

AMENDING THE CANADIAN CONSTITUTION

David Beatty

The Charlottetown Accord is dead. So what's new? It's not as if we haven't been here before. Charlottetown joins Victoria and Meech Lake as graveyards of constitutional tombstones which clutter so much of our history.

So what should we do? It is clear that the problems — the constitutional issues — will not go away. They remain as pressing and irritating as ever. The questions we have been struggling with for the last thirty years — the status of Québec, Aboriginal self-government and the Senate — cannot just be ignored. Sooner or later we will have to start down the path of constitutional reform again.

In the past, whenever we have tried to pick up the pieces of earlier failures, we have always gone back to the same process of constitutional renewal. Each time we have put our faith in a process of "executive constitutionalism" in which the Prime Minister, his provincial counterpart and their closest cabinet colleagues and advisors closet themselves behind closed doors to hammer out a new constitutional framework for the country. Even though this time large numbers of other Canadians were superficially involved, in the end, the essential components of the agreement were produced by intense negotiations among our political elites.

This time we must do things differently. If we continue to ignore the lessons of our history we will, as the saying goes, be doomed to repeat them. It is time to consider the possibility that to a large extent our failures in the past have been caused by the way we have gone about constitutional reform.

Admittedly, there is a sense in which executive constitutionalism is the most natural way of trying to work out new constitutional arrangements. If you think that a constitution is like a social contract between different interests and groups, negotiation and compromise — swapping and horse trading — is the obvious way to play the game. Encouraging people to give and take, to agree to things they dislike, is the way contracts are made.

However natural it is for people to barter and bargain when they think of constitutional reform, it is important to recognize that when we design new constitutional arrangements in this way, we are strongly biasing what their substance and shape will be. Like any method of constitutional change, executive constitutionalism exerted a powerful influence on what terms and conditions were included in the final settlement.

Characteristically, bargaining procedures give priority to those interests and ideas which people care about most. Self-interest dictates the terms of a deal. Bargaining procedures are notorious in

discriminating against interests and ideas which have no one to champion their cause.

The bias of the bargaining process against more objective and detached approaches is dramatically illustrated by the Charlottetown Accord. Interests and ideas which did not figure high on anyone's shopping lists generally did not fare very well.

Undoubtedly the most prejudiced groups were Aboriginal women and democrats whose Charter guarantees were put at risk in exchange for the approval of the patriarchs of the Assembly of First Nations to the rest of the deal. No one can doubt that had Aboriginal women been given the seat at the bargaining table to which the Federal Court of Appeal said they were entitled such a serious threat to their constitutional rights would never have been proposed.

Other issues dealt with in the Accord, like the nature of the Canadian economic union, or the role of the third (judicial) branch of government, also suffered from the focus on self-interest, although in a slightly different way. Rather than being resolved in a way which prejudiced particular interests or ideas, Canada's economic union and the Supreme Court were, for the most part, ignored.

Even though there was widespread agreement within the academic and professional communities that our constitutional arrangements in these areas could benefit from meaningful reform, practically nothing was done. In both areas there is a substantial consensus that our political leaders missed good opportunities to shore up what are central pillars in the constitutional framework of our country. Because neither issue was pressed hard by anyone at the table, the Accord effectively constitutionalized the status quo.

As well as distorting the shape and substance of the Accord by leaving out or ignoring various interests and ideas, the focus on self-interest also skewed what the parties ended up putting in.

One of the most striking features of the Accord was that a lot of what was included would have had virtually no effect on the constitutional make-up of the country. Symbols and pious declarations cost very little and so were relatively easy to accept.

Part three of the Accord dealing with Canada's social and economic union was the most striking example of the parties' preference for empty phrases over meaningful reform. Rather than remove barriers and inequities which interfere with the freedom of Canadians to pursue their economic interests and social needs equally across the country, the negotiators were satisfied with the weakest expressions of political intent.

The Canada Clause was another example of how caught up the negotiators were with words. Everyone wanted their most important interests and ideas to be recognized in the strongest possible terms. This was so even though, in the view of many experts, the clause would have added virtually nothing of substance to the Constitution.

The fear that the Canada Clause would create a hierarchy of rights and compromise the protection which the *Charter* provides was, in reality, quite unfounded. The fact is the Supreme Court has already ruled that governments in Québec can act to protect the distinctness of their society so long as they do not rely on policies which are too heavy-handed. There was nothing in the Canada Clause to suggest that this fundamental principle of judicial review should or would be relaxed.

It is important for Canadian to see the linkage, to understand that the way we have gone about constitutional renewal has had a profound impact on the quality of the reforms that have been proposed. The fact is that the weakest and most dubious parts of the Accord are very natural and logical ways for people who are wheeling and dealing, and subjected to intense psychological pressure, to express themselves.

If we are going to do things differently this time and avoid the weakness of the Charlottetown Accord and the earlier failures of our past, we must think of new ways of changing the constitutional framework of our government. We must search for other methods of amending our constitution which are not motivated by such self-interested and emotionally charged behaviour.

One possibility would be to create a specialized constitutional assembly or convention whose only task would be to discuss and deliberate questions of constitutional reform. The idea would be to design a body which would conduct its proceedings in a principled and analytical way. Rather than thinking of constitutional renewal as a process of cobbling together a long list of competing and often conflicting ideas, it would explore the possibility of organizing the constitutional framework of our country around a set of very basic and widely accepted first principles.

We would not need very many. If, for example, the members of a constituent assembly began their deliberations with a commitment to the principle of equal autonomy — to the idea that every Canadian has an equal right to control as much of their lives as possible — it is virtually certain that issues like gender and voter equality in our Aboriginal communities, the nature of Canada's social and economic union, and the organization of the Court would be resolved very differently than they were in the Accord.

Recognizing a principle of equal autonomy would certainly protect Aboriginal women and democrats from the risks of discrimination that plagued the Accord. In the economic and social sphere, studies already exist which show how the principle of equal autonomy leads naturally to the idea of economic citizenship around which most, if not all, of the interests of the federal and provincial governments could be rationalized. Similarly, if we began our discussion about the Supreme Court of Canada with a reaffirmation of the values of personal autonomy and democratic accountability, we could be confident of finding a better method of selecting Judges for the Court, one which would favour the appointment of human rights activists in a way the process recommended by the Charlottetown Accord would not.

It will require some imagination and considerable energy to figure out how such an approach to constitutional renewal could best be operationalized. If rational dialogue and debate are going to replace high-pressure tactics and backroom deals as the order of the day, we will need a completely new *modus operandi*. Every institutional dimension of how such a body would be constituted and would conduct its affairs would have to be carefully considered to ensure that when it turned its mind to the difficult issues such as Aboriginal self-government, our economic and social union and the Supreme Court, reason and cool deliberation would carry the day.

The fact that there are no ready made solutions which could be substituted for the current method of executive constitutionalism should not lead to despair. There is much we can learn from the experience of other countries, and during the next two to three years we have some time to consider which alternatives best suit our needs. Until Québec has gone through its next provincial election and possibly another referendum on some form of independence or sovereignty association, all of the substantive issues of constitutional reform will be on hold.

We should see the next two or three years providing us with a valuable window of opportunity. Rather than trying to solve all of our constitutional difficulties at once, as we have in the past, we can concentrate our attention on the institutional and procedural aspects of constitutional reform. As well, by giving the job to a specialized body, our politicians could concentrate their energies on the social and economic disabilities under which our country is labouring.

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