

weeks, politicians asked how it was that a couple of small provinces, representing between them less than ten percent of Canadians, could resist. The answer was, of course, that Clyde Wells and Gary Filmon probably could not have withstood the pressure had they not realized their sentiments reflected widespread English Canadian opinion.

Now that Meech is dead, Canadian constitution-making is in a shambles. Even so, Meech did clarify two things. First, until Meech the strongest card a politician could play was to portray national unity as threatened. That card was played to the hilt in Meech and English Canada did not respond. It is equally unlikely to respond to deals it finds unacceptable in the future. Special status is unlikely to succeed in any form and Canada without Québec is now openly contemplated. Second (and here I must admit to a twinge of doubt), the old process is dead. I cannot imagine any politician undertaking constitutional reform in a manner as closed as the Meech Lake one. The doubt arises, though, from a fear that panic ensuing from a threatened referendum in Québec could lead to anything. Finally, constitutional reform itself probably should move more slowly than it has in the past. We have to absorb the massive implications of 1982 and sort out in our own minds all sorts of priorities of rights,

identities, and federal-provincial balances required to make Canada governable again — for at the moment it seems frighteningly ungovernable and ungoverned.

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1. G.M. Grant, "Review of Goldwin Smith, 'Canada and the Canadian Question'" *The Week* (April 1891).
2. Richard Simeon, "Political Pragmatism Precedes Democratic Process" in M. Behiels, ed., *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord* (Ottawa: Ottawa University Press, 1989) 125-35 at 135.
3. For a quick summary of post-1945 constitution making see Robert Bothwell, Ian Drummond, and John English, *Canada Since 1945*, Rev'd. Ed. (Toronto: University of Toronto Press, 1989) c. 28, 29, 32.
4. Of course there were elements of this in the minority religious clauses of the *British North America Act*. Those clauses, however, were not phrased in universal terms but related to specific provincial jurisdictions such as Manitoba and Québec. In effect, they were caveats to the norms of federal-provincial power sharing.
5. Alan Cairns, "Citizens and Their Charter: Democratizing the Process of Constitutional Reform," in Behiels, *supra*, note 2, 109-124.
6. See as an example Philip Resnick, *Letters to a Québécois Friend* (Montreal: McGill Queen's Press, 1990).

MEECH LAKE AND DEMOCRATIC POLITICS: SOME OBSERVATIONS

Allan Tupper

Canadian elites have long been concerned with constitutional reform. But only recently has debate about the democratic quality of constitutional change become prominent. Indeed, a noteworthy aspect of the Meech Lake round of constitutional negotiations was its explicit focus on such broad questions as how the Canadian constitution should be amended, the relative roles of governments, interest groups and citizens and the desirable extent of public participation in constitutional negotiations. As Reg Whitaker argues, our relatively late discussion of such basic issues reflects deeper weaknesses in the Canadian democratic tradition, notably a powerful elitism, and an anti-democratic strain in our political culture.¹

My goals in this brief paper are threefold. First, I outline and try to explain briefly the various criticisms, during and after the Meech Lake negotiations, of "executive

federalism" as the basic process of constitutional change. Second, I outline and assess some of the possible alternative methods for securing constitutional amendments. Finally, I speculate about some of the lessons the debate about the Meech Lake process might hold for the broader conduct of Canadian politics. Does the Meech Lake experience raise questions that are somehow unique to constitutional negotiations or does it reflect broader concerns about the quality of contemporary Canadian democracy?

Before probing these issues, a number of qualifications and assertions merit some attention and explanation. First, while I am a member of the large chorus of critics of Meech Lake's democratic qualities, I offer neither a panacea nor a powerful, overarching explanation of our recent constitutional experiences. Second, it is important to avoid falling into the trap of arguing that a reformed, more

democratic process of constitutional renewal, however defined, will magically lessen deep and abiding conflicts of interest. Such sentiments were widely and strongly expressed immediately after the collapse of Meech Lake and to a degree they underpin the rationale of Keith Spicer's task force. Reformed processes will make some issues more prominent in future debates, will raise the influence of some groups and lessen that of others and, to the degree that a desire for public input is satisfied, will enhance the democratic legitimacy of resultant constitutional reforms. But more than this should be neither expected nor promised. Indeed, we must be cautious in predicting necessarily benign results from new processes of constitutional renewal. In this vein, some of the underpinning assumptions of the Spicer task force require serious debate. For example, an implicit argument is the fuzzy notion that Canadians will somehow become more tolerant of each other if only they can engage in a dialogue unmediated by governments, interest groups and political parties. A related, and very questionable, assumption is that the "real problem" is that Canadians, through poor communications, do not really understand each other's aspirations. But who is to say that a better informed citizenry will necessarily be more tolerant? More importantly, is it not possible that Canadians, armed with greater understanding of each other's demands, will become more stubborn and less willing to compromise? Third, we certainly do not enjoy perfect knowledge about public attitudes toward the Meech Lake process. For example, how many Canadians supported the goals and substance of Meech Lake but were appalled by the process and hence unable to give their full support? Similarly, how many constitutional actors are best labelled as "strategic democrats"? That is, did a large number of Meech Lake's opponents wrap their opposition in the robes of democratic propriety when, in fact, their opposition was rooted in the substance and symbolism of the proposed Accord? Another concern flows from this point and it is a reminder that an obsession with process can become conservative if it deflects attention from spirited discussion of the content of proposed constitutional reforms. Here reformers should remember that the democratic quality of proposed reforms is as important as the democratic quality of the process. Another remarkable feature of the Meech Lake debate is the relative silence of philosophers about both substantive and procedural questions. Those most informed and skilled in the debate about democratic politics continue to yield the constitutional reform field to such traditional observers as constitutional lawyers and students of federalism. We are not well served by the curious abstinence of our philosophers. Finally, the following discussion assumes that

future constitutional negotiations will involve the eleven existing governments (and possibly the territories) and that some form of federal system of government will be maintained. If such assumptions are not met and if we consider seriously a sovereign Québec and other fundamental political realignments, the requirements for democratic processes become much more complex. Their discussion is beyond the scope of this short essay.

EXECUTIVE FEDERALISM UNDER ATTACK

A fundamental characteristic of the Meech Lake debate was a powerful consensus among interest groups, journalists, and academic observers that the process of change employed was flawed, ineffective, and unjust. Indeed, even a cursory examination of the public statements of many Canadian interest groups reflects a deep anger about their exclusion from a round of constitution-making that directly affected their political interests and goals.

At the heart of the critique were several intertwined concerns. Among the most important was the idea that Meech Lake, unlike the reforms of the early 1980s, was not preceded by a focussed public debate about a relatively widely understood and accepted constitutional agenda. A fundamental constitutional change was negotiated in secret and unveiled to a surprised and, in some cases, uninformed public whose role was to accept the handiwork of constitutional elites.

The second core concern was that the Meech Lake process was too dominated and orchestrated by the First Ministers and their closest bureaucratic advisors. This process of intergovernmental negotiation, normally described as "executive federalism", has often been assailed as detrimental to the quality of Canadian democracy. For example, more than a decade ago the late Donald Smiley denounced executive federalism as too secretive, too dominated by the political and bureaucratic drives of governments as complex organizations, and too oriented toward the aggrandizement of executive power at the expense of legislative input and public accountability.² But during the Meech Lake debate a new and powerful indictment was levelled at executive federalism when a range of interests challenged the capacity and willingness of the First Ministers to represent their constitutional demands. Women, aboriginal peoples, the disabled, and the representatives of various ethnic groups unanimously asserted that governments, as presently constituted, could not articulate their constitutional visions. The image of "eleven

able-bodied white males" negotiating secretly our constitutional future became an ingrained aspect of the Canadian constitutional landscape.

Such complex problems were exacerbated by the federal government's firmly held, albeit deeply elitist, notion that the Meech Lake Accord was unamendable given the complexities of the negotiations involved and the intricacies of constitution-making in a complex federal state like modern Canada. Moreover, an already confused undertaking was made more incomprehensible by a lack of detailed discussion papers and by an acute absence of clear, publicly stated rationales for Meech Lake's component parts. The federal government was content to advocate acceptance of Meech Lake as a necessary component of a broad strategy of national reconciliation. Detailed explanation of Meech's parts was apparently unnecessary given the lofty goals involved.

Two other factors merit attention when probing the malaise surrounding the Meech Lake negotiations. First, the range of debate was necessarily limited when the two major federal opposition parties — the Liberals and the New Democrats — quickly, and controversially, supported the proposed accord as negotiated by the federal Conservative government of Mr. Mulroney. Such interparty consensus robbed the process of a compelling and probing Parliamentary debate into the rationale and substance of the proposed reforms. Second, several observers have argued compellingly that national media coverage of Meech Lake failed to offset the glaring inadequacies of the political debate. Media coverage was obsessed with the personalities involved, the regional implications of proposed changes and the short term partisan implications.³ Detailed analysis of the content and possible consequences of the proposals was conspicuous in its absence.

It is now well known how the process of executive federalism staggered toward the bizarre meetings in Ottawa in June 1990 where Canadians witnessed the spectacle of weary, often angry, men arguing about options, which, because of the secrecy involved, were neither known to, nor understood by, Canadians. During this troubling period, various conspiracy theories were advanced by the audiences as they predicted "worst case" scenarios for their constitutional quests. Widespread public cynicism was undoubtedly heightened by Mr. Mulroney's intemperate bragging about how he tried to manipulate the Ottawa meetings and how, far from bothering him, the process was congruent with a model of elite accommodation that had

been historically employed.

Spirited defences of the Meech Lake process were few in number. Some observers pointed to the new requirement for legislative approval of constitutional reforms as a step toward greater democracy. Others argued that it was incorrect to assert that Meech Lake was "sprung" on an unsuspecting public given that Québec's demands for further constitutional reform had been widely known and debated for some time both within and without Québec. Yet another argument ultimately acknowledged the defects of the process but maintained that the political goals of Meech Lake were so important that they must override concerns about the quality of the democratic process. Once Meech Lake was ratified and Québec entered the constitutional family, it was argued, the deck would be cleared for important and necessary discussions about how to conduct future constitutional negotiations. Democracy was important but national unity was a deeper, overriding concern. In all of this, it is curious that governments never attempted to declare that the passage of Meech Lake was an undertaking of such importance that normal processes of democratic politics must be sacrificed and that a strong dose of unfettered elite negotiations was essential if national unity was to be maintained. It is, of course, difficult to gauge public reaction to such a declaration, but it is at least arguable that a forthright articulation of such a proposition might have garnered substantial public support.

"Despite the myriad inadequacies of the Meech Lake process, democratic politics ultimately prevailed over the ambitions of governments."

What accounts for the deep and widespread concern about the process of constitutional change in this country? A preliminary answer lies in the significant expansion of Canada's constitutional agenda in the 1980s. As Alan C. Cairns has persuasively argued in a number of essays, our constitutional plate is no longer filled exclusively by the governments' agenda with its heavy focus on federal-provincial questions, institutional concerns and the status of Québec within Canada.⁴ The constitutional agenda is now also burdened by complex questions about individual and collective rights, the relationship between citizens and state and the rights and privileges accorded and denied to particular interests by constitutional provisions. As induced by the advent of the *Charter of Rights and Freedoms*, many

Canadians and their interest groups see themselves as significant stakeholders in constitutional negotiations. They no longer believe that governments should control the agenda and they are deeply frustrated and angered by processes like executive federalism which limit their participation in constitutional reforms that materially affect their interests. To employ Cairns' apt terminology, the "people's constitution" and the governmental agenda are increasingly competitive rather than complementary. A major upshot of these complex developments is that a cornerstone of executive federalism — widespread public deference to the wisdom and authority of political leaders — can no longer be assumed. Many Canadians are now confident in their ability to advance and define their constitutional interests independent of political leadership.

Before moving ahead, a perhaps self-evident point requires some attention. Despite the myriad inadequacies of the Meech Lake process, democratic politics ultimately prevailed over the ambitions of governments. To a degree, the Accord's passage was derailed by changed political circumstances in Manitoba, Newfoundland and New Brunswick. But also important were the relentless, indeed tenacious, critiques of such diverse Meech Lake opponents as women's organizations, Triple E Senate advocates, and the representatives of aboriginal peoples and Canadians resident north of 60. After all was said and done, politics did matter and various groups can claim a role in the victory. They will undoubtedly approach future negotiations armed with the knowledge that their stubborn resistance was effective in the final analysis. Viewed in this way, future constitutional negotiations, which promise to be more wideranging than those surrounding Meech Lake, will be bitterly contested if stakeholders feel excluded from the process.

WHAT MIGHT BE DONE?

Implicit in my argument thus far, is the proposition that a process like that surrounding the Meech Lake experience is totally discredited and that reforms are required for future constitutional negotiations. Put simply, too many interests are now demanding a major say in constitution-making. The construction of the Canadian constitution is no longer seen as the exclusive preserve of governments. Moreover, any repetition of the 1987-90 experience is highly undesirable given the widespread cynicism generated by recent events.

One obvious avenue for reform is to assume that future

constitution-making will be conducted in the main under governmental leadership and ultimately through intergovernmental negotiations. But future negotiations will have to be preceded and followed by *genuine* public participation through serious, well-equipped and properly financed legislative committees. Moreover, government positions will have to be clearly articulated through widely circulated position papers which outline the underpinning logic of their constitutional visions and proposals. Implicit in this argument, which does not take us far from the status quo, is the idea that governments will approach constitution-making tolerantly and with a willingness to make substantial changes if necessary. The hard line, "it is not amendable" approach of Meech Lake talks, cannot be repeated in the future.

In this vein, the Alberta government has decided to adopt a different approach to the construction of its future constitutional positions. As recently outlined, the government plans a task force comprising ministers and government members of the Legislative Assembly whose role it is to gather publicly expert opinion and then to draft a position paper. In turn, the position paper will be turned over to a multi-party legislative committee whose task will be to hold public hearings on the proposals. The committee will then report to the government which will mull over the various inputs before presenting a comprehensive resolution to the legislature.

A number of issues arise when assessing such recent initiatives as the Spicer task force, the Belanger-Campeau commission, the federal Parliamentary committee on the amending formula, the Alberta proposals and developments in other provinces. First, a more participatory approach will probably be slower than the more focussed executive federalism model. And, as already noted, the provision of opportunities to be heard does not guarantee a reduction in levels of conflict or disagreement. Second, while some interjurisdictional variation in the participatory techniques employed is inevitable, a consensus must develop on a process whose core elements will apply federally, provincially, and in the territories. Put differently, the situation must be avoided where citizens in one jurisdiction enjoy substantially greater opportunities for the public discussion of constitutional change than their fellow citizens residing elsewhere. The need for common standards, a "level playing field" to employ the contemporary cliché, is an important, albeit neglected, element of the debate about reformed democratic processes. Finally, and most importantly, have governments learned from the Meech Lake

process? Is their recent desire to promote greater public input into constitution-making rooted in a genuine commitment to listen and to respond to non-governmental actors? Are governments really willing to experiment with such devices as referenda or do they ultimately remain wedded to executive federalism? Is there now a clear grasp of our changing constitutional agenda and a recognition that the older set of federalism issues must share centre stage with the newer agenda of rights and state-citizen relations? No clear answers have yet emerged to these questions but suffice it to say that many stakeholders, after a decade of hard fought struggles to impress on governments their constitutional viewpoints, are skeptical of governments' real commitment to change.

"It is no longer possible to dismiss proposals for more direct democracy as radical, utopian or unnecessary."

Beyond reforms to the government-dominated status quo are proposals which stress popular sovereignty through the widespread use of referenda and/or citizens' constitutional forums. Referenda, probably based on regional majorities, would grant citizens the capacity to accept or reject major constitutional reforms. Constitutional assemblies, which can assume many forms, are based on the notion that democratically elected citizens, not governments, are best placed to debate and negotiate constitutional changes. No blueprint for such a forum has yet garnered widespread support and philosophical, political, and legal issues abound. But the serious discussion of such proposals reflects the widespread disenchantment with Meech Lake's executive federalism approach. Put simply, it is no longer possible to dismiss proposals for more direct democracy as radical, utopian or unnecessary alternatives to a smoothly functioning status quo. In this context, one of Meech Lake's most important legacies is to highlight the weaknesses of executive federalism as a process for major constitutional renewals and to demonstrate that change is both necessary and feasible.

Agreement about new processes for constitutional reform will not be arrived at easily. For one thing, through their indirect capacity to shape outcomes, alterations to the process of constitution-making will necessarily remain deeply political undertakings. To argue otherwise is naive. This having been said, we must interject greater dispassion into the debates about process and strive to disentangle them

from the substance of current proposals. We must somehow avoid linking reformed processes with the achievement or blockage of particular undertakings. For here is where the "strategic democrats" thrive. Indeed, much recent discussion of referenda and other changes is linked simply with a desire to achieve short term political ends. Major reforms must, however, be rooted in clearly articulated democratic grounds, must be subject to clear criteria for evaluation and must show themselves to be feasible and desirable long term alterations. Otherwise we may well burden ourselves for the long haul with changes designed to solve today's problems. The logic of many interests — that we want referenda when we think we will win but oppose them if we might lose — is utterly deficient as a guide to serious reform.

The recently formed Parliamentary committee on the amending formula has indicated a willingness to discuss the role of referenda and citizens' forums.⁵ Its deliberations may, thus, provide a venue for assessing the degree of public and governmental support for new processes of constitutional amendment. It may also be a site for a relatively objective assessment of procedural alternatives *independent* of discussions of substantive constitutional changes.

CONCLUDING THOUGHTS

Is the debate about democracy and Meech Lake exclusively about the processes of constitutional amendment or does it reflect deeper anxieties about the effectiveness of contemporary Canadian democracy? Do concerns about the Meech Lake process reflect a growing alienation from, and disenchantment with large, often remote, public and private institutions? Put positively, does the Meech Lake experience reveal a broadening of Canadians' interest in democratic participation and a desire to engage in meaningful debate about our political future?

No definitive answers emerge to these complex questions. But the Meech Lake experience can be put in context with several other recent developments, all of which point to growing concern about Canadian democratic practices. First, as most observers note, the rapid rise of the Reform Party reflects a concern with the political practices of Canada's extant party system. In this vein, much attention has been paid to the party's avowed anti-statism and to its roots in the traditions of Prairie protest against the allegedly overwhelming political power of Ontario and Québec. But another clear Reform message is the need for a restructuring of Canadian democratic practices with a view to weakening the power of the political executive, enhancing the role of

individual legislators, strengthening popular accountability over elected officials and experimenting with referenda as important mechanisms of public participation. It is, of course, impossible to isolate the precise appeal of Reform's various claims but a strong critique of indirect democracy as now practised in Canada lies at the heart of the party's ideology. As well, the ardent, and related, advocacy of a "Triple E" (equal, elected and effective) Senate reflects a perennial regional concern about the effectiveness of national institutions. In a very different context, the 1990 provincial election in Ontario gives further evidence of an electorate weary of established political practices and willing to engage a hitherto untried option. Finally, the media has recently been swamped with survey data and more anecdotal evidence revealing a cynical electorate which believes the political system as presently constituted seldom responds to public opinion. To be sure, the factors mentioned above can be interpreted very differently. But these developments, and the Meech Lake debate, are linked by a common concern about the responsiveness of our political institutions, political processes and party system.

If the preceding argument has some merit, the Meech Lake debate, to be understood, should be seen as a symptom of a broader concern about indirect democracy in contemporary Canada and not merely as an exclusively "constitutional" concern. But, far from seeing these developments as unnerving "threats" to the status quo, governments, their political opponents, interest groups, and

citizens should view such reformist tendencies as desirable developments. For, after all, they reflect a desire of citizens to participate meaningfully in politics. In turn, such desires to enter into democratic dialogue reflect the emergence of a more mature, ultimately richer, democratic tradition. However disruptive such pressures might seem, they must be compared with the alternative of an increasingly cynical, apathetic and alienated citizenry.

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1. Reg Whitaker, "Democracy and the Canadian Constitution" in Keith Banting and Richard Simeon, eds, *And No one Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen Publications, 1983) 240-260.
2. Donald V. Smiley, "An Outsider's Observations of Federal-Provincial Relations Among Consenting Adults" in Richard Simeon, ed., *Confrontation and Collaboration: Intergovernmental Relations in Canada Today* (Toronto: The Institute of Public Administration of Canada, 1979) 105-113.
3. See, for example, David Taras, "Meech Lake and Television News," in Roger Gibbins, ed., *Meech Lake and Canada: Perspectives from the West* (Edmonton: Academic Publishing, 1988) 219-234.
4. See, for example, Alan C. Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake" (1988) 14 *Canadian Public Policy*, S120-S145.
5. For details see Government of Canada, Federal-Provincial Relations Office, *Amending the Constitution of Canada: A Discussion Paper* (Ottawa, 1990).



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