

Preface

This paper is one of a continuing series of occasional papers to be published by the Institute of Intergovernmental Relations. Their purpose is to provide a relatively quick and inexpensive means of communicating to practitioners, scholars and other students of federalism the results of work in progress. While many of the papers will emanate directly from work being undertaken in the Institute, we also hope to draw on work being done by others, and we invite readers to submit contributions. Subjects may range over any aspect of federalism. Papers published reflect the Institute's judgement that the subject is worthy of discussion in a wider audience. Views taken do not, unless specifically noted, constitute a statement of position by the Institute.

The following paper is a slightly edited version of the opening statement made by me on September 13, 1978, at a hearing of the Special Joint Committee of the Senate and House of Commons on the Constitution. It was followed by an extended discussion with members of the Committee, the transcript of which is available in the proceedings of the Committee.

Richard Simeon,
Director.

Mr. Chairman, members of the Committee. I'd like to thank you for giving me the opportunity to talk to you today. I should say at the outset that I speak for myself as an individual, rather than as a spokesman for the Institute of Intergovernmental Relations, which I direct, or as a spokesman for any other group. I shall be discussing the issues before the committee not so much in terms of legal principles and precedents, but rather from the perspective of a political scientist.

I should like in this statement to summarize some general considerations which underlie the search for accommodation in Canada, and to provide my understanding of the contemporary political difficulties in the country.

In light of some of these considerations I would like to comment on the current debate about the methods or procedures to be followed in arriving at constitutional change, and on a few of the proposals in Bill C-60 and elsewhere.

I should also say at the outset that I remain rather pessimistic about the outcome of the present debate. Fundamental disagreement exists at a great many levels: about whether or not there is a critical problem requiring major changes in the Canadian political system, about the dimensions of the problem if there is one, about its causes, and about the procedures to be followed in reaching change. Most fundamentally, there exist basic differences in the Canadian political community which are extraordinarily hard to resolve.

Moreover, the reception that has been accorded to the many proposals now being made illustrates how deep are the differences among these various analyses and conceptions, how strong is the fear of change and uncertainty, and how widely the various groups and regions differ. The debate shows how very far we are from a consensus. So the dilemma we face is frightening. Because of the fundamental lack of consensus, we are forced to seek a new settlement; but because of the same lack of consensus we are unable to agree on one. Unfortunately I see no easy way out of the dilemma.

I also have doubts about the efficacy or effectiveness of constitutional engineering itself. It is very difficult to predict the long-run effects of institutional changes; often they work quite differently from the expectations of the reformers. It is not easy to use a new constitution to alter existing political and social realities; it can only be successful if it reflects them. Therefore we must be modest about what can be achieved in this process of review. The constitution itself is not the prime cause of our discontents; nor is it the only solution. However, while I believe the existing constitution has been extremely successful and adaptable, it seems to me that dissatisfaction with it is now so profound that revision is necessary if its legitimacy is to be restored.

The Canadian crisis has several dimensions and causes, all of which are linked to each other. Both scholars and political leaders differ in the weight they assign to each of the dimensions, and these differences in turn determine the nature and direction of the proposals they make. I would like to sketch out some of these perspectives, and examine Bill C-60 in the light of them.

The three major dimensions of the problem I wish to discuss are the following:

- The relationship between language groups,
- the relationship between the national society and regional societies, and,
- the relationship between governments.

The federal government's proposals in Bill C-60, and in the White Paper, A Time for Action, focus primarily on language and region. Their main weakness lies in the relative lack of attention to the mechanisms of intergovernmental relations and to the division of powers. In general, I see the Canadian crisis as resulting from a decline in the political legitimacy of the central government, on one hand, and the growth of provincial power on the other. Hence, the two primary needs are for changes to increase the representative capacity of the central government and to improve the relations between it and the provincial governments.

Put another way, constitutional change must address itself

to three sets of institutions: first, those of the central government; second, those of the provincial governments; and, third, those which define and arbitrate the federal relationship itself. Here I include the Supreme Court, the division of powers, the Head of State, the machinery of intergovernmental relations and the Second Chamber.

Linguistic Relations

Relations between French and English Canada pose the greatest immediate threat to Canadian unity, and the strongest thrust of Bill C-60 lies in this domain. Here the crucial sections are those spelling out language rights, the symbolic recognition of the status of both principle languages, and the double majority proposal for voting in the House of Federation on matters of special linguistic significance.

The Bill emphasizes the importance of reconciling the interests of French and English-speaking Canadians within central government institutions, and the importance of assuring that both language groups should be at home throughout Canada. It denies that French-English relations are coterminous with Quebec-Ottawa relations and asserts that French-Canadians can be represented as well in Ottawa as in Quebec.

This approach rejects an alternative view, which is that it is only within Quebec and through a stronger Quebec government that French-Canadian culture can be preserved, and that in fact, if not in law, Canada will effectively consist of regions which are unilingual. This view, of course, has strong adherents in Quebec, but it also has strong supporters outside Quebec who resist the extension of French language rights.

The Bill reflects these political difficulties. For while it adopts the first approach, the federal government alone is unable to deliver on it. Thus it does not propose the same rights for French-Canadians in every province, and to be effective many of the rights which are stated require provincial implementation, and a decision by provinces to "opt-in" to them. Thus they are necessarily

incomplete; and this in turn undermines their effectiveness in convincing French-Canadians they can be at home elsewhere. Moreover, it might be said that the rights proposed are mainly symbolic in that they alone can do very little to hold back the profound economic and social forces leading to the assimilation of French-Canadians outside Quebec.

Personally, I find myself torn here. I believe that as a matter of right the strongest possible guarantees of minority language rights and services are necessary both in the central government and in the provinces. But I am pessimistic about their effectiveness, either for preserving Francophone communities or for saving confederation. And I see the political strength of both alternative views. Many Anglophones will resist even these measures, and will, outside Quebec, see French-Canadians as just another ethnic group. In Quebec, alternatively, it is widely believed that national language rights across Canada do little to strengthen French language and culture there. While the federal government's strategy for linguistic relations might have been effective if implemented many years ago, I am afraid that it will not be so today.

I agree with the principle of a legislative bulwark against the infringement, by a majority in Parliament, of French-language rights. This underlies the proposal for a double majority in the House of Federation. I am, however, concerned about the method, which seems to involve an invidious entrenchment of linguistic division. I would prefer a special majority rule which does not mention language but which could have the same operational effect. I am also concerned that the double majority may prevent extension of language rights. For example, it seems to me that there is at least a reasonable chance that the Official Languages Act would have been rejected by the English-speaking group in the House of Federation.

Regional and National Societies

Regional divisions are as old as Canada itself. While not in themselves now threats to Canada's national existence, they appear

to have grown more important in recent years: regional identities have strengthened, regional economies have become more diverse and conflicts between them more intense. Increasingly, provinces seem to be emerging as distinct societies, with a strong desire to chart their own destinies. Events since November 1976 have heightened, rather than diminished, the sense of regional alienation and regional conflict.

Just as the language issue revolves largely around the question of which level of government can best represent and speak for linguistic interests, and around the question of where accommodation between French and English will be achieved, so it is with regionalism. Are federal politicians and federal institutions effectively able to represent and reconcile divergent regional opinions; or are these interests to be expressed through provincial governments?

There is considerable evidence that, for many reasons, the federal government's own capacity to play this role has declined. Party discipline in the House of Commons restricts the ability of members to speak out for their regions, or to form cross-party caucuses. The tremendous increase in the complexity of government means that cabinet members have come to be policy managers more than representatives and spokesmen for regional interests. The growth of prime ministerial power, accentuated by the role of the media in shaping the style of political campaigning, further reduces the role of regional spokesmen. And the administration, with some exceptions, tends to be organized in such a way as to stress interests other than regional ones.

Most important, the national political parties are increasingly unable to develop support in all regions, and this is greatly exaggerated by the effects of the electoral system. Thus, the classical Canadian model of "brokerage politics" in which parties won national support and regional interests were reconciled in caucus and cabinet, has been deeply eroded. As a result, for long periods of time, whole regions are frozen out of full representation in Ottawa. Surely this is in itself a major cause of regional alienation.

Thus, national political institutions are unable to serve as the central arena for reconciling regional and national interests. I do not believe these failures are the effects of any one government or party. They are built into the system. Nor should we blame the institutions entirely; they are in part victims of the growing range of differences which must be bridged.

Representational failure is also reflected in policy grievances in many regions. Thus there appears to be a widespread sense that Ottawa is unfair, that it has failed to deal effectively with regional disparities, or that it exploits the west in the interests of Central Canada, or of English-Canada at the expense of French-Canada. As the many attempts to construct a full "balance-sheet" of Confederation demonstrate, such views are extremely hard to evaluate in precise terms.

This analysis suggests that one primary direction for change should be to somehow strengthen the integrative potential of the central government. It assumes that federal politicians can and should effectively represent regions, and that they should seek to generate policies which transcend region and assert a broader national interest. In this view too, a condition for Ottawa's retaining, and perhaps even enhancing, its powers over economic management and other matters hinges on revitalization of federal institutions.

Bill C-60 does contain some elements which reflect this view. Most important is the proposal for a House of the Federation, which would transform the Senate into a regionally representative body, and which would also include an important element of proportional party representation. While provincial legislatures are given a role in selecting half the members, it is not designed to represent provincial governments. Indeed, I would argue that in the long run it seeks to undermine their capacity to claim to speak for their regions. This is the fundamental difference between the government's proposals and that for a House of the Provinces.

While the federal proposal is intriguing, especially in the mixture of modes of representation it embodies, I have some important reservations. It is hard to speculate on its effects: some feel it would be merely another patronage body; others that it has the potential to become a powerful representative body, rivalling the House of Commons. The dilemma is thus that on the one hand it might

end up not effectively defending regional interests; but, on the other hand, if it does achieve its goal, it undermines the supremacy of the House of Commons and the principles of cabinet government. It is thus a rather awkward and confusing hybrid.

I would have preferred far more consideration of ways to improve the ability of parties and the House of Commons to act as regional representatives. There are many possibilities here, though few of them have been fully developed and some could undermine Parliamentary and cabinet government as we have come to know it.

Thus there are proposals either for full proportional representation, or for some element of it, to provide more regionally representative party caucuses. Full proportional representation would in the short run provide a better fit between seats and votes. In the longer run it could well give rise to a more fragmented party system, and to permanent minority or coalition governments. If the proportional representation constituencies were based on provinces, it might also encourage the emergence of parochial "provincial" parties. Despite the difficulties, I believe serious consideration should be given to introducing at least some of the elements of proportionality into the selection of Members of the Commons. Other more modest changes are also possible. They would require moving away from party discipline and strengthening the independence of committees.

Probably the most important changes, however, lie largely beyond the realm of constitutional engineering - in strengthening the parties so as to provide greater integration between federal and provincial parties in leadership, organization and philosophy, and increasing the ability of the major parties to win national support. In different ways both the American and German party systems do a much better job of integrating national and regional politics, and of injecting local needs into the national legislature, than does our own.

Thus, I would have differed from Bill C-60 in placing less emphasis on the House of Federation and much more on the House of Commons and the political parties.

Even if that were done, it is most unlikely that the federal institutions could fully accommodate all regional disagreement. The

House of Commons necessarily operates on the principles of majority rule, which will in turn mean that on some issues French-Canadians will fear being swamped by English-Canadians, and that others Westerners or Maritimers will fear being over-ruled by Central Canada. As long as so many political divisions in Canada pit language against language, or region against region, this dilemma will remain. Nor, at least in the short run, will a more representative federal government reduce the powers or claims of provincial governments - and that is the most pressing problem.

The Problem of Governments

While language and region are indeed central aspects of the Canadian problem, the most important aspect concerns the relationship between governments. It is through them that regional and language tensions are given political expression. Thus, the Canadian crisis has taken the form of the relationship of the government of Quebec to Ottawa and the other provinces, and of the provinces in general to the federal government. Regional alienation and provincial aspirations to develop their own societies are opposite sides of the same coin.

The competition between governments is first a competition about representation: which level best represents regional and linguistic interests? It is, second, based on conflicting policy priorities stemming from the fact that federal administrations tend to argue for what they perceive to be the national or the majority interests, (which may not be the same thing), and the provinces speak for the particular social and economic needs of their regions.

These elements have increasingly combined in what seems to be a kind of competitive state-building, in which each level seeks to control all the levers of policy to promote the development of its own region. This perspective suggests that the central task for constitution making lies not so much in reforming central government institutions, but in regulating and making more effective the intergovernmental relationship. We are therefore directed to examine the division of powers, the machinery of intergovernmental relations, and the role of institutions like the Supreme Court, which are arbiters of the federal-provincial relationship.

Bill C-60 has relatively little to say on these matters, though they are prominent in the preceding White Paper. It leaves the division of powers until Phase II. It suggests the abolition of the disallowance and reservation powers as a quid pro quo for provincial acceptance of the language provisions, commits the government to consult provinces with respect to the use of the declaratory power, and provides for consultation with respect to Supreme Court appointments. It also requires an annual conference of First Ministers. In Section 99 it seems to provide for constitutional entrenchment of equalization, which I strongly support.

But, here lie what I believe to be the primary weaknesses or omissions in Bill C-60. It is essential that any constitutional revision directly concern itself with the intergovernmental relationship. It must provide a framework for constructive dialogue, set out principles for the resolution of conflicts and, most important, provide mechanisms which will facilitate co-operative decision-making.

This view is based on several assumptions. First, we have in Canada today two orders of government each exercising wide powers, commanding formidable bureaucratic and political resources, and controlling a large proportion of revenue and spending responsibilities. In pursuing their goals, each level of government tends to act in areas at least nominally within the authority of the other; "intrusion" is a two-way street. In virtually every important policy area responsibilities are shared: both are involved in economic development, consumer protection, and social policy, to name only three. This implies a high degree of interdependence and a strong potential for mutual frustration. It also implies that if effective national policies are to be developed, some degree of harmony, and even joint decision-making, is essential in many areas. This overlapping, duplication and inconsistency not only frustrates governments, but also groups and individuals.

To operate this complex process there has grown up a large network of federal-provincial and interprovincial relationships. Increasingly these have become politicized stressing competition

between rival political executives.

The process has had many successes, and often works well at the level of co-operation among bureaucratic specialists. But it has important failings in its ability to resolve conflict, to develop coordinated policy, and to respond to citizen needs. There are few clear decision rules. Deliberations tend to be secretive. Public accountability is rendered difficult. And there are relatively few incentives to agree.

In approaching these questions, federal and provincial governments tend to have different perspectives. The federal government tends to be the country-builder, emphasizing the need for and legitimacy of national leadership, arguing that basic responsibility for the economy, redistribution and other matters must remain in Ottawa, and justifying action in provincial fields by over-riding national needs. Hence it tends to argue that Canada is already the most decentralized federal country - perhaps too decentralized for Ottawa to play its proper role in maintaining national unity or managing the economy. So decentralization of power is resisted, and there is less willingness to grant provinces a central role in national policy-making.

Many provinces, pursuing their own development strategies argue for fewer federal intrusions, more fiscal and jurisdictional powers, and a greater voice in national policies which affect them. They are much less willing to grant Ottawa's claim to represent the over-riding national interest.

The Quebec government, indeed every Quebec government since 1960, asserts not only the role of provincial spokesman, but also that of spokesman for a national community, with a fundamental responsibility to seek more autonomy in order to promote the cultural and economic well-being of Quebec.

Hence, when it comes to the division of powers we have three broad drives: for maintaining and perhaps enhancing federal power, for extending provincial powers, and for a special role for Quebec.

Along with these governmental demands, each commanding substantial popular support, are the concerns of other groups. These relate primarily to the costs of duplication, conflict, delay, uncertainty, lack of accountability, etc. The demand is for reduced entanglement, and a clearer delineation of the respective powers of governments.

Nationally oriented business and labour groups also tend to argue for stricter adherence to a common market, national standards, and the like.

When one tries to resolve these competing claims one sees instantly why the government hesitates to embark on discussion of the division of powers. Here the conflict between differing conceptions of country and community is greatest, and the technical complexity of the issues most baffling. Nevertheless, I believe a few points can be made about the division of powers and the machinery for intergovernmental relations.

Machinery

The conflict among the principles of country, province-building and Quebec nation-building, and the need for institutionalizing inter-governmental relations has led me to support proposals for the establishment of a House of the Provinces. Such a House would directly represent the provincial governments at the centre, would be a forum for deliberations of federal-provincial matters, and provide a provincial voice in federal policy-making. I think that the principle of the idea is more important than any of the particular variants advanced by the Ontario Advisory Committee, the Conservative Party, the British Columbia Government, the Bar Association Committee or others.

The proposal can be seen from two perspectives. First, on the assumption that none of the three types of state-building can be defeated, it provides a framework for dialogue among them, one which should, moreover, be sensitive to popular shifts of opinion and changing policy needs. Second, it is a compromise; it gives each side something of what it wants but denies other things. Thus, the centralist retains, and may even enhance Ottawa's broad powers to intervene - but this can only be done with provincial consensus as reflected in the House. To the provincialist it says "Yes, you can have more voice in national policy, but you will not be able to exercise it independently".

Third, for the public, it renders the federal-provincial debate more open. It enhances accountability in that provincial governments will be held directly responsible for the actions of their representatives.

This approach to the Second Chamber suggests that its powers would be limited. Primary legislative responsibility would remain with federal and provincial governments. The House of the Provinces would consider all legislation but would have a direct veto only on federal actions which - as with the exercise of the spending power or emergency powers under the Peace, Order and Good Government clause, encroach directly into areas of provincial responsibility. It would be inappropriate for such a body to be able to initiate legislation. Indeed, my view is that it would not be an integral part of the national Parliament but a body within which representatives of the national and provincial governments come together.

No institution, certainly not this one, can guarantee inter-governmental harmony. But it does offer important incentives. It requires Ottawa to consult in advance of legislation and it means that if provinces were to take a parochial or obstructionist position they would do so in the light of national publicity and would have to accept the consequences.

There are two primary objections to such a body. One is that it entails the loss of those functions which the present Senate performs well: especially that of investigating matters of broad public interest, and providing a careful, detailed, scrutiny of federal legislation. I would not want to lose these roles, and would look to reform in the House of Commons, especially at the committee level, to achieve similar results.

The other is that the House would reinforce the dominance of the executives of federal and provincial governments in a system which is already executive-dominated. I agree with this concern: again, however, I would seek alternative means within the constitution to limit executive power: in a freedom of information provision, stronger committees, altered procedures for confidence votes, etc., And, of course, I think it is as important to limit executive power at the provincial as at the federal level.

Thus I believe that some form of the House of the Provinces is a desirable innovation which would meet our needs better than the federal government's proposed House of the Federation or an elected Senate. Neither of these is directed at the central problem of the

intergovernmental relationship.

The other element of the intergovernmental machinery in Bill C-60 is the Supreme Court. Certainly in any new constitution it will play an exceedingly important role. The essential point is that the Supreme Court will be, and be seen as, independent of any of the levels of government among whose interests it is to decide. This dictates that the court be entrenched in the constitution, and that judicial appointments be made in a manner which demonstrates they have widespread support. This means that apart from the the necessity of representing a given number of Justices trained in the Civil Code, there should be no explicit elements of regional, much less governmental representation. Thus, rather than adopting the approach taken in Bill C-60, I would rely on informal mechanisms to ensure that a broad regional distribution was maintained: such norms would doubtless appear if the provinces, either through the House of the Provinces, or by means of a judicial council involving all eleven governments, were directly involved in appointments.

The Division of Powers

Few of the recent proposals have dealt extensively with the division of powers, though many suggestions have come from the provinces. I am most impressed with the proposals in this regard to be found in the Bar Association Report.

I would like to mention a few principles: First, while much can be done at the administrative level to reduce duplication and mutual entanglement, the prospects are limited. In every federation there is much interpenetration of state and national activity; nowhere do "watertight compartments", in which each level is independently responsible for a given set of functions, prevail. Given changing public preferences, emerging policies, and the objective of governments, it is impossible to conceive of any once-and-for-all neat division of responsibilities. Nonetheless, this can be a starting point. The more we are able to allocate responsibilities unambiguously to one or other level, the less chance for conflict, for mutual frustration and delay or confusion. We shall try to narrow down the

range of shared responsibilities as much as possible but a very broad range of joint concerns will inevitably remain.

Second, this means that the law should recognize that there will be substantial areas of overlap. Thus we are likely to have a much longer list of concurrent powers than there is now, but these can be accompanied by clear rules about paramountcy and the resolution of conflicts.

Many areas of government policy have both local and national dimensions: for example, housing is primarily local in impact, but its financing is very much part of national economic management. Allocations of power will have to recognize this dual character of many activities.

Third, in any conceivable division of powers which is politically acceptable, "national" policies in areas like economic planning will depend on actions by both levels of government, and will therefore require some form of joint decision-making.

Fourth, most general propositions, such as that Ottawa should have the chief economic powers and the provinces chief cultural or social powers, break down. It is simply impossible to believe that provinces will give up their present very large role in shaping provincial economies. On the other hand, to reduce Ottawa to the role of economic manager will, in the long run, reduce its political effectiveness; it must play a social and cultural role too.

Fifth, greater concurrency, together with opting-out provisions is one of the primary means available for responding to Quebec's desire for extended powers.

Sixth, it is important to spell out more clearly the relationship among some present heads in the BNA Act, and indeed to clarify the meaning of those heads themselves. For example, what is the relationship between the trade and commerce power and the provincial control over natural resources? What exactly does "property and civil rights" permit provinces to do? What is the meaning of "peace, order and good government?" The vagueness of such provisions, and the complex ways in which they have evolved through judicial interpretation mean that the BNA Act is totally inadequate as a guide to citizens or governments with respect to the respective powers.

Seventh, flexible elements which permit federal intervention in matters of over-riding national interest must be retained, but with strict provincial controls over their use.

Additional considerations

My analysis has been based primarily on the question of the Canadian community: the relationship between language groups, regions and governments. These do, I believe, define the Canadian crisis.

I have suggested two directions for change: first, efforts to make the federal government itself more able to represent and accommodate within itself Canadian linguistic and regional diversity. I would do this primarily through the House of Commons. In the long run this may reduce the tendency of regional grievances to be expressed through assertive provincial governments.

Second, I have suggested the need to focus on the inter-governmental relationships as even more fundamental. But we should also remember that the constitution serves other purposes.

In approaching constitutional change, two other prime questions must be borne in mind: what are the implications of change in functional terms - the ability of Canadian governments to generate together the policies required in an advanced capitalist society, and indeed one which is so vulnerable to world economic forces. Will jurisdictional changes limit the collective capacity of governments to develop effective policy, to respond to new needs, to meet the demands of various social groups, and so on?

Second, what are the consequences for democratic values? Do changes make citizens more or less effective?

Bill C-60 addresses some of these questions, notably in the lists of civil and political rights, and in the discussion of Parliament and the executive. I am not an expert in these areas, and will confine myself to observing that, with respect to the Bill of Rights, I would like to see the addition of the principle of freedom of information, and would like a much more tightly drawn escape clause. On its face, section 25 seems to vitiate all that has gone before. We should also use this opportunity to put tighter limits on the War measures Act. With respect to the executive, I would like to see not only specification of the role of the monarch and the Prime Minister, but also a fuller spelling

out of other important inherited constitutional principles: ministerial responsibility, the rights and privileges of parties, the Opposition, and so on.

Unfortunately as we assess proposals from the perspective of functional and democratic needs, along with the need to reconcile different conceptions of community, we find that difficult trade-offs have to be made among all three sets of values.

The Question of Procedure

I would like now to turn to the question of the procedure for enacting constitutional changes, about which this Committee has heard so much conflicting evidence. My opinions derive not so much from my reading of the constitutional precedents, though I do lean to Professor Lederman's interpretation of them, but rather from my conception of the spirit of federalism and of current political realities.

Bill C-60 is complicated because of the varying status of its clauses. The elaboration of the several types of clause at the beginning of the Bill is most obscure. Essentially, the federal government claims it can enact some clauses as part of the constitution completely on its own. Others it proposes to "constitutionalize", binding itself, but without actual entrenchment which would put the changes beyond the reach of any particular government. Still other sections it is admitted from the outset do require provincial agreement. Thus, while Bill C-60 is indeed a fairly comprehensive constitutional package, in the process of implementation it will be split into several parts. This makes it very hard for a citizen to judge just what passage of the Bill will actually achieve. In addition, it is noted at the outset, that its purpose is to "encourage public discussion" of proposed changes; yet the form of a Bill implies something much more firmly fixed. The necessarily technical quality of legislative language tends to obscure the underlying principles and reduces the Bills' educational value. Thus - in retrospect - I think I would have preferred that the ideas were presented in the form of a White Paper not a Bill such as this.

Second, the federal government proposes to divide the whole process into two phases, one to be completed by 1979, the other by

1981. Phase One includes matters which Ottawa feels it can do on its own, together with items which it feels most strongly about. Thus it focusses on language and civil rights, and on federal institutions.

There are a variety of problems with this approach. First, given the nature of the proposals, and the intention to promote wide discussion, the deadline of July, 1979, for the first Phase seems somewhat unrealistic. The Bill could, of course, be pushed through Parliament by then, but I doubt there would be time to achieve the degree of consent and understanding by the provinces and the country at large which is necessary for basic constitutional provisions.

Second, since the 1960's, the federal government has asserted the primacy of individual and collective rights on its constitutional agenda. Equally the provinces, especially Quebec, have asserted the primacy of the division of powers. All the governments at Victoria, and the provincial governments on their own in 1976, achieved considerable progress with the division of powers, and it would seem reasonable to build on those discussions, rather than set them aside.

Third, it seems to me that the division of powers is in fact inseparable from the discussion of federal institutions. By that I mean that the nature and responsibilities of a second chamber, for example, depend very greatly on what changes in the division of powers are made. While to have all these matters on the table at once does complicate the discussion, it permits trading and compromises which could not be possible if the discussion were separated. Indeed, I think it is only when the extreme difficulty of arriving at agreement on the division of powers is recognized that the case for the House of the Provinces becomes compelling.

Fourth, I think that there is an understandable fear among the provinces that federal willingness to debate the division of powers would wane considerably once it had achieved Phase I.

Thus, because of the inherent inter-relationships of Phase I and Phase II, I do not believe they should be separated. Obviously in any process of debate one cannot discuss everything at once: but the order of discussion should be a negotiated one.

Similar considerations apply to the ability of the federal government, under Section 91(1), to enact major changes in the Senate and Supreme Court, without agreement of the provinces or reference to Westminster. The fact that the central government is now alone responsible for the Senate and for the Supreme Court is an anomaly of the existing Constitution stemming from the highly centralized view of the federation held by most of the framers of the BNA Act and from the quasi-colonial position of Canada at Confederation.

My own approach assumes that the federal and the provincial governments are equals; neither has moral or juridical superiority over the other. Since the Supreme Court and the second chamber are institutions which define the federal bargain, and provide the framework for the interaction between governments, it seems to me that the provinces must agree to their form.

In Bill C-60 the very title "House of the Federation", the fact that the provincial legislatures will nominate half the members, that its membership will depend in part on the results of provincial elections, and the nature of its powers, all suggest that the proposal is fundamentally oriented to the federal relationship. It will be a body which in a real sense marries federal and provincial politics. The change envisioned goes far beyond changes like altering the age of retirement, which have previously been made by Ottawa alone.

In addition, many other proposals for change in the second chamber, such as that advocated by B.C., the Bar Association Report, and the Ontario Advisory Committee, would make the second chamber even more a "federal-provincial" body and therefore would be even less amenable to unilateral change by the federal government.

Both the procedure for selection of members and for a special majority with respect to legislation of special linguistic significance would seem, at least in spirit, to fall within the exceptions to federal power set out in Section 91(1).

Finally, the legitimacy of any set of constitutional provisions depends on a large measure of consensus. To push ahead with these changes even over provincial objections would deny the changes that legitimacy. They would feed suspicion of federal dominance felt by many Quebecers, and thus might well be counter-productive in persuading Quebecers of the virtues of federalism.

Having said that I disagree both with unilateralism with respect to some of the major items in Bill C-60, and that I disagree with the phasing and timing set forward by Ottawa, I should also say that I sympathize very much with the considerations which no doubt led to this strategy.

Debate on constitutional change has indeed been drawn out and has continually failed. It has been hard to convince many provinces - not to mention many citizens at large - of its importance. The discussion has been carried out with no agreed rules for registering decision. This has meant that among important groups our basic institutions have been in question for many years now. There is a very understandable desire on the part of the federal government to break the log-jam and take the initiative. It is also vital that some progress toward reform be made before the Quebec referendum campaign. Quebec voters must have before them a relatively clear "federal option" and the federal and provincial governments must signal to Quebec voters what kinds of changes they are likely to accept. Hence there is considerable urgency to get on with it.

However, I believe most provinces are now willing to join the debate seriously, and are prepared to compromise some of their interests in order to reach agreement. Moreover, as I said above, I think that any set of changes which was seen to have been enacted by Ottawa, over the protests of the provinces and of most Quebec federalists, is unlikely to be persuasive to Quebec referendum voters.

So, while I would profoundly hope that a fully-developed set of federalist proposals could be set forth in the referendum campaign, I doubt that is possible. If that is true, it would be better for federalists to have demonstrated through their proposals and informal agreements the kind of federalism they envisage, and to be seen to be moving towards agreement, than to have formally enacted some basic change which had only limited consent.

I believe the route to major alteration in either the Senate or the Supreme Court must be through intergovernmental consultation and agreement. The responsibility for a co-operative attitude here, of course, lies as much with the provinces as it does with Ottawa.

One final point. This discussion of the procedures for adoption of the Bill C-60 proposals has implications for the broader question of the amendment process. Few things illustrate the weakness of the federal system more than the inability to find agreement on a formula long ago; today we pay a heavy price for past failures.

Past discussion of amendment formulae turned mainly on the question of which combination of governments would need to agree in order to enact different kinds of change. Who would have a veto, would each province have equal weight, or not, and so on. Wide agreement was reached in the Victoria amending formula. But recently it has been opposed by British Columbia, which argues that it, like Quebec and Ontario, should have the status of a region, and Alberta, which, afraid of Ottawa and the provinces ganging up to acquire control of its petroleum resources, now emphasizes the juridical equality of each province, and therefore argues for complete unanimity.

But a more fundamental issue has now been raised: amendment might not simply be the responsibility of governments; it also involves voters. In this view, sovereign powers inhere not in governments, but in the people. The extreme statement of this view is that a constituent assembly should be elected to write a constitution, which would then be submitted to the electorate. However desirable some may consider that to be it seems unrealistic.

A more limited role for the people has been suggested as a possibility by the federal government. That is if the government of one region, or the federal government, in the face of regional unanimity, refused its assent to an amendment, a referendum might be held in that region to determine the will of its people. This would be the Victoria formula plus referendum. More dramatic could be a general referendum process without any necessary governmental agreement.

I have many doubts about a referendum procedure in the Canadian context. First, to design one would require answering many very difficult questions concerning the nature of the majorities required, the responsibility for drawing up and putting questions, the conduct of campaigns and the like.

Second, in the present process of renewal, one would want to put a new constitution to the people only if there is an extremely high probability of its succeeding in every region: the consequences of a result such as that on the conscription referendum, or even if only one region rejected the package, would be intolerable.

Third, in the present context, the use of the referendum carries with it the inevitable implication that it would be a weapon that one government would hold over the heads of others. There is a possibility that one government could ride a transitory wave of public opinion to alter permanently the balance in the federal system.

Thus, while I do not rule out referendum techniques entirely, and while I admit their attractiveness, especially in the advisory sense, I am concerned about its introduction now. I do believe that more public debate of constitutional options is necessary and for that reason would much like to see the mandate of this committee expanded and to see each province establish a similar legislative committee.

Conclusion

To sum up, I would like to reiterate that the central constitutional problems facing us lie in the relationships between governments. It is, I believe, not too difficult to think through ways of reconciling the tensions between the federal government and nine of the provinces, though even here, we should not minimize the difficulties. It is - and has been for many years - very much harder to envision ways of reconciling the objectives of Quebec with those of other governments. It is true that for some purposes there is a common interest between Quebec and other provinces which may be served by such things as a generally larger provincial voice in national decisions, and perhaps by an across the board decentralization. It is also true that through powers it now has, Quebec can achieve much of what it wants, as Bill 101 attests, and that more concurrency with provincial paramountcy, together with opting-out provisions, may be used to effect a de facto special status for the province. I do not know whether these would be sufficient to convince Quebecers of the value of federalism

in the long term, or even whether these minimal responses would be acceptable to other Canadians. I am convinced, however, that important as the other dimensions are, this is the most important. The fundamental choices we have to make concern not the minutiae of the appointment process for Supreme Court judges and the like, but more basic choices about the role of Quebec, the other provinces, and Ottawa in the Canadian political system.

Committee members will see that there is little that implies radical changes in these proposals. Essentially they are designed to build on what has been emerging anyway. It is very tempting for us academics to write any number of "ideal" constitutions which change things in a fundamental way. I have been impressed, however, with the contemporary realities of political power, and the essential need to define proposals in such a way as to have some possibility of acceptance by the major power centres, which in Canada means the leaders of eleven governments. That greatly limits the scope for change.