The Federal Idea
Essays in Honour of Ronald L. Watts

Edited by
Thomas J. Courchene, John R. Allan,
Christian Leuprecht and Nadia Verrelli

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Ronald L. Watts is Principal Emeritus and Professor Emeritus of Political Studies at Queen's University, Canada, where he has been a member of the academic staff since 1955 and was Principal and Vice-Chancellor 1974-1984. He is a former Director and currently a Fellow of the Institute of Intergovernmental Relations at Queen's University. He was President of the International Association of Centres of Federal Studies 1991-1998, was a founding board member of the Forum of Federations 2000-2006 of which he is currently a Fellow. As a political scientist he has worked for over fifty years on the comparative study of federal systems and has written or edited twenty-nine books, monographs and reports and over one hundred articles or book chapters. He became an Officer of the Order of Canada in 1979 and was promoted to Companion of the Order of Canada in 2000.

The Institute of Intergovernmental Relations is pleased to acknowledge our sponsors for the Federal Idea: A Conference in Honour of Ronald L. Watts that gave rise to this publication

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PREFACE

At the 2006 meeting of the International Association of Centres for Federal Studies in Tübingen, Germany, Sean Conway, then Director of the Institute of Intergovernmental Relations (IIGR), confirmed that the IIGR would organize and host the next International Association of Centers for Federal Studies (IACFS) conference and that it would take the form of a Festschrift for Ronald L. Watts, himself of course a former IIGR Director and currently a Fellow of the Institute.

After consulting with Ronald Watts, John Meisel and the organizers sent invitations to prospective participants. The finalization of the program occurred under the aegis of Thomas J. Courchene, who had succeeded Sean Conway as Director of the Institute of Intergovernmental Relations.

The conference *The Federal Idea: A Conference in Honour of Ronald L. Watts* was held at Queen's University, Kingston, Ontario, Canada on October 18-20, 2007. The event was co-sponsored by the IACFS represented by then President Cheryl Saunders, of Melbourne University, and by the International Political Science Association RC 28 (Research Committee on Comparative Federalism and Federation) represented by Michael Stein, of McMaster University. John Meisel served as Honourary Conference chair. One of the highlights of the conference was Ronald Watts's presentation at the opening banquet in his honour of the *Federal Idea and its Contemporary Relevance* which is reproduced as the second chapter of the Festschrift.

The editorial committee (Thomas J. Courchene, John R. Allan, Christian Leuprecht and Nadia Verrelli) worked with the authors over the following year to prepare the final versions of the papers. At this point the recession sharply constrained the annual revenue inflow to the Institute, with the result that the publication of the Festschrift had to be put on hold for a considerable period. We wish that this were not the case and we apologize to our contributors for any and all inconveniences that this may have caused.

The Institute is pleased to recognize the conference planning and support from John Allan, Mary Kennedy, Patti Candido, Sean Gray, Ryan Zade and Paul Michna. Sharon Sullivan ably ensured that the manuscript was converted into publication format and Mark Howes from the School of Policy Studies Desktop Publishing Unit created the cover design.

It is also a pleasure to acknowledge the financial contributions received from Queen's University, the Ontario Ministry of Intergovernmental Affairs, the Forum of Federations, the Government of Canada's Privy Council Office, Cabinet Office, the Institute for Research on Public Policy, Power Corporation

of Canada, John and Phyllis Rae, Albert Fell, and Donald Rickard and the Drager Institute.

All that remains is for the Institute, on behalf of the editors and on behalf of Ronald Watts, to express our sincerest gratitude to the authors for their patience, cooperation and, especially, their excellent papers.

It is with utmost sadness that we note the passing of one of the authors, Peter Leslie, on November 18, 2010. Peter was a former Director of the IIGR and a recognized scholar of Canadian federalism and a Canadian expert on the role and operations of the European Union. His final published work *European Futures: The Unbearable Heaviness of Thinking Federally* appears as Chapter 22 in this volume.

On a personal note, having taken over as Director of the Institute in March 2010, I am very pleased that my first preface should be about a conference and book in honour of Ronald L. Watts who has been so generous in introducing me to the Institute and Queen's University.

André Juneau
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Section One
Introduction

1

Introduction and Overview

Nadia Verrelli

The Federal Idea: Essays in Honour of Ronald L. Watts *est un recueil regroupant plus de trente études rédigées par d'importants chercheurs et spécialistes du fédéralisme. L'ouvrage s'ouvre sur un texte de Ronald Watts résumant son analyse du statut actuel de l'idée fédérale. Suivent une série d'études sur la contribution théorique de M. Watts à la question du fédéralisme (y compris du fédéralisme comparé) et son rôle clé de conseiller auprès de fédérations dans le monde entier. Les textes des sections IV à VI examinent différents aspects du fédéralisme, dans sa dimension à la fois constitutionnelle et citoyenne, de même que les réussites et les échecs de la doctrine fédérale. Les sections VII à XI traitent ensuite d'un éventail de politiques et de pratiques appliquées dans différentes fédérations. Outre plusieurs études de cas, les auteurs s'intéressent notamment au fédéralisme fiscal, aux relations intergouvernementales, au fédéralisme au sein de l'Union européenne et au régime de dévolution écossais, ainsi qu'aux approches à leur Chambre haute adoptées par diverses fédérations. Nous souhaitons que les lecteurs de cet ouvrage jugeront qu'il vient non seulement renforcer le cadre élaboré par Ronald Watts mais enrichir l'étude de la doctrine fédérale et du fédéralisme comparé.*

The Institute of Intergovernmental Relations (IIGR) at Queen's University, in collaboration with the International Association of Centres for Federal Studies (IAFCS) and the International Political Science Association RC28 (Research Committee on Comparative Federalism and Federation), was privileged to host

and organize "The Federal Idea", a conference celebrating the career and accomplishments of Ronald L. Watts, above all his contributions to the study and practice of federalism. Similarly, the IIGR is privileged to publish the conference proceedings in the form of a festschrift, *The Federal Idea: Essays in Honour of Ronald L. Watts.*

Ron Watts has been associated with the IIGR since its very inception. Indeed, when the Institute was founded by then Queen's Principal J.A. Corry in 1965, Ron was one of the members of Queen's Political Studies department who was consulted on its creation. Subsequently, he served as the IIGR's Associate Director (1988) and Director (1989-93), and has been a Fellow of the Institute ever since. Under his direction, the IIGR was one of the founding centres of IAFCS, and Ron served as the Association's second President (from 1991-98). As Principal of Queen's University (1974-84), he was instrumental in creating the School of Policy Studies in which the IIGR is now housed. As all of the authors enthusiastically attest, Ron was not only a major contributor to the development of the theory and practice of federalism and federations internationally, but as well has been an important influence on their personal academic and policy careers. Not surprisingly, we are extremely fortunate and proud that Ron Watts has been willing to make the IIGR his intellectual home.

The papers collected in the ten following sections of this festschrift reflect the unifying theme of both the conference and this volume, namely, the contributions made by Ron Watts to the study of federalism and, most importantly, in elucidating of the role of federalism in reconciling unity and diversity. The festshchrift opens up with a paper by Ron Watts wherein he explores federalism and the continued relevance of the federal idea. The papers in section III all pay tribute to and celebrate Ron Watts as a person, academic and practitioner of federalism. The contributors to Sections IV to VI are concerned primarily with the relevance of federalism as a concept or as an ideal. Their papers run the gamut from legal and constitutional perspectives of federalism, through the manner in which it accommodates economic and political diversity within a single political entity, to assessing the sources and circumstances of its success or failure. Sections VII to XI focus on the examination of the federal idea in practice. The papers range from an exploration of the nature of intergovernmental relations, to federalism in the European Union, fiscal federalism, and the differing roles of upper chambers in various federal states. The remainder of this brief introduction elaborates on the thirty-two papers that constitute this festschrift.

SECTION II: THE FEDERAL IDEA

The Federal Idea: Essays in Honour of Ronald L. Watts opens up with a paper by the honoree himself. In "The Federal Idea and its Contemporary Relevance", Watts explores the basic idea of federalism − shared rule and self rule − and how it continues to be relevant in the quest to reconcile unity and diversity within a single political system. In particular, Watts's view is that federalism as a political idea has become increasingly relevant because of its ability to accommodate the changing nature of the contemporary world. The basic level of

federalism as a combination of "shared rule" for some purposes and regional "self-rule" for others has been expressed in practice through a variety of pragmatic institutional forms. Watts notes that during the past century the popularity of federal political solutions has experienced four distinct periods culminating in the current resurgence. Among three recent innovations in the application of the federal idea have been the creations of hybrids, the incorporation of federations into supra-federal organizations such as the European Union (EU) and North American Free Trade Agreement (NAFTA), and the quite frequent acceptance of asymmetry in the relationships of constituent units. The conclusion identifies five major lessons from the experience of federal systems.

SECTION III: CELEBRATING RON WATTS

Section III opens with papers by John Meisel (Queen's University), George Anderson (Forum of Federations) and Hugh Segal (Senate of Canada) followed by David Cameron (University of Toronto), Peter Meekison (University of Alberta) and Jennifer Smith (Dalhousie University). All six authors share their personal reflections on Ron Watts and celebrate his passion for the study of federalism and the accommodation of diversity.

In "Introducing Ron Watts", John Meisel provides insight on the factors and influences (including very prominently Donna Watts) that underpinned and shaped Ron's remarkable career and nourished his unparalleled contributions to Canadian and international federalism. Ron, according to Meisel, is superbly adept at seizing opportunities presented to him and having the discipline, will, talent and character to rise to every challenge before him.

George Anderson, in "Encounters with Ron Watts" relates his many and continuing encounters with Ron, both professionally and socially. He argues that Ron has been influential in both his life and in the lives of others through his dedication and commitment to the study and practice of federalism. He concludes with his assessment of Ron as "always humble, always elegant and always eloquent".

Senator Segal in "Federalism, Civility and Conflict Prevention: Watts's Research and Legacy", recalls the remarkable breadth and depth of Ron's work on federalism, both in Canada and abroad. Stressing Ron's civility of tone and elegance, Segal remarks on how his character and persona underline both his scholarship and his work as a government advisor. He concludes by stating that we will all continue to benefit from Ron's scholarship as we seek to address the challenges of shared rule and self rule.

In "The Practical Ron Watts: Glimpses of a Political Scientist in Action", David Cameron offers reminiscences about his experiences with Ron while they both worked on the federally commissioned Task Force for Canadian Unity, better known as the Pepin-Robarts Commission, 1977. This paper is a light hearted review of Ron Watts as a political scientist in action. It views him as a Canadian – indeed, an Upper Canadian – whose rootedness is the foundation of his international success. Cameron concludes that Ron has made significant

contributions to his university, his community and his country, and to the study of comparative federalism.

Peter Meekison, in "Ron Watts: the 'Go To' Person of Canadian Federalism", focuses on Ron Watts's very significant contributions to Canada's attempts at managing French-English relations and at reforming the Constitution. Beginning with Ron's research work with the Royal Commission on Bilingualism and Biculturalism, Meekison traces his participation through to the Charlottetown Accord. His conclusion is that over this period and beyond, Ron has been the "go to" person on Canada's constitutional challenges.

Section III concludes with Jennifer Smith's "Definitions, Typologies and Catalogues: Ronald Watts on Federalism", assessment of the philosophical foundations and methodology underpinning Ron's work and research on federalism. The paper seeks to clarify the thinking that lies behind Ron's prodigious knowledge and, in particular, the relationship that he sees between the techniques of the federal system and the values inherent in it. As promulgated by Watts, the scope for the design of the federal system is sufficiently elastic to enable political actors to find in it creative processes to meet a vast array of demands from both regionally-based communities and citizens at large. The conclusion reached in the paper is that Watts finds in federalism both the means and the values that can assist citizens to meet the ongoing challenges of living together in fairness and peace.

SECTION IV: CONSTITUTIONAL PERSPECTIVES

The papers by Jeremy Clarke (Queen's University) and Janet Hiebert (Queen's University), Thomas Fleiner (University of Fribourg, Switzerland), Cheryl Saunders (University of Melbourne) and Nadia Verrelli (Queen's University), assess the federal idea from a constitutional perspective. In "Scholarly Debates about the Charter/Federalism Relationship: A Case of Two Solitudes", Clarke and Hiebert explore how the Charter and Charter jurisprudence have affected federalism and the federal idea and how these relationships are perceived differently by scholars in English Canada and by those from Quebec. The authors contrast the ambivalence or lack of concern among English-Canadian scholars about the Charter's impact on federalism with the tensions evident in the Québécois literature between the two constitutional pillars of the Canadian political system. They argue that those in French Canada embrace what they refer to as a "thick" understanding of federalism where they recognize that the Charter can impose serious tensions for federalism. In contrast, English Canadian scholars, embracing a "thin" understanding of federalism, seem to be more concerned with how the Charter may pose more of a challenge to parliamentary democracy than to federalism.

Also concerned with the implications of different constitutional perspectives, Thomas Fleiner in "Constitutional Underpinnings of Federalism: Common Law vs. Civil Law" explores how the federal idea is manifested differently in common-law countries than in those under civil law. He observes that many of the newly created federations have not proven to be very stable and he hypothesizes that the source of this instability may be found in their adherence

to the civil-law tradition. Given this, he concludes that the relationship of the central government to the federal units and the role of the judiciary may have to be shaped quite differently in common-law and civil-law federations.

In "Can Federalism Have Jurisprudential Weight?", Cheryl Saunders focuses on the courts in their role as arbiters of the constitutional division of powers. She finds evidence of a paradox in the operation of some federations, namely, a tendency for judicial review to favour the central government. Using Australia as her case study, she argues that the interpretive approach adopted by the Australian High Court has had an impact in shaping Australian federalism. She notes that this is probably not unique to Australia, and suggests that similar studies might usefully be undertaken for other countries.

Concluding this section, Nadia Verrelli's paper on "Judicial Review and the Federalism Factor" re-examines traditional theories of judicial review, arguing that all seem to underestimate the role an understanding of federalism and socio-political factors play in shaping the judicial review process. Using four references − *The Senate Reference*, 1980; *The Patriation Reference*, 1981; *The Quebec Veto Reference*, 1982; and *The Secession Reference*, 1998 − she demonstrates that a particular conception of federalism underpins all four opinions of the Supreme Court of Canada. She suggests that further analysis is required to assess the degree to which the Supreme Court of Canada is influenced by and influences the dominant understanding of Canadian federalism.

SECTION V: DIVERSITY AND FEDERALISM

In the next section, Peter Russell (University of Toronto) and Alan Tarr (Rutgers University) explore the relationship between diversity and federalism. In "Federalism and First Peoples", Russell examines three dimensions of relations with indigenous peoples within three federal states, namely, Australia, Canada and the United States. First, from the perspective of the division of powers, federal and state or provincial governments in all three countries are just beginning to view their relations with indigenous governments in a government-to-government rather than an imperial context. Second, formal and informal forms of treaty federalism are proving to be the most promising ways of building federal relations with indigenous peoples. However, developing relations with indigenous peoples that are fully federal, meaning realizing both the self-rule and shared-rule aspects of federalism, require more effective ways of engaging them in the governing institutions of the federation. Third, in their relations with their respective indigenous peoples, Australia, Canada and the United States have much to gain from drawing on the confederal traditions of these peoples.

Alan Tarr, in "Symmetry and Asymmetry in American Federalism", highlights the implications of asymmetry in the American federalism design by focusing on non-state constitutional units in the United States, namely, the District of Columbia, Native American tribes, and territories not yet admitted to statehood. He describes the current status of these non-state constituent units and analyzes the factors that have prompted shifts in their status over time and the

problems plaguing efforts to reconcile diversity with the American federal Constitution. Both Russell and Tarr speak to and elaborate on the use and usefulness of federalism as a political tool for the accommodation of diversity.

SECTION VI: FEDERALISM – A CENTRIFUGAL OR CENTRIPETAL FORCE?

The papers by Michael Burgess (University of Kent) and by Richard Simeon (University of Toronto) examine the centrifugal and centripetal effects of federalism on nations. Burgess begins by exploring how we define the terms *success* and *failure* when applying them to the comparative study of federations. In his paper, "Success and Failure in Federation: Comparative Perspectives", he demonstrates that the complexity of demonstrating success and/or failure permits no sweeping generalizations; typically, federations succeed in some things, but fail in others. He also suggests that the key to evaluating the success of federal states must always depend upon how far they have achieved the standard objectives common to all states while maintaining the hallmark of a federal system, namely, union and autonomy. Equally, a federation may be deemed to have failed if the pursuit of good government has been achieved at the expense of the differences and diversities that were its *raison d'*ê*tre*. In this sense, success and failure must be contextualized.

In "Preconditions and Prerequisites: Can Anyone Make Federalism Work?", Richard Simeon examines federations generally perceived to be successful with a view to ascertaining the sources of their "success". While these are commonly believed to include democracy, constitutionalism and the rule of law, mutual trust, shared identities, and the presence of other supportive institutions, he notes that they seldom all exist in any given federation. It is thus necessary to ask which conditions are essential and which are merely desirable. Federalism, he concludes, may not always be the best or the most workable solution, but where it is not, it may be a strong second best to alternative arrangements.

SECTION VII: CITIZENS' PERCEPTIONS OF FEDERALISM

In the following section, papers by John Kincaid (Lafayette College) and Richard Cole (University of Texas), and by Kathy Brock (Queen's University) explore federalism from the perspective of the citizen and the impact of such perspectives on the federal system. Focusing on Canada and the United States, Kincaid and Cole in "Citizen Attitudes and Federal Political Culture in Canada, Mexico, and the United States", assess the nature of the federal culture in both Canada and the United States utilizing the results of various surveys they conducted. The results suggest that in Canada, where federalism and federal political culture are comparatively robust, public trust and confidence in all governments is comparatively low, the perceptions by citizens of the degree to which their province is treated with respect in the federation are also

comparatively low, and there are significant regional and partisan differences in attitudes. In the United States, where federalism and federal political culture are less robust, public trust and confidence in all governments is comparatively high, perceptions by citizens of the degree to which their state is treated with respect in the federation are comparatively high, and there are few significant regional and partisan differences in attitudes. Finally, the response pattern from Mexico suggests that Mexico is the least pro-federal of the three federations.

In "Testing Federalism through Citizen Engagement", Kathy Brock addresses and assesses the relationship between social forces and the development of political institutions vis-à-vis the health of the Canadian federal system. She examines the effectiveness of this relationship by applying what she refers to as the "Watts test" to Canada's experiences with the constitutional amending process, Aboriginal governance, and non-governmental organizations. In each case, strong local identities have competed with and threatened the ability of Canada to maintain the strong sense of common interests that ultimately bind these identities into a national whole. Brock concludes that the institutions of Canadian federalism have adjusted over time to reflect changes in society and societal values, to channel and influence expressions of unity and diversity, and to balance diversity with unity.

SECTION VIII: INTERGOVERNMENTAL RELATIONS

The papers in Section VIII are concerned with the practice of intergovernmental relations in federal states. In the first of these, "R.L. Watts and the Managing of IGR in Federal Systems", Robert Agranoff (Indiana University) focuses on Watts's contributions to administrative federalism. Agranoff first explores the intergovernmental-relations (IGR) groundwork laid by Watts to work on comparative federalism. The particulars of administrative IGR, (or intergovernmental management) developed by Watts is then elaborated. In the concluding section, Agranoff examines six contemporary forces that compound the problems of administrative IGR.

In "Federalism and the New International Health Regulations 2005", Harvey Lazar (University of Victoria), Kumanan Wilson (University of Ottawa), and Christopher McDougall (University of Toronto) analyze and compare how four federations − Australia, India, Canada, and the United States − have responded to the new International Health Regulations adopted by the World Health Organization in 2005. The commitments that result from the adoption of these regulations pose unique challenges for federal states. While it is common for the national government of federations to have the constitutional power to enter into such agreements, important mechanisms for implementing the commitments may constitutionally be assigned to state/provincial governments. Lazar, Wilson, and McDougall demonstrate that in the more centralized federations, India and Australia, governments have made good progress, while in the more decentralized federations the process of implementation has been slower. They suggest that the normal pace of intergovernmental relations that

characterizes decentralized federations, most certainly Canada and the United States, is slower, and this may hinder the successful implementation of the International Health Regulations.

Robert Young (University of Western Ontario) in "The Federal Role in Canada's Cities: The Pendulum Swings Again", looks at how the Canadian federal and provincial governments have handled demands from municipal governments. The extent of federal-government interest in urban issues has varied considerably in Canada. In recent years, the Chrétien government's rather traditional stance of restraint was succeeded by Paul Martin's enthusiastic involvement in the municipal file, as embodied in his government's New Deal for Cities and Communities. The Harper government, in contrast, is committed to Open Federalism, one of the tenets of which is a strict respect for constitutional jurisdiction; consequently, this administration wound down most of Martin's New Deal initiatives. Young argues that, with the division of powers at its core, federalism provides national governments with an excuse to ignore strong demands and needs of municipal governments, an excuse not available to governments of a unitary state.

SECTION IX: FEDERALISM AND EUROPE

Peter Leslie (Queen's University) and Rudolf Hrbek (University of Tubingen) both explore the manifestation of the federal idea in Europe. With "European Futures: The Unbearable Heaviness of Thinking Federally", Leslie begins by focusing on the eventual non-ratification of the Treaty of Lisbon by Ireland. While most member states have since ratified the Treaty, Leslie concluded that no one can be sure it come into force.[1] This is one source of uncertainty about the future of Europe and the EU, but there are others as well. Noting this, he explores the implications of five alternative European futures. He argues that each scenario meets the demands of the EU regionally based communities and hypothesizes that each suggests the need to create a more federal Europe.

Rudolf Hrbek, in "German Federalism in the Context of the European Union", assesses the implications of the European Union on Germany's federal state, its intergovernmental relations and on the balance of powers between the two orders of government. He details the various ways that German federalism has undergone changes in the context of the EU integration process. Indeed, the adaptations of the pattern of German federalism might well be regarded as a case of Europeanization. In particular, the Länder have been successful in acquiring new rights and in gaining procedural means that strengthen their position vis-à-vis the federal government. Both orders, however, remain closely linked and interrelated. He concludes by arguing that "cooperative federalism" continues to be the proper label for characterizing the German federal system.

[1]Since the presentation of Peter Leslie's paper, the Treaty of Lisbon did come into force on Decemeber 1, 2009.

SECTION X: DEVOLUTION AND FISCAL FEDERALISM

In "Mind the Gap: Reflections on Fiscal Balance in Decentralized Federations", Robin Boadway (Queen's University) explores the notion and importance of fiscal imbalance in federations and the manner in which it interacts with the degree of decentralization. He draws upon recent work on political economy and fiscal federalism to illuminate the concept of fiscal balance and to provide useful lessons for the economic management of federal systems, especially those that are decentralized.

Both Charlie Jeffrey (University of Edinburgh) and Alan Trench (University of Edinburgh) look at the importance of territorial financial relations in general and how such relations affect the devolution of powers to Scotland. In "Problems of Territorial Finance: UK Devolution in Perspective", Jeffrey addresses the fundamental importance of territorial financial arrangements in shaping conditions of power and legitimacy in decentralized political systems. These arrangements shape what governments can or cannot do, both directly in equipping them with the resources to carry out (or not) their allotted functions, and indirectly in their significance for shaping the economic conditions that generate – or limit – the take of the public purse. The arrangements are also important in forming citizens' views on the legitimacy of federal political systems. Jeffrey notes that during the two or three years preceding the conference, an intensive discussion about the fiscal relationship of Scotland and the rest of the United Kingdom has unfolded. This, he argues, exemplified contentions about Scotland's place in the United Kingdom.

Alan Trench, in "The United Kingdom: The Second Phase of Devolution", deals with the implications of the 2007 elections to the Scottish Parliament for the National Assembly for Wales and the Northern Ireland Assembly. He argues that these developments have led to significant changes in how devolution works, including more contentious intergovernmental relations, the increasing importance of financial issues, and a developing set of constitutional debates. In Trench's view, this indicates that devolution has entered a distinct second phase very different from that of its first eight years. At the same time, wider issues about devolution – notably what to do about England – remain unresolved.

SECTION XI: SHARED AND SELF-RULE: FEDERAL CASE STUDIES

The penultimate section includes four federal case studies relating to the operations of federalism. Nico Steytler (University of Capetown) in "Co-operative and Coercive Models of Intergovernmental Relations: A South African Case Study", details the South African experience in relation to the two models of intergovernmental relations, cooperative and coercive. He argues that in South Africa, a more coercive model of IGR emerged. This, he contends, was inevitable given the South African government's reluctance to embrace a federal type of government. This practice of IGR may shift. However, according to

Steytler, changes to the political culture depend on the larger forces shaping the polity of a particular country.

Isawa Elaigwu (University of Jos), in "Nigeria: The Decentralization Debate in Nigeria's Federation", examines how federalism was and continues to be used as a tool to manage diversity in Nigeria. Over the years, Nigeria has undergone several changes in its structure, institutions and processes; all are indicative of the contemporary challenges facing the federation. With recent changes, including the exit of the military from government in 1999 and the change of government, Elaigwu argues that Nigeria seems to be on the threshold of a new democratic and federal polity. According to Elaigwu, there are signs that federalism may flourish in Nigeria as Nigerian politicians develop a supportive federal culture.

Alexei Trochev (University of Wisconsin Law School) in "The Federal Idea in Putin's Russia", explores whether Russia can still be considered a federation. The life-support system of the federal idea in Russia resides in two sources: the legal framework and the private initiative. Trochev argues that, although severely wounded, Russian federalism is not yet dead, and concludes that the challenges of governing over Russia's vast landmass now require the federal centre to co-operate with the local authorities, leaving them with some degree of policy autonomy.

In "Shared-Rule and Self-Rule in the Working of Indian Federalism", Akhtar Majeed (Hamdard University, New Delhi, India) examines the social and political evolution of federalism in India where, he believes, the desire to identify some common goals and purposes and to establish political legitimacy and political accountability has become the basis of its nationhood. He argues that, if power is properly shared and varied interests are accommodated, there need not be any threat to central authority The Indian federal mechanism is intended to provide precisely the same. In the Indian Constitution, decentralized and grass-root planning and implementation are features of shared governance; and this, in turn, reflects the correct image of federal governance.

SECTION XII: SECOND CHAMBERS

The volume concludes with three papers concerned with upper chambers in federal states. David Smith (University of Saskatchewan) analyzes Senate reform in Canada in "The Senate of Canada and the Conundrum of Reform". He argues that the conundrum of Senate reform rests in the failure of Canadians to recognize that the keystone for Canada's structure of representation is provided by the unelected Senate. According to Smith, a maze of compromises, deals and agreements, and knowledge of Canada's structure of representation is central to any successful reform initiative.

Uwe Leonardy (Bonn University), in "Ron Watts and Second Chambers: Some Reflections on the Bundesrat", reviews the analyses, approaches, and categories utilized by Watts when studying the Canadian Senate. Utilizing these, the chapter tries to discern Watts's always cautiously formulated evaluations and recommendations for federal second chambers. Leonardy points out that Watts has always had a strong preference for the German Bundesrat as a potential

model for Senate Reform in Canada, even though, since the 1990s, he has tended to distance himself from that recommendation.

In "The Senate in Australia and Canada: Mr. Harper's 'Senate Envy' and the Intra vs. Interstate Debate", Gerald Baier (University of British Columbia), Herman Bakvis (University of Victoria) and Doug Brown (St. Francis Xavier) utilize the intra- and interstate federalism distinction to analyze the Australian and Canadian Senates and to assess whether Canada's adaptation of the Australian model would lead to more of a "parties' house" as in Australia, or a "provinces' house". They argue an Australian style elected senate established in Canada would likely see provincially based parties, and that an elected Senate in Canada could enhance the representative capacity of the federal government, serving as a check on executive dominance.

CONCLUSION

We thank the authors for their contributions to this festschrift and we trust that the reader will enjoy the fruits of their endeavours. We also trust that, building on the conceptual framework developed by Ronald L. Watts, the papers have advanced the study of the federal idea and comparative federalism, thereby confirming Watts's enduring contention that the federal idea is the best way of reconciling diversity and unity.

Section Two

The Federal Idea

2

The Federal Idea and its Contemporary Relevance

Ronald L. Watts

Le fédéralisme en tant que doctrine politique a gagné en pertinence au gré de l'évolution du monde actuel et des pressions convergentes qui en ont découlé sur les États de toutes dimensions. L'idée de base du fédéralisme, qui combine une « réglementation commune » à certaines fins et une « autoréglementation » régionale à certaines autres, s'est incarnée sous des formes institutionnelles pragmatiques. Au cours du dernier siècle, les solutions politiques fondées sur le modèle fédéral ont connu une forte popularité lors de quatre périodes distinctes, qui ont mené à l'enthousiasme renouvelé qu'elles suscitent aujourd'hui. Dans la période récente, l'application de la doctrine fédérale a donné lieu à trois principales innovations : création de modèles hybrides, intégration de fédérations à des organisations supra-fédérales comme l'UE et l'ALENA, et acceptation de plus en plus courante de rapports asymétriques entre les unités constitutives. En conclusion sont tirées cinq grandes leçons de l'expérience des systèmes fédéraux.

INTRODUCTION

In the contemporary world, federalism as a political idea has become increasingly important. This arises from its potential as a way of peacefully reconciling unity and diversity within a single political system.

The reasons for this popularity can be found in the changing nature of the world leading to simultaneous pressures for both larger states and also for smaller ones. Modern developments in transportation, social communications, technology, industrial organizations, globalization and knowledge-based and hence learning societies, have all contributed to this trend. Thus, there have developed two powerful, thoroughly interdependent, yet distinct and often actually opposed motives: the desire to build dynamic and efficient national or even supra-national modern states, and the search for distinctive identities. The former is generated by the goals and values shared by most Western and non-Western societies today: a desire for progress, a rising standard of living, social justice, influence in the world arena, participation in the global economic network, and a growing awareness of worldwide interdependence in an era that makes both mass destruction and mass construction possible. The latter arises from the desire for smaller, directly accountable, self-governing political units, more responsive to the individual citizen, and from the desire to give expression to primary group attachments – linguistic and cultural ties, religious connections, historical traditions, and social practices – which provide the distinctive basis for a community's sense of identity and yearning for self-determination.

Given the dual pressures throughout the world, for larger political units capable of fostering economic development and improved security on the one hand, and for smaller political units more sensitive to their electorates and capable of expressing local distinctiveness on the other, federal solutions have had an increasing appeal throughout the world. The reason for this is that federalism provides a technique of constitutional organization that permits action by a shared government for certain common purposes in a larger political unit, combined together with autonomous action by smaller constituent units of government, directly and democratically responsible to their own electorates. As such, federal political systems provide the closest institutional approximation to the complex multicultural and multidimensional economic, social and political reality of the contemporary world.

These developments have contributed to the current interest in federalism, not as an ideology, but in terms of practical questions about how to organize the sharing and distribution of political powers in a way that will enable the common needs of people to be achieved while accommodating the diversity of their circumstances and preferences.

As a consequence, there are in the world today some two dozen countries that are federal in their character, claim to be federal, or exhibit the characteristics typical of federations. Indeed some 40 percent of the world's population today lives in countries that can be considered, or claim to be federations, many of which are multicultural or even multinational in their composition.

During the past decade, especially, there has been an international burgeoning of interest in federalism. Political leaders, leading intellectuals and even some journalists are now increasingly speaking of federalism as a healthy, liberating and positive form of political organization. Furthermore, Belgium, Spain, South Africa, Ethiopia and Italy appear to be emerging towards a variety of new and innovative federal forms. In a number of other countries, such as the United Kingdom, devolutionary processes have incorporated some federal features, although by no means all the features of a full-fledged federation. Furthermore, the European Union (EU), with the addition of new member states, is in the process of evolving its own unique hybrid of confederal and federal institutions. Thus, everywhere, with changing world conditions, federal political systems have continued to evolve.

THE FEDERAL IDEA: THE ESSENTIAL FEATURES

Over the years there has been much scholarly debate about the definition of federalism. Definitions have varied from broad inclusive ones to narrow restrictive ones. The basic essence of federalism, as Daniel Elazar has noted, is the notion of two or more orders of government combining elements of "shared rule" for some purposes and regional "self-rule" for others. It is based on the objective of combining unity and diversity: i.e., of accommodating, preserving and promoting distinct identities within a larger political union (Elazar 1987).

This basic idea has been expressed though a variety of federal institutional forms in which, by contrast to the single source of constitutional authority in unitary systems, there are two (or more) levels of government, combining elements of shared rule through common institutions with regional self-rule for the governments of the constituent units. Like Elazar, I have viewed the broad category of federal forms combining shared rule for some purposes and regional self-rule for others, as encompassing a wide range of institutional forms from constitutionally decentralized unions to confederacies and beyond. Within this broad genus of federal political systems, federations represent one distinct species in which neither the federal nor the constituent units of government are constitutionally subordinate to the other, i.e., each has sovereign powers derived from the constitution rather than from another level of government, each is empowered to deal directly with its citizens in the exercise of its legislative, executive and taxing powers, and each is directly elected by its citizens (Watts 1999).

What basically distinguishes federations from decentralized unitary systems and from other federal forms such as confederations is that in unitary systems the governments of the constituent units ultimately derive their authority from the central government, and in confederations the central institutions ultimately derive their authority from the constituent units and consist of delegates of those units. In a federation, however, each order of government derives its authority, not from another order of government, but from the constitution and each relates directly (not through another government) to the citizens.

Consequently, the structural characteristics that distinguish federations as a specific form of federal system are the following:

- Two (or more) orders of government each acting directly on their citizens (rather than indirectly through the other order);
- A formal constitutional distribution of legislative and executive authority, and allocation of revenue resources between the orders of government ensuring some areas of genuine autonomy for each order;
- Provision for the designated representation of distinct regional views within the federal policy-making institutions, usually provided by a federal second chamber composed of representatives of the regional electorates, legislatures or governments;
- A supreme written constitution, not unilaterally amendable by one order of government, and requiring the consent not only of the federal legislature but also of a significant proportion of the constituent units through assent by their legislatures or by referendum majorities;
- An umpire (in the form of courts, or as in Switzerland provision for referendums) to rule on interpretation or a valid application of the constitution; and
- Processes and institutions to facilitate intergovernmental collaboration in those areas where government responsibilities are shared or inevitably overlap.

At the same time it should be noted that some political systems are hybrids combining characteristics of different kinds of political systems. Those that are predominately federations in their constitution and operation, but which include some federal government powers to override governments of constituent units – an arrangement more typical of a unitary system – have sometimes been described as "quasi-federations". At different stages in their development Canada, India, Pakistan, Malaysia and South Africa have been so described. On the other hand Germany, while predominantly a federation, has a confederal element in the Bundesrat, its federal second chamber, which is composed of instructed delegates of the Land governments. A hybrid, predominantly a confederation but with some features of a federation, is the European Union since Maastricht. Hybrids of various sorts occur because statesmen are often more interested in pragmatic political solutions than in theoretical purity.

In setting out the distinctive characteristics of a federation there are some further important points to note. First, there is the distinction between constitutional form and operational reality. In many political systems political practice has transformed the way the constitution operates. Therefore, to understand how a given federation or federal system operates, it is necessary to examine not only its constitutional law but also its political practices and processes. Significant characteristics of federal processes include:

- A strong disposition to democratic procedures since they presume the voluntary consent of citizens in the constituent units;
- Non-centralization as a principle expressed through multiple centres of political decision making;
- Open political bargaining as a major feature of the way in which decisions are arrived at; and

- A respect for constitutionalism and the rule of law since each order of government derives its authority from the constitution.

While certain structural features and political processes may be common in federations, it must be emphasized that federations have exhibited many variations in the application of the federal idea. There is no single ideal form of federation. Among the variations that can be identified among federations are those in:

- The degree of cultural or national diversity that they attempt to reconcile;
- The number, relative size and symmetry or asymmetry of the constituent units;
- The distribution of legislative and administrative responsibilities among governments;
- The allocation of taxing powers and financial resources;
- The degree of centralization, decentralization or non-centralization, and the degree of economic integration;
- The character and composition of their central institutions;
- The processes and institutions for resolving conflicts and facilitating collaboration between interdependent governments;
- The procedures for formal and informal adaptation and change; and
- The roles of federal and constituent-unit governments in the conduct of international relations; and
- The electoral system and number and character of political parties.

Ultimately federalism is a pragmatic and prudential technique whose applicability in different situations has depended upon the different forms in which it has been adopted or adapted, and even upon the development of new innovations in its application.

One further point about federal systems. Federal systems are a function not only of constitutions, but also of governments, and fundamentally of societies. It is important, therefore, to distinguish between federal societies, governments and constitutions in order to understand the dynamic interaction of these elements with each other. The motivations and interests within a society – which generate pressures both for political diversity and autonomy, on the one hand, and for common action on the other – the legal constitutional structure, and the actual operations, processes and practices of government, are all important considerations for understanding the operation of federations.

At one time, the study of federations tended to concentrate primarily on their legal frameworks. Scholars have come to realize, however, that a merely legalistic study of constitutions cannot adequately explain political patterns within federations. Indeed, the actual operation and practices of governments within federations have, in response to the play of social and political pressures, frequently diverged significantly from the formal relationships specified in the written legal documents. Scholars writing about federal systems have, therefore, become conscious of the importance of the social forces underlying federal systems.

But the view that federal institutions are merely the instrumentalities or expressions of federal societies, while an important corrective to purely legal and institutional analyses, is also too one-sided and oversimplifies the causal relationships. Constitutions and institutions, once created, themselves channel and shape societies (Cairns 1977). For example, in both the United States in 1789 and Switzerland in 1848, the replacement of confederal structures by federal constitutions marked turning points enabling the more effective political reconciliation of pressures for diversity and unity within their societies.

The causal relationships among a federal society, its political institutions, and its political behaviours and processes are complex and dynamic. The causal impact is not simply unidirectional; rather, it involves two-way interactions with each factor influencing the other two. The pressures within a society may force a particular expression in its political institutions, processes and behaviour; but, in turn, these institutions and processes, once established, usually shape the society. They do this both by determining the channels in which the social pressures and political activities flow, and by establishing policies that modify the shape of society.

Thus, the relationships between a society, its constitution, and its political institutions and processes are dynamic and involve continual mutual interaction. It is not sufficient, in considering the experience of different federations, to review only the influence of social forces upon the adoption, design, modification, and subsequent operation of federal constitutional structures. Rather, it is also necessary to consider the influence those federal political structures – and the related political processes and practices – have had upon social loyalties, feelings and diversities. It is thus necessary to assess both how well the institutions in each federation reflect the particular social and political balance of forces within that society, and how effectively these institutions, once established, have channelled and influenced the articulation of unity and diversity within that polity.

THE VARYING POPULARITY OF THE FEDERAL SOLUTION DURING THE PAST CENTURY

One may identify roughly four distinct periods in the popularity of the federal solution during the past century.

Prior to 1945

In the century and a half prior to 1945, federal or ostensibly federal regimes had been established in the United States (1789), Switzerland (1848), Canada (1867), Australia (1901), Germany (1871-1918) and also in Latin America in Venezuela (1811), Mexico (1824), Argentina (1853) and Brazil (1891). Nevertheless, prior to 1945, the general attitude, particularly in Europe and in Britain, appeared to be one of benign contempt for federal forms of government. Indeed, this attitude still prevails in some quarters in Britain today. Many

viewed federation as simply an incomplete form of national government and a transitional mode of political organization, and, where adopted, to be a necessary concession made in exceptional cases to accommodate political divisiveness. The more ideologically inclined considered federalism to be a product of human prejudices or false consciousness preventing the realization of unity through such more compelling ideologies as radical individualism, classless solidarity or the General Will.

For example, writing in 1939, Harold Laski declared: "I infer in a word that the epoch of federalism is over" (367). Federation in its traditional form, with its compartmentalization of functions, legalism, rigidity and conservatism, was, he argued, unable to keep pace with the tempo of modern economic and political life that giant capitalism had evolved. He further suggested that federal systems were based on an outmoded economic philosophy, and were a severe handicap in an era when positive government action was required. Decentralized unitary government, he concluded was much more appropriate in the new conditions of the Twentieth Century. Even Sir Ivor Jennings, a noted British constitutionalist, who was an advisor in the establishment of several new federations within the Commonwealth during the immediate post-war period, did not hesitate to write that "nobody would have a federal constitution if he could possibly avoid it" (Jennings 1953, 55).

The Surge of Popularity Between 1945 and 1970

While up to 1945 the federal idea appeared to be on the defensive, the following two decades and a half saw a remarkable array of governments created or in the process of creation that claimed the designation "federal". Indeed, only eight years after 1945, Max Beloff was able to assert that the federal idea was enjoying "a popularity such as it had never known before" (Beloff 1953, 114). With this occurred a burgeoning of comparative federal studies. This was the period when my own interest in the comparative study of federations was aroused during my studies at Oxford with K.C. Wheare, and led to my first book (Watts 1966).

Three factors contributed to this post-war surge in the popularity of federal solutions. One was the wartime success and post-war prosperity of the long-established federations such as the United States, Switzerland, Canada and Australia, coupled with their development into modern welfare states.

A second factor stemmed from the conditions accompanying the break-up of the European colonial empires in Asia, Africa and the Caribbean. The colonial political boundaries rarely coincided with the distribution of racial, linguistic, ethnic and religious communities or with the locus of economic, geographic and historic interests. In the resulting clashes between the forces for integration and for disintegration, political leaders of independence movements and colonial administrators alike saw in federal solutions a common ground for centralizers and provincialists. The result was a proliferation of federal experiments in these colonies or former colonies. These included India (1950), Pakistan (1956), Malaya (1948) and then Malaysia (1963), Nigeria (1954), Rhodesia and Nyasaland (1953), the West Indies (1958), Indochina (1945-47),

French West Africa and its successor, the Mali Federation (1959), and Indonesia (1945-49). In the same period, in South America where the federal structure of the United States had often been imitated, at least in form, new ostensibly federal constitutions were adopted (some short-lived) in Brazil (1946), Venezuela (1947) and Argentina (1949).

A third factor was the revival of interest in federal solutions in post-war Europe. World War II had shown the devastation that ultra-nationalism could cause, gaining salience for the federal idea, and progress in that direction began with the creation of the European Communities. At the same time, in 1945 in Austria the federal constitution of 1920 was reinstated making Austria once more a federation, Yugoslavia established a federal constitution in 1946, and in 1949 West Germany adopted a federal constitution.

Thus, the two decades and a half after 1945 proved to be the heyday of the federal idea. In both developed and developing countries, the "federal solution" came to be regarded as the way of reconciling simultaneous desires for large political units required to build a dynamic modern state and smaller self-governing political units recognizing distinct identities. Not surprisingly, these developments produced a burgeoning of comparative federal studies by scholars such as Kenneth Wheare, A.W. Macmahon, Carl J. Friedrich, A.H. Birch, W.S. Livingston, and others including myself. Also the first establishment of academic centres specializing in federal studies occurred at Queen's University in Canada in 1965 and Temple University in the United States in 1967.

A More Cautious Enthusiasm for Federal Solutions, 1970-90

From late in the 1960s on, it became increasingly clear, however, that federal political systems were not the panacea that many had, in the early years after 1945, imagined them to be. Most of the post-war federal experiments experienced difficulties and a number of these were abandoned or temporarily suspended. Examples were the continued internal tensions and frequent resort to emergency rule in India, the secession of Bangladesh from Pakistan, the forcing out from Malaysia of Singapore, the Nigerian civil war and the subsequent prevalence there of military regimes, the dissolutions of the federations of the West Indies and of Rhodesia and Nyasaland, and the collapse of most of the French colonial federations.

These experiences indicated that even with the best of motives, there were limits to the appropriateness of federal solutions. In addition, the experience in Latin America, where many of the constitutions were federal in form but unitary in practice, added skepticism about the utility of federation as a practical approach in countries lacking a long tradition of respect for constitutional law.

In Europe the slow pace of progress towards integration, at least until the mid-1980s, also seemed to make the idea of a federal Europe more remote.

Even the classical federations of the United States, Switzerland, Canada and Australia were experiencing renewed internal tensions and a loss of momentum that reduced their attractiveness as shining examples for others to follow. In the United States, the centralization of power through federal pre-emption of state and local authority, and the shifting of costs to state and local governments

through unfunded or underfunded mandates, had created an apparent trend towards what became widely described as "coercive federalism" (Kincaid 1990; Zimmerman 1993). Furthermore, the apparent abdication in 1985 by the Supreme Court of its role as an umpire within the federal system (*Garcia v. San Antonio Metro Transit Auth*., 469 US 528 (1985)) raised questions, at least for a time, about the judicial protection of federalism within the American system.

Switzerland had remained relatively stable, but the long-drawn crisis over the Jura problem prior to its resolution, the problems of defining Switzerland's future relationship with the European Community, and the prolonged unresolved debate for three decades over the renewal of the Swiss constitution raised concerns within the Swiss federation.

In Canada, the Quiet Revolution in Quebec during the 1960s, and the ensuing four rounds of mega-constitutional politics in 1963-71, 1976-82, 1987-90 and 1991-92 had produced three decades of severe internal tension. Aboriginal land claims, crises in federal-provincial financial relations, and the problems of defining the relative federal and provincial roles under the free-trade agreements with the United States, and later Mexico, created additional stresses.

In 1975, Australia experienced a constitutional crisis that raised questions about the fundamental compatibility of federal and of parliamentary responsible cabinet institutions. The result was a revival in some quarters in Australia of the debate about the value of federation.

Through most of this period West Germany remained relatively prosperous. Nevertheless, increasing attention was being drawn to the problems of revenue sharing and of the "joint decisions trap" entailed by its unique form of "interlocked federalism" requiring a high degree of co-decision making (Scharpe 1988). Furthermore, the impact of membership in the European Union upon the relative roles of the Bund and the Länder was also a cause of concern.

At the end of this period, the disintegration of the former authoritarian centralized federations in the Soviet Union, Yugoslavia and Czechoslovakia exposed the limitations of these federal façades.

In such a context, one strand in the comparative studies of federations focused on the pathology of federal systems, examples being Thomas Franck, Ursula Hicks and some of my own writing. Nevertheless, others such as Ivo Duchacek, Preston King and especially Daniel Elazar provided perceptive insights into the character and variety of federal arrangements. Furthermore, the establishment of an International Association of Centers of Federal Studies in 1977 linking ten multidisciplinary centres, and shortly after of *Publius*, a journal specializing in federal studies, contributed during this period to intensified research on the operation of federal systems. In 1984, a second body for collaborative federal studies, the International Political Science Association Research Committee on Comparative Federalism, was established linking individual political scientists working in this area.

The Resurgence in Enthusiasm for Federal Solutions During the Past Decade and a Half

In the 1990s, there developed a revival in the enthusiasm for federal political solutions. Outside the academic realm, political leaders and leading intellectuals have come increasingly to refer to federal systems as providing a liberating and positive form of political organization. Indeed, as I have already noted, by the turn of the century, it could be said that some 40 percent of the world's population lived in some two dozen federations or countries that claimed to be federal. Furthermore, in a number of other countries some consideration was being given to the efficacy of incorporating some federal features, although not necessarily all the characteristics of a full-fledged federation. In Latin America, the restoration of federal regimes has occurred in a number of countries after periods of autocratic rule. In Asia, the economic progress of India showed that coalition-based federalism was a workable response to the problems of development. Elsewhere in the Third World and especially Africa, the failure of "strong leaders" to resolve persistent social and political problems, and the realization by such international bodies as the World Bank that decentralization was the preferred strategy for economic development, have contributed to a widespread renewal of interest in federal or at least devolutionary political solutions.

A number of other factors contributed to this trend. One was the widespread recognition that an increasingly global economy had unleashed centrifugal economic and political forces, weakening the traditional nation-state and strengthening both international and local pressures – a combined trend that Tom Courchene has called "glocalization" (Courchene 1995). Another was the changes in technology that were generating new, more federal, models of industrial organization with decentralized and flattened hierarchies involving non-centralized interactive networks. These developments have influenced the attitudes of people in favour of non-centralized political organization.

Developments in three political areas also appeared to have an impact. One was the resurgence of the classical federations which, despite the problems they had experienced in the preceding two decades, had nevertheless displayed a degree of flexibility and adaptability in responding to changing conditions. Another was the collapse of the totalitarian regimes in Eastern Europe and the former Soviet Union. These developments undermined the appeal of transformative ideologies and exposed the corruption, poverty and inefficiency characteristic of systematic and authoritarian centralization. A third was the progress made during this period in Europe's apparent federal evolution with the Single European Act and the Maastricht Treaty and the broadening of the European Union to incorporate a much widened membership.

All of these factors have contributed to the renewed general interest in federal methods of organizing political relationships and distributing political powers in a way that would enable the common needs of people to be achieved while accommodating the diversity of their circumstance and preferences. It must be noted that this revival of interest in federal political systems beginning in the 1990s has differed, however, from the excessively enthusiastic

proliferation of federations that occurred in the early decades after 1945. Experience since that period has led generally to a more cautious and sanguine approach (Elazar 1993).

There is one distinctive feature of this period, however. In previous eras federation was characterized as the result of political communities freely joining together or devolving to build something better. But in a number of cases today, federal systems are being proposed as a solution for warring communities. In countries like Iraq, Sri Lanka, Sudan and Cyprus, instead of federation being advocated on grounds of providing mutual benefits, it is being advocated as a way of ending acute civil ethno-cultural conflict and of avoiding utter political collapse. The problem in these cases has been a lack of what previous experience has suggested are the prerequisites for an effective federal system: respect for constitutionalism, and a prevailing spirit of tolerance and compromise. Until these necessary underlying conditions are created, efforts to create sustainable federal systems are likely to prove simply futile. Much more effort to establish first the prerequisite conditions will be required in these cases.

A new development at the turn of the century has been the establishment, on the initiative of the Canadian federal government, of the international Forum of Federations. The Canadian government was convinced that there would be real value, particularly for practitioners in federations – statesmen, politicians and public servants – in organizing an opportunity to exchange information and learn from each other's experience. Accordingly, it arranged a major international conference on federalism at Mont Tremblant in the autumn of 1999. Over 500 representatives from twenty-five countries, including the Presidents of the United States and Mexico and the Prime Minister of Canada, participated. Major presentations and papers of the conference were subsequently published in the International Social Science Journal, special issue 167, 2001. Among the themes upon which the conference focused were social diversity and federation, economic and fiscal arrangements in federation, intergovernmental relations, and provision for the welfare state in federations. Such was the success of this conference, that is was decided to put the Forum of Federations on a permanent basis with its own international board (a board on which I was privileged to serve from its inception until 2006). Initially, the funding for the Forum came totally from the Canadian federal government. Although until 2011, it contributed the largest share, the Forum has now evolved to the point where governments in eight federations (Australia, Austria, Germany, India, Nigeria, Mexico, Switzerland and Ethiopia) are sustaining members. A number of others are contemplating membership, and the current chairman of the Board is a former President of Switzerland.

Among the major activities of the Forum have been building international networks fostering the exchange of experience and information on best practices among practitioners in existing federations or countries with some federal features, and the sponsorship at three-yearly intervals of major international conferences of practitioners and academics on federalism. The second international conference was held at St. Gallen, Switzerland in 2002 with over 600 participants from more than 60 countries. The third was held in Brussels in 2005 with over 1000 participants from some 80 countries, and the fourth (for

which I am the international advisor for the Indian government) is scheduled for November 2007 in New Delhi.

RECENT INNOVATIONS

Three recent innovations in the application of the federal idea require special comment. One is the creation of the hybrids. The hybrid character of the post-Maastricht institutional structure of the European Union combines, in an interesting way, features of both a confederation and of a federation. Among the confederal features are the intergovernmental character of the Council of Ministers; the distribution of Commissioners among the constituent nation-states and the role of the latter in nominating commissioners; the almost total reliance upon the constituent national governments for the implementation and administration of Union law; and the derivation of Union citizenship from citizenship in a member state.

Among the elements more typical of a federation, on the other hand, are the role of the Commission in proposing legislation; the use of qualified majorities rather than unanimity for many categories of legislation generated by the Council of Ministers; the role of the Council's secretariat in developing more cohesive policy consideration than is typical of most international or confederal intergovernmental bodies; the expanding role of the European Parliament, which, under the new co-decision procedure introduced by the Maastricht Treaty, has a veto power over about fifty percent of Community legislation; and the supremacy of Community law over the law of the member states.

The net effect of this hybrid of confederal and federal features is that, while member states have "pooled" their sovereignty and accepted increasing limitations on their power of independent decision – to a degree considerably greater even than in some federations – the common legislative and executive institutions still lack the characteristics of a federation in which the federal institutions clearly have their own direct electoral and fiscal base in relation to citizens. Not surprisingly, the resulting technocratic emphasis and "democratic deficit" has undermined public consent and support for the European Union. These are issues which remain to be addressed in the evolution of the European Union.

Another innovation that has come to the fore is the growing trend for federations themselves to become constituent members of even wider federations or supra-national organizations. In the contemporary effort to reconcile supra-national, national and regional impulses, there has been an emerging trend towards multi-level federal organization. Thirty-five years ago, Pennock suggested that multiple levels of political organization were desirable to maximize the realization of citizen preferences, although this had to be balanced against the additional costs of increased complexity (Pennock 1959). Now we have a growing, practical experience of federations within wider federations or supra-national organizations. Germany has been a pioneer in adjusting its internal federal relations to its membership in the European Union, but these experiences have also informed debates in Belgium, Spain and Austria, as members of the European Union. It is worth noting as well that, although

NAFTA is only a free trade area and far from a federal organization, its three members are each federations. In Canada, for instance, the impact of NAFTA upon internal federal-provincial relations has been an important issue. This emerging experience demonstrates the need to study closely and learn from these examples in order to maximize the benefits of multi-level federal organization at supra-national, national, regional and local levels, while minimizing the costs of excessive complexity.

A third innovative, contemporary trend is the acceptance of constitutional asymmetry in the relationship of member units to federations or supra-national organizations as a means of facilitating political integration. Examples are found in Malaysia, India, Spain and Belgium. Another is the impact upon the European Union of the Maastricht Treaty, whereby the European Union has taken significant steps towards becoming a Union of "variable speeds" and "variable geometry". From its beginning as a federation, Canada has included, in relation to Quebec, some modest asymmetrical arrangements, and the debate over the Meech Lake Accord and Charlottetown Consensus during the period 1978-92 turned to a significant degree on whether and how far this asymmetry should be increased. Perhaps the most complex current example of asymmetry in practice was displayed in Russia, in the Yeltsin period, by the then eighty-nine subjects of the Russian Federation, and this in spite of the formal symmetry set out in the new Russian Constitution. Constitutional asymmetry in the powers of constituent units, however, is not unique to federations: Italy and the United Kingdom also provide significant examples. Experience in the various federal examples suggests that constitutional asymmetry among constituent units within a federal system does introduce complexity and often severe problems; but for some federations, it has proved necessary as the only way to accommodate severely varied regional pressures for autonomy.

LESSONS FROM THE EXPERIENCE OF FEDERATIONS

Let me conclude by noting that the experience of federal systems has taught us five major lessons. First, federal systems do provide a practical way of combining through representative institutions the benefits of both unity and diversity. For instance, the United States (1789), Switzerland (1848), Canada (1867), and Australia (1901) are among the longest continually operating constitutional systems anywhere in the world today. Furthermore, in recent years the United Nations has annually issued an Index of Human Development that uses a weighted average of life expectancy, adult literacy, school enrolment, and per capita gross domestic product to rank some 160 countries in terms of quality of life. This has consistently ranked four federations – Australia, Canada, the United States and Switzerland – among the top six countries in the world, and four others – Belgium, Austria, Spain and Germany – not far behind. Moreover, a number of recent empirical studies – including those of Lijphart (1984, 1999), an edited volume by Wachendorfer-Schmidt (2000), and Kincaid (2006) – have indicated that federal political systems have, on balance, actually facilitated

political integration, democratic development and economic effectiveness better than non-federal systems.

Second, it is also clear, however, that federal systems are not a panacea for humanity's political ills. Account must therefore also be taken of the pathology of federal systems, and of the particular types of federal structural arrangements and societal conditions and circumstances that have given rise to problems and stresses within federal systems.

Third, the degree to which a federal political system is effective depends very much upon the extent to which there is acceptance of the need to respect constitutional norms and structures, and an emphasis upon the spirit of tolerance and compromise. Where these are lacking – as they are currently, for instance, in Sri Lanka, Sudan, and Iraq – it is futile to advocate federal solutions unless the necessary preconditions are established first. The dilemma is how such preconditions are to be established in a situation permeated by hostility.

Fourth, the extent to which a federal system can accommodate political realities depends not just on the adoption of federal arrangements, but on whether the particular form or variant of federal institutions that is adopted or evolved gives adequate expression to the demands and requirements of the particular society. There is no single, ideal federal form. Many variations are possible. Examples have been variations in the number and size of the constituent units; in the form and scope of the distribution of legislative and executive powers, and financial resources; in the degree of centralization; in the character and composition of their central institutions; and in the institutions and processes for resolving internal disputes. Ultimately, federalism is a pragmatic, prudential technique, the applicability of which may well depend upon the particular form in which it is adopted or adapted, or even on the development of new innovations in its application.

Fifth, it has been suggested by some commentators – Daniel Elazar (1993) is an example – that federations composed of different ethnic groups or nations may be unworkable or run the risk of suffering civil war. While these are certainly possibilities, the persistence of federal systems, despite evident difficulties, in such multi-ethnic or multi-national countries as Switzerland, Canada, India and Malaysia, in my view indicates that, with appropriately designed institutions, federal systems can be sustained and prosper in such countries. In a number of significant cases where ethnic nationalism has been a crucial issue, federal devolution has in fact reduced tension by giving distinct groups a sense of security through their own self-government, thereby paradoxically contributing to greater harmony and unity.

While federal political systems are not universally appropriate, in many situations in the contemporary world they may be the only way of combining, through representative institutions, the benefits of both unity and diversity. Experience does indicate that countries with a federal form of government have often been difficult to govern; but then it has usually been because they were difficult countries to govern in the first place that they have adopted federal political institutions. And it is that which has made for me a lifetime spent on the comparative study of federal political systems so fascinating.

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Section Three
Celebrating Ron Watts

3

Introducing Ron Watts

John Meisel

To introduce Ron Watts to students of federalism is like introducing Jesus to the Apostles, the Pope to the College of Cardinals, or John Lennon to the other Beatles. Unnecessary. We came here (some from great distance) because we have benefitted from his prodigious contribution to the study and practice of federalism. Some of you have written searchingly about this, and we have spent the better part of the day reviewing and revering his massive work in the field.

Were he less wise and reasonable, he might well deduce from all he heard that he is much too good for us and that rather than feasting here he would be more suitably employed elsewhere, making further improvements to the body politic.

So rather than primarily adding to the catalogue of his accomplishments, I shall briefly speculate about what it is in his background and make-up that has brought him here and has shaped his remarkable gifts.

I must, however, begin with a confession. If he had followed advice I gratuitously offered him in the 1950s, this conference would not be taking place and Ron would have made himself indispensable elsewhere. My specialty, at the time, was the study of elections and political parties. These were then subjects in the mainstream of political research, attracting much media attention and even research funds. Political behaviour was deemed the most promising path for the discipline, not the study of institutions. As for federalism, it was decidedly on some distant spot of the back burner. But not for Ron. He joyfully and persistently toiled in his archaic vineyard, never mind the blandishments of more fashionable fields. He politely, as ever, resisted my efforts to seduce him into

probing elections and he stuck to his last. You know the rest. As I sank quietly into oblivion, he rose to the pinnacles of those addressing the most burning issues confronting the governance of humankind. This conference eloquently attests to who has the last laugh.

This steadfast, sure-footed adherence to a chosen path is highly characteristic of Ron and arises naturally from the formative influences which have shaped him. What are these?

Born in Japan of missionary parents, he spent his first eleven years there and went around the world twice on a boat before he was ten. Among the consequences of this exotic beginning, two stand out: First, he was endowed with the sense of social responsibility and commitment so often found among sons and daughters of the manse; and, secondly, he was exposed at an early, impressionable age to the comparative perspective.

Educated in the best academies all along the way from his mother's knee and the Yokohama International School to Oxford via T.C.S. and Trinity at the University of Toronto, he was also blessed with stellar senior colleagues when he settled to teach at Queen's. Those familiar with the pantheon of Canadian academe will recognize his mentors: J.A. Corry, W.A. Mackintosh, A.R.C. Duncan, Martyn Estall, John Deutsch, J.E.Hodgetts, W.R. Lederman and Daniel Soberman.

It is a little known fact that, after graduation, he trained as an accountant, which paid off handsomely when he assumed very higher responsibilities in university administration. This was vividly brought home to me once when he bailed me out from a seemingly inextricable conundrum. I had been awarded an unsolicited Rockefeller grant to be spent as I wished. I also worked for a Royal Commission, and nevertheless retained part of my Queen's salary and full pension. The implications for my income tax were totally baffling. Ron, who was then Dean of Arts and Science, took the time to tackle the problem. What had caused me sleepless, anguished nights was settled in a jiffy. On a pristine sheet of paper, and with a very sharp pencil, he resolved the crisis by subjecting my file to the columns and rows of figures beloved of accountants. Problem solved. This trivial example attests to the eclectic nature of his bag of tools. He had been taught to keep track of the large and small issues, and above all, despite emerging as a national academic statesman, he retained a keen interest in his colleagues and students. This was manifested likewise in his having worked not only as a senior university administrator but also as the head of a halls of residence. He and his wife, therefore, literally shared the personal lives of many students.

Almost, but not quite, a workaholic, he nevertheless always finds time for non-academic pastimes. He is an expert on issues affecting aeronautics, and even builds model aircraft. A seasoned sailor, he has learnt to capitalize on prevailing winds, and continues to build and race, by sophisticated, remote electronic means, model ships of his own manufacture.

One of the reasons for Ron's great accomplishments is an astonishingly effective, performance-enhancing, support system. It is called Donna Paisley Watts. At the domestic, intellectual, social, emotional and interest-augmenting levels, she accompanies and enriches him everywhere and her passion for travel perfectly complements his globe-trotting ways. She is as fitting a partner at their

regular Scottish dancing events as under the crystal chandeliers illuminating the abodes of the high and mighty, and as she was during the ten years he was the Principal and Vice Chancellor of Queen's University.

These seemingly marginal aspects of his life have not only nourished his contribution as a university instructor, but also his insights and analyses of federalism. Fixing the facts, considering and minding the human dimension, being capable of wearing the other person's shoes, comparing experiences elsewhere, knowing what the essence is without losing touch with the context and the marginalia, these are the attributes required by a master of comparative politics.

What all this adds up to is that fortune has smiled on Ron and provided an unusually wide and relevant range of experiences and opportunities to hone and apply his skills. If ever there was the right person, at the right place, and at the right time, Ron was it, not once but time and again and again, until this day.

But he would not have been so strategically placed and so appropriately suited to the tasks he discharges so well had he not been superbly adept at seizing opportunities presented to him, and had he not had the discipline, will, talent and character to rise with class to every challenge before him.

4

Encounters with Ron Watts

George Anderson

If Ron Watts were the protagonist of a major Russian novel − a bit of a stretch, admittedly, given his untortured temperament − I would be one of those minor characters who crops up from time to time, in chapter twelve, chapter twenty, chapter thirty-five and so on, always in different contexts. The threads running through our relations would be of a growing friendship, of our mutual interest in Queen's and federalism, and of the interesting ways lives unfold, coming together and moving apart, in a fairly small society. If there is any originality in my experience of Ron, it is that I have seen him in such varied circumstances and roles.

I am not a scholar − not of federalism nor of anything else, alas. I fear I may have let my former teacher down in that regard. Consequently, I cannot pretend to deliver a profound, original or even merely pedantic assessment of Ron's contribution to the study of federalism. Clearly he is one of the Great Men of the subject, arguably the Dean of Federalism Studies, but I leave it to others to marshal the evidence and embellish that argument.

My first encounter with Ron was in the early Sixties, when I was an undergraduate pursuing political studies at Queen's and he was a professor. The Queen's of those days looks, in retrospect, more like a liberal arts college than a major university. It did have faculties of medicine and law, but it was still an intimate institution, with a total student population of fewer than 5,000 when I left in 1967. That said, this small university loomed large in Canada and most particularly in such fields as Canadian studies, political science and economics. The politics department was remarkable and perhaps uniquely distinguished in its contribution to Canadian public life. In my time, it included three professors who eventually became Companions of the Order of Canada (Alec Corry, John Meisel and Ron). Flora MacDonald, also now a CC, had escaped the Tory battles around John Diefenbaker and found refuge as the departmental secretary − but of course she was much more, including a tutorial leader. The Dean of Law, Bill Lederman, an eventual OC, gave a seminar on constitutional law for politics students. Ted Hodgetts, OC, was still there in my first two years,. And there were other exceptional teachers as well: of those who left marks on me, I'd mention Jock Gunn, Jack Grove, Hans Lovink, and Hugh Thorburn. The honours politics program was small − some twenty students − and class sizes were a fraction of those today. I remember at least two seminars in which we

were fewer than ten. We students had easy access to our professors and occasionally saw them socially (though I don't remember addressing any of them by their first name in those years). Some of these acquaintances with professors matured into friendships that I have been lucky enough to enjoy for many years.

My first sure memory of Ron is of his fourth year seminar on comparative federalism. Ron had returned to Queen's in the early Sixties after completing his thesis at Oxford. His book *New Federations: Experiments in the Commonwealth* had just been published by the Clarendon Press. He was a late-comer to political science, having started teaching at Queen's as a philosopher before deciding to switch disciplines and return to Oxford for his doctorate. The seminar was small, with lots of discussion. For me, it was illuminating because of its strong comparative dimension, including − because of Ron's field research − a close examination of post-colonial societies which had had very different experiences of federalism. Ron had studied under K.C. Wheare, who emphasized the institutional aspects of federalism, but his own approach was notably eclectic. He steered between the Scylla of Wheare's institutionalist approach to federalism and the Charybdis of W.S. Livingston's sociological approach. Ron was focused on whether political systems in practice functioned in a federal way and what forces and factors shaped them − including their historical development, societal and institutional structures, and parties and leaders. His interest in the new federations, a number of which failed, also led him to reflect deeply on the pathology of federations. A particular originality of Ron's course was that it cut across a wide spectrum of Western and developing countries, in contrast with many courses in comparative politics which were more focused on either Western, or communist, or developing countries. He used the focus on federalism as a prism for looking at how a kind of institutional arrangement played out in very different contexts.

Aside from the content of the course, I was struck by Ron's style. In fact, I think it was virtually identical to his style today. Even in the Age of Aquarius, he was always properly dressed in a donnish way. And though he was only in his late thirties, he seemed older somehow, probably because of his exceptional maturity and soundness of judgment. (No doubt these qualities lay behind his becoming the youngest Principal ever at Queen's.) He was the least ideological or passionate of teachers. Calm reasonableness and balanced judgment prevailed. Despite, or perhaps because of, his strong philosophical background, he was wary of very abstract political science: facts and the complexity of different countries were foremost (he had spent time in each of the new federations on which he wrote). He advanced concepts and taxonomies to aid understanding, but he came to generalizations cautiously and eschewed ambitious theory. He used the comparative method as a kind of laboratory of interesting specimens where hypotheses could be tested. I might not have appreciated that as much then as I came to later because I was very caught up at the time in systems theory. Of course, he was not completely immune to enthusiasms: at the time he was rather seduced by the charms of the German Bundesrat, thinking it might fit Canada's needs; he has since changed his mind on this.

The politics department hoped I would win a Woodrow Wilson fellowship and go off to Yale or one of the leading American universities. I let them down badly. I had not even started on my thesis when I went for my interview, which did not seem to impress the selection jury as it probed for thoughts that I had not yet formed. A few days after the bad news arrived, I encountered Ron in the lower level of the Student Union. He expressed his regrets about the Wilson and asked if I had ever thought about Oxford. I had not, but was thrilled by the idea. So Ron set to work. His plan was to get me into Nuffield College, where he had done his doctorate, and which would provide a full scholarship. However, Nuffield would not make a final commitment until they had interviewed me, which would not happen until I arrived in September. So Ron spoke with his great friend, Christopher Seton-Watson at Oriel, to arrange a place there as a potential fall-back. Fortunately, by this time I had done my thesis and graduated honourably so things worked out at Nuffield.

Unexpectedly, all this put Ron in the unlikely and unknowing role of Cupid. For it was at Oxford that I met Charlotte Gray, who became − after a long friendship and eventual courtship − my wife and the mother of our three sons. Thus the Fates and Ron lined up to steer me towards the best and happiest decision of my life. Often teachers have no idea what impact they have on their students. I am glad to report that Ron approves of my choice: he stood, with John Meisel, as one of Charlotte's two sponsors when she was recently hooded with an honourary doctorate at Queen's.

After Oxford, I took a job with the federal government in Ottawa "for a year or two". I still thought I might eventually teach at a university. I had worked in a few departments by 1977, when I was recruited into the so-called "Tellier Group" that had been set up in the Privy Council Office to advise the government on dealing with the newly elected Parti Québecois government and a possible a referendum on sovereignty-association. An early initiative was the creation of the Pepin-Robarts Commission, which Ron joined as a commissioner the following year. Prime Minister Trudeau had grave reservations about the commission, even as he set it up, because he did not want to confront a long list of proposed changes to the structure of the country that he might not support or be able to deliver. In fact, I saw relatively little of Ron during this period, but it is probably fair to say that we came at the national unity issue from different angles as the great drama unfolded through constitutional rounds, elections and referendums.

Ron's writing, even recently, tends to give great weight to what he calls the "structural problems" of Canadian federalism. Like many in the political science community in Canada, he has seen some aspects of our constitutional arrangements as dysfunctional. This led him to support major constitutional change in the Pepin-Robarts Report and in the Meech and Charlottetown accords. My own optic has been shaped from working within PCO on unity scenarios and strategies in the late seventies. While I recognized structural tensions in Canadian federalism, I was not convinced that they were necessarily much worse than those in some other federations or would be cured by various proposed constitutional solutions. It was hard to see how to rally the PQ to any "Canadian" solution, and their continued opposition would undermine the value of whatever was accomplished. Moreover, addressing some of the structural

issues, such as the Senate and the spending power, risked pitting regions against one another. Many constitutional innovations would bring their own problems. In the contest over national unity, I thought it might be easier to wear down the credibility of independence through incremental change and reasoned argument than to win a clear constitutional victory for Canada. In the end, this has made me reluctant about the major constitutional initiatives of the last twenty-five years. I supported none of them with enthusiasm, because I always had reservations about process (1981) or substance (Meech and Charlottetown). Ron was probably keener on the structural reforms in Meech and Charlottetown. In retrospect, it is hard to say who was right or wrong about what because the story has had so many surprising twists. Ron, in his post-mortem of the Charlottetown Accord, asked whether Canadians are now "inoculated from the disease of wanting to solve all structural problems by means of constitutional change".

In fact, I was not professionally involved in the great dramas of Meech and Charlottetown (and only peripherally in patriation). The next time I seriously engaged with Ron was after I became Deputy Minister of Intergovernmental Relations in 1996. This was in the wake of the near-death experience of the Quebec referendum the previous year. By then, for better or for worse, we were in a world of incremental, non-constitutional change as well as the debate around the rules of secession and the need for "clarity". My minister was Stéphane Dion, very much the former professor of political science, who was voracious in his demand for facts and arguments about Canadian federalism, including comparisons with other federations. This led to my Medici moment, my becoming the unlikely patron of one of Ron's great successes. I phoned to propose that we commission him to write a short book, no more than one hundred pages, putting Canadian federalism in comparative perspective. We would have no editorial control and the book would be published by the Institute at Queen's. Our idea was that such a book could be useful in addressing a number of myths around Canadian federalism. The result was *Comparing Federal Systems.* The book is a classic: a major best seller, now into its third edition, translated into French, Spanish, Arabic, Ukrainian and Kurdish. It was such a success that I went back to Ron and asked for a second short book, which became *The Spending Power in Federal Systems,* an equally masterly product, though on a much narrower subject. The success of these volumes should be an inspiration to scholars at the top of their game as to the advantages in publishing *short* books, even though it is very challenging to do well.

In 1998, I called Ron on another project. In the same spirit of opening the Canadian debate to experiences of other federations, we were thinking of holding a major international conference on federalism and sponsoring an organization to promote an international network on federalism. We wanted him to join a small committee to explore the idea. So began what became the Forum of Federations. Ron has been central to the creation and development of the Forum and has given an incredible amount of time to it. I saw a fair bit of Ron in the Forum's earliest days leading up to the Mont Tremblant conference, but I have come fully to appreciate not just his dedication but his skills and knowledge only since I was selected (by a jury including Ron) to become President of the organization in 2005. He is the committee man *sans pareil*, always totally prepared, clear on the outcomes desired, attentive to all views and

punctilious. At one stage, he was chairing not only our program committee, but also covering off our finance and investment committees. (Not many know that Ron spent a year training to be an accountant. It shows in his committee work.) He has been on the editorial board of the Global Dialogue program from day one and arranged our marriage for that program with the International Association of Centres of Federal Studies. Whenever we are concerned that we may have a problem with clashing egos − often academic egos from around the world − we wheel in Ron to smooth things over and produce a coherent result. He has traveled ceaselessly for us, often to difficult environments. Wherever he goes, business comes first, so he often sees little beyond the walls of a hotel. Too often, his tourism is largely vicarious − experienced through the reports his beloved Donna brings back of her explorations while he has been in meetings. For a long time Ron reviewed every article in our magazine for content. He is always quick to comment on drafts of anything sent to him. Most recently, he has helped to shape and bring order to the Fourth International Conference on Federalism planned for Delhi in November 2007, as he did for the previous three conferences. He can be tough when necessary: for example, he categorized the draft papers for Delhi into four lots, namely "outstanding, good, salvageable, and beyond hope"; appropriate action followed. Through all of this, I have never seen him complain, ruffled or even remotely rude. Finally, Ron was the most assiduous reviewer of drafts of a little book on federalism that I authored and he was unstintingly generous with comments and corrections.

Finally, let me finish where I started − at Queen's. I have been on its board for a number of years and have benefited from Ron's perceptions and careful judgments on a number of occasions. At the same time, even twenty years after stepping down as Principal, he has always shown the greatest discretion and supportive deference towards his successors. We had a particularly happy occasion last year, when a new student residence was designated Watts Hall.

So you can see that it has been my good fortune to know Ron Watts first as my teacher, but in turn as my mentor, my client, my boss and my advisor. It is a measure of the man that with every step he became, more and more, my friend.

5

Federalism, Civility and Conflict Prevention: Watts's Research and Legacy

Hugh D. Segal

I am honoured to reflect on the remarkable breadth and depth of Ron Watts's seminal scholarship, over decades, on federalism both in Canada and abroad. It is hard for me to be in any way detached about Ron's remarkable contribution to Queen's University, to Canada and to a better world. When I served an Ontario premier and, subsequently, a federal prime minister, Dr. Watts was one of those non-partisan scholars on whom we depended for critical advice at serious junctures in the federal-provincial contexts of the day. For an advisor, there is nothing more elegant than offering sage and insightful advice, only to have it not taken. And even when Ron's advice was not taken, his civility of tone and elegance of demeanor reflected the remarkable individual he is.

I know of many occasions, from Cape Town to Islamabad, Zurich to Kuala Lumpur, Queen's Park to Madrid, Barcelona, to Mexico City, Beijing to Delhi, Brasilia to Moscow, where Ron Watts's advice was taken – and – we are all living in a better world as a result. When Ron and I sat around various federal tables on the Meech-Charlottetown constitutional cycle from the mid-1980s through the early 1990s, I witnessed pugnacious turf-guarding federal bureaucrats confusing their own careerist interests with the country's, and set Ron's advice on specific issues aside, to the ultimate detriment of Canada and the vibrancies of our federal prospects going forward. And, just so we are absolutely clear, on those issues my staunch and enthusiastic support for his wise counsel had no meaningful impact at all! In fact, while he is far too much the gentleman and colleague to ever say so, I am sure that as I stepped in to support his insight or counsel, he might well have wished, in terms of ultimate outcome, that I had been on the other side! He never betrayed any such cavil.

And while I will leave to the genuine scholars of federalism assembled this week the more detailed analysis of the broad impact of his scholarship and insights on the study and execution of federalism itself, I do think we can relate the broad themes of his work to the present challenges global and domestic governance face.

Civility is not often a term one associates with the intergovernmental tensions of any country or region. Ron Watts's scholarship, underlined by his character and persona, imply a view of the world where civility is actually the primary social and economic goal to be associated with both outcomes and

processes in government, both robustly democratic or less so. In my view, it is the absence of civility in process that leads most directly to the events, pressures, conceits, excesses and conflicts that produce violence, war, suffering and failed states and societies.

I think it is a fair read of Dr. Watts's many articles, monographs, working papers and books, and certainly of the broad sweep of his many different and contextually precise counsels to emerging, refurbishing or pressured federations that a dynamic and calibrated federalism, where shared sovereignties invest decision-making with just the right balance and built-in sensitivities, is usually the best way for diverse geographic, ethnic and national identities to pull constructively in the same direction; providing, of course, there is the right mix of trust and political will.

It is, in a sense, a matter of both intent and design meeting on the field of political form and substance. While the precise nature of institutional design will vary from Brasilia to Canberra or as between Moscow and its oblasts and a future Iraqi federation – in ways that reflect the competing forces seeking to be reconciled in a workable federal government – the inclusion of positive and structural forces of reconciliation in a government structure constitute the true promise of federalism and its immense creative response to the politics of dissolution, division and dysfunction. The remarkable work of the Forum of Federations, an organization in which Ron Watts's paternity is undeniable, underlines the extent to which the federal idea is very much a force for the future, and not only an analytical template for assessing governance world-wide.

In a background paper written for the second global meeting of the Forum of the Federation in St. Gallen, Switzerland, in 2002, Dr. Watts approached federalism this way:

> Federalism provides a technique of constitutional organization that permits action by a shared government for certain common purposes, together with autonomous action by constituent units of government for purposes that relate to maintaining their distinctiveness, with each level directly responsible to its own electorate. Indeed, taking account of such examples as Canada, the United States and Mexico in North America, Brazil, Venezuela and Argentina in South America, Switzerland, Germany, Austria, Belgium and Spain in Europe, Russia in Europe and Asia, Australia, India, Pakistan and Malaysia in Asia, and Nigeria, Ethiopia, and South Africa in Africa, some 40 percent of the world's population today live in countries that can be considered or claim to be federal, and many of these federations are clearly multicultural or even multinational in their composition.

However we view the prospects for expanding world-wide trade and market participation, or the strength and weakness of the global monetary or security architecture necessary to sustain this great march forward, we need also face the confounding threats of poverty, terrorism, environmental or authoritarian blow back. What is clear is the extent to which the quest for sustained local, national and cultural identity confronts, at some interval, the willy-nilly spread of the good and the bad of market growth and expansion.

In the same way, everything from increased Islamist identity issues in the caucuses and North Africa, continued if less acute Quebecois focus on language,

culture and the undue use of the federal spending power here in Canada, tension between rural and urban areas in China, angst about something less than an established federal/oblast funding formula in Russia, all reflect some of this core identity vs. central/global market reality. These tensions are not only driven by this interplay, but also this interplay is a defining parameter for the tensions, scope and reach. The creative federal-design function is still a potent and constructive instrument to alleviate these tensions – if and only if there is trust and political will.

One of the many challenges federations such as Canada have yet to face is the reconciliation of structural federalism where provinces have substantially more jurisdiction and clout than their American state analogues, while the federal government is in its day-to-day legislative function more unitary than the division of powers driving Washington, or Länder-Bundesrat or state-Canberra integrated legislative processes, in Germany or Australia. A critical question relative to Canada's way ahead is the extent to which its brand of federalism remains relevant when it is unable easily to adapt to meet new requirements. While non-constitutional or bilateral constitutional agreements, around revenue sharing, confessional schools, and some international presence for subnational actors and constructive innovations, such as the Council of the Federation, speak to a core will to co-operate, dysfunctional federal-provincial lacunae can produce disturbing competitive downgrades in terms of the excellence and effectiveness of government. This competitive downgrade is not without cost. Incoherent and unduly diverse approaches to securities issues, continued incoherence in large areas of environmental and health policy, strong interprovincial trade barriers that would embarrass Europeans, a discontinuity between our federal system and the key wealth and immigration roles of cities are just a few of the issues that downgrade the economic and social efficiency of Canada's federalism. These all cost jobs, investment and have huge opportunity costs. Quebec's initialing as between Charest and Sarkosy of a medical-services-free-movement zone for doctors from Quebec and France – points out how much work remains to be done.

A democratically detached Senate and almost anti-democratic electoral system – while not necessarily the fault of our federal structure − speak to the difficulties for reasonable, incremental change in systems that have been in place from 1793 or 1864 – depending on how, where and what one starts counting. It is in that reflexive context that we need to look at the dynamic capacity of federalism going forward as both a structural and reconciling framework to serve our interests while also being a determined and creative architecture for greater civility, economic and social progress for Canada and its global partners going forward. As David Cameron and Bob Rae would have found out in Sri-Lanka, Kurdish Iraq and Baghdad, even the most practical and elegant of structuralist federal constitutional solutions cannot be built on foundations infected with warmongering, ethnic hatred and retributive core intent. And, as we see elsewhere, confusing federalism with robust democracy may be more prayer and wishful thinking than hard fact.

Federal systems imply not fixed and separate areas of power and jurisdiction − but ongoing negotiation between jurisdictions so that undue countervailing or programmatic frustrations do not inadvertently demolish the

acuity of either policy competence or service delivery. Many federations world wide, including and especially Canada, have not embraced the same level of subsidiarity of Europe. Waste and duplications overlap and far too often define program failure. Certainly for Canada within North America, the challenge of greater framework integration among Canada, the United States and Mexico in areas as diverse as monetary policy, public health, environment, and migration, are a crucial determinant of our prosperity and sovereignty. We need to be as creative facing these issues as we have been on other challenges of statecraft, such as acid rain, free trade, and NAFTA in the past.

A debate about the spending power will reflect in some important respects the true maturity or lack of same for the Canadian federation as a whole. There is precious little evidence that Ottawa, under any political party, can spend, account for our dollar value for money effectively in many areas under its own jurisdiction, let alone in the jurisdictions shared with the provinces or usurped by the federal government from the provinces in the past. By effectively, I mean in a well-targeted less wasteful fashion, that produces not only barometers as to input but some actual measurement as to output vs. original plans. Both Ottawa and some provinces have real problems in areas such as health care, child health, the poverty gap and the immigration integration challenge writ large. Unemployment statistics in Toronto that are higher than Moncton or St. John's, or public satisfaction in Canada with health care where we fall well below non-federal countries, such as France, speak to these difficulties as does Canada's relative failure on child poverty. Federal structures that facilitated nation-building and great and historic compromises on pensions, equalization or health care cannot be reasons for complacency regarding present-day judgment and evolution on results. Winning the last war counts. But that does not equal being up to today's challenges.

The creativity of an ongoing dynamic between jurisdictions, not based on federal or provincial orthodoxy, but on both effective subsidiarity, fiscal capacity and client and citizen service measures would be healthy indeed for Canada's future federal system. It is not part of our defining culture as of yet – but one can hope and pray.

Civility and mutuality in our collective efforts to serve the public better and advance economic and social prospects for all in a society, is essentially in the DNA code of Canadian federalism – and that is a DNA code that Dr. Watts has worked tirelessly to adapt and infuse with contemporary political and fiscal realities, both at home and abroad.

But even genetically sourced tendencies and behaviour can be suppressed with the drugs of avarice, nationalism, paternalism regionalism, civil service incapacity and greed. And, none among us can assert that these narcotics are unknown to our federal, provincial, or public-service class. For his part, I believe that Prime Minister Harper with his 'Fédéralisme d'ouverture" has joined the government of the day to the long multi-partisan Quebec tradition of "coopération toujours, assimilation jamais" of Mr. Duplessis, the "Maitre Chez Nous" of M. Lesage, the "Egalite ou Indépendance" of M. Johnson, the "deux nations" of Mr. Stanfield, the "fédéralisme rentable" of M. Bourassa. All speak to a more vibrant and necessary subsidiarity. While some may disagree with what it does or does not mean, it does mean a more profound opening to a

qualitative framework for creative accommodation as opposed to top-down "fédéralisme dominateur" often associated with others – which was not really federalism at all, except perhaps for the arch-centralist. More of that civility on all sides will improve the coal-face reality in federal-provincial dynamics that will help fuel Canada's development politically, economically and socially in the decades to come.

Let me beg your indulgence for a final thought. Civility in federal structures requires both an absence of complacency and the will to compromise on the structural components of a dynamic federal system going forward. In democracies that are federations, the federal structure itself and the modalities of its operation are sinews of the fabric of democracy that generated the need for a federation to begin with. There would have been no "Canada" were it not for the federalism in our founding core dynamics. That Canada and Canadians should be such determined promoters and proponents of federalism world-wide is not, with these historical roots, in any way surprising.

But as a part of our superstructure of civility and infrastructure of democracy the competence of our federalism cannot be ignored or set aside. Like any infrastructure it requires apprehensive updating, strengthening and refurbishment. Overpasses wear out, old unimproved machinery can fail. The federal-provincial system is no different.

Much of the tension within the engine of federalism is over the federal-confederal aspirational division that has always been with us. While what the Fathers of Confederation constructed and the British North America Act enshrined was absolutely federal with central legislative bodies directly accountable to the voting public, much of what emerged as a placating prop for local political support or acquiescence in 1864 was of a confederal nature – the colonies having been the creators of the central government and not the other way around. That structural-aspirational divide remains at the core of the challenge facing our federal system. And as we seek to address that challenge in the months and years ahead and sustain the essentially humane and conciliatory promise of Canadian federalism, both at home and abroad, in the years to come, all of us, from whatever areas of study, geographic vantage point, or scholarly or practitioners' perspective, can be immensely cheered by the outstanding benefit Ron Watts's continued sage counsel, remarkable scholarship and vast experience will provide, as an ongoing beacon of light, intellectual support, insight and wisdom for us all.

6

The Practical Ron Watts: Glimpses of a Political Scientist in Action

David Cameron

Ce portrait sans prétention du politologue Ron Watts met en lumière l'intense activité professionnelle d'un Canadien – en fait originaire du Haut-Canada – dont la renommée mondiale repose sur la fidélité à ses racines. Ron Watts a apporté une contribution inestimable à sa collectivité, à son alma mater et à son pays, de même qu'à l'étude du fédéralisme comparé. Mais il a fait beaucoup plus. Ceux qui sont surtout familiers du grand spécialiste du fédéralisme comparé pourraient méconnaître la façon dont il a mis en pratique ses idées et principes en participant à l'élaboration des politiques, à l'évolution constitutionnelle ainsi qu'au développement et à la réforme de diverses fédérations. Il a mené une seconde carrière tout aussi remarquable de conseiller, de consultant, de commissaire, d'allié bienveillant et de stimulateur auprès de nombreux acteurs politiques et gouvernementaux chargés de résoudre d'épineux problèmes aux quatre coins du globe. L'efficacité de son action est enracinée dans trois éléments : sa personnalité, son expérience et son savoir. Tous ses dons et qualités me sont clairement apparus lorsque j'ai collaboré avec lui dans ses fonctions de commissaire du Groupe de travail Pepin-Robarts, aussi connu sous le nom de Commission de l'unité canadienne.

This volume honours Ron Watts. It contains a fine collection of serious and substantial contributions, many of which advance our understanding of the field Ron made his own – Canadian and comparative federalism. Serious and substantial. That may be how one would describe the other contributions in the volume, but certainly not this one. You might better view this chapter as an *amuse-gueul*e or *amuse-bouche* – the little dish before the main meal. A light-hearted and loving appreciation of a fine man and an accomplished scholar. In thinking about this chapter in relation to the others that follow, I am reminded of a comment Chips Channon made in his marvellous, gossipy diaries of England in the inter-war years; he said that one of the great London hostesses, Lady Cunard, used to put Benzedrine in the drinks to make the party go. If our collection of essays were a drink, this chapter would be the Benzedrine.

The *Who's Who in Canada* entry for Ron Watts is long, and packed with information – just like the man himself. But here are a couple of excerpts.

- Watts, Ronald Lampman, C.C. M.A., D.Phil., LL.D.
- Principal and professor emeritus, Queen's University
- Born: Japan, 10 March 1929, son of missionary parents
- Married: Donna Catherine Paisley, 1954

All these things are significant, and I will get to them in a moment.

The entry charts Ron's inexorable rise through the ranks at Queen's, where he spent his entire career: lecturer in political philosophy; warden of men's residences; assistant, associate and full professor of political studies; assistant dean; associate dean; and real dean of the faculty of arts and sciences; principal and vice-chancellor from 1974-84. And here the arc of his administrative career – but certainly not his intellectual life – begins its descent. He becomes downwardly mobile. The next entry is Director of the Institute of Intergovernmental Relations; then, humble fellow of that self-same Institute, which is the title he now holds.

If you stopped reading the *Who's Who* entry at this point, you would conclude that here is a man who has had a distinguished career, but perhaps somewhat local or restricted in nature. Joined the organization; rose to the top; still hanging around.

As all of us know, this would be a gravely mistaken appreciation of our dear friend and colleague. It is true that he served one of Canada's finest universities with dedication and distinction, but, as they say on century farms in these parts, that ain't the half of it.

Look at the rest of the *Who's Who* entry. It lists the following countries which Ron has visited and with which he has been associated professionally: England, Australia, India, Belgium, Malaysia, Germany, Nigeria, Japan, South Africa, Uganda, Papua New Guinea, the United States, Russia, Mexico, New Zealand, Switzerland. I know they've missed several: Cyprus, for example; and Pakistan, where, if my memory serves me well, the Vice-President insisted that he wanted Professor Watts, and no one but Professor Watts.

The entry also reports on the jobs he has taken in some of these places during his long career: visiting professor all over the place; consultant to many foreign governments; member and often chair of numerous commissions of inquiry here and abroad; board member of a half dozen organizations. He was even a federal civil servant, for goodness sake. From 1991-92, Ron was Assistant Secretary to the Cabinet for Constitutional Affairs in the Federal-Provincial Relations Office in Ottawa – a position, I am honoured to say, that I held several years earlier myself. This is perhaps the single occasion when I can truthfully say that Ron Watts followed in my footsteps.

Clearly, when you look at this list of extra-curricular activities, the man must have hated his work at Queen's. He was always trying to get away. And usually succeeding.

Indeed, I have rarely met a man with such an insatiable taste for foreign travel, and such a breezy willingness to accept the travail that attends trips to difficult parts of the world. Ron travels for business. He travels for fun. Where did this travelling desire come from? Well, he first saw the light of day in Japan; perhaps he inherited the adventurous spirit of his missionary parents. That may explain it.

On the other hand, I could offer you another reason for Ron's love of travel: Donna. Donna Catherine Paisley Watts. Donna's desire to see the world is, if anything, even more ardent than Ron's. She it was, if I remember correctly, who arranged for the two of them to take a ship around Cape Horn with the ostensible purpose of visiting the Galapagos Islands. Other people have managed to get to the Galapagos without the antipodean challenges she set for them; but, for Donna, getting there is more than half the fun, even if it means a tempest in the Antarctic.

Perhaps it was on that same trip that Ron had his mishap. At the Forum of Federations we have a video on federalism called *The Kingston Sessions*, which captures a training course the Forum organized at Queen's and the Royal Military College in 2006 for some visiting Iraqi legislators. In the video, Ron is speaking with his usual authority about second chambers, regional governments in a federation, and the like, but – weirdly – every time he gestures, he holds up this great bandaged paw. Rather like the Queen, waving, with her gloves on. His arm had been broken, falling off an all terrain vehicle in South America. I think that was one of his fun trips. So far as I know, he has never broken a limb in the service of the federal idea around the world.

While Ron has always remained true to his home base in Kingston, he is constantly leaving it. I think of him as a kind of rooted gadfly, a grounded gadabout. He displays to a striking degree the gift of travelling widely, while always remaining true to himself. You might well encounter him anywhere, but you are never left in any doubt about where he is from.

Where is he from? From Canada, obviously, but it is possible to be more specific than that. I have always had the impression that he is best understood as an Upper Canadian, and – coming from Vancouver – I speak as one who is not. This may seem an increasingly antique character type in our riotously multicultural, twenty-first century country, but it speaks to some solid virtues that undergird the Canadian experience and are as valuable today as they have ever been – prudence, industry, modesty, a taste for quiet accomplishment, clarity of purpose, courtesy, independence of mind, a dislike of error. I am tempted to sum all this up with an equally antique phrase, by saying that Ron has bottom, but I won't, because I would not want to be misunderstood.

Others will speak more fulsomely about Ron's achievements in political science. While I will touch on them glancingly, I want to focus in my remarks on his practical side, on the way he put his ideas and principles into practice, on his participation in policy-making, constitutional design, and the construction and reform of federations. Those who know Ron mainly as the academic world's pre-eminent student of comparative federalism may be less aware of this, but Ron has had a remarkably distinguished second career as an advisor, consultant, commissioner, friendly supporter, and all round encourager of politicians and government actors who have been working on acutely difficult problems around the world. I will give you one example in a moment, but let me speak first about why he has been so successful in this practical work, and why he has been so much in demand.

I believe his success as a practitioner is fed by three roots: his character; his experience; and his knowledge.

Ron's character I have spoken briefly of. An Upper Canadian type. To meet Ron is to know that you are going to get the straight goods. There is no game playing with him; what you see is what you get. He treats everyone with the same slightly formal courtesy; and he treats bad ideas with the trenchant criticism they deserve, no matter what their source. I have certainly experienced this myself; Ron can make his views crystal clear when he sees that I am possessed of a bad idea or speaking beyond my brief, but he never makes me feel more foolish than the ignorance I have just exposed would warrant. You need to trust the advisor if you are to trust the advice, and Ron's personality and character foster respect for him and belief in the validity of what he says. As my Mother used to say to me, having a good character is very important, and Ron has that in spades. My Mother would have been pleased if I had brought Ronnie home for dinner.

Then there is experience. It is obvious, at this stage in his career, that Ron has tons of experience in offering ideas and support to governments at home and abroad, and that rich repository of prior activity is a resource anyone seeking his counsel today can draw on. But the experience he has gained from his time in administration at Queen's has also been, I think, extremely important in increasing the impact of his practical activity in the "real world". He has not just been a superb academic social scientist. He has run things. Ron has something like three decades of university administration at Queen's under his belt. He has run parts of the University; he has run the University as a whole. I have always thought that university administration is an excellent training ground for a career in politics. The university is filled with academics doing weird and wonderful things, and professors are as independent as hogs on ice. If you ask: "who's running the place?" What's the answer? There is a perpetual, and perpetually unresolved, tension between the formal administration and the collegium, between the president, provost and deans, on the one hand, and the corporate body of faculty members – all of them, in principle, equal – on the other. Achieving practical results in an environment of this sort requires political and diplomatic skills of a high order. So I believe that, through his rich experience in university administration, Ron developed a highly refined sense of what it means to be in charge, to be faced with making changes in a fraught and uncertain environment, to cope with the collision between high ambition and scarce resources, to meet deadlines. This has allowed him to appreciate the problems and issues from the point of view of those to whom he is offering counsel. He understands, not just the formal problem that he is being asked for advice on, but the pressures and constraints that are part of the lives of the politicians and officials whom he is advising. If he is not actually one of them, he certainly knows what it means to be one of them.

The third and surely the most obvious thing Ron brings to his practical activity is knowledge. He knows stuff. He knows a lot of stuff. Blessed with a retentive mind and an awesome work ethic, Ron not only enjoys a theoretical and historical understanding of political institutions in stasis and in change, but he also commands an immense storehouse of information about federal experience throughout the world. Indeed, I venture to say that he knows more about federalism and federal systems than anyone else in the world today. I imagine that most of us in this room have had occasion to go to Ron to check a

fact, to test a generalization, to seek guidance about where to look for what we need. I have never resorted to Ron without coming away a better informed (and often more modest) student of federalism.

These three things – character, knowledge and experience – make for a dynamite combination when it comes to taking what we know in the academy out into the big, wide world. The domestic and international demand for Ron's services is eloquent testimony of just how rare, and how highly valued, this combination is.

I first got to know Ron well, and to have the opportunity to work with him and see him in action, in the late 1970s. I was the Research Director of the Task Force on Canadian Unity, a commission co-chaired by Jean-Luc Pepin and John Robarts, established by then Prime Minister Pierre Trudeau in the wake of the election of the first Parti Québécois government in Quebec. It was a tempestuous time in our national politics, and, such was the level of tension between Ottawa and Quebec, that it was difficult for the government even to find credible Quebecers to serve on the Task Force. It was established in July 1977, but the Government of Canada did not until August of that year manage to identify and name the francophone members – Gérald Beaudoin, a distinguished constitutional lawyer, and Solange Chaput-Rolland, a prominent writer and journalist. Ron Watts, then Principal of Queen's, was not on the original slate of commissioners. In fact, he was not appointed until seven months later, in February 1978, to replace a sitting commissioner, John Evans, who resigned to present himself as a candidate in the pending federal election.

This already tells you something about Ron. First of all, when he was asked to join the Task Force, he was the head of a major university; he already had a full-time job, but he did not let that stop him from taking on another one. Second, he was not invited to serve on the Task Force at the outset, but only to fill a vacancy. Yet he accepted the invitation. This, I think, speaks to several of the virtues I have already mentioned, and one that I haven't. The issue for Ron was not about the proper stroking of his ego; it was never about that. The issue was the significance of the task at hand. Furthermore, as a patriot, he found it very difficult to say no to a request from his government in an hour of need.

He may have arrived on the scene late, but his impact on the life and work of the Task Force was profound. His arrival had a steadying, calming effect on what was at the time a fairly fractured organization, wounded by the abrupt departure of John Evans. The commissioners were from all over Canada, with deeply different understandings of the country's nature and of the challenges it was facing with the accession to power of the sovereignists. Views were deeply felt, and passionately expressed, not least by Solange Chaput-Rolland. She was a wonderfully warm and generous person, but those who knew her would acknowledge that she was, well, excitable. Her presence made Board meetings extremely interesting, but highly unpredictable. Ron was a bridge builder, listening carefully to what everyone was saying, treating everyone with courtesy and respect, struggling to identify the common ground that would allow the Task Force to proceed to a successful conclusion. Very rapidly, Solange connected with Ron – what an odd couple – and she began to depend on him for understanding and for the representation of her views and concerns to the other Task Force members. As I think today about their relationship, I am reminded of

that wonderful *New Yorker* cartoon, in which neighbours are pointing at a couple down the street. The woman looks flighty and anxious; the man is dressed in work clothes and wearing a tool belt around his waist. One neighbour says to the other: "Oh, they make a perfect couple. She's high maintenance, and he can fix anything." That the Task Force, despite its difficulties, was able to deliver a strong, unanimous report was in no small measure owing to the quiet authority of Ron Watts, and to his capacity to fix anything.

With Ron's arrival, the commissioners suddenly had an expert in their midst. Jean-Luc Pepin and John Robarts were highly intelligent and highly experienced politicians with large and generous world views, but they were not possessed of academic expertise. Gérald Beaudoin, another of the commissioners, was a distinguished student of Canadian constitutional law. But until Ron arrived, there was no one with a rich comparative understanding of political systems, especially federal political systems similar to Canada's. He was able to open up a discussion more widely by introducing relevant comparative experience, and to reassure commissioners, when they were on the cusp of recommending a significant reform, that what they were proposing was neither unprecedented nor dangerous. He was also able to play a special role in assessing the work of the research team and the submissions of outside experts.

Finally, I think his practical experience in running a large post-secondary institution was brought very creatively to bear on the Task Force's work. Let's not forget that he was Principal of Queen's during this period, so, when he wasn't with the Task Force, he was coping with the incessant demands any university president confronts. Clearly, he knew something about time management, and about how to get the job done. This became obvious at the end of the Task Force, as it was completing its work.

The Task Force became persuaded in December of 1978 that, if it didn't have its final report published in time for an important federal-provincial meeting, to be held in February 1979, that it would miss the boat. Clunky drafts of possible chapters of a final report had been floating around the Task Force in the fall of 1978, but they were unusable. At their December meeting, the commissioners decided to prepare an entirely new report from scratch and to have it published just seven weeks later, in time for the federal-provincial conference to be held 5-6 February 1979. Ron Watts and I were deputed to write it. It seemed impossible to pull off at the time. The commissioners had not agreed on their recommendations, had not established the structure of the report, had not arranged for translation, had not made plans for printing and publishing.

I was to write the first half of the report; Ron was to write the second half. I began on Boxing Day, holed up in a neighbour's vacant apartment. Ron announced calmly that he was going sailing in the Caribbean over Christmas. "I've promised Donna. She'll kill me if I don't go. But don't worry. I'll write it on the boat. I'll have my part ready when we get together after New Year's." And sure enough, he did. I still find this more than a little irritating, even after all these years. What I thought was a close to heroic accomplishment, drudging away in my neighbour's apartment, Ron was able to do, while sailing with his wife and family in the Caribbean. Ron may seem phlegmatic, but appearances are deceptive. I don't know if you have ever seen a bear in the forest: bears look slow and ponderous, but, can they ever move when they want to. They are

frighteningly fast. That's my image of Ron. I hope he will forgive me, but there are worse things than being compared to a bear.

In January 1979, by the way, all the other steps were taken, and the final report of the Task Force on Canadian Unity, *A Future Together*, was distributed to first ministers at their meeting in February, setting what must surely be a record for the most rapid production of a commission's final report.

Let me close with an observation. Conferences honouring someone are customarily organized towards the end of that person's career. While Ron is of a certain age, he is by no means at the end of his career. He just sent me the draft of the third edition of his matchless little book, *Comparing Federal Systems*, and, so far as I am concerned, he is still the go-to person if I want to know exactly how many federal systems there really are in the world today. Look at the picture of him at the front of this volume; he looks young and green and supple – and pictures never lie.

So I regard this volume as a mid-career celebration of Ron Watts, and it's being done now for a good reason. If we waited until the end of his career, there would have to be a *festschrift* of two volumes, instead of just one.

7

Ron Watts: The "Go To" Person of Canadian Federalism

Peter Meekison

Ce texte retrace l'importante contribution du professeur Ron Watts à l'odyssée constitutionnelle du Canada. Outre les recherches qu'il a menées pour la Commission royale d'enquête sur le bilinguisme et le biculturalisme et sa participation aux négociations de l'Accord de Charlottetown, il a été observateur à la Conférence sur la Confédération de demain en 1967, membre de la Commission de l'unité canadienne et principal auteur de son rapport Se retrouver, *de même que conseiller du BRFP lors des délibérations ayant précédé l'adoption de la* Loi constitutionnelle de 1982. *Pendant la ronde de négociations de Charlottetown, il a collaboré à la rédaction de l'exposé de principes du gouvernement fédéral intitulé* Bâtir ensemble l'avenir du Canada, *puis dirigé lors des négociations proprement dites le groupe de travail chargé d'examiner la réforme du Sénat. En dressant le bilan de cette période, on ne peut que constater son extraordinaire détermination. Un trait de caractère qui repose notamment sur sa connaissance approfondie du fédéralisme comparé mais aussi une habileté consommée en matière de facilitation, de conciliation et de consensus.*

This paper focuses on Ron Watts's extensive and varied involvement in Canada's constitutional odyssey (Russell 1993). In particular, it looks at his influence on the debate with respect to Senate reform. Starting with his research paper for the Royal Commission on Bilingualism and Biculturalism of 1963, the paper traces his participation up to the Charlottetown Accord in 1992. He was an observer at the 1967 Confederation of Tomorrow Conference. He was a member of The Task Force on Canadian Unity (1977 to 1979) and was the lead author of its Report, *A Future Together*. During the 1980 deliberations leading to the *Constitution Act, 1982*, he was an advisor to the Federal-Provincial Relations Office. He was one of the principal architects of the federal government's 1991 position paper, *Shaping Canada's Future Together*, and, during the negotiations leading to the Charlottetown Accord, chaired the Senate reform working group of officials. His extensive and continuing participation in public affairs is in

keeping with the long tradition set by other eminent scholars from Queen's University, such as W.A. Mackintosh, J. A. Corry, and John Deutsch.

If I had to summarize my paper, I would simply say that Watts was the "go to" person of Canadian federalism. There are many reasons why, but the principal ones are: his extensive knowledge of comparative federalism, his wisdom and skills in applying that knowledge, and his generosity in sharing that knowledge. As Watts explained so clearly:

> There is a genuine value in undertaking comparative analyses when considering solutions that might be appropriate for Canada. Comparisons may help in several ways. They may help to identify alternatives that might otherwise be overlooked. They may identify consequences, including unforeseen ones, which are likely to follow from particular arrangements that are advocated. Through identifying similarities and contrasts they may draw attention to certain features whose significance might be otherwise underestimated. Furthermore, we can learn not only from the successes but also from the failures of solutions attempted elsewhere. (Watts 1998a, 359)

By way of introduction, in 1966, Watts published his groundbreaking publication on comparative federalism, *New Federations: Experiments in the Commonwealth.* This work was central to his study, *Multicultural Societies and Federalism*, which he prepared for the Royal Commission on Bilingualism and Biculturalism (Watts 1970a). Although the study was published in 1970, it was completed in the summer of 1967. In his study he noted that:

> most of these federations have wrestled with just the sort of problems with which Canadians are concerned. These include not only problems of "recognized national languages", education in different languages, and the cultural impact of a federation-wide economy, but also the distinctively federal problems which arise from the attempt to accommodate the needs of a multicultural society by means of a federal political system. Among these issues are relation of provincial autonomy to cultural distinctiveness, the place of minorities and majorities within provinces, the impact of the federation-wide economy on provincial autonomy, cooperative and consultative relations between levels of government, and the institutions and processes by which different linguistic and cultural groups may participate in the establishment of a consensus in central politics. (ibid., 3-4)

If this list of issues sounds familiar, it should. Every one of them became an agenda item on the constitutional reform initiative Prime Minister Pearson launched in 1968. Watts was remarkably prescient! At the same time, he also informed the Royal Commissioners that "most of the new federations have attempted to copy certain features of Canadian federalism and in a number of instances to improve upon the Canadian model" (ibid., 4). One of his concluding observations was, "bicameral central legislatures in which senators have usually been appointed by the provincial governments have helped to bring regional cultural interests to bear upon central legislation…" (ibid., 87).

That same summer, Watts became one of the first individuals to participate in the constitutional renewal odyssey upon which Canada was about to embark. In 1967, Premier John Robarts of Ontario convened a meeting of Canada's ten

premiers to discuss the future of Canadian federalism. The gathering was known as the Confederation of Tomorrow Conference. Despite the fact that Canada was celebrating its Centennial that year, the conference proceedings suggested a rather uncertain future for the country. In addition to the provincial leaders, Premier Robarts also invited three leading constitutional scholars to observe the proceedings: Bora Laskin (formerly of the University of Toronto and then on the Ontario Court of Appeal), Frank Scott (McGill University) and Ron Watts (Queen's University). Ron was certainly in illustrious company!

In response to Premier Robarts' initiative, Prime Minister Pearson called for a constitutional conference in February 1968. Over the next three years, federal and provincial governments worked out a constitutional reform agreement that was finalized in Victoria in June 1971. Although the agreement, known as the Victoria Charter, was supported by all 11 governments, the Government of Quebec withdrew its support a few days following the conference, abruptly ending this phase of constitutional reform.

To assist the Government of Ontario in both developing and defining its position during these negotiations, Premier Robarts established the Ontario Advisory Committee on Confederation. Although Watts was not a member of the committee, he was asked to write a paper on second chambers for the group's consideration. Although governments had placed Senate reform on the reform agenda, it was given little attention.

The paper, "Second Chambers in Federal Political Systems", was an important contribution both to the rather limited literature on Senate reform and to the emerging discussion on the fundamentally different approaches to second chamber reform (Watts 1970b). Drawing on his extensive knowledge of second chambers, Watts argued that "a bicameral legislature has usually been an essential part of the federal compromise" (ibid., 318). With respect to the process of selecting the second chamber, he observed that "since control of central power is at stake, it has sometimes been suggested that members of the central legislature should be selected by the provincial legislatures, rather than chosen by direct popular election" (ibid., 331). A compromise solution is to have one chamber elected and the other appointed. He noted that Canada is unique among federations in that the central government appoints all the Senators.

One comment in Watts's comparative analysis of second chambers is particularly significant. He argued that "the Bundesrat is a more influential and significant body than the second chamber in any of the parliamentary federations in the Commonwealth" (ibid., 336). He thereby injected a very different perspective into the debate on Senate reform. As will be seen below, this approach to reforming the Senate was one of the central recommendations contained in the Report of the Task Force on Canadian Unity. Moreover, this approach continues to surface whenever discussions turn to second chamber reform.

Watts stressed that "the starting point for any attempt to reform the Senate must lie in seeing it in its context as one element within an interdependent federal system. To look at it as an institution by itself, or even as one of a group of institutions, is to see its functions out of focus" (ibid., 350). He concluded that

> there appears to be an urgent need to improve the ability of the Senate to assist in the process of generating a federal consensus which accommodates the interests of the different sectional and cultural minorities. Senate reform alone cannot be expected to solve all the contemporary problems of Canadian Confederation, but it may contribute to their resolution. (ibid., 351)

Twenty years later, during the negotiations on both the Meech Lake and Charlottetown Accords, Senate reform became a constitutional reform priority.

The election of the Parti Québecois in 1976 and its commitment to a referendum on Quebec's future status in Canada, once more put constitutional reform at the top of the intergovernmental agenda. One of the federal government's initial responses was the establishment of the Task Force on Canadian Unity in July 1977, otherwise known as the Pepin-Robarts Task Force. Watts was appointed to the Task Force in February 1978 to fill a vacancy resulting from the resignation of one its members. At that time he was Principal of Queen's University. In an interview, he recalled that his Queen's colleagues strongly encouraged him to accept. They assured him that they would do what was necessary to see that he had the time to fulfill the needs of the Task Force. Accordingly, he accepted the federal government's invitation. National unity was reconciled with the needs of Queen's University.

A close reading of the Task Force report, *A Future Together*, reflects his very significant involvement in its drafting. Put another way, his fingerprints are all over it. For example, who else would have thought about a specific reference to Malaysia? Muriel Kovitz, another member of the Task Force, confirmed this observation during an interview. In a few words, she described Ron perfectly. "He was a wonderful driving force, so even keeled (she must have known about his love of sailing). His manner was so positive and constructive. We were fortunate to have him and his expertise." (Kovitz)

Meanwhile, as the Task Force criss-crossed the country ascertaining the public's views, the federal government was actively engaged in developing a policy position and response to the ongoing threat to Canadian unity. In June 1978, the federal government released two key documents, *A Time for Action* and Bill C-60, *The Constitutional Amendment Bill*. The former was the federal government's broad policy paper on constitutional reform whereas Bill C-60 outlined the specific content of a revised constitution. Thus the federal government embarked on a new round of constitutional negotiations well before the Task Force had completed its consultations and report.

One can only speculate why the federal government would release its position paper in advance of receiving the final report, or even an interim report, from the Task Force. One reason may have been the fact that the government was now in its fifth year in office. Another reason may have been that it was under pressure to produce some kind of position well in advance of the yet to be announced Quebec referendum. It is also possible that the federal government did not agree with the general direction in which the Task Force was moving.

At the 1978 Annual Premiers' Conference, the provinces responded to the federal position paper and identified the issues they wanted to include on the constitutional reform agenda. The provincial response led to the Prime Minister convening a constitutional conference in October 1978. The federal government was now well into the fifth year of its mandate. Given the results of the fall 1978

by-elections, there was every indication that the government might be defeated in the general election. Given the federal-provincial negotiations then underway and the rapidly approaching federal election, the Task Force was under tremendous pressure to complete its deliberations and produce its report.

The Task Force released its report, *A Future Together*, in January 1979. It is one of those unfortunate quirks of fate that the release of the Task Force report was immediately before the February 5-6, 1979 constitutional conference. There was simply no time for governments either to absorb or to consider seriously the significance of its recommendations. As a result, *A Future Together* received limited attention at that conference. In my opinion, it was a missed opportunity. One wonders what direction the constitutional discourse would have taken had the Task Force's report been the focal point as opposed to *A Time for Action*.

In terms of its general orientation the Task Force report was much more decentralizing than the federal government's position as outlined in *A Time for Action* and in Bill C-60. The two documents represented very different visions of the types of changes needed to sustain Canadian unity, a reality that probably sealed the fate of the Task Force report. Given the decentralizing nature of the report, Prime Minister Trudeau virtually ignored its recommendations. By way of contrast, at an interprovincial meeting of Intergovernmental Ministers and officials held a few days before the February 1979 First Ministers' conference, Claude Morin, Quebec's Intergovernmental Affairs Minister, fully recognized the general thrust of the report and indicated that it would have provided a solid basis for intergovernmental discussion. Those of us in the room certainly took note of his remarks.

Edward McWhinney, a constitutional law expert, described the report as "lucid and often sparkling in its literary style and presents an impressive analysis and synthesis of the main currents of Canadian federalism" (McWhinney 1982, 9). With respect to the Task Force's position on Quebec's right to self determination, he said, "This was to dare to speak the politically unspeakable and to answer the hypothetical question before it should have arisen concretely. It was in keeping with the courage, intellectual honesty, and generosity of outlook with which the commission approached its task. The commission went on, in this same spirit, to recognize Quebec's 'unique position' based on its 'distinctive culture and heritage'…." (ibid.). With reviews like this, one can see why Prime Minister Trudeau was less than enthusiastic about the report and why Claude Morin, a cabinet minister in the Parti Québecois government, was willing to give it serious consideration.

The Task Force recommended a fundamental institutional change with its proposal to create a Council of the Federation. They selected the name, Council of the Federation, "because it could combine the function of a second legislative chamber in which provincial interests are brought to bear, and a means of institutionalizing the processes of executive federalism (with their confederal character) within the parliamentary process" (The Task Force on Canadian Unity 1979, 97). The Council was to be a legislative chamber replacing the Senate. Provincial representation was to be "roughly in accordance with their respective populations but weighted to favour smaller provinces" (ibid.). Provincial governments would appoint their representatives who would act on instruction. Federal cabinet ministers could participate in the Council's deliberations but only

as non-voting members. While the Council would exercise a suspensive veto on legislation, its powers also included a special role in the ratification of treaties, the exercise of the federal spending power, and certain federal appointments including Supreme Court judges. In arriving at their position, the Task Force concluded that the federal position on reform of the second chamber in Bill C-60 was the wrong approach, giving the federal government another reason to ignore their report. One cannot help but notice the similarity between the institution recommended by Watts in his 1970 paper on second chamber reform and the one proposed by the Task Force.

Constitutional discussions resumed in the summer of 1980, shortly after the Quebec referendum. The federal government enlisted Watts to assist them in developing its position. While he undoubtedly referred to the Task Force report within the confines of the Privy Council Office, its recommendations were not central to the federal government's position. The Charter of Rights and Freedoms, and strengthening federal powers over the economy, were the federal government's main constitutional priorities. While institutions were addressed, they were secondary to other policy areas such as natural resources, regional disparities, and the amending formula. This round eventually led to the enactment of the *Constitution Act, 1982* over Quebec's opposition.

Five years later, discussions leading to the Meech Lake Accord commenced. The main provisions of the Accord addressed the Government of Quebec's five conditions for resuming constitutional discussions.[1] To this list, the government of Alberta added Senate reform. It did so in two ways. The first was an interim measure included in the Accord that provided for the provincial appointment of Senators until such time as "real" reform was achieved. The second was the specific inclusion of Senate reform as one of the subjects that would be addressed at future constitutional conferences following the adoption of the Meech Lake amendment. Watts made a submission to the Joint Parliamentary Committee examining the Accord, and was asked about the idea of Senate reform. He said, "Senate reform, while it certainly will not solve all problems, is in my view desirable" (Special Joint Committee 1987, 13.62).

In the same presentation, he reflected that "the accord expresses the spirit of what the task force on Canadian Unity was trying to urge on the country" (ibid., 13:60). He also pointed to the title of the Task Force report, which was "A future together!" The hearing also provided him with the opportunity to reflect on the centralization-decentralization debate that the Accord had generated. As he said, "excessive centralization can lead to anemia in the extremities and apoplexy at the centre" (ibid., 13:61).

With the expectation that Meech Lake would be approved and in anticipation of the ensuing discussions on Senate reform, the Government of Alberta established a Ministerial committee both to develop its position and to promote the Triple E model with the other provinces. The first witness the committee

[1]The five conditions were: recognizing Quebec as a distinct society; placing limits on the federal spending power; provincial participation in the appointment of judges to the Supreme Court of Canada and guaranteeing three judges for Quebec; a veto for Quebec on constitutional amendments; and a greater legislative jurisdiction with respect to immigration.

called was Ron Watts. He gave the committee a detailed overview of the role of second chambers and the challenges associated with Senate reform. He was the "go to" person, whom the committee felt it had the most to learn from about the challenges ahead.

As the clock wound down on the three-year time limit to ratify the Meech Lake Accord, it was becoming increasingly apparent that it might not receive the unanimous provincial consent required for its proclamation. Watts and two of his colleagues reflected on the idea of a parallel accord process that was being promoted by Premier McKenna of New Brunswick in the spring of 1990 (Watts, Reid and Herperger 1990). He drew upon the American constitutional experience 200 years earlier. He and his co-authors reflected on the differences between drafting a new constitution and a constitutional amendment. In a very telling point, they stressed that ratification of the United States' constitution was not dependent on unanimity.

In a last ditch attempt to save the Accord, Prime Minister Mulroney convened a First Ministers' conference on 3 June 1990, 20 days before the clock ran out. The conference continued for a week. As Senate reform was one of the issues under consideration, Premier David Peterson of Ontario enlisted Watts as an advisor. The negotiations led to the fashioning of what could be called "a parallel accord for future considerations". Should Meech Lake be approved, first ministers agreed to achieve Senate reform by 1 July 1995. Should that deadline not be met, Premier Peterson agreed to reduce Ontario's representation in the Senate from 24 to 18 seats. The representation from Quebec and PEI would remain at 24 and four respectively and the other provinces would each have eight. Despite these efforts, the Meech Lake Accord failed and once more there was a degree of uncertainty about Canada's future.

As a result of this uncertainty, Watts was approached by the Business Council on National Issues to convene a conference, the purpose of which was to identify a series of constitutional options for the consideration of both governments and the public. To the Business Council he was the most qualified and respected person to meet this challenge. Moreover, if the conference was to have any impact, the resulting volume was needed almost instantaneously. According to Watts, who edited the volume with Doug Brown, the conference papers were published in record time by the University of Toronto Press (Watts and Brown 1991). Watts contributed a chapter entitled "The Federative Superstructure". In it, he paid careful attention to the shifting debate on Senate reform, going from the idea of a "house of the provinces" model to one where the Senate is elected. He chided the critics of the "house of the provinces" model, saying they had "overlooked the integrative dynamics that in practice have been induced by the Bundesrat. This occurs in intergovernmental relations because Bundesrat decisions do not require unanimity, thus reducing the leverage of hold-out states" (Watts 1991, 325). He concluded that, "While it should not be considered a panacea, Senate reform would be an important element in improving both the effectiveness and representativeness of our federal institutions" (ibid., 336). Shortly after this conference, Watts became a federal public servant.

Following the demise of the Meech Lake Accord, Prime Minister Mulroney appointed Gordon Smith, then Canada's Ambassador to NATO, as Secretary to the Cabinet for Federal-Provincial Relations. Both felt that in order for

constitutional reform to be successful, a new approach was essential. In an interview, Smith said he asked himself, "Who in the academic world was best suited to provide that new approach?" Without any hesitation he said, "Ron Watts was clearly number one in the country". He went on to stress that it was Watts's extensive comparative knowledge that distinguished him from other scholars of federalism. He added that he really had to twist Watts's arm to come to Ottawa. His persistence paid off and in April 1991, he became Assistant Secretary to Cabinet, Constitutional Development, and began the weekly commute to Ottawa.

Watts played a major role in the development of the position paper *Shaping Canada's Future Together*, released in September 1991. This paper outlined a series of constitutional proposals that eventually led to the August 1992 Charlottetown Accord. In addition to the release of the position paper, the federal government also released a series of background papers prepared under Watts's careful scrutiny. To assist him, Watts pulled together an impressive group of academics including Roger Gibbins, Doug Purvis, Kathy Swinton and Peter Leslie. The objective of the group was to come up with the new approach that the federal government was looking for. In an interview, Roger Gibbins described Watts as the "intellectual godfather" of the group. He added that "Ron brought a broader perspective to the consideration of constitutional issues and was constantly pushing the boundaries of the deliberations".

The preparation of *Shaping Canada's Future Together* is well documented by Bakvis and Hryciuk. They noted that Watts did all the preparatory work for the first major session of the Cabinet Committee on Canadian Unity and Constitutional Negotiations (CCCU) convened in May 1991. As the federal position paper came together by August, "Watts had shifted his focus to the background studies" (Bakvis and Hryciuk 1993, 126).

With respect to the reform of the second chamber, Bakvis and Hryciuk indicated that the CCCU initially favoured a "Pepin-Robarts type of solution". They added:

> The committee was clearly struggling with the problem of finding ways to meet public expectations for a properly elected Senate, whetted in part by the federal government having committed itself to this concept in the parallel agreements of 1990 intended to save the Meech lake Accord, while at the same time providing some kind of institutional mechanism allowing for the direct representation of provincial interests. The end result was the proposal for both an elected Senate and a Council of the Federation that appeared in the September package. (ibid., 132)

Following the release of the federal government's position paper, there were a series of public consultations. These consultations included the establishment of a Joint Parliamentary Committee, the Beaudoin-Dobbie Committee and a series of roundtables or town-hall meetings devoted to a specific theme such as the division of powers. This latter approach included: members of the public who had been encouraged to apply as delegates, constitutional experts, representatives of government, Aboriginal organizations, and representatives of organized groups such as students, and labour and business. While not exactly serving as a series of constituent assemblies, they were deliberative bodies and more than a gathering of the usual suspects.

One of the six roundtable themes was institutional reform, and was convened in Calgary. Both reform of the existing Senate, and the establishment of a Council of the Federation, as outlined in the federal position paper, were considered. The former was greeted enthusiastically by the participants while the latter was subjected to considerable criticism. Given this very clear signal, the proposed Council of the Federation basically disappeared from future deliberations. Perhaps, if the session on institutions had been convened in a province other than Alberta, the proposed Council of the Federation might have received a more favourable reception. At that time Calgary was probably the intellectual hub for debate on Senate reform through organizations such as the Canada West Foundation and individuals such as Bert Brown, the farmer who ploughed Triple E's into his wheat field calling for an equal, elected, and effective Senate.

After concluding its public hearings on the federal government's position paper and having benefited from their participation in the roundtables, the Beaudoin-Dobbie Committee recommended Senate reform through elections and a more equitable distribution of seats among the provinces. They politely, but decidedly, rejected alternative approaches to second chamber reform.

Immediately after the release of the Beaudoin-Dobbie Committee report there followed an intensive series of intergovernmental negotiations. The participants included the federal government, the 10 provinces, the (then) two territories and four national Aboriginal organizations. Seventeen different sets of interests were at the negotiating table. Although it was kept fully informed on the negotiations, the Government of Quebec only decided to participate formally in the process well after the negotiations had commenced.

To facilitate and expedite the deliberations and preparation of recommendations, Ministers established four working groups of officials. One of these working groups was on institutions.[2] Three of these working groups had co-chairs, one appointed by the federal government and one by the other 16 parties. The working group on institutions had a single chair, Ron Watts, reflecting the esteem, trust and confidence that all delegations had in him.

His task was not easy. The Government of Alberta was the leading advocate of Senate reform and was determined to see reform patterned after the Triple E model that it was championing. Premier Don Getty of Alberta made it very clear that his government's support of the final agreement was contingent upon acceptance of equal provincial representation. Put another way, this was a deal maker or breaker for Alberta. While the 1990 agreement to save the Meech Lake Accord had endorsed the idea of an elected Senate, it only went so far as supporting a more equitable distribution of Senate seats among the provinces. Both the federal government's position paper and the Beaudoin-Dobbie report reflected this position. Thus from the very outset Watts was between a rock and a hard place. As a result, the committee spent a considerable amount of time tackling the third E, effective.

[2]The other three were on the Canada clause, Aboriginal self government and the division of powers.

There should be no misunderstanding; the working group was breaking new ground. They had to go from the general principle of reform, factor into their deliberations the existing constitutional provisions and functioning of the Senate within the Canadian parliamentary system, factor in the agreement reached in 1990 with respect to Senate reform, develop a set of principles and draft a legal text over a period of about three months with 17 parties at the table! Among other things, they had to consider size (including the physical size of the chamber), whether or not Ministers of the Crown should sit in the Senate, what constitutes a confidence motion, Canada's linguistic and cultural duality, representation of Aboriginal peoples, deadlock breaking mechanisms, joint sessions, legislative authority over natural resources, money bills, origin of legislation, the role of the Speakers of both houses, methods of election and gender equality. To some this may sound fairly straightforward but in reality it was exceedingly complex, going to the very heart of the functioning and intersection of both our parliamentary and federal systems coupled with the need to accommodate dualism and Aboriginal concerns.

The working group was fortunate because it had Ron Watts at the helm to navigate them through the shoals, reefs and other obstacles that could have led to a shipwreck. Given his encyclopedic knowledge of how other federations, especially parliamentary ones, had grappled with similar challenges, he was able to suggest alternatives for consideration. Because of his diplomatic skills, his patience (which was tested on occasion) and his evenhandedness a legal text finally emerged.

To be sure, it was not a final draft. For example, the specifics of Aboriginal representation, but not the principle, were to be completed after the referendum. However, without his firm and steady hand combined with his knowledge, the draft could not have been concluded in the time available. As with so many of the other provisions of the Charlottetown Accord, the reformed Senate was based on a series of compromises. There were also ambiguities that would be resolved at some point in the future once the new parliamentary structure began to function. As Watts explained to the Joint Parliamentary Committee examining the Meech Lake Accord five years earlier, ambiguities are to be expected in constitutional drafting (Special Joint Committee 1987, 13.61).

The draft legal text represents a significant achievement in Canada's efforts to reform the Senate, one that is unlikely to be repeated in the near future. Although Senate reform is once again being debated or at least under consideration, there does not appear to be any great interest in reopening constitutional discussions. In this context, it is unlikely that we will ever again reach agreement on equal provincial representation. I should probably qualify that comment because Ron Watts will likely be the go to person for that reform.

Let me conclude with a few observations. First, throughout his many and varied roles in and contributions to Canada's constitutional odyssey, Watts has emphasized and demonstrated the importance and relevance of the comparative approach. He has encouraged Canadians to learn from and benefit from the experience of others – their innovations, their mistakes, and as he has so gently reminded us, their improvements on the Canadian model.

Second, he has contributed greatly to the debate on and our understanding of what is needed to achieve second chamber reform. He has done it through his

scholarship, his active participation in the public discourse, as a member of the Task Force on Canadian Unity, and as a fully engaged participant in the thick of the negotiations.

Third, through his comparative analysis he has contributed to our understanding of the treatment of minorities within federal systems. His first study was in 1967 and was commissioned for the Royal Commission on Bilingualism and Biculturalism. He made a similar contribution to the Task Force on National Unity Report, *A Future Together*. He also prepared a study for the Royal Commission on Aboriginal Peoples which was most helpful to that Royal Commission (see Watts 1998b). What the two Commissions had in common, and this was reflected in both of his studies, was their examination of the relationships between peoples. He advised both Commissions on how the Canadian federal system could be adapted to accommodate minority needs and aspirations. The importance of these studies is that as our political institutions continue to evolve, Watts's analysis and ideas will continue to inform the debate.

Finally, from both interviews with people who have worked with Ron and my own personal experience, Ron makes a difference. He has spent a lifetime devoted to the study of federal systems and applying his knowledge to assist Canada and many other countries in furthering their constitutional objectives. He is a very special and generous human being – the one that political leaders, governments, scholars, public servants and many, many others go to! Thank you, Ron.

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8

Definitions, Typologies and Catalogues: Ronald Watts on Federalism

Jennifer Smith

Ronald Watts jouit d'une grande renommée de spécialiste de la notion de fédéralisme et du fédéralisme comparé. Ce texte vise à éclaircir la pensée sur laquelle repose un savoir prodigieux qui confine à l'érudition, pour ce qui est notamment du lien entre les techniques des régimes fédéraux et les valeurs qui leur sont inhérentes.

Comme l'a établi Ronald Watts, la conception des régimes fédéraux est suffisamment extensible pour permettre aux acteurs politiques d'y trouver les processus créatifs répondant à un éventail de demandes issues des collectivités régionales et de l'ensemble des citoyens. Or ces processus sont porteurs de valeurs. C'est donc dire que leur application doit se conformer à une série de valeurs précises en l'absence desquelles les acteurs politiques choisiraient sans nul doute de faire les choses différemment. C'est ainsi que le fédéralisme englobe aux yeux de Watts les techniques mais aussi les valeurs susceptibles d'aider les citoyens à relever le défi du « vivre ensemble » dans la paix et l'équité.

INTRODUCTION

One central concept comes to mind in connection with the academic writings of Ronald L. Watts: federalism. Further consideration gives rise to two more thoughts, namely, definitional clarity about federalism and the facts of comparative federalism. My question is simply this – is that all there is? Is the Watts *oeuvre* nothing more than an analytical catalogue of all things federal?

My answer to the question is – no. That's not all there is. On the contrary, there is a good deal more. However, it takes a little digging to find it. Watts is so utterly professional in the approach to his work that he has done a superb job of hiding his politics. But the politics are there. The easiest way of getting at them is to ask why he has been so interested in federalism that he has devoted a life of study to it. Clearly he finds in federalism both the techniques and the values that assist citizens to meet the ongoing challenges of living together in fairness and peace.

In the remainder of the paper, I propose to examine the techniques and to uncover the values. They are linked closely to one another. As promulgated by Watts, the design of the federal system is sufficiently elastic to enable political actors to find in it creative processes to meet a vast array of demands from regionally-based communities as well as citizens at large. In the processes are the values. Put differently, the pursuit of the processes is consistent with a particular set of values, without which political actors undoubtedly would choose to settle matters differently.

Before turning to the techniques and values associated with federalism, however, it is essential to consider the empirical side of the equation, the definitions and the facts. This is undoubtedly the side with which innumerable students of government and politics are most familiar.

EMPIRICAL WORK ON ALL THINGS FEDERAL

Definition of the Federal Political System

E. E. Schattschneider reminded the group theorists of the mid-twentieth century who were wont to cast all politics in the mould of interest-group politics of the need to "get hold of something that has scope and limits and is capable of being defined" (1975, 22). Otherwise, he said, the subject has no beginning, no end, and ultimately no significance whatsoever. In a careful and consistent approach to the definition of his subject, Watts has given federalism a beginning, an end and therefore significance for those looking for assistance in crafting governmental arrangements and processes in response to the demands of diverse societies.

While Watts's understanding of what is at stake in the work of defining the federal system has been consistent, the actual definition itself has been a work in progress. In *Administration in Federal Systems*, published in 1970, he wrote that the federal system is "a political system characterized by two sub-systems, one of central government and the other of state governments, in which the component governments are co-ordinate, in the sense that neither is politically subordinate to the other, but which interact with each other at many points both co-operatively and competitively" (Watts 1970, 8). At this early stage he was concerned to broaden the definition beyond the legal dimension to include the administrative, financial and political dimensions, and to counter the excessive (in his view) focus of analysts on the cooperative behaviour among governments at the expense of the rivalries between them.

In 1985, Watts and Donald V. Smiley expanded the definition of the federal system to include the concept of intrastate federalism, that is, the ways in which the interests of the regional governments and/or the residents of the regions are represented in the structures and operations of the central government (Smiley and Watts 1985, 4). A few years later this conceptualization took the form known to many students today, that is, "two (or more) levels of government which combine elements of *shared-rule* through common institutions and *regional self-rule* for the governments of the constituent units" (Watts 1996, 7).

The reference to common institutions is the invitation to consider whatever intrastate components they might possess, an exercise best accomplished in the study of particular federal systems and how they actually work.

Distinguishing the Concepts of Federalism, the Federal Political System and Federations

Latterly Watts has fixed on the utility of distinguishing between the concepts of federalism, the federal system and federations. He says that the term, federalism, is now a normative concept associated with such goods as democracy, freedom, sharing, diversity and the maintenance of identities. It is about finding ways of enabling citizens to combine political integration and political freedom within a system of government that is based on consent (Watts 1998, 4). On the other hand, the concept of the federal political system that is outlined above is an empirical one. It is also an umbrella concept within which are housed many combinations of shared rule and regional self-rule ranging from decentralized unions at one end to the league at the other, not to mention the variations in between (Watts 1996, 13). Latterly Watts (1999) has attended to yet another component of federal political systems, namely, the variety of *de facto* and *de jure* asymmetrical arrangements embodied in the structural relationships between the member states and the general government.

For its part, the concept of a federation refers specifically to the American model, and it remains one of the best known types of federal political system. According to Watts, the key feature of a federation is that the powers of the federal government and the governments of the constituent units are derived from the constitution rather than from one another, so that neither is subordinate to the other. In a list often consulted by political-science instructors and their students, he includes other features: two elected orders of government that act directly on the citizens within their boundaries; a written constitution that is not amendable unilaterally by any of the parties to it and provision for an umpire or final interpreter of the constitution to determine disputes arising under it; a constitutional division of powers among the governments and an allocation of revenue resources to them; provision for regional representation within the decision-making arrangements of the federal government; and the establishment of avenues of intergovernmental collaboration where that is required (Watts 1996, 13).

The Importance of the Definitional Exercise

In specifying the scope of the subject matter, Watts lets us get hold of it and helps us to avoid confusing one thing with another. The real eye opener, however, is the commentary that accompanies the definitional exercise, from which it is clear that the right start is everything. The right start is to reject the definitions of the federal political system advanced by the likes of A. V. Dicey, W. P. M. Kennedy and K. C. Wheare. Why? First, because their definitions are

too strict, too confining, too exclusive, and leave out almost anyone and anything with a claim to the federal label. Let us consider Watts's handling of Wheare.

Wheare said that the essence of the federal system is the allocation of power among the federal and regional governments such that each is independent of the other within its own sphere of jurisdiction. As a result, neither level of government is subordinate legally to the other (1963, 10). As Watts points out, even Wheare had to concede at the time of writing in 1945 that, strictly speaking, no federation met the standard of his definition, either in law or in practice. This was not a promising effect of the exercise. Neither was the trend particularly helpful, since the older federations were heading into a period of centralization following the second World War that in some cases would sharply curtail the so-called independence of the regional governments (Watts 1970, 6).

Critical of the exclusionary effect of Wheare's essentialism, Watts continually has sought a definition of the federal system that is mindful of practice as well as law. He knows that political processes can negate unitary features of a system or modify them in the direction of federal practices. He is open to the complexity of the interactions among the governments of federal systems. To the charge that the independence of governments is the key to the federal puzzle, since otherwise governments form a dominant-subordinate relationship, Watts responds that the interdependence characteristic of the conduct of governments in federal systems is not necessarily hierarchical. In practice, he says, it is interdependence that secures the coordinate, non-subordinate position of the constituent governments of most federal systems, not constitutionally-sanctioned independence (ibid., 7).

Being so rigid and therefore exclusionary, Wheare's definition can have the effect of deterring the student of federalism from looking at a vast array of federal-like arrangements and practices. And therein lies a second reason why Watts rejected it from the beginning. The definition is not practical or useful to political and administrative actors who are looking for workable solutions along federal lines. From their standpoint, the workable and the practical win the day over "purity" and "theoretical niceties". "Federalism", Watts writes, "is not an abstract ideological model to which political society is to be brought into conformity, but rather a way or process of bringing people together through practical arrangements intended to meet both the common and diverse preferences of the people involved" (1998, 4).

A final reason that Watts rejects Wheare's definition of the federal system is best described in his own words as the "spirit of federalism", by which he means the habits of pragmatic compromise and negotiation (ibid., 4). He reminds us that the constitution of the United States, the first modern federation, was the product of such behaviour. The implication is that the pragmatism often required to get the federal project underway in any particular country should inform the analyst's understanding of what federalism is really about – and it is not about a fixed definition. And so we are left with Watts's definition of the federal system as the combination of shared-rule and regional self-rule. It is broad enough to encompass a remarkably wide set of governmental arrangements; it is useful to politicians and administrators who are looking for workable federal solutions to various problems; and it is consistent with the pragmatic, flexible approach to

negotiation that produced the American model of federalism and many other federal states. All of which raises this question – why does Watts want to include so many political systems in the federal category?

COMPARATIVE FEDERALISM

Watts is a student of comparative federal political systems who has developed a definitional approach to the subject that results in the inclusion of a staggering number of countries under the federal umbrella. He includes "hybrids", that is, countries with unitary features as well as federal ones. He even mentions the possibility of innovations as yet unknown (ibid., 5). His is a catholic approach.

If there is a good reason for this approach, it comes down to one thing − problem-solving. Not problem-solving on a small scale but problem-solving on a grand scale. The problem is nothing less than the stable accommodation of diversity in unity. It is about how to get citizens who are unlike one another in politically significant ways to live together, on their own volition, peaceably and fairly. Watts describes it as the search for political structures that accommodate the "powerful concurrent pressures both for larger political units and for smaller autonomous regional entities" (ibid., 14).

Given the size of the problem, it is hardly any wonder that Watts prefers to work from the largest toolbox possible. As already indicated, he has amassed evidence from a large number of countries, the political arrangements of which exhibit some type of federal feature. Variety abounds. Nevertheless, the federal tools in the box are not simply there for the taking. Arrangements that look good on paper and work well in one system – say, the design of the Australian Senate − are not necessarily suitable for another. They get lost in the translation. Watts has been fully aware of the implications of this commonplace from the outset, and he is careful to distinguish between the formal federal arrangements and techniques in any one political system and the context within which they are given effect by those who administer the state. To paraphrase his teaching, the particular form that federal arrangements take in any one system needs to be understood against the contextual backdrop that prevails there.

As might be expected, the aspects of the backdrop to which Watts draws attention are numerous, beginning with the very building blocks of any federal system, that is, the number, size (in terms of population and territory) and economic wealth of the constituent units of the system. The effect of such factors on the choice of federal institutions and how well political and administrative leaders make them work are compounded by another set of factors, namely, the political institutions not normally regarded as federal that operate along with the federal arrangements. An obvious example is the form of government, that is, whether it is parliamentary or congressional, a mixture of both, or something uncommon, like the collegial executive of the Swiss. Another is the existence or otherwise of an entrenched bill of rights. Such institutions are bound to affect and be affected by the strictly federal ones.

Watts offers yet another set of factors − the political processes that citizens use to articulate their interests to elected and unelected governmental actors,

processes that are also used by governments to speak to citizens. Among them are interest groups and movements, political parties, the media and the informal networking of societal elites. They play a significant role in the degree of internal cohesion and intergovernmental cooperation found in the system. Finally, there is the most complex factor of all − the economic, cultural and social makeup of the society itself.

Although he never fails to fill in the details of the backdrop that needs to be considered in connection with any particular federal system, Watts's comparative federalism is never merely a study of particulars – interesting in its own right but unhelpful in tackling the problem of accommodating diversity within unity. Certainly he is quick to caution his readers not to expect too much from the comparative exercise (Watts 1996, 1-2). Yet he also observes that, despite the dissimilarities among them, federal systems face many common problems. That being so, he outlines good reasons to study comparative federalism: to get a better grasp of cause-and-effect relationships within federal systems; to see more clearly why our own federal system operates the way it does; to distinguish the more successful from the less successful federal arrangements; and to identify new solutions to old problems (ibid., 2).

Happily, Watts is his own test of the usefulness of comparative federalism. Throughout his career he has looked to the resolution or amelioration of problems that arise in federal systems. There are many examples of Watts in the role of the political scientist in action, and they stand as a model of what political scientists usefully do. In the next section I examine three of them: Nigeria; Canada and the Meech Lake Accord; and Canada and Aboriginal self-government.

PROBLEM SOLVING

Nigeria

Nigeria is an example of thinking big. As he explains in the preface to *Administration in Federal Systems*, 1970, Watts put the book together on the basis of a series of lectures and seminars that he offered to government officials in Nigeria in 1969, while the country was still in the midst of a civil war. The theme is the administrative arrangements in federal systems and the connection between these arrangements and fundamental political issues. Clearly he was looking to offer his audience useful data about other federal systems that they might consider in relation to the amendment of their own as well as some home truths about securing effective and peaceful government.

The home truths reflect sound judgement about governmental and political matters. The book is full of them, a good example being the section on the impact of the form of executive on intergovernmental administrative arrangements. Watts draws the structural contrasts between the American presidential system and the Swiss collegial system, both predicated on the principle of the separation of powers, and responsible cabinet government, predicated on the principle of the collective responsibility of the executive to the legislature, and

then proceeds to outline the effects of each for intergovernmental processes and for cohesion within the federal system. In the American and Swiss cases, he points out, the effect is to give administrators at each level of government more freedom to negotiate with one another within their areas of expertise. Not so in the cabinet model, where the collective responsibility of the cabinet for all executive matters tends to elevate the role of the elected politicians in inter-governmental negotiations and restricts the role of the public servants in them. Watts's analysis is far more detailed than this summary of it, of course, but the point to be stressed is that it holds up today.

So does the analysis of the same linkage between structure and process, this time with political parties as the intervening variable. In the American and Swiss cases, Watts says, the fixed executive coincides with somewhat undisciplined political parties that are unable to maintain close control of the administrative side of government. As a result, public officials can and do take on a bit of a political role in lobbying for their preferred programs. By contrast, in parliamentary systems the dependence of the cabinet on disciplined political parties leaves little room for administrators as independent political actors outside the cabinet system (Watts 1970, 20).

The structure of the executive has an impact on the cohesiveness of federal systems, which is always a concern. Watts makes the argument that in the United States, the combination of the fixed executive and the need for political mobilization generated by the checks and balances sewn in the system have combined to prod the country's political leadership to generate a broad consensus on important public policies, not all of the time, and not at the time he was writing in 1970, but much of the time. The downside, he remarks, is the length of time often required to construct the consensus during which very little is accomplished. By contrast, the lack of checks and balances in the parliamentary systems enables majority governments to get a lot of things done, although not necessarily on the basis of widespread consensus. Thus the political parties have an important role to play in the reconciliation of the conflict of viewpoints. He writes: "If the political parties fail in this task, and particularly if a fragmented multi-party system or primarily regional parties develop, the parliamentary federation becomes prone to political instability" (ibid., 22). He includes Canada in the years 1962-68 as an illustration of the point. One cannot help but think that Canada is now an even better example.

Before leaving the Nigerian example, it must be stated that the book is utterly non-judgemental. Written in the first instance for the Nigerian audience, there is nothing in it that would have signalled to the Nigerians that their problems were unique or somehow worse than anyone else's. The tone invariably is objective, calm and helpful. There is really only one piece of advice. Written in Watts-speak, it needs to be taken seriously: "experience would seem to indicate that in multi-ethnic or large countries, the alternatives [to federalism] have rarely been very successful" (ibid., 9).

Canada and the Meech Lake Accord

In the midst of the impasse in Canada over the proposed Meech Lake Accord, Watts, along with Darrel R. Reid and Dwight Herperger, pursued the idea of a parallel accord as a way out of it. The deadline for the ratification of the Accord on 23 June 1990 was fast approaching, and only Parliament and seven provincial legislatures had voted to approve it. Newfoundland rescinded an earlier vote of approval, and New Brunswick and Manitoba remained hold-outs, demanding that changes be made to the agreement. Meanwhile Quebec, the constitutional satisfaction of which was the real target of the Accord, insisted that no changes be made to it.

There was talk in the air about a companion resolution or parallel accord that would stipulate additional provisions to satisfy the objectors. New Brunswick introduced such a resolution in the province's legislative assembly. Accordingly, Watts, Reid and Herperger saw value in examining the American precedent as embodied in the Bill of Rights, a companion resolution if ever there was one. The result, a study of the ratification of the constitution drafted at the Philadelphia Convention in 1787 and the later addition of the first 10 amendments of the constitution, is a classic exercise in useful public-policy analysis.

Lest the exercise be regarded as naïve or the comparison far-fetched, the authors are careful to outline fully the differences between the two cases as well as the similarities. They point out that the Americans were considering a new constitution while the Canadians were looking at a set of amendments to the existing one; the Americans used specially elected state ratification conventions while the Canadians resorted to their incumbent legislatures; the Americans required that at least nine of the thirteen states ratify the constitution while the Canadians demanded unanimity. Such procedural differences, they continue, imply disparate risk analyses on the part of the participants, the American venture being more high risk than the Canadian one. In addition, there are huge contextual differences to ponder, which they do, an example being the sustained and in-depth character of the American debate of the late eighteenth century versus the skimpier, mediated Canadian debate of the late twentieth century.

By contrast, the list of similarities is shorter. As the authors state, in both cases the proposed documents in question were hammered out in *in camera* negotiations and on release proved to be more extensive than the respective attentive publics expected; the reception the proposals received in the states and in the provinces ran the gamut from enthusiastic to deeply skeptical; concerns were expressed that the proposals would implicate the rights of individuals; and for some, the futures of nations were at stake (Watts, Reid, and Herperger 1990, 3-5).

Whether or not the similarities seem enough to go on, for Watts and his co-authors one compelling feature of the American case – and a lesson to draw from it – is the adroitness with which the supporters of the Philadelphia constitution shifted tactics to win the support of enough skeptics to succeed in their endeavour. They demonstrated flexibility, a prized Wattsian virtue in political conduct, by signaling their commitment to amend a ratified constitution by adding to it some rights provisions demanded by opponents. And they

persuaded their opponents that they could be trusted to keep the promise. In applying the point to the Meech Lake situation, the authors write that "the key to saving the Accord … may lie in keeping the Accord intact while at the same time making in a parallel agreement a firm commitment to additional constitutional revisions that would accommodate the concerns of the reluctant provinces" (ibid., 67).

The other lesson that the authors report from the American experience is the need for proponents of a proposal as significant as the Accord to explain fully what they are doing and why; in other words, the need for public debate − not just a partisan debate or even a robust, lively debate but also an informed debate. This is exactly what the proponents of the Philadelphia constitution were able to do, one of the highlights being the series of newspaper articles that came to be called *The Federalist.* The proponents joined with their opposite side to produce a very high level of public discussion that was carried on throughout the society, not simply at the elite level. By contrast, the authors point to the surveys of public opinion conducted during the three-year ratification period of the Accord that showed not only declining support for it but also an alarming lack of knowledge about it. Over two-thirds of those surveyed indicated that they knew very little about the proposal (ibid., 31-32).

The Meech Lake Accord died before the idea of a parallel accord got too far off the ground. It is impossible to know whether a concerted, early drive to rescue the accord with the promise of further amendments would have been a successful strategy or not. Nevertheless, in their monograph Watts, Reid and Herperger offer a useful discussion of the American case along with some shrewd observations about the reasons for the success of the strategy there. Since Canada faces a lot of unfinished business on the constitutional front, the idea of a parallel accord might still have a future, in which case students of these matters would do well to consult their analysis.

Aboriginal Self-Government

In a paper prepared for the Royal Commission on Aboriginal Peoples (RCAP), Watts writes about federalism in connection with the accommodation of distinct groups within the state in general and the Aboriginal quest for self-government in particular, or at least self-government within the Canadian state. He makes a convincing case that the federal idea and therefore federal arrangements are worth exploring for ways of responding to this quest.

The paper bears all the hallmarks of Watts's scholarship: carefully crafted definitions, the use of comparative analysis, no stone unturned, *caveats* where required, no promise of a rose garden, no over-generalization and sound lessons learned. For the student who is concerned about the prospect of Aboriginal self-government, he offers many leads to track down, ranging from how other federal systems are organized to respond, or not, to such self-government issues to the array of federal arrangements available for consideration and how they might be tweaked to get a result that is workable in the Canadian context. For the generalist, he offers some useful observations about the conditions under which

the federal system can be expected to accommodate the interests and concerns of distinct groups.

There is no question that Watts thinks the federal system offers the likeliest prospect of such accommodation. Certainly he sees no evidence to indicate that, absent the use of coercion, any other candidate is in the offing. Nevertheless, he points out that the experience of federal systems in the years following the end of the second World War is a checkered one, to say the least. Many of the newly-established federations in formerly colonized areas in Africa, Asia and the Caribbean failed, as did the longer-lived and in some quarters much admired federations of Czechoslovakia and Yugoslavia. Even the oldest and most stable federations, like Canada, have experienced significant pressures of disintegration. To use his term, the federal system has proven to be no "panacea" for the goal of establishing and maintaining large states inhabited by communities of varied identity (Watts 1998, 11). There are lessons to be learned from the record, and he identifies four of them, beginning with the point already made – the federal system should never be regarded as a racing certainty in the hunt for solutions to the problem of holding a state together.

The second lesson that Watts draws is the need for the political leadership and the citizenry at large to respect constitutional norms and structures in order for a federal system to succeed. The federal system is rule-governed and therefore dependent upon the maintenance of the rule of law for its survival. Related to the requirement of the rule of law, and the subject of the third lesson, is the all-important concept of trust. There needs to be an adequate level of trust amongst the communities within the system, he writes, meaning the trust that generates among public actors a willingness to negotiate a way through difficult issues, finding compromises that work. These two points are obvious, yet at the same time reveal the normative standards that the political culture has to embody before the federal system can be expected to work at all. The fourth lesson is the importance of the particulars of any federal system and the extent to which they achieve the right note between the demands of distinct communities within the state for some self-governing room and the capacity of the central government to attend to the common concerns of the whole. However difficult it might be to achieve the right note, the achievement is a technical, institutional matter. By contrast, generating and maintaining respect for the rule of law and trust among communities not necessarily used to trusting one another are extremely difficult tasks because they require widespread changes in the behaviour of citizens.

It could be said, then, that Watts does not view federalism with rose-coloured lenses. Certainly he never suggests to the RCAP that it is an easy solution to the challenge of Aboriginal self-government, instead pointing out that most federations have done little or nothing to accommodate their Aboriginal populations within the constitution. Moreover, he suggests that federalism is worth consideration only if people are prepared to think creatively about the possibilities, emphasis on the adverb, creatively. How? Essentially by setting aside some of the standard features of the conventional model of the federation and pondering different features, such as: three or more constitutional orders of government rather than two; constituent units that comprise a federation within the federation; the non-territorial representation of constituent

units; asymmetrical arrangements in the assignment of jurisdiction to some constituent units (ibid., 30-31). Of course each of these entails problems for the system as a whole. Nothing is simple. For inspiration one needs to hold on to Watts's promise that "within the realities of the contemporary world, federal forms of political organization can and do provide practical ways of reconciling common interests and the particular identity of distinct groups in a form based on consent" (ibid., 30).

CONCLUSION: THE VALUE OF FEDERALISM

Federalism is all about rules, processes and institutions. As Watts stresses, these variables can be packaged in an enormous variety of ways. The effect of the package is to channel the behaviour of officials and citizens in complicated patterns as they work their way towards the resolution of the issues of the day. Any one package is unique, however, and the behavioural patterns that flow from it are not as predictable as one would like. In other words, the subject of federalism is technical and complex. It is also value laden. Why would Watts find it so appealing?

My personal view is that Watts is a Canadian liberal pluralist, a liberal constitutionalist at work. He understands that politics inevitably are not simply about difference and diversity, but how difference and diversity will line up in the ongoing political controversies of the life of the political community. The problem is how to get people with disparate interests and identities to make deals and compromises in such a way as to permit public resources to be shared somewhat equitably among them. The problem is how to deal with a politics of public accommodation.

One answer is to cultivate the habit of tolerance, to avoid the adoption of extreme political positions and instead maintain the middle ground. Lester B. Pearson counselled political leaders to stake out the middle ground in an effort to maintain the governing premise of the country, namely, "that by compromise and adjustment we can work out some sort of balance of interests which will make it possible for the members of all groups to live side by side without any one of them arbitrarily imposing its will on any others" (1970, 90).

Federalism is another answer to the problem of the politics of public accommodation, or at least a part of the answer. Through the study of federalism, Watts has found a way of contemplating institutional construction for the purpose of making the politics work. If federalism teaches anything, it is that government need not take a unitary form. On the contrary, federalism demonstrates how sovereignty can be divided amongst governmental institutions. Watts has pursued the next step, or how to tailor the institutions to assist elected and unelected leaders and public officials to develop the habit of give and take in the resolution of the issues before them. Of course as Watts continually reminds us, the institutions cannot stand alone in this venture. But they can have the effect of influencing the individuals who work within them to develop the habit of tolerance that Canadians like Pearson regard as so important in political life.

In describing Watts as a liberal pluralist, I emphasize that he embodies the Canadian version of the type, not the version often associated with the American position. His is not a pluralism that is focused exclusively on pressure-group diversity and the politics of coping with it. The politics of pressure groups, albeit extremely important, are essentially about money. Watts's interest is broader than that. He is looking for institutional mechanisms that encourage the accommodation of community diversity in relation to a vast array of public-policy issues, not simply pressure-group diversity. It is hardly surprising that a Canadian with the approach that I have described would be anxious to study comparative federal government. It is a very Canadian thing to do, this looking beyond the country's borders for fresh ideas, both for help in resolving the country's issues and for help in assisting others with theirs. Watts is the academic statement of both endeavours.

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Section Four
Constitutional Perspectives

9

Scholarly Debates about the Charter/Federalism Relationship: A Case of Two Solitudes

Jeremy Clarke and Janet L. Hiebert

Cette étude compare l'état de la recherche au Québec et au Canada anglais sur les rapports entre le fédéralisme et la Charte canadienne des droits et libertés. Ses auteurs soulignent que les chercheurs canadiens-anglais se montrent peu intéressés ou ambivalents face aux répercussions de la Charte sur le fédéralisme, alors que leurs homologues québécois sont nettement plus sensibles aux tensions qui opposent ces deux piliers constitutionnels du régime politique canadien. La perception canadienne-anglaise pourrait s'expliquer par un « faible » attachement à la procédure du fédéralisme, la recherche privilégiant les questions de compétence et les pouvoirs consentis aux législatures provinciales plutôt que les fondements du fédéralisme lui-même. Cet attachement est qualitativement différent au Québec – sans l'être nécessairement sur le plan quantitatif –, où le lien établi par les chercheurs entre les fondements du fédéralisme et les finalités de l'État québécois expliquerait que les tensions opposant la Charte et le fédéralisme y soient jugées plus vives et plus profondes.

As a leading scholar of comparative and Canadian federalism, Ron Watts is keenly aware of the probable tension arising from the juxtaposition of constitutionally entrenched rights in a federated system of government committed to

the decentralization of power (Watts 1996, 96-99). As this year marks the 25th anniversary of the *Canadian Charter of Rights and Freedoms*, and as these proceedings are in Watts's honour, it seems an opportune time to reflect on the relationship between these two constitutional pillars of the Canadian political system. To this end, this paper examines scholarly discussion of the Charter/federal relationship, and reveals fundamental differences in how the English-Canadian and Québécois literatures address this relationship.[1] These literatures convey not only a different interpretation of federalism in and out of Quebec, but influence whether, and to what degree, the purported tension between the Charter and federalism is considered serious.

The first half of this paper deals with these differences. Scholars in English Canada are less troubled than their Québécois counterparts about the Charter's potential to generate uniform or homogenous outcomes. Whereas the English-Canadian literature has expressed either optimism about the reconciliation of the Charter and federalism, or a lack of awareness that any tension exists, the Québécois literature perceives the Charter to seriously undermine the rationales for federalism. Where critical of the Charter, the English-Canadian scholarship addresses the impact of judicial review on democratically elected legislatures, but raises concerns that are virtually indistinguishable from the kinds of criticisms of judicial power that arise in a unitary system. They are, for the most part, concerns about democracy or power, not federalism or diversity. In contrast, the Québécois literature is far more acutely aware of the Charter's effects on provincial autonomy or diversity.

The second half of this paper offers an explanation for these differences. It suggests that the low level of interest in federalism in the English-Canadian Charter debate is not explained by an antipathy towards federalism, so much as it is by a theoretically underdeveloped conception of federalism that has provided infertile ground for recognizing and assessing the inherent tensions between these two constitutional pillars. Federalism for English-Canadian scholars is understood primarily in terms of a particular process of government, and the powers that are vested in provincial legislatures to represent provincial interests as defined by provincial governments. This relatively "thin" understanding of the reasons and purposes for federalism helps explain the lack of interest in an explicitly federalist discourse when analyzing the political effects of the Charter. This thin understanding of federalism also explains the non-problematic way English Canadians view the Charter's potential to facilitate pan-Canadian outcomes for how rights constrain legislative objectives. The fact that local preferences might be defeated by Charter interpretations is viewed more as a challenge to parliamentary democracy than it is to federalism. As such, while judicial review of the Charter might be viewed as being in tension with parliamentary democracy, this anxiety about competing constitutional principles is not as obvious for federalism. In contrast, federalism

[1]The definition of "Québécois" and "English-Canadian" scholarship is not a neat and tidy one. Many scholars, for instance, write in both French and English (Guy Laforest is probably the best example), and several English-Canadian scholars reside in Quebec (James Kelly, for one). Here, the definition of "Québécois" and "English-Canadian" scholarship depends on a determination of the author's first audience.

in Quebec rests on the "thick" foundation of the process of decision-making and the diverse outcomes federalism protects. The Charter is considered as imposing serious tensions for the very rationales for choosing and sustaining federalism.

Part One

THE TWO-FOLD TENSION BETWEEN THE CHARTER AND FEDERALISM

According to Peter Russell, the Charter has two political purposes: first, the better protection of individual and minority rights, and second (and perhaps more purposively), the promotion of "pan-Canadian" values at the expense of provincial ones (Russell 1983, 1994; Laforest 1995; Trudeau 1968, 52-60). The problem, for federalism, is that both of these two *Charter* purposes collide with federalism's own political purposes.

Different motivations underlie the choice of a federal, as opposed to unitary, government. Among the most pressing are "the quest for political structures that are closer to the individual citizen" and "the creation of scope for cultural diversity" (Koller 2003, 5). The first of these motivations comes from a desire for a particular "process", one that favours localized decision-making. The second is an appeal for a particular "outcome", the promotion and protection of diversity.

It should be easy to understand why many would be sceptical about the logic of grafting the Charter onto a mature federal society. The Charter appears to constrain both the procedural and substantive rationales for federalism. First, empowering a hierarchical, federally-appointed Supreme Court to ensure provincial compliance with the Charter's protection of individual and minority rights introduces an anti-federal *process*, insofar as another body or agency can interfere with democratically-elected local decision-making. Second, as a statement of pan-Canadian values with which all provinces are expected to comply, the Charter introduces an anti-federal *outcome*, insofar as rights constrain a province's capacity to promote its distinct regional or local views and preferences, thereby undermining provincial diversity.

Concerns for the Charter's impact on federalist processes and outcomes are not, of course, mutually exclusive. Any legislative outcome is the result of a particular process. But as entangled as they are, the process-outcome distinction is a useful way of organizing the literature on the relationship between federalism and the Charter. Indeed, although the particular language of "processes" and "outcomes" is missing, the same two-fold understanding of the tension is manifest in both the English-Canadian and Québécois literatures. Introducing her chapter on "The Charter and Canadian Federalism", for instance, Heather MacIvor identifies the "two ways" the Charter may compete with federalism. First, the Charter promotes "Canadianness" at the expense of "competing regional loyalties", an *outcome* contrary to the federalist's predilection for diversity. Second, MacIvor observes that the Charter "empowers the judicial branch of the national government at the expense of provincial

legislators", a process at odds with a preference for local decision-making (MacIvor 2006, 221-222). In a similar vein, José Woehrling describes "les conséquences … de la charte pour l'équilibre du fédéralisme" as two-fold: "centralisation" and "uniformisation":

> La centralisation consiste en un transfert de pouvoirs des organes fédérés vers un organe fédéral; elle contredit l'autonomie des entités fédérées. L'uniformisation consiste en une imposition, par les tribunaux, de valeurs uniformes qui limitent la capacité des entité fédérées d'adopter des politiques diverses; elle compromet la diversité fédérale. (Woehrling 2006, 264)

Like MacIvor, Woehrling's depiction of a two-fold tension between federalism and the Charter conforms to the process-outcome nomenclature. Woehrling's "centralisation" corresponds to the concern for processes, viewing the transfer of decision-making power to the federal judiciary with scepticism. "Uniformisation", on the other hand, relates to the issue of Charter decisions, or the effects of Charter discourse, that promote pan-Canadianism at the expense of diversity. Beyond the characterization of the issues, however, there is less agreement.

The English-Canadian and Québécois scholarship differs considerably on how it assesses the Charter's effects on three important purposes associated with federalism: the protection for 1) diversity, 2) identity, and 3) provincial autonomy. Differences in how the respective scholarship addresses each of these dimensions are discussed below.

THE CHARTER'S IMPLICATIONS FOR DIVERSITY

One concern for the relationship between federalism and the Charter is grounded in the tension between diversity and uniformity − whereas federalism is a system of government that is committed to the preservation of diversity, the Charter represents and operates as a statement of pan-Canadian rights. Like federalist scepticism more generally, this also is a two-fold concern. On the one hand, there is apprehension that the Charter will homogenize legislation in areas of provincial jurisdiction that had previously allowed for diversity. On the other hand, is the worry that the Charter will transform diverse provincial *societies* into a more uniform, pan-Canadian community. Both the Québécois and English-Canadian literatures have recognized these potential conflicts. But while they remain a concern for Québécois scholars, this concern has largely disappeared from the writing of English-Canadian scholars.

English-Canadian Scholarship

Soon after the Charter was adopted, some scholars recognized tension between the Charter and federalism, discussed under the rubric of the "centralization thesis" (Kelly 2001). According to this thesis, pan-Canadian rights, interpreted by the Supreme Court, would tend toward the homogenization of policy across

provincial boundaries. This effect was attributed to the combination of a hierarchical judicial system and the principle of *stare decisis* − the rule of legal precedent − which meant that if the Supreme Court were to rule that the Charter prohibits or compels a particular legislative outcome in one province, this decision would have the same implication for all other provinces.

In 1983, Peter Russell observed that a troubling element of Trudeau's Charter strategy was to bring provincial policy into line with a single set of national standards (Russell 1983). Two years later, Rainer Knopff and F.L. Morton expressed a similar apprehension. If a Charter claimant successfully challenged provincial policy, this would generate a common constraint on provincial capacity to adopt diverse policies adapted to the particular needs of their populations (Knopff and Morton 1985, 147-150). Yet over time, scholars in English Canada have become ambivalent, even sanguine, about the Charter's conflict with the diversity contemplated by federalism. Although Morton remained steadfast in his assertion that the Charter allowed the central government to craft pan-Canadian "policy outcomes that would otherwise be beyond its jurisdictional reach" a decade after these initial concerns were first expressed (Morton 1995, 188), most other Charter scholars appear to view the homogenization of policy outcomes as less serious than earlier predicted.

For his part, Russell had either dropped issues of homogenization from his work (Russell 1994) or conceded that with notable exceptions, the Charter had not greatly affected "social and economic policies of central importance" to provincial governments (Russell 1992). Subsequent scholarship has emphasized the potential for judicial review to mitigate the possible conflict between federal diversity and Charter conformity. Writing in the wake of the failed Meech Lake and Charlottetown Accords, which would have had implications for the Charter/federalism relationship, Katherine Swinton expressed optimism that tensions between the Charter and federalism could be reconciled. Swinton's reading of Charter jurisprudence led her to conclude that despite a core of pan-Canadian rights, the Supreme Court was sympathetic to the needs of Canada's provincial communities. Due largely to how the Court had interpreted section 1 of the Charter (which recognizes that limitations on rights can be justified where these are reasonable and consistent with a free and democratic society), Swinton suggested that the Court had allowed provincial governments to justify the limitation of Charter rights in the name of the divergent needs of their local populations (Swinton 1995, 307). A year later, Janet Hiebert elaborated on this theme. Although Hiebert was cognizant that the Charter constrains a province's capacity "to promote community values based on [its] own set of priorities", (Hiebert 1996, 126-149) she believed the provinces had the potential to make proactive arguments for federalist interpretations of the Charter. These arguments would most likely be framed under section 1, and would require a court sympathetic to interpreting the Charter in a way that was consistent with federalism (Hiebert 1996, 137-138, 144-147). Based on early jurisprudence, she believed the Court appeared "receptive to arguments that the Charter should not be interpreted in a manner that disregards federalism" (Hiebert 1996, 133).

If Hiebert was cautiously optimistic about the potential reconciliation between the Charter and federalism, several years later James Kelly was unreservedly so. By 2001, Kelly was prepared to declare concerns expressed in

the centralization thesis to be no longer relevant (Kelly 2001, 323; see also Kelly 2005, chapter 7). Like Swinton and Hiebert before him, Kelly found section 1 to be particularly important in the creation of space for diverse policies in a Charter context. Based on his interpretation of the relevant jurisprudence, Kelly concluded not only the need to set aside the centralization thesis, but suggested there has been a "reconciliation" of pan-Canadian Charter rights with the diverse societies of Canadian federalism (Kelly 2001, 354). If there ever had been a tension between rights and federalism, it had since been done away with by the Supreme Court, a conclusion in which Kelly was joined by some English-Canadian colleagues (Kelly and Murphy 2005; MacIvor 2006, 235).

Kelly provided an even more definitive statement on this need to reassess the apparent tension between the Charter and federalism in his 2005 book-length treatment of the Charter, *Governing under the Charter* in 2005, when he concluded that concern of the Charter threatening federalism was now seriously misplaced. The reason for this, he argued, is that bureaucratic evaluations and executive decisions by the provinces have adapted their assumptions and processes so as to ensure that legislative goals are now consistent with the Charter. Due to this, the Court is less likely to conclude that legislation is inconsistent with the Charter. As Kelly states:

> Because federalism is foremost a political arrangement to protect diversity, it is folly to view the courts as the predominant institution in the management of federal diversity and provincial autonomy. The protection of federalism centres on the parliamentary arena because federal and provincial cabinets have guarded this essential element of the constitutional system by reforming the policy process to ensure that entrenched rights are advanced during the legislative design of public policies. (Kelly 2005, 182)

Kelly is arguing, in essence, that the Charter no longer provides a serious problem in terms of blocking provincial legislation because provincial bureaucracies and governments have changed their assumptions about what constitutes a valid legislative objective. But this conclusion does not support the proposition that there is not an inherent conflict between federalism and the Charter; only that provinces' federalist aspirations are not as important as their determination to enact legislation that is consistent with the Court's Charter rulings.

In sum, despite the initial concerns expressed by Morton, Knopff and Russell, the scholarship in English Canada today no longer seems troubled by the Charter's potential to prevent diverse provincial outcomes on issues that implicate the Charter.

Québécois Scholarship

Elements of the Québécois literature build on some of the early concerns about the Charter expressed by English-Canadian scholars. For instance, Guy Laforest, drawing upon arguments of Russell and Knopff and Morton, observes "there has definitely been a homogenization of public policies … [u]niform national

standards have been imposed where previously regional diversity reined supreme" (Laforest 1995, 135). A similar apprehension prompted André Burelle to argue that Canadian courts should interpret the *Charter* less universally in order to balance the *Charter's* individual rights with the collective rights guaranteed by federalism (Burelle 1995, 64, 179).

But while English-Canadian scholars have not elaborated on these concerns and, in fact, no longer seem to question the Charter's unifying effects, this is not the situation for Québécois scholars. Only limited recognition exists in the Québécois literature for judicial efforts to balance federal diversity with pan-Canadian rights (Woehrling 2006, 271; Gaudreault-Desbiens 2003, 47-48). But where the Supreme Court's jurisprudence has come to be viewed in English Canada as the balancing and even reconciliation of the Charter with federalism, the Court has not assuaged the federalist concerns for Québécois scholars, who remain troubled that the Charter will promote uniform policy outcomes, for "il n'en demeure pas moins que la Charte s'ouvre sur une disposition qui postule de façon moniste le caractère singulier et indifférencié de la communauté politique canadienne" (Caron *et al*. 2006, 162). Thus, the occasional instances of judicial willingness to accept variance when interpreting or defining Charter rights do not negate the Charter's threat to federalism (Woehrling 2006, 272).

> [M]algré le fait que le droit constitutionnel offre ainsi plusieurs techniques permettant d'introduire un certain relativisme dans la portée des droits et libertés, la protection de ces droits par le processus constitutionnel et judiciaire aura inévitablement des effets uniformisateurs. (Woehrling 2006, 272-273)

Alain Gagnon and Rafaelle Iacovino challenge the perception of English-Canadian scholars that there is a "reconciliation" between the Charter and federalism. For Gagnon and Iacovino, it matters little if the Supreme Court allows diversity and the Charter rights to coexist, since relatively few provincial legislative decisions will actually be subject to Supreme Court decisions. The real problem is the attempt by provincial public and political officials to comply with the Charter "at the stage of policy formulation" (Gagnon and Iacovino 2007, 41). If pan-Canadian standards are internalized into the entire policy process, in an attempt to avoid litigation, the homogenizing effects of the Charter will be even more widespread than any reading of Supreme Court jurisprudence could possibly suggest. Thus, while Kelly views this internalization of Charter values as diminishing the Charter/federal tension, it is this very fact of political reliance on a common interpretation of the Charter when legislating, that Gagnon and Iacovino interpret as a threat to federalism.

But there is another reason why a focus on judicial decisions is believed to understate or overlook the Charter's potential to undermine diversity. The real problem is not the homogenization of a few provincial legislative acts, but the transformation of diverse provincial *societies* into a single, homogenous Canadian one (Gaudreault-Desbiens 2003, para. 53). And on this score too, French and English-Canadian scholars exhibit different levels of concern.

THE CHARTER'S IMPLICATIONS FOR IDENTITY

English-Canadian Scholarship

Scholars in English Canada do not generally perceive a conflict between the provincial or English-Canadian identities and the values the Charter promotes. Some English-Canadian scholars recognize the potentially adverse effect the Charter could have on cultural and identity claims by Québécois (LaSelva 1996, 96; Tully 1995, 163-164). But they do not perceive the Charter as having an adverse impact on the identities or cultures of English speaking provinces. Although English-Canadian scholars recognize the Charter is relevant for identities, it is not community or provincial identities at issue, but those identities that are based on personal characteristics (those enumerated in s. 15 of the Charter) that transcend provincial identities. But here, the Charter is not a threat to identity but the source of its protection. And it is a protection that far from offending federalism, is believed to address an important shortcoming in federalism; namely the vulnerability of minorities to the preferences of provincial majorities (Cairns 1995, 192, 204; LaSelva 1988, 223). As LaSelva argues, the Charter provides a theory of justice otherwise lacking in federalism (LaSelva 1996, 68).

To the extent there is concern about the corrosive effects of the Charter and the English-Canadian identity, it is expressed not in the context of provincial community, but as will be argued shortly, of community in the abstract. The concern is not only for a loss of the habits and temperaments of federal governance, but for a loss of the "habits and temperaments of representative government" more generally (Morton and Knopff 2000, 149; see also Hutchinson 1995, xi, 92-95).

Québécois Scholarship

Québécois scholars are acutely aware of the potential conflict between the Charter and Quebec's provincial identity. Gaudreault-Desbiens argues that from the perspective of federalism, the most problematic Charter outcome might be the "attitudes que la Charte semble inspirer, particulièrement dans la population" (Gaudreault-Desbiens 2003, para. 53). Worse than the homogenization of policy, is the Charter's tendency towards the "uniformisation des mentalités" (Caron *et al.* 2006, 162) and the corollary "defederalization of the political culture" (Laforest 2007, 70; see also, Woehrling 2006, 265). The problem is with the Charter's insistence on the primacy of individual rights, which describes Canada as an assemblage of rights-bearing individuals, regardless of their regional or cultural distinctions (Gagnon and Iacovino 2007, 87). The Charter identity comes, therefore, at the expense of the different provincial ones, which previously formed the basis of Canadian constitutional society and identity (Woehrling 2006, 265). Seen in this light, the Charter is not simply a statement of individual rights, but of a "roving Canadian nationalism oblivious to provincial boundaries" in general, and "repugnant" to Quebec nationalism in

particular (Laforest, 1995, 143; 2005, 20). Nor should the potential strength of this new identity be underestimated. Invoking the spectre of Lord Durham, Guy Laforest argues that while the Charter's assimilation may be less explicit, the rhetorical force of Charter rights is no less dangerous than the prescriptions contained in Durham's controversial 1840 *Report* (Laforest 1995, 178-179). As Burelle characterizes the problem with the Charter's vision, it "permet de metre en veilleuse les droits collectifs des diverses composantes de la fédération et d'homogénéiser le pays au nom de l'égalité et de l'intangibilité des droits des individus" (Burelle 1995, 64).

THE CHARTER'S IMPLICATIONS FOR PROVINCIAL AUTONOMY

English-Canadian Scholarship

Scholars in English Canada have occasionally made an explicit link between the tension between judicial review of the Charter and federalism in terms of constraining provincial legislation. Morton has characterized the process of Charter review as akin to "disallowance" in reference to the conventionally defunct federal power to overturn provincial policy (Morton 1995, 181). But for the most part, the English-Canadian debate does not centre on the legitimacy of federally appointed judges reviewing the decisions of the provincial legislatures, but instead it focuses on the legitimacy of an unaccountable judiciary reviewing the decisions of elected representatives. But the conceptual framework for this assessment is indifferent to federalism, and is made without distinction for whether the legislation at issue is federal or provincial, or whether the impugned legislative objective relates to a particular community or local objective. As such, it could just as easily be made (as it has been elsewhere) under a unitary system. Debate is framed in terms of the Charter undermining democratic principles of representative government or eradicating the principle of "parliamentary sovereignty", not on judicial interpretations of the Charter that undermine or interfere with provincial autonomy, as it is framed by Québécois scholars (discussed below).

Although Sam LaSelva observed in 1983 what he thought to be a conspicuous absence of concern for federalism in the largely speculative discourse about the Charter's implications for Canadian politics (LaSelva 1983, 383-384), this tendency to overlook federalism continues. Scholars from both the right (Morton and Knopff 2000; Manfredi 2001; Brodie 2002) and left (Mandel 1989; Hutchinson and Petter 1988; Fudge 1987), have produced a sizeable literature assessing the Charter, but their focus is not on federalism but democratic principles they associate with representative government.

The first of these democratic objections emerged as a class-based critique of the "manifest dangers" associated with the Charter's legalization of Canadian politics (Mandel 1989, 376-405). Critics emphasized the unelected, unaccountable and non-representative nature of judges who are charged with interpreting and applying the Charter, and expressed scepticism about whether

legislative measures that seek to redress inequality would be vulnerable if subject to judicial review. This scepticism was rooted in a deeper suspicion for the very project the Charter represents: its preoccupation with a legal form of liberal individualism that portrays the state (and not private power) as the principal threat to rights. Thus the Charter was viewed as an outdated statement of 19th century ideals set upon a modern welfare state, one that could perpetuate and even exacerbate inequalities in society (Hutchinson and Petter 1988, 286; Mandel 1989, 35-64).

This class and power-based critique of the Charter was soon joined by a more conservative critique. Like their counterparts on the left, these critics were also troubled by the "undemocratic" nature of judicial processes policy making. But their concern was not with economic or class inequality, but with the lack of accountability they equate with use of judicial review to change social policies. This critique was expressed most forcefully in the works of F.L. Morton and Rainer Knopff, who argued that the Supreme Court of Canada's power to override the decisions of the elected branches should be limited to policies that are "absolutely clear contraventions of the constitution" (Knopff and Morton 2000, 152). Judicial power under the Charter, according to these critics, is "deeply and fundamentally undemocratic, not just in the simple and obvious sense of being anti-majoritarian, but also in the more serious sense of eroding the habits and temperament of representative democracy" (Knopff and Morton 2000, 149; see also Manfredi 2001; and Brodie 2002).

For once, it seems the left and right in English Canada have much in common. Both ends of the ideological spectrum have lamented the Charter's transfer of power from elected legislatures to an unaccountable judiciary. Critics on either side of the English-Canadian ideological spectrum also share in common little reflection about the relationship between the Charter and provincial autonomy (earlier works by Morton and Knopff an exception).

Academic commentary continues to assess the political consequences of the Charter, and debate remains mired in a concern for the Charter's purported "non-democratic" aspects rather than its "non-federal" effects. A recent direction this debate has taken utilizes the metaphor of "constitutional dialogue" to assess the impact of judicial review for democracy. The explicit use of the dialogue metaphor is generally credited to a 1997 article by Peter Hogg and Allison Bushell, who used it to challenge criticism that the Charter represents an undemocratic veto on legislation (although Paul Weiler and Peter Russell discussed inter-institutional engagement with the Charter several years earlier).[2] Following a judicial declaration of constitutional invalidity, so the metaphor goes, legislatures are free to "reply" with new or modified legislation (Hogg and Bushell, 1997; Roach 2001). The dialogue "theory" has not been free of criticism. Use of this metaphor, and what its proponents characterize as examples of dialogue, have been subject to wide-ranging criticisms, including: failure to address judicial remedies that alter legislative intent, such as "reading in" a purpose or effect not intended by parliament; failure to make a moral claim that would justify an authoritative judicial role for pronouncing on the

[2]See, for example, Weiler (1984, 51-92) and Russell (1991).

constitutional merits of legislation; characterizing the notwithstanding clause as an element of dialogue given the strong presumption of its lack of legitimacy; and adopting a court-centred approach that treats parliament's role as entirely reactive − to respond with judicially-defined parameters for what constitutes a reasonable limit on a protected right (Manfredi and Kelly 1999, 513-527; Petter 2007, 147; Hiebert 2002, 50-51; Morton 2001, 111-117; Huscroft 2007, 91-104).

But whatever its flaws, a striking feature of dialogue theory is the almost total exclusion of federalism from its terms. And what is true of those promoting use of this metaphor, is equally true of their critics. For all of the critiques of the dialogue, none has targeted its omission of federalism. By way of punctuation, a recent issue of the *Osgoode Hall Law Journal* on the 10th anniversary of the dialogue included commentary (Haigh and Sobkin 2007), critique (Huscroft 2007; Manfredi 2007; Petter 2007) defence (Hogg, Bushell Thornton, and Wright 2007), and elaboration (Roach 2007) of the metaphor. But there was not a single mention of federalism, let alone an attempt to reconcile the autonomy of Canada's provinces vis-à-vis a federal judiciary. A similar discussion of Charter processes seems unthinkable in French-Canada.

Québécois Scholarship

Quebébécois scholarship similarly expresses concerns about the ideological impact of judicial review (Pinard 2006, 421-454). Yet in contrast to the absence of federalism from English-Canadian debates about how the Charter has affected principles of representative government, federalism remains an important part of many assessments by Québécois scholars. According to Gagnon and Iacovino, one of the prerequisites for meaningful federal governance is the "autonomy" of the constituent units (Gagnon and Iacovino 2007, 62-63; see also Burelle 1995, 128). Citing Réjean Pelletier, Guy Laforest elaborates. Any federation worthy of the name must respect the "principle of autonomy" according to which

> each member of the federation […] can act freely within its sphere of competence and can make decisions that will not be reversed by another level of government. (Pelletier in Laforest 2007, 57)

Provincial autonomy, then, demands two things: first, unfettered decision-making in areas of provincial jurisdiction; and second, a guarantee that the federal government cannot overturn those decisions. From the earliest days of French Canadian nationalism to current political debates, autonomy has been a "near universal" theme in Quebec intellectual circles (Gagnon and Iacovino 2007, 72-73). It is perhaps not surprising, then, to find that provincial autonomy is at the heart of the concern for the Charter's processes in French Canada. Although the Charter does not formally transfer provincial jurisdiction to the central government, it nevertheless has this effect of undermining provincial autonomy.

Section 24[3] of the Charter permits individuals who believe their rights have been infringed by a government to apply to a court of competent jurisdiction for a remedy. If the court agrees that there has been a violation, section 24 directs a court to apply a remedy which it believes "appropriate and just in the circumstances", which can include reading new meaning into the legislation to bring it into conformity with the Charter or declaring the legislation of "no force or effect" according to section 52[4] of the *Constitution Act*. But Charter rights are couched in vague, imprecise language leaving judges with considerable discretion to review and overturn legislation. This capacity is viewed, by some, as elevating Canadian courts to the level of "co-legislatures" (Chevrier, in Caron *et al.* 2006, 162) and undermining provincial decision making (Laforest 1995, 148), thereby violating an important aspect of the principle of autonomy because a province is no longer free to "act freely within its sphere of competence".

But the Charter is believed to also violate a second aspect of provincial autonomy. The problem lies in the structure of the Canadian judiciary, which "reflects the federal reality of our country most poorly" (Laforest 1995, 135). The Canadian judicial hierarchy is quasi-unitary, with a single Supreme Court, responsible for all matters of Charter interpretation at its apex. Compounding the problem is that the appointment of judges to the Supreme Court, as well as to provincial courts of appeal, is the constitutional purview of the central government alone. When provincial policy is impugned by a Charter challenge, provincial governments are forced not only to defend activity that is supposedly within areas of their own jurisdiction, but they also must do so before a body whose institutional, organizational, and cultural ties make it more "sensible aux priorités et aux préoccupations de la classe politique et des élites fédérales qu'à celles des provinces" (Woehrling 2006, 264; see also Gagnon and Iacovino 2007, 42). The interpretations of the Charter not only limit the capacity of provinces to act within their spheres, they result in the possibility of provincial legislation being reversed by "another level of government" − the federally appointed judiciary − and therefore violate the second part of the principle of autonomy.

Concern about the impact of Charter interpretations is thus expressed in terms of a transfer of power from the provinces to the central government − as a "constraint on provincial autonomy" (Gagnon and Iacovino 2007, 41). For instance, when a Quebec law aimed at the protection of the French language was recently struck down as a contravention of the Charter, it mattered little that the court doing the damage was the Quebec Court of Appeal, for the Court does not represent the views of Quebecers: "It is a federal institution. Judges are appointed by the federal government" (Jean Dorion in CBC 2007).

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[3]Section 24(1) states that, "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".

[4]Section 52(1) declares that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".

Part Two

EXPLAINING THE DIFFERENCES

The preceding discussion reveals significant differences in how English-Canadian and Québécois scholarship defines and assesses the relationship between the Charter and federalism. First, whereas the Charter's tendency to promote uniform interpretations of rights is a serious and persistent concern for Québécois scholars, English-Canadian scholars have become increasingly ambivalent about this issue. Second, English-Canadian scholars do not perceive the Charter as a threat to provincial identities. To the extent that identity considerations are relevant, the Charter is viewed as addressing a shortcoming in federalism in that it lacked a theory of justice from which to assess provincial legislation (LaSelva 1996, 68). In contrast, Québécois scholars view the Charter's promotion of individual rights, interpreted in universal terms, as inconsistent with the promotion of a provincial identity that is shaped by cultural and linguistic factors. Third, when it comes to assessing the impact of Charter decisions for politics, scholars in English Canada are less prone than their Québécois colleagues to situate their critique or defence of that process in federalism grounds or on the autonomy of the English-speaking provinces.

The remainder of this paper offers an explanation for these differences. It argues that the different interpretations of the Charter's effects for federalism is a product of disparate ideas of "what federalism is for".

The conference for which this paper was prepared is called "The Federal Idea", not "the federal *ideal*". The distinction is an important one, for as Ron Watts himself has noted, "there is no single pure model" – no *ideal* form – of federalism (Watts 1996, 1). On the one hand, this refers to the different institutional arrangements that can be identified in the federal countries of the world. But even prior to differences in institutional design are different ideas about "why federalism" in the first place (Watts 1996, 4-5). As noted previously, one motivation is a desire for a political *process* that is closer to the individual citizen. Another is a desire to protect and promote diverse *outcomes*.[5] It seems likely that some mix of consideration for both processes and outcomes informs every federal arrangement, but the precise balance is apt to vary. From this variance comes a different choice or different level of comfort with different federal institutions. While American federalism, for instance, is most concerned about federalism's value as a process and is indifferent or even hostile to difference (Kymlicka 1995, 28-29), Swiss federalism rests much more on the desire to protect diversity (Schmitt 2005).

But what is true of such interstate comparison can also be true of intra-state comparison (Tarr 2005, 9). Members of the same federation can have different ideas of federalism. Such is the case in Quebec and in Canada outside of that province. In Quebec, federalism exists both to protect diverse outcomes, as well

[5]Others have compiled lengthier records of federal rationale, but these too can arguably be reduced to justifications based on process and outcomes (see, for instance, Gaudreault-Desbiens 2003, 22; Watts 1996, 4-5; Howard 1995, 11-29).

as a process aimed at achieving that outcome. Federalism in Canada also protects a different legal tradition in Quebec than elsewhere in Canada, and some argue that different legal systems affect how citizens view the state.[6] In English Canada, centred primarily outside of Quebec, federalism is valued less in terms of the diverse outcomes it protects than in the process of governing it authorizes. In this sense, federalism in English Canada is supported by a relatively "thin", procedural foundation, which helps explain the ambivalence about the implications of Charter outcomes.

It is not contentious to suggest that in Quebec, from Confederation onwards, the raison d'être for federalism has been to secure a very particular outcome: the survival of diversity, and more specifically, of the French fact on the North American continent. In the debates leading to Confederation, George-Étienne Cartier saw his primary obligation as assuring "cultural survival" amid a sea of English (Vipond 1985, 268-269; Laforest 2005, 2). Speaking a few years later, Wilfrid Laurier echoed Cartier's view:

> C'est un fait historique que la forme fédérative ne fut adoptée qu'afin de conserver à la province de Québec cette position exceptionnelle et unique qu'elle occupait sur le continent américain. (Laurier, in Burelle 1995, 34-35)

And so it remains today that for French Canada, the legitimacy of Canadian federalism remains tied to "le droit à la différence des provinces fédérées" (Burelle 1995, 42, 129). The "historic fact" to which Laurier referred − that federalism is above all a guarantor of a particular outcome − has never been abandoned (Gagnon and Iacovino 2007, 89).

This is not meant to suggest that the *processes* of federalism − autonomous decision-making − are unimportant in Quebec. Rather, it is only meant to stress why so much importance is attached in Quebec to autonomous decision-making. The principle of provincial autonomy is central to the French-Canadian idea of federalism. But it exists alongside the principle of cultural difference. As Gagnon and Iacovino observe, from Canada's beginnings, "the notions of provincial autonomy *and* clearly-defined cultural groupings were already beginning to take shape as the driving forces behind federalism [emphasis added]" (Gagnon and Iacovino 2007, 72-73). In Quebec, provincial autonomy (which is allowed by the process of federalism) is not sufficient in the absence of the "cultural groupings" (the outcome of federalism) it aims to protect, and vice versa. For Quebec, federalism has a dual mandate: a process and an outcome. This federalism might, therefore, be described as having a "thick" foundation for which the Charter is seen as posing a serious conflict with the very rationales of federalism.

The extra, substantive layer to which federalism is celebrated in Quebec, has encouraged considerable scepticism amongst Québécois in the legitimacy of the Charter, because it is perceived to raise serious difficulties for provincial autonomy when exercising the powers given to legislatures under the federal

[6]See the paper by Thomas Fleiner in this volume.

system of government, as well as the provincial legislature's capacity to protect a distinct culture and identity.

In contrast, federalism in English Canada rests upon a much "thinner" foundation. What is more, this thin English-Canadian conception of the "federal idea" has not been fertile ground for the development of an English-Canadian theory of federalism, which helps explain the absence of federalism from English-Canadian discussion of the political impact of the Charter.

In English Canada, it would be historically incorrect to characterize federalism as devoid of any concern for the diversity of its constituent units (see, for instance, Azjenstat *et al.* 1999, 235; LaSelva 1996, 8-9). At Confederation, federalism was seen by some in Canada outside of Quebec as a guarantor of a process and an outcome − a "quête de liberté politique [a process] et de sécurité ou d'intimité culturelle [an outcome]" (Caron *et al.* 2006, 158; see also, Laforest 2007, 58). This view was, however, confined primarily to the Maritimes and the fringes of the Upper Canadian Reform movement (Vipond 1991, 270). Many or even most of the key Anglophone players in the early debates over federalism were less concerned about the protection of a particular outcome than with the creation of a particular process for local decision-making.

Little needs to be said about John A. Macdonald's antipathy toward both the diverse legislative processes and outcomes that federalism permits. But his was not the position of all English Canadians. For George Brown, whose coalition with Macdonald and Cartier broke the deadlock that would lead to Confederation, federalism recommended itself because it met the longstanding grievances of his Reform Party. Confederation offered not only a measure of representative reform in the central government, but also embraced the principle that "local governments are to have control over local affairs" (Vipond 1985, 270-271; 1991, 19). The idea of federalism in process terms, of allowing for local government, would be an enduring theme in English Canada. In the late 19th century, for instance, while Wilfrid Laurier insisted on the importance of diversity to the federal principle, members of the English-Canadian provincial rights movement − in Ontario, the Maritimes, and in Ottawa − expressed their concern about the central government's abuse of the federal principle in terms of self-government. In their struggles against Macdonald's desire for a more unitary state and his repeated forays into areas of provincial jurisdiction, defenders of provincial rights appealed not to the value of diversity. Instead, they underscored "the powerful connection between provincial autonomy and parliamentary self-government". As Robert Vipond observes,

> [T]he autonomists argued that to permit the lieutenant governor to use the veto power of reservation, or to view prerogative as a discretionary power, was in effect to sustain the very sort of arbitrary executive power that earlier generations of constitutional reformers had struggled against. (Vipond 1991, 47)

This same preoccupation with "autonomy" and "self-government", Vipond argues, continues to inform the English-Canadian conception of federalism (Vipond 1985, 288).

But this preoccupation with provincial self-government in English Canada provided a thin foundation for federalism, especially when compared to how federalism is understood in Quebec, where it rests on a thicker foundation of protecting both diverse processes and outcomes. Some might explain this difference as a different level of commitment to federalism. Hamish Telford, for instance, describes English Canadians as "ambivalent" about federalism, even as wanting "less" of it when compared with French-Canadians (Telford 2005, 1). But it is not a matter of different commitments to federalism, but of commitments to different ideas of federalism.

Drawing on an analogy with the political philosophy of Charles Taylor is illustrative. Taylor argues that a fundamental difference between Quebec and Canada outside of that province can be found in their respective answers to the question "What is a country for?" One such difference, Taylor submits, involves different ideas of liberalism (Taylor 1993). Outside Quebec, a more procedural form of liberalism prevails. To the extent that a country should endorse a conception of the "good life", for Canadians outside Quebec, it should only be that everyone should be able to pursue their own conception. In Quebec, by contrast, it is "axiomatic" that the protection and promotion of the French language and culture is a "good" worthy of common pursuit, even if not everyone in the society sees the value in that good. But, according to Taylor, this is no less liberal than the procedural model. Rather, it is a choice to live according to a different, yet equally legitimate "communitarian"[7] brand of liberalism (Taylor 1993).

But we can just as easily ask, "What is federalism for?" According to the preceding, as with Taylor's different forms of liberalism, federalism in the English-speaking provinces is valued for its procedural qualities. It protects a particular process, which allows provincial societies to pursue their conception of the good life unhindered by the national majority. But it takes no position on what that good life should be − it is not concerned with the outcome of the process. Although federalism qua process, which is at the heart of the English-Canadian idea of federalism, can generate diversity (Tully 1995, 140-141), the point of having a federal society has less to do with producing outcomes that are different than it has with allowing provinces to pursue their own objectives (within the logic or reach of their enumerated powers). Contrast this English-Canadian commitment to procedural federalism, with the understanding of federalism in Quebec, where both the processes and outcomes of federalism are highly valued. Not only is provincial autonomy and local decision-making jealously guarded in Quebec, but so is the outcome associated with federalism – the preservation and promotion of diversity – and it is considered an essential reason for having joined (and remaining in) Confederation.

Like Taylor's variations on liberalism, these procedural and substantive versions of federalism cannot be quantitatively ranked. Canadians outside of Quebec are not necessarily less committed to federalism. They may simply be committed to a different brand of federalism. Although a thin, procedural

[7]The term "Communitarian liberalism" is not used by Taylor himself, but has been used to describe his work (Bickerton, Brooks, and Gagnon 2006, 91-118).

understanding of the "federal idea" should not necessarily be equated with a lack of interest in federalism itself, the lack of a deeper, substantive commitment to the different rationales for federalism obviate tensions inherent in the relationship between federalism and the Charter. The thin foundation for how English-Canadian provinces view federalism has both discouraged English-Canadian scholars from elaborating on a meaningful theory of their federalism and has encouraged English-Canadians to be relatively indifferent about the tensions between the Charter and federalism.

This indifference stands in stark contrast to how the relationship between the Charter and federalism is viewed in Quebec where it is seen as inconsistent with both.

THE LEGACY OF A THIN UNDERSTANDING OF FEDERALISM WHEN ASSESSING THE CHARTER

A puzzle arises from this attempt to articulate and understand the different treatments of federalism in the respective literatures in Canada: *Why is the Charter not considered more of a threat to federalism in English-speaking Canada?*

One of the reasons for choosing a federal system for the English-speaking British colonies (as it was for Quebec, or Canada East as it was then known) was its guarantee of local decision-making. This interest in protecting local decision making remained in place after Confederation. Recall the provincial rights movement of the late 19th century, where appeals to parliamentary sovereignty were invariably tied to the "federal principle" and emphasized the principle of "provincial autonomy".

One would expect that this concern would have persisted and would have influenced evaluations of the Charter once it was adopted. But, as discussed above, references to federalism or provincial autonomy have become conspicuously absent in the English-Canadian scholarship. Appearing instead have been concerns about the impact of the Charter on democratic governance. Clearly something has happened in terms of the importance attached to provincial autonomy in the English-speaking literature. More important, at least for the purpose here, is what has not happened. English Canadians have not felt the need or desire to develop a clear or comprehensive theory of federalism; at least one that confronts the implications of the Charter for the rationale and operation of federalism.

Perhaps the explanation for this is no more complicated than the fact that a thin, procedural understanding of federalism, which emphasizes the powers or jurisdiction of a legislature rather than the purposes or outcomes that justify or necessitate this power, does not make for a good theory. In a different context, Robert Vipond has raised this same issue. The leaders of the English-Canadian provincial rights movement of the 19th century may have been successful in their use of the principles of federalism and provincial autonomy to fend off John A. Macdonald's centralizing vision. But they never really explored what was meant by these principles. By portraying provincial autonomy as a "fundamental

principle", the movement was not forced to explain "*why* provincial autonomy should prevail; it had merely to show *that* it was threatened". As a result English Canada has inherited an under-developed understanding of federalism, with little to say about the ways in which federalism related to "the harder questions of liberal democracy" (Vipond 1985, 292).

By contrast, the thicker substantive version of federalism in Quebec – built on a process and geared toward a particular outcome – provides more insight into why provincial autonomy is valuable. It is not simply an important end to promote, but is also a means to an end. Thus, when autonomy is threatened, it opens a debate that provides meaningful answers to the question of "why autonomy?"

The relatively thin foundation on which the provincial rights for English Canada was based has had lasting implications for the understanding of federalism, not the least of which is that it has left federalism amenable to the winds of political change. While Quebec politicians relied vigorously on the principle of autonomy to reject federal incursions in areas of provincial jurisdiction in the first half of the 20th century (Telford 2005, 2-3), English Canadians welcomed those same initiatives as a corrective for flaws in distribution of powers in the federal system, which had hindered the development of responses to emerging needs. Similarly, in the 1960s, when English-Canadian scholarship came to define "federalism as intergovernmental relations", the focus remained on the institutional aspects this concept evoked, "rather than on federalism as political theory" (Simeon 2002, 12). Thus, despite the fact that this generation of English-Canadian scholars was inclined to view provincialism and regionalism more favourably than its predecessors, the thin process-driven view of federalism meant that federal incursions through the second half of the 20th century were not considered as problematic as they might otherwise have been (and were in Quebec) (Simeon 2002, 12). The conception of federalism in English Canada continues to reflect an atheoretical, process-oriented focus on legislative power, which results in little consideration for the relationship between federalism and larger constitutional questions; specifically, the relationship between federalism and the Charter. This lack of a theoretical grounding for English-Canadian federalism, then, predates the Charter. The Charter did not generate the lack of interest in developing a federal theory.

In fact, if there is a cause-effect relationship between a lack of federal theory and the Charter in English-Canadian provinces, it is likely the other way around. That is, a lack of a strong federal theory might explain not only why English-Canadian scholars seem relatively unconcerned with the effects of the Charter for federalism, but also why they have been so taken with the Charter. A constitutional identity built on thin, procedural understanding of federalism is relatively easily displaced by the promises and rhetoric of pan-Canadian rights. Thus, in many ways, the Charter filled a void in English Canada. It provides for Canada outside of Quebec "a common reference point of identity, which can rally people from many diverse backgrounds and regions" (Taylor 1993, 161). If English Canadians had had a strong theory of federalism, likely connoting a strong sense of provincial community, perhaps they would not have required this common reference point to rally Canadians together. This is most certainly the case for Quebec, where federalism itself has provided the common reference

point. For the Québécois, the way of belonging to the Canadian community is by their belonging to a constituent element of it (Taylor 1993, 182). The Québécois constitutional identity is tied to federalism, which is precisely why the impact of the Charter is considered so problematic. In the rest of the country, where the thin federalism has prevented the emergence of a strong theory of federalism, the Charter does not offend the English Canadian sense of self. Moreover, had there been a stronger theory of federalism, the Charter's potential to lead to uniform legislative outcomes might have generated more concerns about its capacity to undermine provincial autonomy. But the Charter debates in English Canada at the time of its adoption were remarkable for the lack of concern about its impact on the principles of provincial autonomy or diversity (Romanow, Whyte, and Leeson 1984, 216-220; LaSelva 1983). Little has changed. Concerns are expressed in English Canada not in the language of federalism, but in the language of democracy and parliamentary sovereignty.

CONCLUSIONS

The discussion offered here of how Québécois and English-Canadian literatures address the relationship between the Charter and federalism reveals the following. The ambivalence or lack of concern amongst English-Canadian scholars for the Charter's impact on federalism can be explained by a thin, procedural commitment to federalism, which focuses more on jurisdictional issues, and the powers federalism authorizes for provincial legislatures, than on the rationales for federalism itself. But this has provided neither fertile ground for a comprehensive theory of federalism to develop nor a context for suspicion about the Charter's potential to undermine provincial autonomy or lead to uniform social policies that undermine provincial diversity. In contrast, the much deeper commitment to federalism in Quebec, and the important link between its rationales and the objectives and purposes of the Quebec state, ensures that these tensions are perceived to be both more acute and serious.

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10

Constitutional Underpinnings of Federalism: Common Law vs Civil Law

Thomas Fleiner

La communauté internationale a contribué depuis quelques années à la création de plusieurs fédérations, qui restent toutefois relativement instables. Parmi les nombreuses raisons de cette instabilité, l'auteur relève la tradition de droit civil à laquelle appartiennent ces nouveaux pays. Selon qu'ils sont issus du droit civil ou de la common law*, les régimes fédéraux doivent en effet être établis différemment en ce qui a trait à leur système judiciaire, au rapport entre la fédération et les unités fédérales et même au concept fondamental de l'État. Les spécialistes des constitutions fédérales applicables à ces cas doivent ainsi comprendre que la légitimité d'un État est beaucoup plus étroitement liée au concept de nation, que la constitution d'une fédération doit s'élaborer en lien avec celle des unités fédérales, et que la répartition des pouvoirs doit prendre en compte le fait que plusieurs questions de droit civil et criminel dépendent dans les pays de* common law *du partage des pouvoirs du système judiciaire, alors qu'elle relève dans les pays de droit civil de la répartition du pouvoir législatif entre la fédération et les unités fédérales.*

INTRODUCTION[1]

In recent years the international community has contributed to the creation of several federations such as Bosnia and Herzegovina, Iraq, Sudan, Somalia, Congo and other states threatened by conflicts. However, the federations created by the international community have not been very sustainable thus far: they

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[1]In this paper, the term "federal units" refers to the governments of the constituent units (e.g., provinces, cantons, Länder, states) and "government branches" refers to the executive, legislative and judicial branches or functions.

function only under the supervision of the United Nations or the United States and its Coalition of the Willing.

These failures have many different reasons. One of them, not to be underestimated, has to do with the fact that in many instances the experts drafting these constitutions have had their roots in the tradition and legal culture of common law, whereas the country they were dealing with was rooted in the tradition of continental civil law. For example, Bosnia and Herzegovina are clearly grounded in the civil law system. And even though Iraq has sometimes been under British rule, its main legal tradition and culture is that of the Ottoman Empire and thus much more linked to the tradition of civil and religious law.

Constitutions for federations in the civil law tradition are not likely to be well served by frameworks devised from common law traditions. For example, the distribution of legislative powers for those federal constitutions drafted at conferences in, for example, Dayton, Ohio, or Amman, Jordan, do not recognize the distinction between civil and criminal law. Nor do they refer to laws with respect to procedure, which are an important part of the assignment of powers in a federation based on the civil law tradition.

Accordingly, the main purpose of this paper is to demonstrate analytically that constitutional architects need to be aware of whether they are dealing with a common-law or civil-law federation. Ron Watts has become the global expert on federalism and in this capacity he has advised many governments with regard to drafting federal constitutions. He is one of the very few political scientists who is fully aware of these issues. Thus, I am happy to be able to contribute to this volume in his honour with some legal perspectives relating to the differences between those federations in the civil-law tradition and those steeped in common-law.

Although both legal systems are committed to the constitutionalism of modernity, their respective divergence is much more fundamental than one might imagine. These different legal frameworks have important consequences for the different structures of these federations. At the same time, the paper will also recognize the tendency for the merging of these systems under the influence of globalization.

When comparing different systems of common law, one has to be aware that common law developed differently in its two main historical places: the United Kingdom, with no written constitutional document, and the United States with its federal constitution. In terms of the latter, the U.S. Supreme Court, with its power to review the constitutionality of statutes, has added many new principles and thus served to modify some of the traditional common law concepts. Moreover, the Founding Fathers of the United States certainly developed a most original and unique concept for a federal system in 1789. Indeed, in the over 200 years since its birth, the U.S. federal system has influenced virtually all of the currently existing 24 different federations, notwithstanding their different legal cultures and traditions.

With regard to the continental civil law system, the ensuing analysis will focus mainly on the French concept. The French system has influenced the fundamentals of administrative federalism followed in continental federations

such as Germany, Austria, Switzerland and even within the European Union itself.

THE STATE AND ITS LEGITIMACY

Nation and Legitimacy

If one were to ask to whom do Canada, the United States, France or Germany belong, one would get many different answers. Countries colonized by peoples from other continents may give a totally different answer than countries where the peoples are historically rooted in a given territory. But even within colonized countries the answer of peoples belonging to indigenous nations will be very different with those of the settler peoples.

The question itself might even be challenged. Would an American, Canadian or British citizen even ask such a question? Probably not, since it presupposes that the state is an object which can belong to someone. Canada, the United Kingdom and the United States are not states that belong to anybody. However, in France the answer will likely be different in the sense that France is thought of as belonging to the French Nation. The Germans would answer that Germany belongs to the German people. What does this mean with regard to federations and federalism? The German and the French answers aim at the collectivity of the nation or the people as the bearer of the sovereignty of the state. The nation emerged from the "big-bang" of the French revolution, and it serves to legitimize the state, its laws and its justice.

Our purpose here is not to look into the different concepts of nation and people. However, what is important for the understanding of federalism is the fact that in the civil law tradition influenced by the French revolution the state is considered to be the result of the collective will of the people or the nation. If one considers the state as a higher being with a higher value than just the added sum of its individuals, the state then becomes the unaccountable authority; in fact, it becomes the fountain of law and justice.

How can such a state be fragmented into several federal units? The answer is that this is only possible if the state is conceived as composed of different units (either homogeneous or further divided into different municipalities). These different units belong to different nations, as in the Ethiopian Federation. The federation represents a "composed state" or a "composed nation". That would be the Swiss or Belgium answer to this question. On the other hand, the German and Austrian answer would be that the unity of the state is not questioned by the federal structure. The federal units are mere decentralized parts of the one people, which is the German people. Federalism is but an additional tool to limit the powers of the central government.

The common law history has never been confronted with a revolutionary body such as the French National Assembly which needed a new legitimacy in order to justify its revolutionary will. The Glorious Revolution of England, from this point of view, was not comparable to the French Revolution. In the French case, the bearer of legitimacy for a new revolutionary state was found in the

collective body of the French Nation composed of equal individual citizens. This body became the source of the new law which had been issued by the national assembly. Thus, there was a clear break from the former law developed by the crown and the courts, and the beginning of a new era and law enacted only by the legislature.

In common law history, the legitimacy of the courts came from the crown which was later replaced by the rule-of-law principle that men are ruled by law, and not by men. The various branches of government did not need to have legitimacy within the nation as bearers of sovereignty. For this reason the fragmentation of the state into different federal units under a common law framework does not fundamentally call into question the legitimacy of the unitary nation, as would be the case in a civil law framework. Within the civil law conception, a real federation has to accept the principle of a composed nation fragmented into different federal units as is the case in Belgium, Ethiopia and Switzerland. The German and Austrian federations are but political instruments for an additional separation of powers but are not a new concept of fragmented legitimacy.

Therefore, if one intends to re-structure a unitary state into a federal state within the civil law system, one has to provide a basis for the legitimacy not only of the federation but also of the different federal units including their local governments.

The State: An Instrument to Change Society?

The conception of the state as a unity is different in systems belonging to the common law tradition than those belonging to the civil law tradition. In the common law tradition, the state is seldom seen as a collective unit, whereas in the civil law tradition the unity or essence of the state is the main legitimizer for the constitution of a state. In the common law tradition, the function of the various governmental branches is to mediate among conflicting interests. According to civil law, however, the state has the function to steer and direct society, i.e., the state not only has to moderate but to guarantee the engineering of the society for the purpose of justice.

The civil law tradition is strongly influenced by the ideals of the French Revolution, including further elaboration by Napoleon. Accordingly, the state is envisaged as an instrument to be used to transform a feudal society into a liberal society with equality and justice. The state thus has the responsibility to determine and implement the common good and common happiness.

Federalism and multicultural societies

One can readily admit that federalism, within this civil-law conception, is much more difficult to implement than in a common-law system. The latter only deals with creating governmental branches as instruments for moderating power and not with legitimizing the power of these governmental branches. This leads to a critical point. Multicultural federations embedded within the civil law culture will have to empower their constituent units to develop the culture and identity

of their nation or nations. The federation can only be integrated on the basis of the co-existence of the different cultures fostered at the level of the constituent units.

Different cultures of multicultural societies within common law systems need not be fostered by either the federal states or by the federal units. The state as moderator has only the function to manage peacefully the various conflicts within the society. The state itself is not the foundation for the identity of these different cultures. Thus, confronted with the issue of multicultural societies, the common law tradition provides no adequate solution. Instead, federalism tends (more) to be a way towards secession of the different nations rather than an instrument to integrate different nations. The challenges associated with the religious diversity of Nigeria and with the reluctance of Sri Lanka to adopt federalism may be explained by this basic view of a common law system which in general bans culture and cultural identity from politics.

Layers of government

In the civil law tradition, one uses the word "state", whereas in the common law tradition the lawyers would prefer to use the word "government". The government, according to the understanding of the common law, does not have the function to "change and to engineer" society, but only to moderate conflicts among the different social groups in order to harmonize society. Thus, if the governmental branches are not only horizontally separated but − as in federations − also vertically divided, their legitimacy is not at stake. But, in the civil law concept, if federal governments or local governments have to be installed, they need first to be embedded in a unit that can legitimize their power and which has to determine the geographic and political borders within which the government has the power and the responsibility for engaging in "social engineering".

Thus, in the common law tradition it is much easier to conceive of two or even three layers of government, since their role is to moderate among the different social groups operating within their own jurisdiction.

In a civil law system, however, the concept of two levels of government raises some difficulties. The state as an instrument to change society requires, in principle, a centralized power which does not allow decentralized legal concepts. For this reason France (and Napoleon) could not come to terms with a conception of federalism that would run counter to the civil law conception of the state as a sovereign, central, unitary and indivisible unit.

Second class states

As a result, many French scholars view a federal state as a second class state. In the famous decision on the breaking up of the former Yugoslavia, the arbitration court of the French president (Badinter) of the constitutional council justified the right of self-determination of the Yugoslav Republics on the basis that a federation blocked by the conflict among its different constituent units is in a status of dissolution. On this reasoning, the various federal republics had an original and initial right of self-determination. Such arguments are only possible

within a concept of the state that considers a federal state as a second class state compared to a unitary state.

How, then, can one conceive of a federation with different constituent units attempting to achieve different goals for changing the society. Such a concept is only possible if one accepts the idea that a state has different societies (such as the Swiss Federation) which, in turn, must address the needs of their distinct social groups differently. This may also explain why civil law federations that are not composed of different societies (such as Germany and Austria) are strongly centralized federations which deliberately delegate mainly administrative (as distinct from legislative) powers to the federal units. The political complexity of the Belgium federation can be explained because in this case the borders of the social units and their unity (e.g., Brussels) composing the federation are overlapping. On the other hand one might understand that the strong centralization of Russia under President Putin falls within the tradition of the Napoleonic idea that the state is the instrument for changing society.

THE CONSTITUTION AND ITS FUNCTION

Constitution Making

The role and processes of constitution-making for a federation are far from obvious. According to the democratic principle, the constitution-making power belongs to the people based on their right to self-determination. But when constitutions have to be framed for federations, the most difficult issue will be: which peoples are relevant. Should the peoples of the constituent units have the power to make the federal constitution, or should there be a role for the federal people overall as well as the peoples of the constituent units?

In the civil law tradition, a constitution does not only constitute or create the governmental branches of the new state, but it also constitutes the unity that is the state. If this is the case, then the question to be solved will be: which entity creates the units of the federation? Is it the overall federation or the federal units themselves out of their right of self-determination? In the case of a federation made by supra-national centralization, such as the European Union, the question is: is this new unit to be created by the member-states or by a European People?

Most of the federal constitutions that have emerged within the common law tradition have been primarily established out of the British colonial power. From where did the constitution making power originate? Did it come from the Westminster traditions or out of a war of independence? Although the American Confederation came out of the Declaration of Independence, it created the federation out of the independent members of the subsequent confederation. In such situations the constitutions were either based on the legitimacy of Westminster or on revolutionary instruments legitimized by a war against the colonial power.

In civil law countries new constitutions have arisen out of sovereign states which created a new state entity and not just a federal government or, as in the

case of Belgium, the central state created new federal constituent units in order to establish a new federal constitution.

The difficulties with regard to the European Union Constitution can be seen precisely in this context of the differing ways of viewing the constitution. A consensus may be found for a better functioning of the different governmental branches of the European Union, but not at all with regard to the constitution of the federation as a new state entity.

In the common law tradition, the constitution has the function of limiting the powers of the governmental branches. Thus the creation of a new entity is not at the core of the issue. Looking at the new historical examples of Bosnia and Iraq, one would have to admit that the issue of the creation of the new Bosnia and Herzegovina or of the constituent units in Iraq was not the main focus of the negotiation. This is understandable from a common law point of view, but not from a civil law point of view.

Is the Role of the Constitution to Limit or to Empower Government?

Linked to the different concepts of the state are also the different conceptions of the constitution itself. In the Anglo-Saxon world, the main purpose of the constitution is to limit governmental powers. The Lockean idea of the rule of law is based on the concept of inalienable rights which can only be protected if governments installed by the social contract are limited by their constitutional powers. The constitution thus does not empower governments: rather, its main function is to limit the powers of the government. The constitution thus has to separate the powers of all governmental branches. The main function of the third branch of government (the judiciary) is to guarantee that men are ruled by law and not by men. Hence the constitution has only to guarantee that the court is not limited with regard to this function in regulating the other branches of government.

In federations, this system of horizontal checks and balances of governmental powers is supplemented by a system of vertical checks and balances. The main function of the federal constitution and the horizontal and vertical separation is to limit governmental powers and to provide a system of checks and balances. Federalism thus constructed can be viewed as a further instrumentality to protect the liberty of persons.

On the other hand, constitutional perceptions can also be based on the idea that the constitution at the same time empowers as well as it limits governmental powers. Constitutions can create constitutional liberties and provide for their protection by courts and by the institutional system of checks and balances. Since the French Revolution, constitutions have also been seen as the instruments implementing state sovereignty and, thus, as the source and the fountain of justice and the legitimate legal system of the state. The law is not given by courts and their historic wisdom over the generations; rather, the law is made by the legislature and has to be applied by the courts.

To empower the different governmental branches, a constitution not only has to provide for checks and balances of the governmental branches, but also

has to decide what function and powers each of these branches will have. In the common law tradition each branch has its own prerogatives according to its function as executive, legislature or judiciary. In the civil law system the constitution has to clearly define the different powers of the legislature, executive and of the judiciary. Only common law countries such as New Zealand and Israel could and can still afford to be states without a written constitution. A constitution is not needed because state sovereignty is not at stake. Moreover, functions of the different governmental branches need not be determined by the constitution because their prerogatives are self-evident so that there is no need for constitutional empowerment to execute their powers.

When one sees the constitution as a document which installs the state and the powers of the government, it follows that there must be only one constitution that has the power to create governmental competences. The consequence of such a constitutional perception is that the powers of the constituent units flow from the federal constitution. Federations can either provide a residual power for the federal units or define the powers of the local units. In any case, if it is the federal constitution's role to determine this, the federal constitution can also be changed and this means that the local powers can be eroded or taken away by centralization. In sum, the governmental powers of the constituent units are also empowered by the federal constitution.

This is probably the reason why continental legal scholars question whether the federal state can be a state with divided sovereignty, as advocated by Madison in the Federalist Papers, or whether, legally, only the federation is sovereign because ultimately only the federation as an entity can legally modify the constitution and thus take powers away or give new powers to the constituent units by constitutional amendments.

This may also explain the European debate around the issue of the constitutional design of the European Union. Were the main function of the constitution to be only to limit governmental power, then a constitution for the European Union would not be a problem. If, on the contrary, the constitution empowers governments, then the constitution becomes a real problem as a concrete challenge to the already existing national sovereignties. This problem cannot be avoided even by requiring unanimity for constitutional amendments or by providing a unilateral right to secession. The label "constitution" carries with it the idea that the European Union, empowered by the constitution, would become a new federal state.

There are federations in the common law tradition, such as in India, where the constituent units do not have their own separate constitutions. However, in the civil law tradition a constituent unit needs to be constituted by a constitution which is the original source of law for the constituent unit. As long as constituent units do not have their own constitutions, e.g., as in the regions in Spain, there is legally not a real federation but only a highly decentralized unitary state. This is so because, legally, a government of a constituent unit needs to be empowered and constituted by its own constitution.

Distribution of Powers: Legislative Vacuum

One of the most important differences between a common law country and a civil law country can be seen in the law-making power. The making of laws is shared in a common-law country by the courts and the legislatures. The development of the "common-law proper" belongs to the courts, while similar regulations are dealt with in civil law countries by the legislature. According to the common law tradition, courts can decide on controversies if there is a writ and thus a remedy to go to the court. Based on these powers courts have, over several centuries, developed principles governing civil law, family law, and criminal law as well as principles of procedure for trials with or without a jury.

In civil law countries there are no traditional powers of the courts. The courts can only decide on the basis of legislation. The legislature has to decide what behaviour is to be prohibited by criminal law, how private parties contractually can create mutual obligations, and what are the rights and obligations of parties within the trial before a court.

Thus, if one looks into the federal constitutions of civil law countries they contain several provisions providing for the distribution of legislative powers with regard to the traditional civil law and criminal law as well as with regard to the power of the courts and the criminal law and civil law procedures. In many federations such powers are granted to the federation. This is now even the case with regard to procedural law in Switzerland since the new constitution of 1999.

If common law experts educated by the common law tradition draft federal constitutions for states with civil law traditions, they need to be particularly careful about the assignment of powers. For instance, with regard to the distribution of federal and regional powers, the draft for a federal constitution to decentralize Iraq cannot simply follow the American model of assigning the residual powers to the constituent units, with only the federal powers being explicitly assigned. This raises consequential issues when it comes to creating federations via decentralization within former civil-law nation states. How will the new federal units exercise their residual powers when they have never been states? Such a system may create a dangerous vacuum of legislative regulations in a civil law country federalized by decentralization. In this context, it is important to note that the draft of the Iraq constitution is silent on the issue of the power of the central legislature to enact legislation belonging to the common wealth. Of course it might be evident that these issues will be decided by existing religious laws. Will this also be the case for the Kurdish area? From my perspective at least, it seems that such issues should be regulated within the constitution.

Empowerment of Local Governments

In a common law country the local governments of the constituent units need not be installed by their own constitutions. This follows because the main purpose of the constitution is not to empower the branches of government but, rather, to limit their power. In other words, a federal constitution can function both as a limit to the federal branches of central government as well as to the

branches of the constituent units. The courts will always have the power to fill this vacuum. In addition the traditional concept of prerogative powers of the executive might also be helpful. Based on these powers the executive of a constituent unit can function without the setting out of precise constitutional powers in their own constitution.

In a civil law country, however, the executive cannot function if there is no valid constitution determining the powers of the executive. Thus, if a constitution of a former unitary state is intended to federalize the country it must be complemented by specific constitutions establishing the powers of the governmental branches of the constituent units. The constitutional design of a newly federalized country thus needs to be supported by additional transitional regulations determining the constitution making power of the constituent units and regulating the powers of their governmental branches.

THE LEGAL SYSTEM

The Judiciary and the Administration of Federal Law

Unitary or parallel legal systems

The common law tradition has a continuous historical development going back to the early court decisions of the Middle Ages. Thus it is the repository of the accumulated court wisdom of centuries. One of the main features of common law is to be seen in the fact that the law evolves mainly from court decisions which, in turn, depend on decisions in different jurisdictions (and even in different countries).

The civil law tradition has its roots in the French revolution and in the sovereignty of the national assembly as the only or at least the supreme law-maker of the state. Civil law is thus not only the law mainly made by the legislature: it is also considered as a united pyramid in which the higher law controls the hierarchically lower law. The unity of civil law is not characterized by court decisions but by the unity of legislation promulgated under the constitution.

Within such a system, the double jurisdiction of the American system, with federal courts and state courts independently deciding on federal or state law cases, is inconceivable. Laws made by the legislature are considered as a united whole which has to be applied by the executive and by the courts loyal to the legislature. Therefore, in civil law countries all law is applied by the same courts be they federal or courts of the constituent units whose decisions can be appealed to the federal court.

This is the basic reason why in civil law countries federal laws are usually applied or administered by the administrations of the constituent units. Civil law systems cannot implement a dual federalism as in the United States. Parallel legal systems are contrary to the principle of unity and hierarchy in the civil law system. Therefore, a civil law federation cannot have distinct court systems and

jurisdictions. The federation is legally composed only by the legislatures of the federation and of the constituent units.

Independence of the judiciary

The independence of the judiciary has always been a much more important issue in civil law countries than in common law traditions. This factor has had important consequences for the federal structure and in particular for the second chamber in Ethiopia. Unlike the case in most federations, this second chamber has no legislative powers. Its function is rather to mediate conflict situations, to promote self-determination and, in particular, to interpret the constitution with regard to the division of powers between the federation and the states. Such a quasi judicial function for a political body would probably never be introduced within a federation embedded in the common law tradition. Being part of the civil law tradition, however, Ethiopia can entrust the second chamber with a judicial function.

Legal Dualism of Civil Law Countries

To understand the concept of federalism within a civil law tradition one has also to understand the specificity of the public law concept in the civil law tradition. It was Napolean who literally invented the so-called public law. What was his intention in doing so? Napoleon considered the state as an instrument to change society. In his view, the state would only have the capacity to perform such a function if the civil servants were not dependent on the traditional, conservative courts and judges. In order to make the administration "immune" from the intervention of the traditional conservative courts, he conceived the public law as a new legal category, distinct from the private law and also excluded from the jurisdiction of the traditional courts. The administration authorized by public law became the only legal authority in France empowered to control the administration. This concept of public law was introduced, with some modification, by Germany and other countries influenced by Napoleon.

Within this new system of public law, legislation could be implemented under the control of the hierarchy of the administration and the political executive. It was only at the end of the 19th century, under the guidance of the French Council of the State, that some court control did develop. Thus, the principle of the rule of law that men are ruled by law and not by men only gradually entered into the exercise of public administration and public law.

This concept had several important consequences with regard to federalism. First, the power of administrative courts has some important limits with respect to the execution and implementation of federal law as it relates to local authorities. The only writ available is an appeal against an administrative decision. In response to such an appeal, the courts can only quash the decision they cannot issue a new decision, nor can they enforce the enactment of a new decision. Any activity (or failure to act) by the administration is usually exempted from the jurisdiction of the court. Courts in the civil law tradition have no power of contempt of court and thus can never enforce their judgments with

regard to the administration. Therefore, the possibility of the courts compelling constituent units to implement central obligations is almost non-existent. The common law power to implement court decisions by contempt-of-court rulings (which would allow a judge to enforce federal law against constituent unit administrative officials resisting federal obligations) does not exist under civil law.

Second, the common law writ of mandamus (which has been developed precisely for the implementation of central law with regard to local authorities) also does not exist in civil law systems.

Third, for these reasons civil law federations need to examine carefully which roles and powers they assign to central authorities in allowing them to enforce central law on constituent units.

CONCLUSION

Experts giving advice with respect to constitution making and the introduction of a federal system in a civil law country should take into account the following specifications:

First, they will need to define the nation or the nations which will be the future units and bearers of governmental legitimacy, since there must exist a legitimization of their powers as well as a determination of their geographical and political borders.

Second, beyond defining the nation or nations in a federal constitution, expert advisors will have to pay attention to constitution making for the constituent units. In particular, they must recognize that one cannot apply the conception of a constitution that has absolute power to create governmental competences as in the common law tradition.

Third, they have to decide on the precise distribution of powers to all the different levels of government, which is often not necessary in the traditional common law. Moreover, they have to determine the powers of the federal governmental branches, to provide for the enforcement of federal mandates within constituent units, and to think carefully about the design of the jurisdiction of the courts at the federal and constituent levels because the courts can only quash decisions and not oblige activities or failures to act.