalism as a forum for negotiating major constitutional amendments. Many have expressed concerns about a constitutional amendment procedure that relies so heavily on prior private negotiations between the prime minister and the provincial premiers before subsequent ratification by Parliament and the provincial legislatures. In recent months, a number of alternatives have been suggested including more extensive public hearings, the use of referenda and the establishment of a constituent assembly.¹ This paper focuses on the last of these in a comparative perspective.

Although in the full sense never previously used in Canada, constituent assemblies and constitutional conventions have been convened in many other countries to write a new constitution or, more rarely, to amend an existing constitution. This paper compares and contrasts the many examples of constituent assemblies or constitutional conventions in the following countries — United States, Australia, Germany, Switzerland, India, Pakistan, Malaysia, the West Indies, Nicaragua, and Namibia. The second section is an overview of the nature and significance of constituent assemblies and constitutional conventions. The third section briefly outlines the experience of other countries with this approach to constitution-making. The fourth section offers a detailed comparison of the cases based on a set of specific criteria relating to the background and origins of constituent assemblies, their structure and mandate, operating procedures, results and the broader contextual factors in which the assemblies have operated. The fifth section is a discussion of some of the implications for Canada to be derived from the experience of other countries with constituent assemblies and constitutional conventions.

THE CURRENT CANADIAN DEBATE

Although the idea of a constituent assembly is not new to the constitution-making process in Canada, since the demise of the Meech Lake Accord in June 1990, the concept has leapt into prominence on the public agenda.² Since that

time, some form of assembly has been advocated by interest groups, media pundits, academics and members of the general public. A *Toronto Star*/Southam poll taken in June 1991 found that almost two-thirds of Canadians both inside and outside Quebec believe that a constituent assembly could help chart a constitutional course for Canada.³ Not surprisingly, such popular sentiment has found an expression in political circles as well, with calls for some form of constituent assembly coming from across the political spectrum. For example, premiers Clyde Wells of Newfoundland, Frank McKenna of New Brunswick, and Bob Rae of Ontario, have all expressed support for a constituent assembly. In Parliament, the New Democratic Party has also called for a constituent assembly.

For all the intensity with which a constituent assembly is advocated, however, most often these calls have remained largely vague and undetailed. This has led some commentators to suggest that calls for a constituent assembly are, at bottom, more an expression of Canadians' deep dissatisfaction with the constitutional status quo than anything else. According to pollster Angus Reid, "People are grabbing at this idea [of a constituent assembly] as a kind of life raft. Because of their massive distrust of politicians, the idea of involving some non-politicians in the process appeals to people."⁴ This inchoate longing for more representative institutions has been echoed by the chairman of the Citizens' Forum on Canada's Future, Keith Spicer:

On constitutional reform, I would urge the government to reconsider its dismissal of some kind of constituent assembly, or similar process allowing citizens to feel directly involved in constitution-making. Many Canadians, especially outside Quebec, have questions about key aspects of this assembly approach, yet find it attractive. So do I, believing it might at least refine the principles for a new constitution before final drafting. And it might give that fundamental law more credibility than today's wounded political system could.⁵

Beyond such general concerns, however, several preliminary models have been advanced for the formation of a constituent assembly. One of the earlier calls for such a body was by Newfoundland Premier Clyde Wells,⁶ who sees a constituent assembly as a means of arriving at a national consensus when there are major constitutional issues outstanding and no clear consensus among governments and regions on how to approach them. The function of such a Constitutional Convention, as he calls it, would be to develop proposals or to achieve a compromise that can subsequently be submitted for approval either to the legislatures or to the people directly in a referendum. While any proposals emerging from such a convention would remain subject to the amending procedures specified in the *Constitution Act, 1982*, Wells sees a national referendum as a means of discovering whether such proposals met an acceptable level of approval across the country.

According to the Wells proposal, a Constitutional Convention should be comprised of not less than 100 and not more than 200 members; of these, at least half should be directly-elected by the public. Of this group, half would be selected in equal numbers from each province and the other half on the basis of a proportional representation formula which would allow, for example, one delegate from Prince Edward Island and eighteen from Ontario. The remainder of the assembly would consist of appointees of the federal and provincial governments who, in the formation of their delegations, would pay particular attention to ensuring adequate representation for aboriginal peoples.

University of Toronto political science professor Peter Russell has proposed a model for a constituent assembly composed of delegations from or appointed by the legislatures of the provinces and the Parliament of Canada.⁷ In contrast to the Wells model, Russell recommends that decisions as to the size, selection and composition of delegations be left strictly to the federal and provincial legislatures, which would decide such matters as the proportion of legislators to non-elected delegates, and which interest groups would be represented. At such an assembly, constitutional issues would be decided not by individual votes but by that of each delegation as a whole. In this process, delegations would strive to achieve as near unanimity as possible.

The attraction for Russell of such a model is that this assembly should closely mirror the composition of the provinces and would include representation from all political groups. In this way, even though all resolutions of the assembly would still be subject to Canada's constitutional amendment procedures, Russell suggests that resolutions arrived at by such a representative grouping would more easily gather the support of the provincial and federal legislatures in the subsequent ratification stage.

Such a constituent assembly would take place in either one or two stages, depending upon whether or not Quebec chose to participate in a first round with the rest-of-Canada. Should Quebec be unwilling to do so, delegations from the rest-of-Canada would meet to formulate proposals for the Quebec delegation to address in a subsequent round.

A third proposal has been put forward by Willard Estey, a former justice of the Supreme Court, and Peter Nicholson. Estey is particularly concerned to avoid the perception that constitutional change is dominated by politicians and interest groups, and that the general public is not consulted on matters of constitutional change.⁸ Estey's approach is to form a constituent assembly composed of 250-300 delegates from all parts of the country. According to this plan every legislator — federal, provincial and territorial — would nominate three names to a pool from which constituent assembly members would be chosen. The requisite number would be selected by computer, with the draw structured around "provincial allocations" designed to strike a balance between population size and the traditional practice of giving smaller provinces

somewhat greater representation. There would be a separate pool for aboriginal peoples.

Estey proposes that draft constitutional changes produced by the assembly would then be submitted to a national referendum for a "Yes" or "No" vote by all Canadians. In those provinces returning a substantial "Yes" vote it would be incumbent upon the legislatures immediately to pass the required constitutional resolutions. At this stage the constitutional amending formula would come into effect; in most cases such proposals would require the approval of at least 7 provinces comprising more than 50 percent of the population. If this level of agreement is reached these changes would then be ratified by the federal Parliament and become law.

In December 1990 the federal government announced the first part of its post-Meech response to Canada's constitutional situation by creating a Special Joint Committee of the Senate and the House of Commons — known as the Beaudoin-Edwards Committee — to examine Canada's constitutional options. Its mandate was to:

consult broadly with Canadians and inquire into and report upon the process for amending the Constitution of Canada, including, where appropriate, proposals for amending one or more of the amending formulae, with particular reference to: (1) the role of the Canadian public in the process; (2) the effectiveness of the existing process and formulae for securing constitutional amendments; and (3) alternatives to the current process and formulae, including those set out in the discussion paper prepared by the Government of Canada entitled "Amending the Constitution of Canada."⁹

Accordingly, the Committee held hearings through late May and early June 1991. Of the more than 500 briefs presented to the Committee, more than 150 advocated some form of constituent assembly.

In its report, the Beaudoin-Edwards Committee rejected the concept of a constituent assembly, calling instead for the creation of a new parliamentary committee that would both consult with specially-created sub-groups charged with examining areas of particular constitutional concern, and hold joint hearings with committees struck for the same purpose by the provincial and territorial legislatures. The Committee rejected a constituent assembly primarily for two reasons: first, the Committee was not convinced that any attempts to bring together a "representative" body of Canadians would be any more effective than the current legislative system; and second, it rejected the idea that such a body would be any less politically partisan. The Committee's conclusion was that "an elected assembly would not be an improvement on existing elected bodies. It would either turn out to be indistinguishable from them, and thus an unneeded expense, or less able to reconcile commitments to principle with the delicate art of consensus-building."¹⁰

The intention of this paper is to provide a comparative component to this Canadian debate. Thus, this paper examines the experience of other countries with constituent assemblies and similar bodies.

SITUATING CONSTITUENT ASSEMBLIES AND CONSTITUTIONAL CONVENTIONS

Before embarking on a comparison of the many examples of constitutional conventions, it is important to try and situate this approach to constitution-making in a broader context. This section: 1) seeks to distinguish between directly-elected constituent assemblies, indirectly-elected constituent assemblies or constitutional conventions, constitutional conferences, and commissions; 2) briefly compares constituent assemblies and constitutional conventions to other processes for constitutional drafting and amendment; 3) offers some preliminary observations about the general rationale for the use of constituent assemblies and constitutional conventions; and 4) offers some general observations on constituent assemblies and federal and democratic theory.

DEFINITIONS

In the literature extant on the subject, the terms "constituent assembly" and "constitutional convention" are often used loosely and interchangeably. Occasionally these terms are even used to denote what are essentially appointed commissions. For the purposes of this paper, we will seek to distinguish between constituent assemblies, constitutional conventions, constitutional conferences and commissions by examining the way in which the members are selected.

The term *directly-elected constituent assembly* will be used to refer to the process where delegates are elected by the population at large with the primary purpose of drafting a new constitution. Directly elected constituent assemblies have in practice been relatively uncommon. One of the most recent examples of this kind of participatory constitution-making has been in Namibia where a directly-elected constituent assembly met from November 1989 to February 1990 to draft a new constitution. Another example was the constituent assembly elected in Nicaragua in 1984, and the Newfoundland National Convention elected in June 1946. Although not elected as a constituent assembly, the main task of the Spanish parliament elected in 1977 was to draft a new constitution for Spain.

A second form is the *indirectly-elected constituent assembly* established for the purpose of preparing a new constitution or revising an existing one. This form in which the members are elected by state or provincial legislatures has

in fact been more common. Sometimes they have been formally labelled as "constituent assemblies" as in India (1946-49) and Pakistan (1947-56) and sometimes as constitutional conventions, as in the United States (1787) and Australia (1891, 1897-98, 1973-85). In the case of Germany, a similar body called the "Parliamentary Council" was established in 1948 and consisted of delegates elected by the legislatures of the Länder. We shall use the terms "indirectly-elected constituent assembly" and "constitutional convention" interchangeably to refer to such examples.

A third form is the *constitutional conference*. These bodies have usually consisted of delegations from the existing national government (if there is one) and the constituent units and have also included in that representation the leaders of the major political parties. While in many respects similar to indirectly-elected constituent assemblies or constitutional conventions, constitutional conferences have been less formal in their selection and organization. This pattern has been mainly employed in colonial situations prior to independence where such conferences have been held (often under the aegis of the imperial government) prior to the promulgation of a new constitution by the imperial government. Examples are Canada (1864-66), Malaya (1948), Malaysia uniting an independent Malaya with the British colonies of Singapore, Sabah and Sarawak (1963), Nigeria (1953, 1954, 1957 and 1958), the West Indies (1947-57), and Rhodesia and Nyasaland (1951-53).

A fourth form is the *representative legislative committee*. The prime example of this was the committee of the Diet of the Swiss Confederation which drafted the new federal constitution of 1848 following the civil war of 1847. The Diet elected a committee of 23 of its members, most of whom, because of the confederal nature of the Diet itself, were also chiefs of their cantonal governments. In operation, as a body composed of cantonal leaders, it operated very much like an indirectly-elected constituent assembly or constitutional convention and, therefore, will be included in our analysis.

A fifth form is the *constitutional commission*. These have usually consisted of public figures or experts appointed to study constitutional matters, to canvas public opinion, or to draft a constitution or amendments to a constitution. In Canada the Task Force on Canadian Unity (Pepin-Robarts, 1977-79) and more recently, the Spicer Forum would fall into this broad category. Examples from elsewhere would be the Wahlen Task Force (appointed in 1965) and the Feurgler Commission (appointed in 1974) in Switzerland, the Troeger (reported in 1966) and Enquête (reported in 1976) Commissions in Germany, and the Australian Constitutional Commission (1985-88). Commissions were also used extensively to supplement constitutional conferences during the creation of colonial federations in Malaya, Nigeria, the West Indies, and Rhodesia and Nyasaland.¹¹ Because constitutional commissions have sometimes been used as a substitute for constituent assemblies we will include references to them in our analysis.

ALTERNATIVE ROUTES TO CONSTITUTIONAL CHANGE

The identification of alternative routes to constitutional change must begin by distinguishing four basic stages: 1) the pre-negotiation period of public discussion and formulation of proposals; 2) the negotiation of agreed basic principles and a framework to be embodied in the new constitution or constitutional amendment; 3) the negotiation of the legal text for the proposed new constitution or constitutional amendment; and 4) the ratification of the new constitution or constitutional amendment.

These various stages may each involve different bodies and different processes. Sometimes several or all of the stages may be telescoped together and performed by the same body. In other cases they may be performed by others. The pre-negotiation discussion may take place through the operation of commissions of enquiry and/or legislative debates; the early deliberations in a constituent assembly, or as in the case of Switzerland, through the processes of the popular initiative. The negotiation of the basic framework for a new constitution or proposed amendment may be worked out by intergovernmental executive diplomacy (as was the case at Meech Lake on 30 April 1987, for example), by a process of parliamentary debate following the introduction of a proposed amendment (as, for instance, in the normal procedures for constitutional amendment in the United States, Switzerland, Australia, Germany and India), or by a constituent assembly. The further stage of working out the legal text for a new constitution or amendment may occur in one or other of these bodies, or be delegated to an expert drafting commission appointed to provide a legal text. Ratification may take place through enactment in the national legislature (sometimes by a special majority) coupled with assent by a required number of provincial legislatures (the normal ratification process in Canada, the United States, Germany and India); by referendum usually requiring not only a national majority but majorities in at least a majority of provinces (e.g., Switzerland and Australia initially and in subsequent normal constitutional amendments); or by simple enactment by a constituent assembly (e.g., enactment of new constitutions by the constituent assemblies of India, Pakistan, Nicaragua and Namibia). The use of different bodies or processes at each of the stages may be linked to a particular set of political objectives and reflect the balance of prevailing constitutional, historical, political and social conditions.

This paper focuses on the role of constituent assemblies and similar bodies and, therefore, will not deal with other approaches. In limiting our attention to constituent assemblies (and similar bodies such as constitutional conventions and constitutional conferences), it is important to keep in mind, however, that a constituent assembly may be used to deal with all four stages referred to above, or may be used only for one or more with other approaches being used for the rest. To take just one example, it would be possible for a constituent assembly to formulate the principles of a new constitution with legal details

being left to be worked out by another body (executive diplomacy, legislatures or an expert drafting commission) followed by ratification by existing legislatures or a referendum.

RATIONALES FOR CONSTITUENT ASSEMBLIES

Where constituent assemblies, constitutional conventions or similar bodies have been established, their role has usually been to draft a wholly new constitution. Most often this has occurred after a revolutionary change of some kind. Such bodies have also been established in a number of cases where the prospect of independence from colonial rule has required the preparation of a new constitution. In some cases, a serious deterioration in the operation of an existing constitution has led to the creation of a constituent assembly (or constitutional convention) with the task of drafting a totally new constitution.

Where partial amendments to an existing constitution are envisaged, the use of a constituent assembly (or constitutional convention) has been relatively rare and, one might add, relatively unsuccessful. Only in the United States does the constitution itself (Article V) expressly provide for national and state constitutional conventions as one of the possible routes to constitutional amendment.

The circumstances in which constituent assemblies, constitutional conferences or similar bodies have been established is considered more fully in relation to specific examples in the section below. However, before turning to the case studies it is useful to consider the linkage between the use of constituent assemblies and constitutional conventions and what one might call the "democratic impulse."

CONSTITUENT ASSEMBLIES AND DEMOCRATIC THEORY

Generally speaking, Canadians have not worried too much about the democratic nature of the country. Until recently there has been a strong consensus as to the nature of democratic politics in Canada. As Donald Smiley has argued, for most Canadians democracy was synonymous with representative democracy "unmixed with popular elements." According to this view, "those whose credentials derive from popular elections have the unfettered power ... to make any and all choices for the political community."¹² However, the legitimacy of the contemporary Canadian variant of representative democracy has been increasingly challenged in recent years.

Consider the actions of environmental and peace movements, third-party advertising during election campaigns, and the mobilization of large numbers of people in support of, or in opposition to, government policies with respect to abortion, free trade and constitutional reform. These are all indications that deference to elected officials is in decline. Indeed, Alan Cairns has argued that, in the constitutional realm, much of this activism can be attributed to the effects

of the Charter which has mobilized women, aboriginals and "third force" Canadians who see themselves in the constitution and demand that they be part of the process.¹³

However, the roots of the "democratic impulse" may go much deeper. In the last 30 years, citizens have increasingly mobilized outside the traditional structures of the political system. This has given rise to arguments about the decline of political parties, the rise of special interest groups and, in the view of some, a "crisis of governance." In response to these trends, political theorists have begun to examine the possibilities for "participatory democracy." There is a large literature on this subject, some of which points to the theoretical and practical difficulties associated with forms of direct democracy.¹⁴ These debates need not detain us here. However, it is perhaps useful to consider the possibility that, although this study focuses on the past experience of various countries with constitutional conventions and constituent assemblies, these institutions will take on a new importance in the future. The contemporary demands for participation by citizens, arising out of the politics of the Charter and more generally, may mean that the restricted use of these institutions in the past may not be a useful guide for the contemporary Canadian experience. Just as the current debate is generating some new and unprecedented definitions of (Canadian) federalism, it may be that the current circumstances will generate new and unprecedented definitions of "democracy," including the innovative use of constitutional conventions and constituent assemblies. As Richard Simeon and Keith Banting have observed, "constitution-making does on occasion involve recourse to unique institutions, or even the creation of new ones." They go on to observe that such innovation is more likely where there is proposed sweeping constitutional change and political elites lack legitimacy.¹⁵ The scope of the current debate and the unpopularity of the federal government suggest both of these conditions characterize Canada in the 1990s.

CONSTITUENT ASSEMBLIES AND FEDERALISM

In addition to the many challenges of reconciling parliamentary and representative democracy with forms of direct democracy, there is also the matter of the relationship between democracy and federalism. Federalism matters in this context because questions of sovereignty and majority rule are more complex in federal states. There are two aspects to this question: first, the need for multiple majorities in a federation and second, the tendency for federations to privilege the interests of governments rather than those of people.

Simply put, in a federation there are concurrent and overlapping majorities. Contrast the case of France where a national referendum or constituent assembly would be based on the country as a whole and where the result would be heavily influenced by the political and demographic weight of Paris. In a

federation such as Switzerland a national majority may be possible but the intensely regional and federal nature of the country favours local or cantonal majorities. In Switzerland, when a constitutional change is to be ratified by a referendum, the proposal must receive the support of a majority of voters in a majority of the cantons. Therefore, in the current context it is important to consider the impact of the regional and federal nature of a country such as Canada when evaluating calls for forms of direct democracy such as a constituent assembly. There may be a need to consider several such assemblies to respond to the regional differences across the country.

However, the nature of federations also raises a second challenge to the form of direct democracy. Federalism tends to be about territory and governments whereas democracy tends to be about individual and collective interests. When federalism and democracy clash, it is usually governments that carry the day. As Reg Whitaker has argued, "Succinctly, federations have a tendency to emphasize government of governments, rather than government of people."¹⁶

INTRODUCING THE CASE STUDIES

In considering examples in other countries of constituent assemblies and other related bodies, we focus in this paper on cases according to the following criteria:

- *Federations* — we have included cases where federal countries have sought to draft a new constitution or to make revisions to an existing one. The sample covers a range of federations from both the "industrialized" and "developing" worlds.
- *Western industrialized countries* — in order to make meaningful comparisons with Canada our sample focuses primarily, but not exclusively, on western industrialized countries.
- *Directly-elected constituent assemblies* — Nicaragua and Namibia are the most recent examples of directly-elected constituent assemblies, and, therefore, have been included even though they do not fit under the criteria above.

Before embarking on a detailed comparison and analysis of all of the cases, this section briefly describes the experience of each country with constituent assemblies, constitutional conventions and constitutional inquiries, task forces and expert committees.

In each case summary, and indeed throughout this paper, we emphasize the "mechanics" of how constituent assemblies have been used. This facilitates comparisons between the cases. We focus much less on the contextual factors that would explain the decision to convene a constituent assembly in the first

place. Such analysis is beyond the scope of this paper. As a result, the comparative case studies should not be seen as part of a theory or even a complete description of constituent assemblies. Rather, they are designed to shed some light on the current debates about constituent assemblies in Canada and suggest some ways in which one can organize a constitutional convention.

UNITED STATES

When the Philadelphia Convention gathered on 25 May 1787 it was to consider amendments to the Articles of Confederation, which had been fully ratified only a few years before in 1781, and which were widely perceived as an unworkable basis for the future of the United States. Instead of revising the Articles, however, the delegates produced a completely new constitution, which was signed on 17 September 1787. The document was then forwarded to Congress, which passed it on without comment to the states for ratification. After a hard-fought ratification process, the proposed constitution received the ratification votes of the requisite 9 of 13 states, bringing the new Constitution formally into effect in June 1788.

The Constitution included alternative procedures for future constitutional amendments. Approval could be by either a special majority in Congress, or a national constitutional convention and ratification by three-quarters of the state legislatures or of state conventions (Article V). In practice a national constitutional convention has never been called since 1788 and only once has ratification been referred to state conventions instead of state legislatures.

CANADA

"Confederation" in Canada was the product of a series of constitutional conferences between 1864 and 1866. These conferences were composed of representatives of the various colonial governments. The idea of Confederation was first proposed at the Charlottetown Conference, held 1-9 September 1864. Although the conference had originally been proposed to discuss Maritime Union, the discussion quickly moved to the matter of a new federal union. This conference was followed by a second at Quebec City, 10-27 October 1864, where delegates produced 72 resolutions which were to serve as the basis for the *British North America Act*. A final conference held in London between 6 and 24 December 1866 largely confirmed the results of the Quebec Conference, and the BNA Act was declared in effect on 1 July 1867.

Subsequent efforts at major constitutional amendment were largely the product of intergovernmental diplomacy. The most notable examples were the First Ministers' Conference in 1981, which laid the basis of the *Constitution Act, 1982*; the First Ministers' Conference at Meech Lake and the Langevin

Block in 1987; and at Ottawa in 1990 about the Meech Lake Accord, which failed to receive ratification by the required number of provincial legislatures.

NEWFOUNDLAND

The Newfoundland National Convention, which was held between September 1946 and January 1948 was notable, first because it played an important role in the transition of Newfoundland from dominion to provincial status, and second because it represents the only directly-elected constituent assembly held in what is now Canada. During the depression years of 1933-34, and in response to Newfoundland's desperate financial condition, the British government re-scheduled Newfoundland's debts and replaced her responsible government with direct rule through an appointed commission. Newfoundland's economic fortunes improved during the war years, however, and in 1945 the British government endorsed the holding of a national assembly to recommend the possible forms of future government to be put before the people in a national referendum.

Elections were held in June 1946 in which 45 delegates were elected to represent the dominion's 38 electoral districts. From the outset of the Convention one issue overshadowed all others: the question of confederation with Canada. The Convention quickly split into an anticonfederate majority and a vociferous proconfederate minority. Although as part of its considerations the Convention sent delegations to London and Ottawa to consider Newfoundland's options, it was only the Ottawa meetings that yielded tangible results; the Newfoundland delegation returned with a series of proposals for Newfoundland's confederation with Canada, which would eventually serve as the basis for Newfoundland's union with Canada in 1949.

The work of this delegation was rejected by the National Convention which, after long and acrimonious debate, voted against putting the option of confederation with Canada on any referendum ballot. With this, the Convention adjourned, submitting a report to the British government which recommended that the upcoming referendum on Newfoundland's future include only two choices: the retention of the Commission of Government or the return of responsible government.

The recommendations of the National Convention were quickly overturned by the British government, however, which determined that the option of confederation with Canada would also appear on the referendum ballot. Two referenda were held in June-July 1948. The first vote eliminated Commission Government as an option; the second resulted in a slim majority for confederation with Canada. The next year, and the work of Newfoundland National Convention notwithstanding, Newfoundland formally entered into confederation with Canada on 31 March 1949.

AUSTRALIA

In 1891 representatives of the British colonies in the South Pacific met to draft the terms of union and the constitution of a new federal state. This initiative was ultimately rejected. In 1897-98 the work of a constitutional convention with members elected by the state legislatures eventually led, following ratification by referenda, to the federation of Australia in 1901.

While the normal procedures for constitutional amendment in Australia make no provision for constitutional conventions, in 1973 a constitutional convention was created to consider a comprehensive revision to the Australian constitution. The convention met in six cities over a decade with no conclusive results, and in 1985, the convention was superseded by a Constitutional Commission named by the Commonwealth government. Whereas the delegates to the constitutional convention were primarily politicians elected from the states, the Commission was created to keep politicians out of the process and to involve the general public. The Commission eventually issued a two volume report which led the government to submit four constitutional amendments to a referendum in 1988. All four were amendments rejected by the electorate. In April 1991 a privately-sponsored conference was convened to initiate a broad-based discussion of constitutional reform in Australia. Further conferences are planned over the next several years as part of the celebrations of the centenary of the events in the 1890s leading to the creation of Australia in 1901.

GERMANY

In August 1948 the Ministers-President of the German Länder named an expert commission to draft a new constitution. The report of this commission was submitted to a constitutional convention called the Parliamentary Council. That Council, composed of members elected by the Land legislatures, eventually agreed upon the Basic Law which after ratification by the legislatures of the Länder became the constitution of the Federal Republic of Germany (West Germany). In the early 1960s the West German government appointed a commission to examine Bund-Länder relations. The work of the Troeger Commission, which reported in 1966, eventually led to a series of constitutional amendments in 1968-69 instituting the practice of "joint tasks." In 1973 the Bundestag initiated the creation of the Enquête Commission which reported in 1976. Only two of the recommendations of that Commission were subsequently accepted as amendments to the Basic Law.

SWITZERLAND

The Swiss constitution of 1848, which followed the Sonderbund civil war of 1847, was developed by a drafting committee appointed by the Swiss Diet or

parliament. Because the Diet was a confederal body, the drafting committee of 23 members consisted mostly of the chiefs of the cantons and operated much like constitutional conventions elsewhere. A provisional constitutional text prepared by the committee was referred to the cantons to enable their representatives in the Diet to be instructed and was then approved by the Diet with minor changes. Finally, the constitution was approved by referenda in the cantons with fifteen and a half of the cantons approving and six and a half cantons opposing. It then came into effect for all 22 cantons in September 1848.

The 1848 constitution included separate procedures for total revision and for partial revision of the constitution, both involving approval in both houses of the federal legislature and a referendum requiring a national majority and majorities in a majority of cantons. Prior to the 1960s total revision was attempted only twice: 1872 when it was defeated and 1874 when it succeeded.

In 1965 the Swiss government named the Wahlen Task Force to canvass public opinion and make recommendations regarding a revision to the constitution. A constitutional commission (Feurgler) was appointed in 1974 to draft amendments based on the work of the Wahlen Task Force. After the Commission reported in 1977, the government initiated yet another round of public consultation. The process came to an end in 1982 as a result of a lack of public support for a general revision to the constitution.

SPAIN

Following the death of General Franco in 1975, democratic elections were eventually held in June 1977. The mandate of the new parliament or Cortes was ambiguous since it technically operated under the rules of the previous regime. The government of Prime Minister Adolfo Suarez was not responsible to the newly elected Cortes. He felt that the government's job was to govern and the main task of the new assembly was to draft a new constitution. The lower house of the Cortes struck a constitutional committee in July 1977 and a draft text was published in January 1978. After extensive debate in both the upper and lower house, the new constitution was approved by the Cortes in October 1978, ratified by a popular referendum in early December and approved by King Juan Carlos on 27 December 1978.

INDIA

The end of World War II and the rise of the Labour Party brought a change in British attitudes towards its Indian colonies. As a result elections were held in July 1946 in the various provincial legislatures to set up a constituent assembly, which would then prepare a new constitution for India. A significant Muslim minority, however, believing they would be submerged in an overwhelming Hindu majority, boycotted the new assembly. Britain, faced with this impasse,

agreed to the partition of India into two states — India and Pakistan. The already elected constituent assembly members were then constituted into two separate constituent assemblies for the newly independent countries in 1947. When the Indian constituent assembly met it immediately voted itself supreme legislative authority as an interim national parliament. Meeting alternatively as a constituent assembly and as an interim parliament, this body succeeded in enacting a constitution three years later, which came into effect on 26 January 1950.

PAKISTAN

After the boycott of the all-India constituent assembly by the Muslim League and the subsequent partition of the subcontinent, Pakistan's constituent assembly met for the first time on 16 August 1947. Its task, like that of India, was twofold: to act as the country's interim parliament and to produce a federal constitution. After the collapse of the Muslim League and seven years of constitutional turmoil, however, Pakistan's Governor-General suspended the constituent assembly on 24 October 1954. A second assembly similarly elected by the provincial legislatures managed to enact a constitution in March 1956, but this document was subsequently abrogated in October of that same year.

MALAYSIA

The preparation of the independence constitution of the Federation of Malaya in 1957 was preceded by conferences involving representatives of the constituent governments, the major political parties and the rulers in the states.

In October 1961 when the Federation of Malaya was being expanded into the Federation of Malaysia, the British and Malayan governments jointly named a Commission of Inquiry to engage in public consultation regarding the creation of the federation of Malaysia. After this Commission reported, an Inter-Governmental Committee was named to draft a constitution for the proposed federation. The Committee reported in July 1963 and in September of that year Singapore and the two Borneo states joined with the states of Malaya to create the Federation of Malaysia.

NIGERIA

From 1946 to 1963 several successive constitutions were drafted for Nigeria, often using the standard procedure of constitutional conferences supplemented by commissions which the British Government had used in other colonial situations. For example, the Colonial Office invited a cross-section of elites to

constitutional conferences in London in 1957-58 and 1960 to draft the new independence constitution.

In 1975, after having announced a return to civilian rule, the military government of Nigeria announced the creation of a constitutional Drafting Committee of approximately 50 members. The Committee reported in 1976. In late 1977, the government announced the creation of a constituent assembly which examined the draft constitution and recommended amendments in a report submitted to the military regime in 1978. The new constitution was then amended and approved by the military government and the transition to civilian rule completed.

THE WEST INDIES FEDERATION

The West Indies Federation, established in 1958, followed a process between 1947 and 1957 in which four constitutional conferences were held, two standing committees dealt with general proposals, and six commissions were appointed to examine particular aspects. Eventually the most contentious issues were resolved and the constitution was enacted by British legislation.

RHODESIA AND NYASALAND

The constitution of the Federation of Rhodesia and Nyasaland that was established in September 1953 was drafted by constitutional conferences under the aegis of the British Colonial Office. Indeed, the constitution of the new federation guaranteed that conferences composed of representatives of the central, territorial and British government should be held for a specified number of years.

NICARAGUA

Following the overthrow of the Somoza regime in 1979, elections were held in 1984 for seats on a national assembly that was given a mandate to draft a new constitution while exercising a limited legislative role. The assembly met for the first time in January 1986. On 18 November 1987 the assembly approved the final text of a constitution that took effect 9 January 1987.

NAMIBIA

In November 1989 voters in Namibia elected a constituent assembly which was charged with developing a new constitution in anticipation of independence. Although several parties were represented, the South West African People's Organization (SWAPO) held a majority of the seats. The assembly worked quickly, producing a draft constitution by February 1990. Following

independence, the members of the constituent assembly were sworn in as members of the new national assembly of Namibia on 21 March 1990.

COMPARISON OF SIGNIFICANT FEATURES

BACKGROUND AND ORIGINS: WHY A CONSTITUTIONAL CONVENTION?

There are several kinds of scenarios that have led governments and political elites to establish constituent assemblies, constitutional conventions or their equivalent as the appropriate means for preparing a new constitution or totally revising an existing one. First, a constituent assembly is called to draft a new constitution after a revolutionary or traumatic event of some kind. As McWhinney has argued, "the motive power of constituent assemblies will come from acting quickly ... following on some great political or social revolution or similar upheaval."¹⁷ Following this line of argument, a number of cases come to mind: Switzerland in 1848 following a short civil war, Germany in 1947-48 following the defeat of the Nazi regime, Spain in 1977 following the death of General Franco, and Nicaragua in 1984 and Namibia in 1989 following the revolutionary overthrow of the previous regimes. In the cases of India and Pakistan the creation of their separate constituent assemblies was directly related to Britain's unilateral withdrawal from, and the partition of, the Indian subcontinent in 1947.

A second general scenario has been the situation where a group of separate colonies see the prospect of joining together into a new federation to create a more viable political entity. The prospect of increasing self-government or full independence has often been an additional factor. Examples of such cases have been the Canadian constitutional conferences 1864-66 that led to the *British North America Act*, and the Australian conventions of 1891 and 1897-98, which led to the federation of Australia. More recently, in Rhodesia and Nyasaland (1953), in Malaya (1957), the West Indies (1958) and Nigeria (1960) new federal constitutions came into effect following constitutional conferences composed of representatives of the constituent units and their major political party leaders functioning much like indirectly-elected constituent assemblies. These were usually supplemented by expert commissions that dealt with particular aspects. Distinctive features of the deliberations leading to these new federal constitutions were the intergovernmental character of the negotiations and the role of the imperial government in guiding the process.

A third general scenario, and the one perhaps most relevant to contemporary Canada, has been the situation where a serious deterioration in the operation of an existing constitution has led to the creation of a constituent assembly or constitutional convention with the task of drafting a new and more effective constitutional structure. It is the perception of such a situation in contemporary

Canada that has given rise to a number of proposals for a constituent assembly as one possible way of attempting to resolve the current difficulties. The clearest example of this rationale for such a body can be found in the circumstances that led in the United States to the creation of the Philadelphia Convention of 1787.

Somewhat related, but involving less sense of urgency, have been the situations where a total revision of the constitution has been considered desirable as a result of the concern on the part of political elites that the constitution is outmoded and requires substantial revision. For example, the constitutional conventions appointed in Australia in 1973, and the constitutional commissions appointed in Australia in 1985, in Germany in 1966 and 1973, and in Switzerland in 1965 and 1974 all arose not so much as a result of public pressure but more in response to a concern among elites that a revision to the constitution was a good idea. In the Australian case, the lack of public enthusiasm for the process was demonstrated by the fact that in the five referenda held since 1970 the voters rejected 13 of the 16 amendments arising from the work of the constitutional convention and the constitutional commission.

OVERALL STRUCTURE AND MANDATE

Number of Members

Constituent assemblies or their equivalent have varied considerably in size. They have ranged from the largest, 389 in the Indian Constituent Assembly, to the smallest, 23, if one includes the Swiss Drafting Committee of 1848. The variation in size has been influenced by such considerations as the size of the population to be represented and the number of constituent units, political parties and other interests that need to be included to ensure representativeness. The members of the Indian constituent assembly when the representatives of the princely states were included numbered 389 and the first Pakistan constituent assembly, 78. The Nigerian constituent assembly of 1977 numbered 200 and those of the directly-elected constituent assemblies of Nicaragua and Namibia, 90 and 72 respectively. The delegates to the Australian convention, which met from 1979 to 1985, initially numbered 90 but this was later increased to 110, although not all the delegates attended all six sessions of the convention. The Australian conventions of 1891 and 1897-98 which led to the original federation of Australia consisted of 50 to 60 members. Similar in size was the American Philadelphia Convention of 1787 with 55 delegates and the Parliamentary Council of 1948 which drafted the German Basic Law with 65 delegates. Most of the colonial constitutional conferences referred to in this paper would have been of this general size or less. The Drafting Committee of the Swiss constitution of 1848 had only 23 members but of the 22 cantons in

Switzerland at the time (which included two half-cantons), members represented twenty and a half of the cantons.

Not surprisingly, the various constitutional commissions and task forces have generally been considerably smaller. This may reflect the fact that their mandate is often much narrower or, in the case of expert or technical committees, the task at hand requires a limited number of members. For example, the expert committee that produced the initial draft of the German Basic Law in August 1948 had only 11 members and the Constitutional Commission which followed the constitutional convention in Australia in 1985 had but five members, although a much larger number of people participated in the work of the various subcommittees created by the Commission.

Method of Selecting Members

Broadly speaking constituent assemblies can be divided into those whose members are directly elected and those whose members are indirectly elected. The constituent assemblies of Nicaragua and Namibia are two examples of the former type. In both cases, members of the constituent assembly were elected in nation-wide elections with political parties playing a prominent role. The case of Newfoundland constitutes an exception to this pattern. Although its members were directly elected, the campaign attracted little public attention; this was due, according to one observer, to the absence of party rivalry in the campaign.¹⁸ Much more common have been indirectly-elected constituent assemblies or constitutional conventions. In these assemblies members have been chosen by the state legislatures or a federal parliament. Examples of this kind of constituent assembly have occurred in India, Pakistan, the United States, Australia and Germany.

In the cases of India and Pakistan, delegates were elected by the provincial legislatures. Nominations were made to the assemblies both from within and without these legislatures. Members of the various ethnic communities (Muslim, Sikh and General, or Hindu) within the legislatures then voted for a predetermined number of delegate posts assigned to them. The lists of those elected included not only politicians but also prominent jurists, constitutional experts and academics, among others.

The 1787 Philadelphia Convention in the United States, the Australian conventions of 1891 and 1897-98, and the German Parliamentary Council of 1948 all consisted of delegates named by the state legislatures. There were no delegates of a central legislature since the American Congress at that time was itself a confederal body composed of state delegates and in the latter two cases no central legislature yet existed. While the method of appointment was similar in these three examples, it is noteworthy that the ratification process for the new constitutions differed in the three. In the United States ratification was not by the state legislatures but by a directly-elected convention in each state. In

Australia ratification was by referenda, and in Germany by the legislatures of the Länder.

The Swiss Drafting Committee, which prepared the 1848 constitution, differed from these examples in being appointed by the existing Swiss Diet, but this contrast is more apparent than real. Since the Diet was a confederal body whose members were delegates acting on instruction from their cantons, the cantons were able to ensure that the committee consisted mostly of leaders of the cantonal governments.

The more recent Australian constitutional convention of 1973-85 consisted of members elected by the Commonwealth and state parliaments. Subsequently three additional delegates, chosen by local governments, were added to each state delegation, raising the size of each state delegation from 12 to 15.

Participation in the colonial constitutional conferences relating to Malaya, Malaysia, Nigeria, the West Indies and Rhodesia and Nyasaland was usually at the invitation of the British government, but this usually followed extensive intergovernmental consultation to ensure that each of the constituent units, the major political parties, and any other major interests were adequately represented. A significant feature of these was that the British Colonial Office was included in the representation.

In the case of constitutional commissions, task forces and similar bodies the general pattern is that they are named by the central government with little or no consultation with the national parliament or state governments. For example, the Pepin-Robarts Task Force was appointed by Prime Minister Trudeau with little or no consultation with the provinces. Similarly, the Constitutional Commission created in Australia in 1985 was named by the Commonwealth Prime Minister with little consultation with the state governments. An interesting exception to this general pattern is the Committee on Constitutional Reform appointed in the Federal Republic of Germany in 1973. One-third of the Commission's 21 members were to be members of the Bundestag (lower house of the federal parliament), another third were to be named by the governments of the Länder, and the remaining third were to be experts named by the different political parties represented in the Bundestag.

Distribution of Members

There have been two general approaches to regional representation in constituent assemblies. The first begins with the principle that all of the constituent units are equal and should be equally represented in the constituent assembly or constitutional convention. This principle is reflected in the conventions in the United States in 1787, Australia in 1891, 1897-98 and 1973, Switzerland in 1848, and Canada in 1864-66. In the cases of the United States and Canada there were no limits placed upon the number of delegates that a state or province could send as each of these groups only received one vote, although a larger

delegation would only make it more difficult to come to a consensus. In determining the composition of such a delegation, attempts were often made to include the various political interests in the legislature. In the case of Canada, for example, all of the provincial delegations to the Quebec conference contained members of both the Tory (Conservative) and Radical (Liberal) caucuses. The intent was that it would be easier to translate the results of the conference into a consensus at home. As became evident in both Canada and the United States, however, any consensus reached in the hothouse convention environment rarely survived the trip back to the state or provincial legislatures.

The second approach does not assume equality among the constituent units. Instead, representation is linked to the population of each state, Land, or province. This principle was used in Germany in 1948 where the legislature of each Land elected one delegate for every 750,000 of the Land's population with an additional delegate for the remainder of more than 200,000. Using this formula, Land representation on the Parliamentary Council varied from a single delegate from the city-state of Bremen to a total of 17 delegates from North-Rhine Westphalia and 13 delegates from Bavaria. A similar approach was used to elect the delegates to the Nicaraguan constituent assembly in 1984 where each of the nine territorial districts had a specified number of seats depending on the population of the district.

In the cases of India and Pakistan the various legislatures elected one delegate for every 1,000,000 people. The total population of a given province or state was then divided into its major religious groupings to determine the total number of delegates. Delegations ranged in size from Madras, which elected 45 general (Hindu) and four Muslim delegates, to Sind, which elected a single delegate.

In cases where there were no preexisting central institutions, or where, as in the United States in 1787 and Switzerland in 1848, these were confederal in character delegations to indirectly-elected constituent assemblies have represented only the constituent states. In the case of the Australian constitutional convention of 1973-85, where there already was an existing federal parliament, it too was represented in the convention by a delegation. Representation was also added for local governments. Originally the convention consisted of 16 delegates from the federal parliament, 72 delegates from the state parliaments (12 per state), and two from the Northern Territory. Subsequently, to provide representation of local governments, three additional delegates were added for each state, one for the Northern Territory, and two for the Australian Capital Territory.

Generally speaking there has been little attempt to "balance" the membership of the constituent assembly or constitutional convention except on the basis of region, population, or as described in greater detail below, to ensure a balance among the dominant political parties. It has generally been assumed and

accepted that the political and economic elites who dominate the political process will exercise a similar dominance in the process of drafting or amending the constitution. There is little evidence to suggest that any special or formal efforts have been made to ensure that women, ethnic minorities or particular economic or class interests have been separately represented among the delegates or commissioners. Nevertheless, minority interests have usually had significant representation, but only as a result of inclusion by a state within its delegation. In the case of the relatively small Diet Drafting Committee of 1848 in Switzerland there was a representative balance between French- and German-speaking members and between the Protestant and Roman Catholic members reflecting the different cantonal majorities.

There are at least two major exceptions to this general pattern. In Germany in 1947 and again in 1973, a special effort was made to ensure that "experts" were members of the convention or commission charged with drafting or amending the constitution. Thus, although the members of the Parliamentary Council in 1948 were appointed by the Land legislatures, the members were not drawn exclusively from among the elected members but included academics and government officials as well.

The second exception to the general pattern were the constituent assemblies of India and Pakistan which were to draft constitutions following partition in 1947. Here, in addition to the regional and political forces that required representation, one important factor was religion. Representative seats within the provincial assemblies were apportioned by three main groupings: Muslim, Sikh and General (i.e., mostly Hindu). The various proportions of these seats were determined on the basis of population, and delegates were elected by members of these religious groupings within the various legislatures. Because these religious groups were largely dominated in each of these countries by a single political party — in India the Congress Party and in Pakistan the Muslim League — the final effect upon the two constituent assemblies did not materially affect the party balance.

Role and Mandate

In the cases of most of the directly- and indirectly-elected constituent assemblies the primary mandate has been to draft an existing constitution or to work out a total revision to a new constitution. Examples of these are the directly-elected constituent assemblies of Nicaragua and Namibia and the indirectly-elected constituent assemblies of India and Pakistan whose mandates were to enact a new constitution to go into effect immediately upon adoption by the constituent assembly. In the cases of India and Pakistan, the constituent

assemblies also took on the additional function of serving as interim parliaments until the new constitutions could come into force.

In other instances, such as the Australian conventions of 1897-98, the German Parliamentary Council of 1948, and the Swiss Diet Drafting Committee of 1848, the mandate of these bodies was to work out a new constitution but enactment would require ratification by other bodies, the legislatures of the states in the Australian case, the legislatures of the Länder in the German case, and the cantons and the Diet in the Swiss case. In Spain in 1977-78, the draft constitution prepared by the parliament was ratified by a popular referendum and subsequently sanctioned by the King.

The role of the Philadelphia Convention in the United States was broadly similar to this latter group although it was originally convened to consider amendments to the existing Articles of Confederation. The Convention chose, however, to go well beyond this narrow mandate and drew up a completely new constitution for the United States. The proposed new constitution was then sent by Congress for approval by ratification conventions in each state, which themselves closely resembled directly-elected constituent assemblies. These conventions, however, could not amend the constitutional document before them; they could merely ratify or reject it.

The constitutional convention created in Australia in 1973 was also an example of a convention being asked to consider major revisions to an existing constitution. Any amendments proposed by it would have required employment of the normal procedure for constitutional amendment under the existing constitution, i.e., passage in both houses of parliament plus a referendum obtaining an overall majority and majorities in a majority of states (i.e., four of the six states).

Constitutional committees, task forces and commissions of inquiry generally have a much more limited mandate. The experience of the countries surveyed suggests that such commissions carry out one or more of the following tasks: the provision of expert advice, public consultation, or the drafting of a new constitution or constitutional amendments. In several countries a committee of experts has been appointed at one time or another to draft a constitutional text or a set of amendments which is then referred to a more representative constitutional convention or constituent assembly. For example, the Ministers-President in what became the Federal Republic of Germany jointly appointed an expert committee to draft a constitutional text which was then referred to the Parliamentary Council. Similarly, the Swiss government appointed a Constitutional Commission in 1974 to translate the findings of the Wahlen Task Force into a draft constitution. The Wahlen Task Force was a good example of a constitutional inquiry in which the mandate is limited to public consultation. This ten-member Task Force was appointed by the Swiss government in 1967 and was asked to collect opinions and information relative to the desirability of

constitutional review and to identify the subject areas most in need of reform. The Task Force consulted representatives of all the cantons, the major political parties, the universities and nine major interest groups. A similar exercise was conducted in the Federal Republic of Germany in the early 1970s when the Enquête Commission held hearings around the country and consulted with legal experts, academics and public interest groups, soliciting their advice about possible amendments to the Basic Law. In contrast to the Wahlen Task Force, the Enquête Commission actually made specific recommendations for constitutional amendment when it submitted its report in 1976.

The Newfoundland national convention would also fall into this category. Although its members were directly elected, their mandate was "To consider and discuss ... the changes that have taken place in the financial and economic situation of the island since 1934, and ... to examine the position of His Majesty's Government as to the possible forms of future government to be put before the people at a national referendum."¹⁹ In this task they acted in a purely advisory role to Newfoundland's six-member Commission of Government.

Duration

There has been a great deal of variation in the duration of the constituent assemblies and constitutional conventions. However, in those cases where a constituent assembly or parliament has been elected following a revolution or major change (e.g. Spain 1977, Nicaragua 1984, Namibia 1989), or a war (e.g., Germany 1948, Switzerland 1848), each assembly completed its work in a matter of months. For example, the Parliamentary Council in Germany in 1948 met for the first time on 1 September and had approved a final draft of the Basic Law by 8 May 1949. This pattern is probably a reflection of the lack of an alternative constitutional structure and the general consensus on the urgent need for change in these cases.

A significant exception to this pattern can be found, however, in India and Pakistan, where the process took much longer despite the urgency following partition. In the case of India the preparation of a new constitution took more than three years (July 1946 to November 1949); with Pakistan, it took almost nine years and two constituent assemblies to produce a constitution (August 1947 to March 1956). In the cases considered here, it seems that the time taken to produce a new constitution can largely be explained by the fact that both constituent assemblies were also acting as interim federal parliaments and therefore had to divide their attention between legislative duties on the one hand and constitution-writing on the other. With such interim parliaments in place, there was also less urgency to fill a constitutional void.

The Philadelphia Convention of 1787, which led to the new federal constitution of the United States, and especially the Australian conventions of 1891 and 1897-98, which led to federation in 1901, were held in circumstances where

there was less sense of urgency than in the cases referred to above. Nevertheless, the Philadelphia Convention completed its work in four months of virtually continuous sitting (25 May to 17 September) and ratification of the new constitution by the required nine state conventions was achieved by June 1788. The new constitution came into effect in April 1789 by which time two more state conventions had ratified it. Shortly afterwards state conventions in the hold-out states, North Carolina and Rhode Island, ratified the new constitution so that by May 1790, less than three years after the conclusion of the Philadelphia Convention, all 13 of the states had voted assent. In Australia, the isolation of the continent, which contributed to the lack of any sense of urgency, meant that deliberations took much longer to resolve and it was a decade from the time the 1891 convention first met until the new federation came into effect. The actual duration of the convention meetings was one month in Sydney in 1891, and one month in Adelaide followed by two months in Sydney and Melbourne during 1897-98.

Constitutional conventions or commissions appointed to consider a total revision to an existing constitution or to suggest a series of amendments seem generally to have been less expeditious and not uncommonly have failed to produce significant results. The most prominent example is the Australian constitutional convention which met six times over a 12-year period from 1973 to 1985 without achieving major amendments to the Australian constitution. Similarly the Swiss began a process of total constitutional revision in the mid-1960s with the Wahlen Task Force (1965-72), followed by the Feurgler Constitutional Commission (1974-77), and a process of consultation led by the Department of Justice (1977-82). However, even after 17 years of debate and discussion, the Swiss could not agree on a set of major revisions to the constitution and the effort fell into abeyance.

OPERATING PROCEDURES AND STYLES

The Role of Political Parties

Constitution-making in other countries has often been a highly partisan affair. As a result, political parties have played a major role in the election and operation in many constituent assemblies and constitutional conventions. This is nowhere more evident than in the progress of the Indian constituent assembly. Given the huge preponderance of Hindus in the country and the dominance of the Congress Party within that religious group, the process of proportional representation virtually guaranteed the Congress Party both a huge working majority on the floor of the assembly and control over the working of the numerous committees. Indeed, the Congress Party was in the position of being able to encourage divergent points of view to proposed constitutional articles secure in the knowledge that these views would not unduly impede the

constitution-writing process. In the case of Pakistan, it could be argued that it was the collapse of the Muslim League into factions after the death of Jinnah in 1948, that hastened the political disintegration of the Pakistan constituent assembly.

Constituent assemblies and conventions do not need to be dominated by a single party, however. The delegates to the German constitutional convention of 1948 were representatives of the major political parties in Germany with an equal number of delegates from the christian democratic parties (CDU/CSU) and from the Social Democratic Party and one or more representatives of the other political parties operating in the Federal Republic at that time. All parties were represented in both the plenary session of the convention and the work of the various subcommittees. Similarly, the elections to the constituent assemblies in Nicaragua in 1984 and Namibia in 1989 were contested by several political parties with a majority of seats going to the revolutionary party.

The delegates to the Australian constitutional convention that met from 1973-85 were drawn from the Commonwealth and state legislatures and represented the partisan composition of these assemblies. The debates in the convention were often conducted on a partisan basis although a bipartisan consensus was on occasion formed around a number of possible amendments.

In general, it would seem that partisan concerns were at least as important as regional concerns in the case of constitutional reform in India, Pakistan, Germany, Spain, Australia, Namibia and Nicaragua. It should be noted, however, that one major exception to this general rule was the United States, where the proceedings of the Philadelphia Convention itself were characterized by a remarkable federalist consensus throughout. It was not until later, in the ratification process, that this consensus nearly broke down into a battle in the state conventions between the Federalists and the Antifederalists.

Leadership

In most constituent assemblies or constitutional conventions, a small group of people have often exerted a disproportionate influence on the operations of the assembly or convention. This is true of cases during the eighteenth and nineteenth centuries where this leadership role was assumed by senior government leaders. In the Philadelphia Convention individuals such as George Washington, James Madison and Alexander Hamilton played key roles. During the Canadian conferences 80 years later that led to the drafting of the *British North America Act*, for example, John A. Macdonald, George-Etienne Cartier, George Brown, and Charles Tupper, among others, played key roles. Less than 20 years later, Sir Henry Parkes and Sir Richard Border, both state premiers, played a key role in the constitutional convention that drafted the Australian constitution.

In the case of the more contemporary examples of constitutional conventions, senior members of the main political parties have often assumed a similar

leadership role. It is significant that, in each process studied here, its success can be identified with either one individual or a group of them. In all cases, a few individuals dominated the proceedings of the assemblies either through the presidency or through control of experts' committees. In the case of India, for example, Congress Party President Jawarhalal Nehru forwent the position of president of the Indian assembly, choosing instead to oversee the powerful Experts' Committee which assumed overall guidance of the process. It has been said of the Indian procedure that the decisions made in the councils of the Congress Party were translated via the various committees to the assembly with ease. In Spain, party elites met privately to resolve key issues before they were discussed in committee.

In the case of Germany, the leader of the CDU/CSU, Konrad Adenauer, played an important role in the deliberations of the Parliamentary Council in Germany in 1947-48. Adenauer, of course, went on to serve as the first Chancellor of the Federal Republic of Germany. Similarly, senior members of SWAPO played a key role in the constitutional convention that drafted the Namibian constitution in 1989-90.

Public Consultation

In most of the cases under review, public consultation in the drafting of a constitution was not a priority although popular ratification of a final text either through a referendum (Switzerland, Spain and Australia) or through directly-elected state conventions (United States) has occurred in a number of instances. Until very recently, the dominant political norms in most countries did not require political elites to consult extensively with the general public in the process of drafting a constitutional text. For example, there is little evidence to suggest that the German Parliamentary Council sought the views of the general public in the process of drafting the Basic Law.

However, public consultation is fast becoming a requirement. Indeed, the Australian constitutional convention of 1973-85 offers an example of a convention that became isolated from the general public, and the "failure" of the convention is often attributed to the fact that it became too far removed from the concerns of the citizens of Australia. One of the arguments offered for replacing the convention in 1985 with a constitutional commission involving extensive public hearings was to ensure that constitutional reform would proceed with a greater degree of public consultation.

There are examples of constitutional conventions that did include an exercise in public consultation. For example, the constitutional convention that met in Australia in 1891 adjourned at one point and the draft constitution was sent to the state legislatures for consideration after which the convention reconvened and completed its work. In more recent times, the Nicaraguan constituent assembly in the early 1980s also adjourned at one point to allow the general

public to comment on the constitutional proposals being considered by the convention.

Something akin to public consultation was attempted during the early stages of the constitution-writing process in India, where the constitutional advisor prepared a questionnaire on the salient features of the constitution and circulated it to all the members of the provincial and central legislatures. The constitutional advisor then prepared a memorandum embodying the findings of these and his own ideas on the main principles that should guide the Union Constitution Committee in devising the structure of the Union Constitution.

It is important, however, to observe that whereas constituent assemblies or constitutional conventions may or may not engage in public consultation, the many commissions and task forces that have been created to supplement them have often been charged with the task of public consultation. For example, the Swiss constitutional reform process that went from the mid-1960s to the early 1980s began with an exercise of public consultation. The Wahlen Task Force consulted widely such that when the Feurgler Constitutional Commission was asked to translate the findings of the Task Force into a constitutional text, there was less pressure to consult with the general public.

Finally, although public consultation in the drafting of a constitutional document is a relatively recent phenomenon, popular ratification of a new constitution or constitutional amendment is not uncommon. The Swiss constitution of 1848 was approved by a majority of voters in a majority of the cantons. Similarly, the Australian constitution of 1901 was submitted to a referendum after the work of the constitutional convention was complete.

Interest Groups

There is little evidence to suggest that interest groups have been given any formal role in the constitution-making or amendment process in other countries. However, the various constitutional inquiries that have been appointed to ascertain the views of the general public have consulted major interest groups. For example, the Constitutional Commission appointed in Australia in 1985 was given explicit instructions to seek the views of the general public, business, trade unions and financial institutions. Similarly, the Wahlen Task Force in Switzerland encouraged nine major interest groups to respond to a standard questionnaire that was also sent to each of the cantons, political parties and the major universities.

Secretariat

Secretariats do not seem to have played an important role in the work of most of the constituent assemblies or constitutional conventions under review. Instead, logistical and administrative tasks were carried out by public servants

drawn from one of the constituent governments. There are two prominent exceptions to this generalization, however.

In India, a Secretariat of the Constituent Assembly was established at the very beginning of the process. Due to the tripartite nature of the assembly, the Secretariat was further subdivided into four secretariats:

- i) the Secretariat of the Union Assembly Group; that is, of the various assembly components in joint session. This secretariat had pre-eminence over the other three and was responsible for channelling information from the three sub-secretariats below it to the assembly;
- ii) three sub-secretariats, each of which was to represent one of the sub-groupings of the constituent assembly. These secretariats were to be channels of information from their assembly group to the union secretariat (above).

The composition of these secretariats was spelled out in great detail. Together, these offices employed 402 staff members, ranging from the secretaries themselves to "Inferior Staff." Funds for the secretariat were provided from general revenues.

In Australia the constitutional convention that met between 1973 and 1985 was served by an independent secretariat which provided a degree of continuity between the meetings of the convention and played a key role in coordinating the activities of the convention and its committees. A chief executive officer, a clerk and an assistant clerk to the convention were appointed by the steering committee. Each of the seven governments (Commonwealth and six states) appears to have also appointed a secretary or legal officer to the secretariat to provide constitutional and administrative support to the convention.

Distribution of Costs

The cost of constituent assemblies and constitutional conventions and how these costs have been allocated among governments is not well documented. In general, the earlier assemblies were funded by the various provincial and state governments that sent delegations. These funds could be notoriously late in coming, however. In the case of the Philadelphia Convention, a case is recorded where one delegate, frustrated by delays in state funding for his delegation, put up the necessary funds himself. In the more recent assemblies of India and Pakistan, costs were borne out of general revenues. This arrangement was likely a reflection of the dual constitutional and legislative roles carried on by these two assemblies. In the case of India, for example, funds were voted for by the legislative assembly (i.e., the same body as the constituent assembly) on an ongoing basis as they were required. The costs of the Australian constitutional convention 1973-85 were shared by the Commonwealth and state governments

with the central government assuming 50 percent and the balance divided among the states roughly on the basis of population.

Presiding Officer

In all cases examined here, presiding officers were elected from the membership of the constituent assemblies, either unanimously or by substantial majorities. The selection of president was always made with an eye to choosing a person whose credentials would lend authority to the recommendations of the assembly. In the case of the United States, for example, the person elected unanimously was George Washington, hero of the Revolutionary War and the country's first President; in Pakistan, the constituent assembly unanimously elected Quaid-i-Azam Mohammed Ali Jinnah, known as the Father of Pakistan. At the first meeting of the German Parliamentary Council in September 1948 the delegates elected Konrad Adenauer President of the Council. However, in keeping with the highly partisan nature of the exercise, a representative of the Social Democratic Party (SPD) was elected first vice-president and a delegate from the Free Democratic Party was elected second vice-president. In the other cases, the office of president seems to have fallen to a member designated by the dominant group in the assembly.

The pattern is quite different in the case of the various constitutional inquiries appointed directly by the governments. Because the commissions or inquiries are appointed rather than elected, the appointing government has normally named the presiding officer who is usually a high-profile political or academic figure. For example, the Chairman of the Australian Constitutional Commission, Sir Maurice Byers, was appointed by Prime Minister Hawke as were the other four members of the Commission. In the case of Newfoundland, the *National Convention Act* specified that the Commission of Government would appoint a justice of the Newfoundland Supreme Court to chair the Convention.

Executive Committee and Committees

Except for the smallest constitutional inquiries with limited mandates, almost all of the constituent assemblies and constitutional conventions under review have resorted to a committee system of one kind or another to achieve their ends. In the earlier examples, committees were often assigned to handle the more technical aspects of constitution-writing. At Philadelphia, for example, the Convention served as a committee of the whole and only turned to smaller committees when special expertise was required — as in the drafting of the actual articles of the Constitution and in the revision of its terms and style.

In contrast, the twentieth-century assemblies have given to committees a preeminent role in their operation. The most prominent example of this is India which was guided from the beginning by a powerful executive committee dominated by Jawaharlal Nehru. In addition to the executive committee, all

aspects of the constitution-drafting process were initially undertaken by such committees as the Experts' Committee, Fundamental Rights Committee, Union Powers Committee and others.

Generally speaking, committees have been created to consider specific issues in greater detail and report back to a plenary session of the convention or assembly. For example, the constitutional conventions that met in Australia in 1891 and 1897 both made use of three committees which met after an initial general debate of the broad principle of a new constitution for a united Australia. Similarly, the Swiss Diet Drafting Committee that met in 1848 divided itself following a general debate into four "sections" to consider four key issues: the new federal or confederal structure, the allocation of customs duties, the distribution of consumption taxes, and a residual category of general concerns.

In some cases, a specialized drafting committee was created to translate the general consensus among the delegates into constitutional language that was then debated by the delegates. This was the pattern, for example, in Switzerland (1848), India (1947), Spain (1977) and Germany (1948). In the case of the recent constituent assembly in Namibia, the draft constitution was developed by the delegates and submitted to a committee of three legal experts who worked on the wording of the constitutional text.

Finally, there are several examples of executive committees of one form or another which were responsible for the overall organization and procedures of the convention or assembly. For example, the constitutional convention which met in Australia from 1973-85 elected a steering or executive committee of 16 delegates which was expanded several times as the number of delegates to the convention itself expanded. This committee was representative of the convention as a whole and played a key role in the organization and operations of the convention. The German Parliamentary Council of 1948 had one of the most elaborate committee structures — a reflection, perhaps, of the partisan nature of the Council's work. The elected president and vice-presidents formed an executive committee which was assisted by a "Committee of Elders" made up of one senior representative of each of the political parties represented at the convention. As mentioned above, there were several specialized committees of 10 to 12 members each which considered specific issues and reported back to the whole convention. An ad hoc committee of three delegates was appointed to review successive drafts of the Basic Law although this group did more than simply fulfill an editorial role. Finally, the Council named yet another ad hoc committee of five and later seven delegates to iron out differences between the political parties and subsequently between the Parliamentary Council and the military governors.

Order of Business and Formal and Informal Procedures, Voting

In general, the order of business has been determined by a committee or group of officers whose job it was to prepare the order of business for the consideration of the assembly. At the Philadelphia Convention a committee of three was elected by ballot of the delegates to carry out this function. The business of the Indian constituent assembly was determined by the Order of Business Committee, which had the responsibility for determining the daily order of business and providing assembly members with copies of the agenda for the day.

Earlier forms of constituent assemblies took a relatively straightforward approach to the decision of issues on the floor; delegations were given one vote each. In the case of the Canadian conferences this rule was modified to allow the United province of Canada — a union of Upper and Lower Canada — two votes in the process. Issues were decided by a straight majority of those delegations present.

The practice for the larger constitutional conventions and constituent assemblies was to adopt a modified form of the procedural rules used in the national or state legislatures. Once within the assemblies, decisions were made by a simple majority of delegates, each of which had one vote. In the case of India, all elections in the assembly were held on the principle of proportional representation by means of the single transferable vote, provided that a quorum of at least one-third of the whole number of members was present. There are no cases where voting was by weighted majorities; in all cases — with the exception of the United States and Canada, which had voting by delegation — each delegate cast a single vote on all matters coming before the convention or assembly. Of course, in most cases there were overlapping partisan, regional and racial groups within the assembly. The extreme cases were Namibia and Nicaragua where SWAPO and the Sandanista Party respectively “controlled” a majority of the votes in the constituent assembly.

Often the work of the constituent assembly or constitutional convention either began with a consideration of a draft constitution prepared in advance, often by an expert committee (e.g., India 1947, Germany 1948, Nigeria 1977), or by a general debate on a set of principles that should guide the work of the convention (e.g., Switzerland 1848, Australia 1891, 1897, 1973). Even in the case of the Philadelphia Convention, certain states brought to the Convention a set of proposals, most notable of which was the Virginia (Randolph) Plan which provoked in reaction the New Jersey (Paterson) Plan. Subsequently, the differences were resolved by the Connecticut Compromise.

Following an initial debate, in most cases, much of the detailed work was done in committee (as noted in the preceding subsection). These committees in some instances were assisted by a drafting committee of some sort, but the process generally led to a constitutional draft being considered by the convention or assembly as a whole. In those instances where the procedure has been

recorded, it would appear that delegates voted on individual articles of the constitutional text before voting on the draft as a whole.

DISPOSITION OF CONSTITUENT ASSEMBLY RESULTS

Process of Enactment in the Absence of an Existing Constitution

Broadly speaking, constituent assemblies can be divided into two categories: those recommending a new constitution and those recommending revisions to an existing constitution. In the former category are constituent assemblies established either following a revolutionary situation or to bring together existing units into a new federation. In either case since there is no existing constitution laying out the appropriate procedure for ratification some agreement has to be reached on this question. One of two general patterns has been followed. The first is to assign authority for enactment to the constituent assembly itself; the other is to require ratification in some form by the constituent units within the federation.

Examples of the first pattern are provided by the directly-elected constituent assemblies of Nicaragua and Namibia and by the indirectly-elected constituent assemblies of India and Pakistan. In each of these four cases the new constitution was simply enacted by the constituent assembly itself, and the new constitution came into effect after formal adoption by the constituent assembly.

Examples of the second pattern occurred in the United States in 1787-90, Switzerland in 1848, Australia in 1897-98, Spain in 1977-78 and Germany in 1948 when the constitution drafted by the constituent assembly or equivalent body was ratified by directly-elected state conventions in the first case, by cantonal, state or national referenda in the next three and by Land legislatures in Germany. There are some special points to note about each of these cases.

In the United States the proposals of the Philadelphia Convention were submitted to the confederal Congress, which instead of acting on them referred them to the states for ratification by directly-elected state conventions. As recommended by the Philadelphia Convention, 9 of the 13 states were required to ratify the Constitution to bring it into effect. During 1787-88 this process resulted in unprecedented public debate over the proposed Constitution and often bitter acrimony between the Federalist and Antifederalist factions in many of the states. The new Constitution formally came into effect when New Hampshire became the ninth state to ratify it in June 1788 and by May 1790 conventions in the four remaining states had also assented to it.²⁰

In the Swiss case the existing confederal Diet proclaimed the new constitution be approved and in force for all 22 cantons following referenda in which fifteen and a half cantons, representing a population of 1,898,887 had assented, and six and a half cantons with a population of 292,371 had rejected it.

In the Australian example, some outstanding issues that remained unresolved in the constitutional conventions were resolved in a premiers' conference and then the proposed constitution was referred to the states for ratification by referenda. But because the states were all still British colonies, following successful referenda in all six states, the constitution was formally enacted by legislation of the United Kingdom Parliament.

In the German case the Basic Law was ratified by Land legislatures. The prevailing consensus meant that these votes were perfunctory in each of the states, except Bavaria where it did not receive approval. Nonetheless, with the backing of the occupying powers, the Basic Law came into effect as the new constitution for all of West Germany in 1949.

The other colonial examples also belong to the second pattern. Once agreement based on consensus in preceding constitutional conferences had been reached, actual enactment was by legislation of the British Parliament. In the Canadian case, the Quebec Conference yielded 72 resolutions, which, largely unchanged, were to form the basis for the *British North America Act*. The articles were then debated by the various provincial governments before being forwarded on for consideration in London. A final conference followed in London with the British government before receiving the approval of Parliament. The pattern was similar in the creation of colonial federations in Malaya 1957, Nigeria 1960, the West Indies 1958, and Rhodesia and Nyasaland 1953.

When a constituent assembly drafts amendments which must be ratified by another legislative body, the cases cited here suggest that ratification is easier if there are strong links between the constituent assembly and the ratifying legislature or legislatures. At one extreme there is the German case in 1949 where, because all of the members of the constituent assembly were also members of the *Länder* legislatures, ratification was a perfunctory affair. At the other extreme, is the case of the United States in 1787 where the delegates to the Philadelphia Convention could exert relatively little influence on the constituent assemblies that were elected in several states to ratify the new Constitution.

However, for Canadians, the most instructive case may be Australia in 1900 where the delegates to the constitutional convention were generally the premiers and other senior politicians of each of the states. As alluded to above, some outstanding issues were not resolved by the convention and concerns about the new constitution were central to the election campaign that occurred in New South Wales shortly after the convention completed its work. In order to deal with the unresolved issues and the shift in the position of political elites from New South Wales, a premiers' conference was called and amendments to the constitutional proposal were made to which everyone could agree. This suggests that, in a federal and parliamentary system such as Canada's, irrespective of what an appointed or elected constituent assembly decides, the prime

minister and the premiers will exert an enormous influence on the outcome. As a result, there are strong incentives to including elected politicians in the constitutional convention since these same men and women must approve the final text.

Process of Enactment for the Amendment of an Existing Constitution

While the number of instances where constituent assemblies or their equivalent have been employed for the amendment of an existing constitution are far less numerous, the normal practice in such instances has been for the recommendations to be dealt with by the normal procedure set out in the constitution for formal amendments.

In the case of the Australian convention of 1973-85 and the Constitutional Commission 1985-58, recommendations were dealt with under the normal constitutional amendment procedure requiring passage in both houses of Parliament and ratification in a referendum with an overall majority and majorities in a majority of states. In the end neither the convention nor the Commission culminated in significant amendments to the constitution following this process.

By contrast, in Germany some success was achieved in translating the recommendations of the Troeger and Enquête Commissions into amendments of the West German constitution, employing the normal procedure for constitutional amendment. By contrast the Swiss effort at total revision through the employment of the Wahlen and Feurgler Commissions never reached the stage of being put through the formal constitutional amendment procedure.

The United States Constitution (Article V) does provide for a national convention to propose amendment as an alternative to Congress and for elected state conventions as an alternative to state legislatures to ratify amendments. In fact, the former has never been invoked (it requires a request from the legislatures of two-thirds of the states), and the latter process has been used only once (the twenty-third amendment in 1933 repealing the eighteenth amendment of 1929 which had imposed prohibition).

These would appear to have been the only instances of the use of constituent assemblies, or their equivalent, to facilitate amendment of an existing constitution, and they do not provide an encouraging picture of their effectiveness.

CONTEXTUAL FACTORS

If the examination of the role and operation of constituent assemblies is limited to analyzing them as mechanisms, there is a risk that their significance may be

misconstrued. Attention therefore is drawn to contextual factors that may have an important impact on their functioning.

Democratic Norms

While all the countries examined here have found themselves in a state of transition at the time of their constituent assemblies in most cases the effective operation of such assemblies has required a tradition of functioning representative democracy. In the cases of the United States, Switzerland, Canada and Australia, even at their inception as federations, robust democratic structures already existed in their state, cantonal and provincial assemblies. In some of the other cases, particularly in Third World countries, democratic institutions were not as well established, which helps to explain some of the difficulties experienced in such examples as the Pakistan and Nigerian constituent assemblies, although in most of the former British colonies a parliamentary tradition was one of the legacies of British rule under which local assemblies had been established.

Partisanship and Consensus

As we have already noted, in most constituent assemblies political parties and partisanship have played an important part in the way in which these bodies have operated. This was perhaps less so at the Philadelphia Convention where a loose coalition of Federalists dominated the Convention, although the polarization between the Federalists and Antifederalists became a marked feature of the subsequent campaign in the state conventions. In the conferences preceding Confederation in Canada, partisan conflict between parties was moderated by the establishment of the "Grand Coalition" in the Province of Canada which enabled the delegates from that province to work together on the project for a wider federation. In the Indian constituent assembly and the Pakistan constituent assembly the dominance of one nationalist party was an important factor contributing to consensus. However, the subsequent fragmentation of the Muslim League was a major factor in the difficulties experienced in Pakistan.

Generally, experience seems to indicate that where a constituent assembly is asked to write a new constitution, a considerable degree of consensus as to the constitutional options that are acceptable is a prerequisite for success. This consensus may be strong or weak and may be very general or limited to what everyone agrees they do not want. Nevertheless, as Ed McWhinney has argued, "For its most effective operation, a constituent assembly would seem to require to be elected against a background of an already existing, and continuing societal consensus as to the nature and desired direction of fundamental political, social, and economic — and hence constitutional — change."²¹

Any number of cases can be cited to demonstrate this general claim. For example, it would appear that all of the delegates to the constituent assembly,

which drafted a new constitution for Nigeria in 1979, were agreed on the need for a democratic, stable government and for the need to retain a federal structure of some kind. Similarly, the delegates to the constitutional convention that drafted the German Basic Law in 1948 were in agreement on the need to avoid the instability created by the Weimar constitution, the desirability of a federal structure and the importance of quickly rebuilding a German state in the context of the Cold War. In both cases, broad agreement facilitated the work of the convention or assembly even if there were significant disagreements as to how to achieve these objectives.

In the two most recent examples of constitution-making by constituent assembly, the consensus was achieved as a result of the dominant position of the revolutionary movement or party. In Nicaragua the Sandanista movement and its allies were dominant in the work of the assembly. In Namibia, SWAPO and its allies held a majority of the seats in the assembly.

Degree of Crisis

It may be argued that in many of the cases referred to in the study, the successful operation of a constituent assembly has depended upon a perceived crisis. As noted earlier, the establishment of a constituent assembly was in some cases the result of a revolutionary change in circumstances as in Switzerland in 1848 in the aftermath of a civil war, in India and Pakistan following partition and the withdrawal of Britain from the continent, and in Spain, Nicaragua and Namibia. In other cases, as exemplified in the creation of many of the colonial federations, constitutional conferences were motivated by the imminence of political independence and the need to establish more viable political entities. In still other cases, as in the United States in 1787, a sharp deterioration in the operation of an existing constitution provided a strong incentive for a constitutional convention to agree upon a new constitutional structure. By contrast, the protracted deliberations of the Australian conventions over the decade of the 1890s, and the failure of the Australian and Swiss efforts to achieve substantial constitutional revision during the period since 1965 show how difficult it is to achieve major changes when the sense of urgency is lacking.

It should be noted, however, that by itself a perceived sense of urgency is no guarantee of success for constituent assemblies. As is demonstrated in the case of Pakistan during the 1950s, a sense of crisis can also work to exacerbate already existing tensions to the point of producing deadlock in a constituent assembly unless a sense of compromise and accommodation accompanies the perceived crisis.

LESSONS FOR CANADA

The experience of other countries with constituent assemblies and constitutional conventions is potentially very instructive to Canadians as we contemplate invoking a similar process to amend the constitution or, more generally, to replace or add to the current approach which has relied almost exclusively on negotiation by executive federalism, followed by legislative hearings and legislative enactment. This section is organized around four interrelated sets of questions or issues arising from our survey and analysis. First, given the disagreements that currently exist with respect to future constitutional arrangements, what might we expect from a constitutional convention? Second, what are the options for the structure (e.g., size, selection and distribution of members) and the mandate of a constituent assembly? Third, what are the possibilities with respect to the operating procedures for the convention? Finally, what considerations should be brought to bear on the question of how the work of a constituent assembly or constitutional convention should be linked to the existing mechanisms for negotiating and ratifying constitutional amendments?

WHY A CONSTITUENT ASSEMBLY?

Perhaps the biggest advantage associated with a constituent assembly is that it responds to many of the critics of executive federalism who see the current approach to constitutional amendments as being elitist and exclusionary. A constituent assembly would potentially make the process of constitutional reform more open and responsive to the participatory, democratic impulse that seems to have arisen in the last decade. However, as we have noted, not all constitutional conventions or constituent assemblies have been successful in drafting new constitutions or making total or partial amendments to existing constitutional documents. One of the key factors that influences the chances for success is the degree of political and societal consensus within which the constituent assembly operates.

Arguably such a consensus does not exist in Canada at the present time. This being said, if Canadians and their governments opt for a constitutional convention, three possible scenarios might develop. First, the delegates might avoid many of the most difficult issues in the face of sharp divisions within the convention. This was the pattern in Australia in 1891 and 1897-98. In the latter case, many of the more difficult issues were resolved after the conventions in discussions between the premiers of the various Australian colonies. The second scenario is that the convention process might become prolonged and continue for several years in an attempt to forge a consensus on the major issues. This was the pattern in Pakistan (1947-56) and in Australia (1970-85). The third scenario is that key leaders of the convention might forge a consensus among themselves and carry the rest of the delegates. In many respects this was the

pattern in the Parliamentary Council that drafted the German Basic Law. The Philadelphia Convention in the United States is often cited in Canada as a model, but it should be remembered that on several occasions during the four months of its deliberations it was on the verge of breaking down, leading Washington and Madison both to describe the outcome as "the Miracle at Philadelphia."²² Given the possible limits on the success of a constituent assembly, the establishment of one in Canada should be weighed very carefully.

STRUCTURE AND MANDATE

The first question that must be addressed contemplating a constituent assembly is the mandate of the assembly. Constituent assemblies elsewhere have been asked to write new constitutions or make minor or major revisions to an existing constitutional text. However, because Canada already has an operative constitution, two questions arise. First, what is the desired degree of amendment? Any attempt to limit the scope of the constituent assembly may not be successful since such assemblies have been known to go beyond a mandate that they deemed to be too narrow (e.g., United States, 1787). The second key consideration in framing the mandate of the constituent assembly is where the assembly itself fits in the broader process of constitutional amendment, i.e., at which of the four stages of pre-negotiation, negotiation of the basic framework, negotiation of the legal text, and ratification. The current stipulations in the *Constitution Act, 1982* deal only with the fourth of these stages, and a constituent assembly established to deal with any of the earlier stages would not necessarily conflict with the current constitutional requirements.

The structure of a constituent assembly involves decisions about the distribution of delegates on the basis of partisan, regional and other considerations, the total number of delegates, and how the delegates are to be elected or appointed. Each of these matters will be considered in turn.

NUMBER AND DISTRIBUTION OF DELEGATES

A recurring debate in Canadian political life, indeed in the political life of most federations, turns on the question of whether or not all provinces are equal. In working out the structure of a constitutional convention, one of the key issues is whether or not all provinces are to be represented equally (as was the case in Australia, Switzerland and the United States) or whether representation should be based on population (as was the case in Germany in 1948, in the constituent assemblies of India and Pakistan and in Nicaragua in 1984).

The representation of non-territorial interests represents a particular challenge. The constituent assembly of India and Pakistan is the only case where a formal effort was made to ensure that non-territorial interests were represented. In other cases where religious, linguistic or racial differences were

salient, representation was assured on a more informal basis (e.g., in the many colonial conferences) or was "built in" to the territorial representation (e.g., Switzerland). In the Canadian situation, there are several options available. The first would be to require formally or informally that each provincial delegation include a certain number of delegates representing non-territorial interests and concerns (e.g., women, aboriginals, ethnic minorities, etc.). A second alternative would be to provide for non-territorial delegations. Peter Russell alludes to such a solution when he suggests that aboriginal groups might be represented in a constituent assembly.²³

With respect to the total number of delegates, the final decision will depend largely on whether representation is on the basis of province or population or some combination of the two. Constituent assemblies elsewhere have ranged in size from 23 to 389 members. There are several reasons to suggest that, all things being equal, an assembly of between 60 and 100 members would be preferable. First, in an assembly of such a size there will be opportunity to ensure that minority interests are represented, either generally, or within provincial delegations. The recent experience of the Bélanger-Campeau Commission is instructive in this regard. After the membership of the Commission was announced, various groups lobbied to expand the membership to ensure that "their" interests would be represented. Second, a sufficiently large number of delegates facilitates the creation and operation of subcommittees which have been an integral part of the constituent assembly process in other countries. Third, the number of delegates should provide sufficient scope to elect or appoint various experts in constitutional law, political science, and related fields. The experience of other constituent assemblies suggests that such expertise can be invaluable, especially if the assembly is to draft a constitutional text.

Finally, there is the question of whether or not there must be delegates from every province and especially from Quebec. What would happen if one or more provincial governments decided not to participate in a constituent assembly? The experience of other countries is mixed in this regard. In Switzerland in 1848 two of the smaller cantons were not represented on the committee of the Diet which drafted a new constitution for a federal Switzerland. Nevertheless, when the new constitutional text was submitted to a referendum it was ratified by a majority of voters in a majority of cantons. The key difference with the contemporary Canadian situation may be that in the Swiss case the vast majority of Swiss citizens were "represented" in the constituent assembly since only two small cantons out of a total of 23 went unrepresented.

A potentially more instructive case is that of the Australian constitutional convention of 1897-98. Although all the states were represented, it soon became clear that the draft was unacceptable to key elites in New South Wales, the largest state in Australia. As described above, the impasse was broken by a Premiers' Conference in January 1899. The Australian experience suggests that

a constituent assembly that is not representative of all the country could serve to draft a text that would be the subject of further negotiation by political elites from all the provinces.

CHOOSING DELEGATES

The final issue with respect to the structure of the constitutional convention is how the delegates are to be chosen. The experience in other countries offers at least two alternatives. The delegates can be elected by the population in a general election, or the delegates can be "elected" by Parliament and the provincial legislatures.

The first option would appear to be, at first glance, preferable if the objective is to make the process of constitutional reform more "democratic." However, the experience in other countries suggests that an elected constituent assembly is quite rare (Namibia 1989, Nicaragua 1984) and that such an assembly will compete with Parliament for authority and legitimacy (assemblies in Nicaragua, India and Pakistan assumed to themselves a legislative role). The "democratic impulse" has sometimes been met in other federations at the ratification stage by means of referenda (e.g., Switzerland, Australia).

The second option, whereby the delegates would be "elected" by Parliament and provincial legislatures would be in keeping with the dominant pattern in most other constituent assemblies. Moreover, this general approach is likely to ensure participation in the assembly of legislators who will have a key role subsequently in the ratification of proposed amendments by legislatures as specified under the present constitutional amendment requirements. A possible model is that agreed upon at the First Ministers' Conference in June 1990, where a federal-provincial joint committee of legislators representing all the constituent legislatures was to be created to develop constitutional proposals on Senate reform.

OPERATING PROCEDURES

We can expect that many of the operating procedures of a constituent assembly or interlegislature joint committee in Canada would be decided by the assembly itself. However, the pattern in other countries points to some broader issues that should be identified and considered in advance. These are the possible role of political parties in the convention process, the place of interest groups, and the general issues related to the detailed operating procedures and voting.

Our survey of the constitution-making and amending experience of other countries suggests that, as modern political parties have arisen, they have played a key role in the work of constituent assemblies and constitutional conventions. This has been a leadership role, with party leaders meeting in smaller groups to negotiate and resolve key disagreements, and they have

provided an effective means to aggregate interests and gather the delegates into coherent groups.

Attention must be given, therefore, to the need to achieve some of the benefits which political parties can bring to the process without making the constituent assembly a totally partisan affair. The emphasis must be on the functions that parties can perform in the assembly process — leadership, interest aggregation, elite accommodation. The challenge, of course, if parties cannot perform these roles, becomes one of finding other mechanisms to meet these functional requirements.

Our survey of other constituent assemblies also suggests that interest groups have not been given a formal role in the convention process. However, in Canada during the past decade, women's groups and native organizations, to name but two, have sought to influence the constitutional negotiation process. Indeed, native groups were given a formal role in framing constitutional amendments during the aboriginal constitutional process from 1983 to 1987. Under these circumstances, it is likely that organizations representing aboriginal Canadians, women, official language minorities, ethnic groups, etc. will demand to be made part of any constituent assembly process. Elsewhere, the representation of minority and other interests has largely been achieved through the mix of delegates selected by the state legislatures.

While many of the detailed operating procedures of constituent assemblies elsewhere have been decided by the delegates themselves, some general observations are in order. First, delegates, at some point, will need to divide themselves into committees and subcommittees to carry out the detailed work that the experience of other assemblies suggests will be required. Similarly, the modern experience with constitutional conventions, especially in Australia, suggests that a secretariat should be named to provide continuity and administrative support. A committee system and a secretariat also provide a means of ensuring that the constituent assembly has access to legal and academic expertise. A drafting committee seems to be a common feature with most constituent assemblies and this committee usually includes at least one or two persons with technical expertise in legal drafting. Alternatively, or in addition, a well-staffed secretariat can provide this expertise.

A second consideration with respect to the detailed operating procedures of a constituent assembly is the issue of voting. The general pattern of other constituent assemblies is that a modified form of parliamentary procedure is adopted allowing for three or four separate votes on the draft constitutional text, individual votes on the articles of the text, elaborate procedures for amendment, etc. This would seem to be directly applicable to the Canadian situation, especially if the delegates include members drawn from Parliament and the provincial legislatures. Finally, it is important to note that, among the cases we have reviewed, there are no examples of a system of weighted voting. In some

instances, however, such as the Philadelphia Convention and the German Parliamentary Council, each state delegation had only one vote and, therefore, the state position on each vote had to be thrashed out in advance within each state delegation.

CONSTITUENT ASSEMBLIES AND PROCEDURES OF CONSTITUTIONAL AMENDMENT

In his discussion of the applicability of a constituent assembly to the Canadian situation, Peter Russell argues that a constituent assembly can be a useful mechanism supplementing the existing constitutional amending formula.²⁴ Indeed, it might function as a more democratized form of negotiation in preparing proposals for legislative ratification. He goes on to argue that a constituent assembly would have to work within the context of the existing formula since it is highly unlikely that the Government of Quebec would agree to change the formula set out in the *Constitution Act, 1982*.

The experience of other countries suggests that, although a constituent assembly can precede the use of an existing amending procedure, the assembly is likely to exert substantial influence on the subsequent process. For example, the pattern in the United States, Australia and Nigeria suggests that the final constitutional draft developed by a constituent assembly will be difficult to amend, especially if there is broad consensus among the delegates to the assembly. Just as Parliament and the provincial legislatures were asked to ratify the Meech Lake Accord, the pattern in other countries suggests that these same legislative assemblies would also be asked to ratify, but not amend, any constitutional draft developed by a constitutional assembly. How can such a "take or leave it" scenario be avoided? The experience of Australia, Nicaragua and Germany suggests two alternatives.

The first is to ensure that before the constituent assembly votes on the final draft of a new constitution or series of amendments to the existing constitution, the convention adjourns to allow Parliament, the provincial legislatures, and the public at large to debate the proposals. Delegates to the convention can then take these debates into account in the final stage of deliberations on the accord. This was the pattern in Australia in 1891 and in Nicaragua in 1984. The second alternative is to limit the mandate of the constitutional convention to act as an advisory body to first ministers who themselves would have to approve and ratify a new constitutional text. This was the pattern in Australia in 1897-98 and in Germany in 1948. However, the fact that German and Australian political elites were asked to ratify the constitution was more a product of disagreements remaining within the constituent assemblies and less a product of a previously planned procedure. The fact remains that a constituent assembly once established will inevitably be a powerful institution and it will not be possible to

ignore or amend the recommendations of such an assembly without significant political costs.

SUMMARY AND CONCLUSIONS

This research paper has reviewed the experience of several countries, most of them federal states, with constituent assemblies and similar institutional mechanisms in the constitutional reform process.

There has been much recent discussion in Canada about the prospects for a constituent assembly in order to renew the Canadian constitution and to redress the perceived weaknesses of the existing processes for constitutional reform, so evident in the failure to ratify the Meech Lake Accord.

The term "constituent assembly" is defined differently in differing circumstances. This study surveyed the broad category of practices in a number of countries with special institutional bodies with the express role of furthering the process of constitutional reform. The most democratic version of a constituent assembly — one directly elected by the general population — has been extremely rare in practice; directly-elected constituent assemblies were convened, for example, in Nicaragua (1984) and in Namibia (1990). More common have been various types of constitutional conventions or assemblies that have been indirectly elected or appointed by the constituent units in federations or confederations. Also surveyed in this study have been a variety of experiences with task forces, committees and commissions appointed to propose or to consult on matters of constitutional revision.

The uses of a constituent assembly, setting aside the important issues of how its members are selected, vary in comparative practice. They can be used at any of four separate stages of a constitutional revision, or serially through some or all of these stages:

- to provide early public input prior to the negotiation of constitutional revisions;
- to undertake the general and or detailed negotiation and drafting of a proposed constitutional text;
- to provide for public participation and debate and, if required, modification of a set of constitutional proposals; and
- to ratify a final constitutional text.

The study of comparative experience suggests that special constituent assemblies or constitutional conventions are most successful in two sorts of historical circumstances. First, they have been particularly effective when established in the aftermath of a significant break from the past such as a revolution, civil war or major disruption of this sort. Second, they have been successful in the

establishment of federations or confederations where a group of independent or separate states or former colonies have come together in a new union. Apart from these cases, however, constituent assemblies have been much less successful in attempts to revise existing constitutions, either partially or totally.

The structure and mandate of constitutional conventions, assemblies and similar bodies has varied considerably. Few have been directly elected; more have been indirectly elected through appointment from among the elected representatives of existing legislatures. Some, notably the constitutional conventions of India (1946-50) and Pakistan (1947-54) and a commission established in Australia (1973-85), included non-parliamentary members. A number of countries, notably Germany, Switzerland and Australia have appointed task forces or commissions, with mixed results. In general terms, smaller task forces and commissions have been used when more modest constitutional amendments are contemplated, whereas the use of larger conventions or assemblies has been reserved for more wholesale constitutional revision.

In almost all of the cases studied, the constituent assemblies or convention processes were highly partisan affairs. Partisan considerations were often as prevalent as regional divisions if not more so. This partisanship extended in particular to the leadership of these bodies. This experience suggests that a "citizens'" non-partisan forum established to draft a new constitution may not be successful in eliminating partisan debate. Democratic societies and processes seem always to gravitate towards partisan camps.

Another finding is that the more recent trend in democratic systems towards consultation with the public at large on constitutional revision has been met through the means of commissions and parliamentary committees rather than through assemblies and conventions. Most of the historical experience with the latter was in the 1940s and 1950s, and in more recent efforts such as Australia in the 1970s or Nicaragua in the 1980s, constitutional conventions employed additional means of gaining public input and feedback. The point here is that the appointment of some sort of new and presumably more representative political body to consider constitutional issues does not in itself eliminate the need for broader public consultation.

In both Switzerland and Australia, the public has always had the ultimate say through the requirement for the ratification of constitutional amendment through referenda. However, the use of referenda is not universal. The results of constituent assemblies or constitutional conventions have been treated in a variety of ways. In the Philadelphia Convention of 1787, the proposals were then ratified by directly-elected conventions in each state. In Germany in 1948, the Länder legislatures ratified the proposed Basic Law submitted to them by a constitutional convention.

Apart from the structure, mandate and processes of constituent assemblies and similar bodies, this study also surveyed contextual factors important to the

success of such mechanisms. Of particular significance seems to have been the existence of a general societal consensus (often in the midst of a perceived crisis or in the aftermath of an exceptional break from the past) on the range of constitutional options. If there is no sense of urgency in the political community at large, then a constituent assembly is unlikely to have much success.

The comparative experiences surveyed in this study therefore lead to a number of tentative conclusions for the current Canadian context. The use of special bodies — whether they be constituent assemblies, constitutional conventions, committees or commissions — have been used extensively and hold some potential for providing a more open and participatory process of constitutional reform.

The success of these bodies depends crucially on the nature and degree of public consensus about basic constitutional objectives, a situation which, it may be argued, does not exist at the present time in Canada. It may be that Canadians would best be served by the careful selection of mechanisms from among the many surveyed in this report. Canadians would need to make a judgement regarding which mechanism would be most appropriate to the current circumstances and which stages of the process from pre-negotiation through to ratification, might best benefit from the special institutions.

In the consideration of these issues, the following questions thus require careful thought, for almost any one of them could provoke sharp divisions among Canadians, which would only exacerbate current difficulties:

- *What is the role of the special body?* Is the mandate to be limited to a form of revised federalism, or to consider the broader range of options such as sovereignty-association, separation, etc.? What is the purpose of the body: to propose general lines of reform, to draft a constitution, to seek public views or to ratify results?
- *Who sits in the special body?* Are all provinces to be represented equally? Comparative experience in most federations has been to represent the federated units equally in such forums, although there has been some experience of representation tilted towards more populous provinces, as was the case in Germany, India and Pakistan (e.g., a few more delegates or members from Ontario and Quebec). Are non-territorial interests (aboriginals, interest groups representing women, ethnic and other minorities, etc.) also to be represented directly?
- *How are representatives to be chosen?* By direct election? By appointment of the federal parliament or provincial legislatures?
- *What is the role of political parties and other groups?* Experience elsewhere suggests that political parties cannot be excluded from these processes, whereas interest groups are less frequently involved. Should

there be a special mechanism to ensure representation of aboriginal peoples?

- *How are decisions made?* Should there be a requirement for unanimity or general consensus? Or should there be a set of voting rules? If votes are to be taken, on what basis? Should individuals cast votes, or vote only by provincial blocks? Is Quebec likely to participate except on the basis of having a block vote? Should there be vetoes? Who gets a veto?

These are not minor issues. They are at the heart of constitutional reform. Canadians took 55 years from 1926 to 1981 to agree on a formula to amend our existing constitution. The issues of who gets to decide, and how, can be as important as anything else on the constitutional agenda. Our existing amending provisions are clearly not satisfactory to all. The reform of these mechanisms was part of the Meech Lake Accord and the use of the existing mechanisms was part of the controversy and division surrounding the Accord.

These questions and concerns being posed, one must not belittle the important task of improving the process of public involvement and representation in constitutional revision. As demonstrated by the comparative experience, great care must be exercised in making decisions to establish a constituent assembly, constitutional convention or a similar body. In cases where political consensus is not otherwise present, the establishment of special bodies can end in frustration, or worse still, further reduce the legitimacy of existing democratic institutions. In any case, finding agreement on such significant matters of process will not be easy and may pose an insurmountable initial hurdle for Canada to cross on its way to constitutional renewal.

Notes

1. Government of Canada, *Amending the Constitution of Canada: A Discussion Paper* (Ottawa: Federal-Provincial Relations Office, December 1990).
2. Such a concept had been proposed, for example, by the Federation of Canadian Municipalities to the Pepin-Robarts Task Force in 1978, and by the Canada West Foundation in 1981 during earlier periods of heightened constitutional concern.
3. *Toronto Star*, 4 June 1991, A1. For the purposes of the poll a constituent assembly was defined as a "body made up of Canadians from all regions and all walks of life" who would meet and formulate a constitutional proposal that Canada would then offer to Quebec. Outside Quebec, 68 percent were in agreement with this statement as compared with 57 percent within Quebec.
4. *Ibid.*
5. Canada, Citizen's Forum on Canada's Future (Spicer Forum). *Report to the People and Government of Canada* (Ottawa: Minister of Supply and Services, 1991), p. 5.

6. Premier Wells' suggestions can be found in his "Submission to the Special Joint Committee on the Constitutional Amending Process" by the Honourable Clyde K. Wells, Premier of Newfoundland and Labrador, 9 April 1991.
7. Peter H. Russell, "Towards a New Constitutional Process," in Ronald L. Watts and Douglas M. Brown (eds.), *Options for a New Canada* (Toronto: University of Toronto Press, 1991). In addition, both the northern territories and aboriginal peoples would be asked to send delegations if they wished such an assembly to deal with their constitutional interests.
8. "In Praise of Citizens' Assembly," *Ottawa Citizen*, 28 May 1991, A11.
9. Canada, Special Joint Committee of the Senate and the House of Commons, *The Process for Amending the Constitution of Canada* (Ottawa: June 1991), viii.
10. *Ibid.*, p. 49. It should be noted that New Democratic members of the committee dissented from this majority opinion, and called for a constituent assembly.
11. Ronald L. Watts, *New Federations: Experiments in the Commonwealth*, (Oxford: Clarendon Press, 1966), pp. 123-24.
12. Donald Smiley, *The Federal Condition in Canada* (Toronto: McGraw-Hill Ryerson, 1987), p. 47.
13. See Alan Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake" and "Author's Introduction" in Douglas E. Williams (ed.), *Disruptions: Constitutional Struggles from the Charter to Meech Lake*, (Toronto: McClelland and Stewart, 1991).
14. See, for example, Carole Pateman, *Participation and Democratic Theory* (Cambridge and New York: Cambridge University Press, 1970); C.B. Macpherson, *The Life and Times of Liberal Democracy* (Toronto: Oxford University Press, 1977), Chapter Four. In a different vein see the work of Ronald Inglehart with respect to the rise of a more participatory, "post-materialist" political culture. See, R. Inglehart, *The Silent Revolution: Changing Values and Political Styles among Western Publics* (Princeton: Princeton University Press, 1977) and *Culture Shift in Advanced Industrial Society* (Princeton: Princeton University Press, 1990).
15. Keith Banting and Richard Simeon, "Introduction," in K. Banting and R. Simeon (eds.), *Redesigning the State: The Politics of Constitutional Change* (Toronto: University of Toronto Press, 1985), p. 17.
16. See Reginald Whitaker, *Federalism and Democratic Theory* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1983), p. 39. See also Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making."
17. Edward McWhinney, *Constitution-making: Principles, Process, Practice* (Toronto: University of Toronto Press, 1981), p. 34.
18. Peter Neary, *Newfoundland in the North Atlantic World, 1929-1949* (Kingston: McGill-Queen's Press, 1988), p. 280.
19. Great Britain, *Parliamentary Debates (Commons)*, 5th Series, 11 December 1945, col. 210-11.
20. For a full discussion of the ratification process see R.L. Watts, D.R. Reid and D. Herperger, *Parallel Accords: the American Precedent* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1990).

21. McWhinney, *Constitution-making*, p. 43.
22. Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787* (Boston: Little, Brown & Company, Inc., 1966), p. 140.
23. Russell, "Towards a New Constitutional Process."
24. Ibid.

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APPENDIX

Selected Examples of the Major Characteristics and Alternatives with Respect to Constitutional Assemblies and Related Bodies

<i>Types Based on the Method of Election or Selection</i>	
Directly-elected	Namibia (1989); Nicaragua (1984); Spain (1977); Newfoundland (1946)
Indirectly-elected	India (1946-49); Pakistan (1947-56); United States (1787); Australia (various)
Constitutional conference	Canada (1864-66); Malaya (1948); Nigeria (various)
Representative legislative committee	Switzerland (1847)
Constitutional commission	Canada (1977-79, 1990-91); Switzerland (various); Germany (various)
<i>Role of Constituent Assemblies in the Constitutional Amendment Process</i>	
Pre-negotiation phase	Switzerland (various); Germany (various)
Negotiation of basic principles	United States (1787); Canada (1864-66); Australia (1897-98); Germany (1948); Spain (1977); Nicaragua (1984); Namibia (1989)
Preparation of a legal text	United States (1787); Germany (1948)
Ratification	India (1946-49); Pakistan (1947-56)
<i>Distribution of Members</i>	
On the basis of population; unequal representation of constituent units	Germany (1948); Nicaragua (1984); India (1946-49); Pakistan (1947-56)
Equal representation of constituent units	United States (1787); Australia (1891; 1897-98; 1973); Canada (1864-66)
<i>Representation of Non-territorial Interests; "Experts" and Political Parties</i>	
Informally within the delegations from each of the constituent units	Switzerland (1848); Canada (1864-66)
Formally within the delegations	Germany (1948); India (1946-49); Pakistan (1947-56)
<i>Examples of Public Consultation</i>	
Australia (1891); India (1946-49); Nicaragua (1984)	