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THE UTILITY AND LIMITS OF FEDERALISM IN CONTEMPORARY CONSTITUTION-MAKING

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In discussing Federalism and Justice on a comparative basis we cannot be concerned with a dry catalogue of assorted constitutional texts; for constitutional texts may or may not work, after all. The point is, of course, that it is easy (and extremely pleasant) to draft a constitution; but all too often rather difficult and tiresome to try to ensure that the constitutional blueprint is actually carried out in practice. So many of the ventures in constitution-making since 1945, including many that have provided for the adoption of a federal form, seem, to the detached observer, to be mere "semantic" constitutions,[1] —exercises in oratory unaccompanied by serious intentions even on the part of their drafters. The factual state of affairs is that, all too often, the constitution, though legally valid, has no integrated reality in its particular community. The constitution, in this sense, is "nominal" and not "normative".[2]

How widely has the experience of any one federal society been carried over to and made use of in other federal societies? We speak, now, not merely of that scissors-and-paste type of eclecticism so often found at the time of drafting of a constitutional instrument when odd snippets of the positive law of the constitution of various countries are sought to be engrafted by the constitution-makers, artificially, on to the new constitutional system that they are calling into being. There is a large element of accident, almost of a mechanical following of style leadership, in constitutional drafting of this nature. We know, for example, that the notion of having Directive Principles of Social Policy written into a constitution, as an express and formal guide to legislative action, stems ultimately from the Spanish Republican Constitution of 1931; from there it passed to the Irish Republican Constitution of 1937; and it was borrowed, finally, by the constitution-makers for the Indian Republican Constitution of 1949; it may not be surprising, considering their rather exotic parentage, that the Directive Principles of Social Policy have had little practical significance in

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1. Karl Loewenstein, in *Constitutions and Constitutional Trends since World War II* (Arnold Zurcher ed., 1951) p. 204; and consult generally Robert R. Bowie and Carl J. Friedrich, (editors), *Studies in Federalism* (1954).

2. *Ibid.*

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the concrete application of either the Irish or the Indian Constitutions.

One may point out again, as an example of the casual, fortuitous, often sheerly capricious element in constitutional drafting, the extreme disfavour currently enjoyed by the American Due Process formulation among contemporary constitution-makers,[3] a product, no doubt, of the popular association of the Due Process clause with the maintenance, through legal means, of economic *laissez-faire*. Yet though everyone seems to be at pains to avoid having, in terms, a Due Process clause in their own constitution,[4] it is noteworthy how often the core ideal of American Due Process tends to recur, nevertheless, in contemporary constitutional drafting.[5] One might say that, at the present day, the popularity of federalism, as a panacea for assorted political ills, is exceeded perhaps only by the popularity of Bills of Rights in the era of constitution-making between the two Wars.[6]

But in the actual working operation of federal constitutions, it is surprising how little has carried over directly from one country to another. Thus when Chief Justice Kerwin of the Canadian Supreme Court assured an audience of American lawyers at the Marshal bicentennial celebrations at Harvard in 1955 that the opinions of the

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3. As to this, consult generally W. Mendelson, "Foreign reactions to American experience with "Due Process of Law", 41 *Virginia Law Review* 493 (1955); F. Frankfurter, *Of Law and Men* (P. Elman ed., 1956) p. 22.

4. Compare, for example, the relevant provisions of the U.S. Constitution and of the Indian Constitution, respectively. U.S. Constitution, 5th Amendment:

"[No person shall] be deprived of life, liberty, or property, without due process of law . . ."

U.S. Constitution, 14th Amendment:

"[No State shall] deprive any person of life, liberty, or property, without due process of law. . . "

Republic of India Constitution, 1949, Article 21:

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

And see *Gopalan* v. *State of Madras*, 13 Sup. Ct. J. (India) 174 (1950); *Keshavan Madhava Menon* v. *State of Bombay*, 14 Sup. Ct. J. (India) 182 (1951).

5. The new legislative Bill of Rights for Canada, adopted in 1960, bravely eschews legal euphemisms in proclaiming "the right of the individual to life, liberty, security of the person and enjoyment of property: and the right not to be deprived thereof *except by due process of Law*". An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms. Canada, Bill C-79, 1960, s. 1(a); discussed by the present author in "The New Canadian Bill of Rights", 10 *American Journal of Comparative Law* 87 (1961).

6. See generally Boris Mirkine-Guetzevitch *Les Constitutions Europeennes*, Vol. I, (1951) 121 *et seq.*

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great early Chief Justice of the United States were referred to throughout the length and breadth of Canada, [7] the reaction of incredulity in Canadian academic and professional legal circles amply suggested that this was really no more than a polite compliment by the Canadian Chief Justice to his American hosts. Actually, the references made to American case law in Canadian Supreme Court jurisprudence tend to be so skimpy and episodic as to never to permit systematic study of those American cases in the context of the special social and economic facts against which they were decided and which alone give them full meaning. And Chief Justice Kerwin has himself peremptorily dismissed counsel's attempt to cite American Supreme Court decisions before him, [8] on the score that these were irrelevant to the adjudication of Canadian constitutional problems, since, in his view, founded on another and quite different constitutional system.[9]

In the United States, Mr. Justice Frankfurter has made a valiant attempt, over the years, through his juridical concept of the "English-speaking peoples" as an ethical-cultural unit with common legal values, [10] to carry over the case law, and ultimately the actual resolutions of interests-conflicts, achieved in the United Kingdom and the Commonwealth Countries, into the jurisprudence of the United States Supreme Court. But Mr. Justice Frankfurter's citation of Commonwealth cases, when he actually indulges in this practice, often seems by way only of footnote to decisions he has already arrived at on a basis of his own distinctive philosophy of law alone; [11] and, on the whole, foreign experience in federalism seems to have made little or no direct impression on his colleagues on the Supreme Court. Even in the elections cases, where the United States Supreme Court, over the years, steadfastly refused to intervene to correct flagrant abuses of the electoral processes as to voting practices, the judges seemed unaware that most of the policy objections, which they had traditionally accepted,

7. See P. Kerwin, "Constitutionalism in Canada", in *Government under Law* (A. Sutherland ed., 1956) p. 453.

8. See, for example, *Saumur* v. *City of Quebec and Attorney-General of Quebec*, [1953] 4 D.L.R. 641, at 665.

9. "We have not a Bill of Rights such as is contained in the United States Constitution and decisions on that part of the latter are of no assistance." Per Kerwin, J., concurring specially, [1953] 4 D.L.R. 641, at 665.

10. See, for example, per Frankfurter, J., concurring specially, *Adamson* v. *California*, 332 U.S. 46, 67 (1947); per Frankfurter, J., opinion of the Court, *Rochin* v. *California*, 342 U.S. 165, 169 (1952).

11. See, for example, per Frankfurter, J., opinion of the Court, *Wolf* v. *Colorado*, 338 U.S. 25, 29 (1949).

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as to judicial intervention in such cases—normally subsumed under the doctrinal category of "political questions", [12]—had been met and quite satisfactorily overcome by the West German Federal Constitutional Court over a period of years.[13] The decision of the United States Supreme Court finally to intervene in such cases was taken without any reference to foreign experience.[14]

In the case of the West German Federal Constitutional Court, in view of the substantial debts, in the actual drafting of the Bonn Constitution of 1949, to American experience, particularly so far as the institution of judicial review is concerned, the desire to consult foreign, and especially American, experience is there; though because of the somewhat abstract and formal character of the court opinion-writing, such foreign case law will not be cited by name or otherwise directly referred to in the court opinions. Where the foreign experience does operate in German jurisprudence, it seems that it will be confined to the privacy of the judges' conference rooms, where it may be invoked by any of the several members of the Court who are familiar with American and Commonwealth experience to give weight to their specific recommendations based on German law. It is known, in this regard, that in the *Reichskonkordat* decision, [15] at least several of the German judges were acquainted with the relevant American and Canadian case law on the ambit of the foreign affairs power in a federal state; though apparently counsel appearing before the Federal Constitutional Court do not regard it as relevant systematically to cite or discuss foreign case law.

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In taking note of the popularity of the federal idea among contemporary constitution-makers, one can hardly fail to consider the concomitant danger that impossible demands may be made upon federalism as a legal-institutional form. It is difficult to believe that a federal constitution, by itself, could have brought peace, order, and good government to the former Belgian Congo on its attainment of independence, in 1960; and there would certainly be no justification

12. See, in the area of elections, *Colegrove* v. *Green*, 328 U.S. 549 (1946); *South* v. *Peters*, 339 U.S. 276 (1950).

13. See the discussion by the present author in *Constitutionalism in Germany and the Federal Constitutional Court* (1962) at p. 54 et seq.

14. See, now, *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Baker* v. *Carr*, 82 S. Ct. 691 (1962).

15. Decision of the Second Senate, Bundesverfassungsgericht, 26 March, 1957, 6 B Verf GE 309 (1957).

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for federalism in the Congo today if it were to be used simply to base Katanga secessionism, and the withdrawal, in consequence, from the whole country, of access to and utilisation of the wealth and mineral resources of the economically most viable section. It is necessary, in fact, to appreciate the very limits of utility of federalism, before one can sensibly make use of it as a governmental form. It may be meaningful today to talk of a formal, federal constitutional association for Western Europe—for the countries of the European Community, certainly—but that is only rendered possible, in large measure, by the degree of effectiveness of the supra-national integration already achieved at the economic and social levels, extending back over more than a decade. Federalism, at the legal-institutional level, can assist and extend movements for association and integration over conventional nation-state boundaries, but the popular desire for such supranational association must surely be there already, and some degree of actual, existing, economic and social association too. In the case of the countries that have gained their independence since World War II it must be recognised, in particular, that while the federal idea may be challenging and revolutionary for purposes of building some larger, more objectively rational, regional groupings or associations transcending the old colonial boundaries which were so frequently rather arbitrarily or accidentally determined; and while federalism may also seem perfectly attuned to the needs of building a genuinely national outlook in these countries while still retaining group or tribally-based claims to ethnic-cultural diversity, the very emphasis of federalism on the merits of decentralisation and ever-wider participation in community policy-making may run counter at times to the needs, as they are conceived, for overall social and economic planning at the centre in the interests of accelerating the stages of national growth. Existing Western stereotypes of the federal constitutional form, derived as they are, today, from advanced, industrially-based societies, may need considerable adjustment and modification if they are to serve as useful models for export to societies at an earlier state of economic growth; and the demands for exercise of the skills of compromise [16] and ultimately of a certain spirit of moderation [17] may be the greater in these societies for this reason.

In addition, it must be recognised that the older federal societies, while they are frequently plural societies accommodating within their

16. Compare Edmond Cahn, *The Moral Decision* (1955) pp. 276-7.
17. Consult Learned Hand, *The Spirit of Liberty* (I. Dilliard ed., 1953) p. 164.

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boundaries two or more distinct ethnic-cultural communities, have the advantage that those same ethnic—cultural communities have either, as in the case of Canada, been distributed into reasonably distinct, geographically—separate areas of the country; or else, as in the case of the United States, been not so far apart in terms of fundamental values and aspirations that they could not be progressively assimilated into a genuine national community. The problems which the constitution-makers face, in such cases, are not insuperable, and one could have some confidence, for the future, as to a reasonable degree of correspondence between law and the social facts,—between the positive law of the constitution as drafted and the *de facto* claims and interests pressed in the society in respect to which the constitution is to operate. But there is no precise parallel, in the condition and experience of the older federal societies, for the situation faced in some of the new countries that have recently achieved their independence or else are approaching it. These countries are plural societies, too, but their differing, ethnic-cultural communities are often not conveniently located and distributed on a regional, geographical basis; but are to be found within essentially the same territorial boundaries, grouped, in effect, *vertically*. The old-line federalism was, and could afford to be, two-dimensional, *horizontal*, without the conflict of interests within the society ever becoming oppressive. But a federal constitution for, say, the Union of South Africa, or for Algeria, or for similar multi-racial societies, that simply followed the older, classical federal stereotypes, would probably end up as an exercise in constitutional futility; for the need in such cases is not for elaborate legal formulae for the geographical, area distribution of power, but rather for effective, institutionally-based guarantees of minority interests and for effective institutionally-based limitations on majority will. (This assumes, of course, that we are not following the South African government in its ultimate lunacy of an attempt to set up, artificially, through the Apartheid scheme and the forced re-location of racial communities, a geographically-based distribution of the racial communities). The most hopeful aspect of constitutional experience in the classical federal societies, here, is the development of the institution of judicial review, which in the case of the United States and Canada at least has gone far beyond any intentions of the original constitutional drafters; and which, in the case of West Germany, may even have come as something of an unwelcome surprise, in its contemporary course of development, to the very political leaders who had approved it in principle as a main contribution to the democratisation of German

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political life post-War.[18] In Canada, at least, the new political role of the Supreme Court in the institutional framework of the federal constitution seems to be a response, in part, to the atrophy of other governmental machinery intended to moderate executive-legislative authority: one may point, here, to the practical disappearance, through desuetude, of the inherent, prerogative powers of the titular head of State, the Governor-General, as to disallowance or reservation of bills passed by national or provincial legislatures, and to the practical disappearance also of the powers of the upper house or Senate to veto or review bills passed by the lower house of the national legislature. And in the case both of Canada and of the United States, the extreme difficulties in securing passage of constitutional amendments through the regular constitutional amending machinery has had, as a consequence, that the judges have been impelled to take on something of a legislative role and to assume some responsibilities, in any event, for adjusting the positive law of the Constitution to changed societal conditions and demands. And in the case of Canada, the United States, and West Germany equally, part of the explanation for the judges' assumption increasing of an activist role must lie in the consideration that the judges have some special responsibility and competence for keeping the political processes free and unobstructed.[19] For the claims of executive-legislative authority to a political "mandate" rest, in the ultimate, on the notion that the legislature is representative and freely elected, and this can only be so in a society where "Open Society" values are effectively guaranteed and protected.

There will undoubtedly be probelms, in the new countries, in the judges' assuming such an activist role, particularly in countries where there is no effective political opposition and which are dominated by a one-party system. Part of the skills of the judicial office lie in a certain sense as to tactics in general and as to timing in particular—as to when to exercise an activist role, and when to recognise the political limitations of one's office and to retire discreetly into judicial self-restraint. These qualities of judicial statesmanship can normally be expected to need some years to develop fully; and they certainly need, also, for their fullest realisation, some element of

18. See generally *Constitutionalism in Germany and the Federal Constitutional Court* (1962) p. 65.

19. Compare per Stone, J., *U.S.* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938); and consult generally the author's *Judicial Review in the English-Speaking World* (2nd edition, 1960) 212 et seq.

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self-restraint and moderation on the part of executive-legislative authority too.

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For Federalism is as much a philosophical attitude on the part of governmental decision-makers, (whether executive, legislators, or judges), as a strictly juridical condition. The key to the working practice of federal government in a plural society is, in fact, the spirit of moderation, in the classical sense in which it has been given expression by Chief Judge Learned Hand:

> "What is the spirit of moderation? It is the temper which does not press a partisan advantage to the bitter end, which can understand and will respect the other side, which feels a unity between all citizens—real and not the factitious product of propaganda—which recognises their common fate and their common aspirations—in a word, which has faith in the sacredness of the individual. If you ask me how such a temper and such a faith are bred and fostered, I cannot answer. They are the last flowers of civilisation .... But I am satisfied that they must have the vigour within themselves to withstand the winds and weather of an indifferent and ruthless world; and that it is idle to seek shelter for them in a court-room"[20].

In the study of federal constitutional law-in-action, we must be concerned with the frequent shifts and accommodations of governtal actions and policy, and with the large elements of testing, almost trial-and-error, inherent in the practice of public law and government in a federal state. The emphasis throughout must be on problem-solving, and on the actual processes of resolving the conflicts and competitions of interests that occur inevitably in a federal system. The focus, therefore, is on the systematised, settled practices of self-restraint and mutual give-and-take, on the opportunities for fruitful co-operation and the painful necessities at times for sacrifice—in a word, on that comity, as between the various parties to a federal system, that is the life-blood of federalism. If the reward for all the complexities and inconveniences and difficulties of living in a federal system is the extra element of cultural richness and diversity and the widened opportunities for social experimentation, it can also be said that the very necessity of working with and adjusting to the complicated governmental and constitutional machinery of a federal state is in itself an educational, and ultimately a humbling, experience.

20. Learned Hand, *op. cit.*, *supra*, footnote 17, p. 164.

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