

# CONSTITUTIONAL REVIEW IN CANADA AND THE COMMONWEALTH COUNTRIES

by EDWARD MCWHINNEY\*

To compare the nature and limits of judicial review of constitutionality in the Commonwealth countries today with judicial review in the United States, one must understand, first of all, the differences in constitutional history and the differences in basic political theory.

All Commonwealth supreme courts exercising or practising judicial review of constitutionality today are English-derived or English-influenced. This holds true even in regard to supreme courts sitting in wholly non-British countries like India and Pakistan or in culturally-mixed countries like Canada, where French and English legal elements coexist.<sup>1</sup> The English constitutional heritage means, in formal terms, a much more dominant *rôle* for the legislature in relation to the courts than in the United States.

Dicey, the high-priest of late nineteenth century English constitutionalism, proclaimed the doctrine of the sovereignty of Parliament.<sup>2</sup> As a constitutional proposition, it was limited to Great Britain and is certainly no longer literally true as a description of the constitutional law-in-action in Great Britain today. Even so, it had major consequences for the constitutional relations between the judiciary and executive-legislative power and major implications for the nature of the judicial office, including the judge's opportunities and responsibilities for community policymaking.

Those countries of the old British Commonwealth and the newer, un-prefixed Commonwealth countries that adopted the system of judicial review, either expressly or (more normally) casually, almost *per incuriam*, have been affected by the historical consequences of the all-pervasive English doctrine of the sovereignty of Parliament. The supreme courts, in contradistinction to their American analogue, have normally accepted the view that the judiciary is a relative, dependent institution with neither a political mandate for, nor the necessary technical competence to indulge in, ventures in community policy-making. Such policy-making is left to

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<sup>1</sup> The succeeding discussion draws freely upon the author's *JUDICIAL REVIEW* (4th ed. 1969); see also E. MCWHINNEY, *COMPARATIVE FEDERALISM* (2d ed. 1965), especially Chapter 3, and E. MCWHINNEY, *FEDERAL CONSTITUTION-MAKING FOR A MULTI-NATIONAL WORLD* (1966).

<sup>2</sup> A. DICEY, *THE LAW OF THE CONSTITUTION* (1885).

the popularly-elected organs of government, the English-derived Parliamentary executive which survives in all of the Commonwealth countries that are federal systems, including those that have replaced the monarchy by a presidency as the form of titular executive.

There will be, to be sure, in all of these countries, a certain gap at times between what the judges say they do and what, according to legal realist demonstration, they are actually doing in any case; and we may discover, here, that the opportunities for judicial policy-making are occasionally as considerable in the Commonwealth countries as they have always been in the United States. But the crucial difference lies in what Continental European constitutionalists call the principle of legitimacy: the notion that the exercise of a community policy-making *rôle* requires, in a democratic polity, the sanction or authority of popular election or at least direct political responsibility and accountability for one's actions.

This leads us into the matter of judicial appointments—the nature and principles of selection of judges for the supreme court. Here we will find a basic difference, in quality and in degree, between the constitutional bases and general criteria for appointment to the supreme courts in the Commonwealth countries and in the United States.

### I. HISTORICAL ORIGINS OF JUDICIAL REVIEW IN THE COMMONWEALTH COUNTRIES

The institution of judicial review in the Commonwealth countries arrived, as we have suggested, almost *per incuriam*. The term judicial review, as such, was not in currency in the Commonwealth countries until the mid-1950's. The public acceptance—the political legitimation, if you wish—of judicial review was certainly preceded by a wave of American legal learning in the Commonwealth countries as Commonwealth students after World War II chose to take post-graduate legal studies in the United States rather than in England.<sup>3</sup>

However, ample historical precursors for judicial review in the old British colonial Empire and the succeeding British Commonwealth and unprefix Commonwealth were contained in the old Imperial institution of the Privy Council, which sat in London as the final appellate tribunal for the British Empire overseas.<sup>4</sup> The Privy Council was an instrument of Empire, in the sense that it existed and saw its own *rôle* as, first, to ensure, if not uniformity, at least mutual compatibility of the private law

<sup>3</sup> This is traced in the author's *Legal Theory and Philosophy of Law in Canada*, in CANADIAN JURISPRUDENCE: THE CIVIL LAW AND COMMON LAW IN CANADA (1958).

<sup>4</sup> See E. MCWHINNEY, *The Privy Council as Final Appellate Tribunal for the Overseas Empire*, in JUDICIAL REVIEW 49 *et seq.* (4th ed. 1969); see generally D. SWINFEN, IMPERIAL CONTROL OF COLONIAL LEGISLATION, 1813-1865: A STUDY OF BRITISH POLICY TOWARDS COLONIAL LEGISLATIVE POWERS (1970).

throughout the colonial Empire, which often permitted, in true pluralist fashion, the coexistence of many diverse legal systems and traditions; and second, to ensure full harmony of the public law of the colonial Empire with the principles and imperatives of the so-called "Mother Country" of England.

As an instrument of Empire, the Privy Council performed many of the functions for which the Imperial executive prerogative powers had been used: to disallow (annul) colonial statutes and laws on the score of their claimed incompatibility with Imperial (English) constitutional law. But as a judicial tribunal, the Privy Council acted with far greater political finesse than would the Imperial executive, the British Government, claiming to use its prerogative powers. So, inevitably, in the historical refinement of the instruments and techniques of Imperial policy-making, the Imperial executive prerogative powers increasingly fell into disuse and were allowed to disappear, whereas Imperial judicial control through the Privy Council burgeoned.

The Privy Council, examined in true legal realist fashion through its actions, certainly indulged freely in judicial policy-making. But it did so with flexibility, imagination, and most often with magnanimity in relation to the colonial countries. It acquired a reputation for political detachment and impartiality that historical revisionist judgments since the break-up of the Empire have tended to augment rather than to diminish. In Canada, for example, where the appeal from Canadian courts to the Privy Council was finally abolished in 1949, the French-Canadian minority in an increasingly nationalist mood, looks back with some nostalgia on the era of the Privy Council's review of the Canadian constitution. The feeling among French-Canadian jurists, indeed, (and there is considerable evidentiary justification for such a claim) is that the Privy Council was always far more pluralistic in its philosophy, and far more tolerant of and sympathetic to French-Canadian claims, than the Canadian Supreme Court has ever been since the abolition of the appeal from Canada.<sup>5</sup>

## II. NATURE AND JURISDICTION OF COMMONWEALTH SUPREME COURTS

The supreme courts of Canada and of the Commonwealth countries

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<sup>5</sup> E. MCWHINNEY, *JUDICIAL REVIEW* 69 *et seq.* (4th ed. 1969). And see the eloquent plea by the French-Canadian jurist, (now a Justice of the Canadian Supreme Court), Pigeon, *The Meaning of Provincial Autonomy*, 29 CAN. B. REV. 1126, 1134 (1951). As an example of the trend in latter-day researches, even in English-Canada, to take a critical, "revisionist" look at older historical ("bad man") stereotypes of the Privy Council's *rôle* in Empire and Commonwealth legal development, see the recent thoughtful study by a younger English-Canadian scientist, Cairns, *The Judicial Committee and its Critics*, 4 CAN. J. POL. SCI. 301 (1971).

in general differ from the United States Supreme Court in many important respects. Since the Judiciary Act of 1925 and the practical control over its own business which that brought with it, the United States Supreme Court has been, to all intents and purposes, a constitutional or at least a public law tribunal. But that is not so, jurisdictionally, with the Canadian Supreme Court or other Commonwealth supreme courts.

Inheriting the Imperial pyramidal legal system administered by the Privy Council, which had full jurisdiction over appeals on all legal matters of whatever nature within the old Empire, the Commonwealth supreme courts are multi-purpose courts with their appellate review completely unlimited as to subject matter. The Canadian Supreme Court, for example, has jurisdiction not merely over all matters of constitutional and public law within Canada, but also over all private law appeals coming from all ten of the Canadian Provinces (member-states). The Provinces include the nine English-speaking Provinces which all "received" the English common law and the French-speaking Province of Quebec which "received" the French civil law and finally codified it, in 1866, into the Quebec Civil Code which largely borrows or derives from the Code Napoléon of 1804.<sup>6</sup>

There have been proposals from time to time that Canada should consider adopting the American system and so confine final appellate jurisdiction over the private law to the Provincial supreme courts. This recommendation has been put forward most strongly in recent years by French-Canadian nationalist groups. They have argued, again with some evidentiary justification, that the Canadian Supreme Court, which by statute is composed of a majority of English-speaking common lawyers, has persistently misunderstood, misinterpreted and misapplied the Quebec civil law and thus has produced a mixed or bastardised civil law that is heavily infiltrated by alien English common law elements. However that may be, the multi-purpose, all-embracing jurisdiction of the Canadian Supreme Court does place heavy demands, in terms of legal expertise, upon its members, and at the present time, as very often in modern times, the Court has no recognized specialist in the French civil law within its ranks as the present members from Quebec are constitutional or corporation law specialists.

Within the Commonwealth supreme courts themselves, there are also certain elements of practice and internal organisation that tend to differentiate, or at least to distance, them from the United States Supreme Court. The Commonwealth courts, although they have not shown too

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<sup>6</sup> See generally E. MCWHINNEY, *CANADIAN JURISPRUDENCE* (1958).

much temptation to adopt the strict Continental European practice,<sup>7</sup> do at least respect the general elements of Continental European, and inherited English, judicial and court practice. They generally observe the principle of *collegiality*, at least in the sense of accepting certain limits on their conduct as judges, *inter se*. On the whole, judges avoid judicial personalities and deliberately abstain (more, perhaps, as a matter of elementary good manners than of conscious political choice) from pejorative individual judicial opinions, whether dissenting or specially concurring, which seek to hold up the majority court vote or the majority opinion to public contempt or ridicule.

Moreover, the Commonwealth supreme court judges, even if they will never achieve that element of anonymity so prized by Continental European judges, generally maintain a low public profile, keeping away altogether from the desire to run for public office or to comment publicly on great political events, whether actual and contemporary or past. In a word, they tend to view their *rôle* as being far more strictly professional and so as imposing far more restraints of political prudence than do their American counterparts. This is a direct consequence, and also a means of insuring the maintenance, of the principle that the judges themselves should be legal professionals and that strictly professional legal criteria should be uppermost in the search for candidates for judicial office. The Commonwealth supreme courts, up to recent times, have generally been free of the "men of affairs" who have so largely staffed the United States Supreme Court since the Roosevelt era. The consequences of that vital difference in judicial personnel are apparent both in the intellectual approach and techniques and also in the actual substantive policy choices and preferences which characterise judicial decision-making in the Commonwealth countries and in the United States.

### III. JUDICIAL APPOINTMENTS IN THE COMMONWEALTH

Supreme court judges are appointed, in the Commonwealth countries, by the government of the day as vacancies occur on the court by death or retirement of existing members. The executive choice is final; there is absolutely no provision for legislative participation in the appointment process by way of confirmation or ratification vote nor for the participation of the governments or legislatures of the member-states or Provinces in the case of federal systems. What this means, effectively, is that the central federal government exercises a complete monopoly on the judicial appointment power and may legally appoint whomever it wants.

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<sup>7</sup> Some of the relevant comparisons between "Anglo-Saxon" and Continental European organization and practice of Supreme Courts are ventured in the author's *CONSTITUTIONALISM IN GERMANY AND THE FEDERAL CONSTITUTIONAL COURT* (1962).

In spite of this legally uncontrolled discretion resting in the central government, judicial appointments in the past have rarely been controversial politically. If central governments will never appoint known supporters of opposition political parties to the court, and if they also show a certain penchant for rewarding known supporters of their own party, the fact remains that the judicial nominees over the years have normally been technically well qualified, with a recognized background in professional legal practice rather than a reputation as political ideologues.

The relative freedom of the Commonwealth supreme courts from the type of political appointments that have very often characterised the United States Supreme Court from its earliest years onwards is due, I think, to two factors. First, the mixed (public law and private law), multi-purpose jurisdiction of the Commonwealth supreme courts demands such expertise that appointment to a court is generally outside the normal range of ambitions of the political "man of affairs," who will typically be rather light in professional legal practice and disinclined to do the hard work, after appointment, necessary to acquire that expertise. Second, the general Commonwealth conception of the political *rôle* of a supreme court exercising appellate review has tended to be a rather modest or limited one. Until very recent times, successive central governments have hardly appreciated the full potentialities for judicially-based policy-making as a contribution to general community policy-making on important social issues.

It was not until the general reception of American legal ideas in the Commonwealth in the post-World War II era, with the new wave of American-trained law professors, that the idea of an activist, legislating, policy-making supreme court became popular in legal circles. As this idea penetrated through to government ministers, it inevitably produced an increasing politicisation of the erstwhile impartial processes of judicial appointment, which had been relegated to the Attorney-General and the law officers of the Crown as a largely routine, technical-professional matter. Just as the World Court's highly controversial one vote-majority decision in the South-West Africa cases<sup>8</sup> stimulated, for the first time, an interest on the part of the Afro-Asian countries in the ideological composition of the World Court which in turn stimulated active political horse-trading and exchange of votes for judges, so Prime Ministers in the Commonwealth countries began to become personally involved in the process of judicial appointments.

The new politicisation of the judicial appointing process for Commonwealth supreme courts can certainly be exaggerated. It will obviously

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<sup>8</sup> South West Africa Cases, [1966] I.C.J. 4.

vary from country to country, and in all cases the judicial nominees will tend to have, following the received English legal traditions, high technical legal qualifications. Yet, only recently the federal Minister of Justice in Canada found it necessary publicly to defend recent federal government appointments to the Canadian Supreme Court by repudiating any suggestion that the federal government was involved in the "casting aside of centuries of legal tradition and the transformation of the Court into a carbon copy of the United States Supreme Court."<sup>9</sup>

#### IV. THE FUTURE POLITICAL ROLE OF THE COMMONWEALTH SUPREME COURTS

There was a time, only a short while ago indeed, when one might have predicted that Commonwealth supreme courts in general, and the Canadian Supreme Court in particular, would inevitably follow the route of the United States Supreme Court to become not merely the "umpire of the federal system" but the pivot of the constitution, in the sense of being the prime instrument for accommodating old positive law rules to rapidly changing societal conditions and community expectations. The patent political success and popularity of judicial review in the United States, which came with the inauguration of the Roosevelt majority on the United States Supreme Court after the Court Revolution of 1937, and the even more successful transplant of that distinctively American institution to the new democratic constitutions of West Germany and Japan after World War II, meant immense prestige for constitutional judicial review and for judicially-based community policy-making in general.

I think that the cause of judicial review has suffered somewhat, worldwide, because of the general reaction against American constitutional institutions and ideas in the post-Watergate era. Such a reaction could be short-lived, of course, but I believe that the reaction, perhaps unlike that in the United States, extends beyond the institution of the Presidency to the other, coordinate institutions of government, Congress and the courts. The feeling seems to be that all these institutions have become overly politicised and that the Supreme Court and other federal courts may have moved too precipitately and also too eagerly into the political fray of Watergate.

Despite any such immediate reactions, which may always be over-reactions to passing political events, the fact remains that Commonwealth countries have begun to find, by trial and error experience if need be, that the difference in degree between legislating interstitially, as Cardozo implied every court was bound to do, and judicial policy-making in the tra-

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<sup>9</sup> Lang, *Judicial Appointments*, 8 L. SOC'Y UPPER CAN. GAZ. 121, 123 (1974).

dition of the post-Roosevelt United States Supreme Court is a very substantial one. Judicial policy-making exposes judges to fierce public criticism by those who do not like the political consequences of their decisions and puts them right in the storm-centre of great partisan controversies for which they have neither the practical political experience nor the detailed problem-solving techniques necessary to effectuate pragmatic compromises.

An instance of judicial policy-making is the 1967 Canadian Supreme Court ruling, rendered by way of advisory opinion, in the dispute between the federal government and the Provinces (member-states) over title to the off-shore submarine oil resources.<sup>10</sup> Traditional legal logic in respect to this issue was hardly compelling either way, and the Court's final conclusion contains an obvious *non sequitur* on the face of the record. Why should the Provinces of Canada regard the Court's ruling in favour of the federal government's claims as politically persuasive, especially since, as at least one Provincial Premier reminded his Provincial electorate at the time of the Court ruling, it was rendered by a wholly federally-appointed tribunal?

Why, as another example, should the Province of Quebec regard as politically conclusive in regard to future Provincial governmental action to strengthen and extend the French "fact" in Quebec, any future federal Supreme Court ruling on the constitutionality of Quebec's recent Official Language Law making French the official language of Quebec? The federal government, profiting from the past political errors of federal overzealousness which attempted to vindicate claimed federal constitutional interests at the expense of Provincial interests (witness the endless political stalemate resulting from the 1967 off-shore oil ruling), firmly refused a bid by the Premier of the Province of New Brunswick, acting at the instigation of English-language extremist pressure groups in Quebec, to challenge the Quebec Official Language Law.<sup>11</sup> But the way presumably lies open, in the light of recent Canadian Supreme Court rulings relaxing the constitutional requirement of a legal "interest" on the part of an individual taxpayer wishing to challenge constitutionality,<sup>12</sup>

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<sup>10</sup> Reference re Ownership of Off-Shore Mineral Rights, 65 D.L.R. 2d 353 (1968); see generally Hubbard, *Constitutional Law: International Law: Ownership of and Jurisdiction over Offshore Mineral Rights*, 2 OTTAWA L. REV. 212 (1967); and the author's discussion, *Les pouvoirs intérieurs du Québec*, 2 LA REVUE JURIDIQUE THEMIS (Université de Montréal) 277, 279-80 (1968).

<sup>11</sup> See generally Fredericton demande que la loi 22 passe le test de la Cour suprême, *Le Devoir* (Montreal), August 10, 1974; Lettre de M. Trudeau à M. Hatfield, *id.*, September 16, 1974; Le bill 22: Richard Hatfield a manqué à la courtoisie fédérale, *id.*, October 5, 1974.

<sup>12</sup> See, in this regard, *Thorson v. Attorney-General of Canada* (no. 2), 43 D.L.R. 3d 1 (1974). Compare, as to the Commonwealth, *Anderson v. Commonwealth*, 47 Can. S. Ct. 50 (1932), with, as to the United States, *Frothingham v. Mellon*, 262 U.S. 447 (1923).

for the same English-language political diehard groups to litigate in their own right. Should the courts actively encourage such political challenges to governmental legislation by special interest pressure groups, or should the courts, instead, exercise judicial self-restraint and insist upon rigorous compliance with standing requirements as a pre-condition to any constitutional litigation?

The Canadian federal and Provincial governments have answered this question in part, in recent years, by consciously trying to resolve their inter-governmental conflicts and differences by diplomatic rather than judicial methods, by patient negotiation that emphasizes political give-and-take, mutuality and reciprocity of interest, and compromise, rather than by political confrontation and a rush to the court-house door. The federal government's conscious political self-restraint in regard to the Quebec Official Language Law, especially since that law seemed, superficially, to be in disharmony with the federal government's own Official Languages (French and English bilingualism) Law, is a signal of this new emphasis on diplomatic methods as the solvent for federal-Provincial inter-governmental differences.

The Canadian trend in favour of diplomacy, arbitration, and compromise parallels similar trends in the world community away from judicial settlement and from recourse to the World Court as a forum for settlement of the really serious political problems. The result, in Canada, is that the federal-Provincial Prime Ministers' Conferences, both the regular annual meetings and also special *ad hoc* meetings for particular problems, have replaced the Court as the main arena for constitutional problem-solving in the decade of the 1970's.<sup>13</sup> And there is every evidence that Canadian federalism is working more amicably, and certainly less wastefully in terms of use of professional and technical resources, because of that switch from the judicial to the diplomatic arena for disposition of the great political *causes célèbres* of our times.

Freed from the impossible burden of trying to preserve inter-governmental peace and harmony, the Court can concentrate more fully on its traditional, received English judicial *rôle*: ensuring the harmonious coexistence of the private law systems within Canada, applying and extending the Rule of Law in administrative law matters, and developing a constitutional civil liberties jurisprudence. The Court, in this context, can amply fulfill Cardozo's mandate to legislate interstitially where necessary, without succumbing to the temptation to take over the legislative function from the popularly-elected organs of government which alone can claim

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<sup>13</sup> Some of the recent developments in this area are canvassed in the author's *Federalism and the Accommodation of Regionalism*, in the special Federalism symposium issue of 9 OTTAWA L. REV. (1975), to appear shortly.

a popular mandate. For its part, the Canadian Supreme Court, which has generally seemed rather reluctant about assuming American-style political prerogatives, can go about its more strictly judicial business with the extra confidence that it will be freed, thereby, from partisan political criticism and from any consequent partisan political pressures to appoint party men to its ranks.